ANTHONY A. *v.* COMMISSIONER OF CORRECTION* (SC 20499)

Robinson, C. J., and McDonald, Kahn, Ecker and Keller, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming, inter alia, that the Department of Correction violated his constitutional rights to procedural due process in assigning him a certain sex treatment need score and to substantive due process in classifying him as a sex offender, even though he never had committed or been convicted of a sex offense. The petitioner had been convicted of unlawful restraint in the first degree and failure to appear, and had been found to be in violation of probation. Prior to the petitioner's incarceration, the state entered a nolle prosequi as to a charge of sexual assault in a spousal relationship after the petitioner's wife, M, recanted her statement to the police that the petitioner had sexually assaulted her during the same incident that formed the basis for the charges of which he was convicted. Following his release from incarceration, the petitioner pleaded guilty to new charges stemming from another incident and was sentenced to concurrent terms of incarceration. Upon his return to prison, the petitioner was notified that a classification hearing would be held to determine whether, on the basis of the prior charge of sexual assault in a spousal relationship, he would be assigned a sex treatment need score of greater than 1 and that, in making its determination, the department would be relying on the police report of the petitioner's arrest and the petitioner's Connecticut rap sheets. Prior to the hearing, the department denied the petitioner's requests that, at his hearing, he be permitted to present live witness testimony and to be represented by counsel. During the hearing, the petitioner denied sexually assaulting M and submitted several documents, including M's letter recanting her statement to the police, in support of his denial. Following the hearing, the hearing officer, T, notified the petitioner that she had assigned him a sex treatment need score of 3, that, in arriving at her decision, she reviewed not only the record concerning the earlier incident that led to the charge of sexual assault in a spousal relationship but also his complete Connecticut criminal record, including numerous corresponding police reports and arrest warrant applications, and that her supervisor, D, had reviewed and approved the petitioner's assigned sex treatment need score. Thereafter, the petitioner appealed, challenging the assigned score, and T and

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

D denied the appeal after discussing it briefly. As a result of his sex treatment need score, the petitioner could not be placed in a correctional facility lower than level three without authorization from the respondent, the Commissioner of Correction, which rendered him ineligible for a veterans program available only at a level two facility. He also was referred to the department's sex treatment program staff for an evaluation, but he refused to participate in the evaluation on the ground that the department had incorrectly classified him as a sex offender. In addition, the petitioner refused to sign his offender accountability plan, which resulted in his forfeiture of twenty-five days of earned risk reduction credit and his being barred from earning additional credit until he signed the plan, and it negatively impacted his eligibility for parole and community release. The habeas court rendered judgment denying the petitioner's habeas petition. With respect to the petitioner's procedural due process claim, the habeas court, applying the standard set forth in *Wolff* v. *McDonnell* (418 U.S. 539), considered and rejected each of the petitioner's contentions regarding the inadequacy of the process he was provided prior to being classified as a sex offender. The court also rejected the petitioner's claims that the sex offender classification violated his right to substantive due process and that his sex treatment need score constituted punishment not clearly warranted by law in violation of article first, § 9, of the Connecticut constitution. On the granting of certification, the petitioner appealed from the habeas court's judgment. *Held*:

1. The department violated the petitioner's constitutional right to procedural due process in classifying him as a sex offender, the petitioner not having been afforded all of the procedural protections required by *Wolff*: the petitioner was not provided an opportunity to call witnesses in his defense, as the department denied his request to call witnesses without knowing who the witnesses were or what they would say, or considering whether their presence would be unduly hazardous to institutional safety or correctional goals, and, under *Wolff*, in the absence of a showing by the department that the presence at the prison of the witnesses whom the petitioner planned to call would have been unduly hazardous to institutional safety concerns, the petitioner should have been permitted to call those witnesses; moreover, the petitioner was not provided adequate notice of the information on which department personnel would rely in determining his classification, as T conducted additional research after the classification hearing had concluded into the petitioner's criminal record, which included reviewing all of the petitioner's arrest records, in order to assess the reliability of M's recantation but never notified the petitioner that the facts of his past arrests would be used against him, and, under *Wolff*, the petitioner was entitled to this information to allow him an opportunity to marshal the facts in his defense, and the department did not satisfy the notice requirements of *Wolff* by notifying the petitioner that his Connecticut rap sheets would be reviewed as

part of the decision-making process; furthermore, the petitioner was not afforded an impartial decision maker to rule on his administrative appeal insofar as T and D ruled on that appeal from their own initial classification decision, and, although the petitioner was denied due process of law because of the manner in which the department conducted the classification hearing, this court concluded that there was sufficient evidence in the record to support the petitioner's classification as a sex offender in light of M's detailed statement to the police describing the petitioner's sexual misconduct and the petitioner's own statement to the police, which corroborated some of M's account of the incident.

2. The petitioner could not prevail on his claim that the habeas court incorrectly concluded that the department had not violated his state constitutional right to substantive due process by classifying him as a sex offender: contrary to the petitioner's argument, there was no evidence that the petitioner was classified as a sex offender on the basis of mental disability or psychiatric illness, and, therefore, because the petitioner was classified on the basis of neutral considerations that did not target a suspect class, his claim was subject to rational basis review rather than strict scrutiny; moreover, the petitioner's contention that the department's classification decision could not withstand rational basis review was unavailing, as the department's interests in effective population management and rehabilitation were both legitimate and rationally related to its classification policy and procedure, and the department's policy and process for classifying the petitioner as a sex offender did not come close to shocking the conscience.

3. The petitioner's classification as a sex offender on the basis of nonconviction information violated article first, § 9, of the Connecticut constitution, as the petitioner was not afforded the full panoply of the procedural protections set forth in *Wolff* prior to receiving that classification; accordingly, the habeas court's judgment was reversed, and the case was remanded with direction to issue a writ of habeas corpus and to direct the respondent to expunge the petitioner's sex treatment need score.

Argued December 10, 2020—officially released June 17, 2021**

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Sferrazza*, *J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *Alvord*, *Sheldon* and *Norcott*, *Js.*, which reversed the habeas

** June 17, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

court's judgment and remanded the case for further proceedings, and the respondent, on the granting of certification, appealed to this court, which affirmed the Appellate Court's judgment; thereafter, the petitioner filed an amended petition for a writ of habeas corpus, and the case was tried to the court, *Kwak*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed. *Reversed*; *judgment directed.*

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

Zenobia G. Graham-Days, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare E. Kindall*, solicitor general, for the appellee (respondent).

Opinion

KELLER, J. In *Anthony A.* v. *Commissioner of Correction*, 326 Conn. 668, 166 A.3d 614 (2017) (*Anthony A. II*), this court affirmed the judgment of the Appellate Court, which concluded that the petitioner, Anthony A., had a protected liberty interest in not being incorrectly classified by the Department of Correction (department) as a sex offender for purposes of determining the petitioner's housing, security and treatment needs within the department.[1] Id., 674. Because the due pro-

[1] As a general matter, inmate "[c]lassification . . . does not involve deprivation of a liberty interest independently protected by the [d]ue [p]rocess [c]lause." *Bailey* v. *Shillinger*, 828 F.2d 651, 652 (10th Cir. 1987). Courts uniformly have held, however, that "an inmate who has not previously been convicted of a sex offense may be classified as a sex offender for purposes of a prison treatment program only if the prison affords him the procedural protections to which prisoners facing disciplinary sanctions involving liberty interests are generally entitled." *Gwinn* v. *Awmiller*, 354 F.3d 1211, 1218 (10th Cir.), cert. denied, 543 U.S. 860, 125 S. Ct. 181, 160 L. Ed. 2d 100 (2004); see also *Coleman* v. *Dretke*, 395 F.3d 216, 222 (5th Cir. 2004) ("prisoners who have not been convicted of a sex offense have a liberty interest created by the [d]ue [p]rocess [c]lause in freedom from sex offender classification and conditions"), cert. denied, 546 U.S. 938, 126 S. Ct. 427, 163 L. Ed. 2d 325 (2005); *Neal* v. *Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997) ("the stigmatizing consequences of the attachment of the 'sex offender' label coupled with the subjection of the targeted inmate to a mandatory treatment program

cess clause prohibits the government from depriving a person of any such interest except pursuant to constitutionally adequate procedures, the case was remanded to the habeas court for a determination of whether the department had afforded the petitioner the process he was due prior to assigning him the challenged classification. Id., 686. Presently before us is the petitioner's appeal[2] from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the habeas court incorrectly determined that the respondent, the Commissioner of Correction, did not violate his right to procedural due process in classifying him as a sex offender.[3] The peti-

whose successful completion is a precondition for parole eligibility create the kind of deprivations of liberty that require procedural protections").

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

[3] Because the appeal in *Anthony A. II* came to this court on a motion to dismiss, we took the facts alleged in the petition to be true; *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 670; including that the petitioner was "classified . . . as a sex offender, despite the fact that he had not been convicted of a sex offense and had no prior history as a sex offender." Id., 672. In its memorandum of decision, the habeas court found that, although the amended habeas petition "allege[d] that the assignment of a [sex treatment need] score [of 3] classifies the petitioner as a sex offender," in fact, "[t]he respondent merely has classified the petitioner as having sexual treatment needs, not as being a sex offender." Prior to February, 2012, the department's administrative directive 9.2 provided that all inmates were to be assessed for their "[s]ex offender treatment" need. Conn. Dept. of Correction, Administrative Directive 9.2 (8) (B) (6) (effective July 1, 2006). On February 23, 2012, pursuant "to the advice of the various [a]ssistant [attorneys general] who have assisted the [department] in litigation and policy . . . regarding sex treatment need scores," the department removed the word "offender" from the directive such that inmates would no longer be assessed for their sex offender treatment need but, rather, for their sex treatment need. All of the criteria for determining an inmate's sex treatment need remained the same, however, as did the penalties for an inmate's refusal to sign an offender accountability plan classifying him in need of such treatment. Moreover, the department's Objective Classification Manual provides that a sex treatment need score of 3 is given to "individuals [who] have a current conviction, pending charge *or known history of sexual offenses involving physical contact with the victim(s)* (necrophilia included)" and that "[a]n inmate who engages in predatory sexual behavior while incarcerated will [also] be given a score of 3." (Emphasis added.)

tioner also claims that the habeas court incorrectly determined that the challenged classification did not violate his right to substantive due process or his right not to be "punished, except in cases clearly warranted by law," under article first, § 9, of the Connecticut constitution. We conclude that the petitioner was not afforded the procedural protections he was due prior to being classified as a sex offender and, therefore, that his classification violated his right to procedural due process under both the federal constitution and article first, § 9, of our state constitution.[4] We reject the petitioner's substantive due process claim. Accordingly, we reverse the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of this appeal. The petitioner was arrested and charged with several offenses, including sexual assault in a spousal relationship pursuant to General Statutes (Rev. to 2011) § 53a-70b, in connection with an incident that occurred on the evening of July 18 and the early morning hours of July 19, 2011, at the home of the petitioner's former wife, M. According to a police report, M informed the police that, on the night in question, she and the petitioner had been drinking and "smoking 'crack' " cocaine, which caused the petitioner to become paranoid and to act in a delusional manner. Believing that another person was in the house, the petitioner began searching for that person under the bed, in closets, and in the hallway outside the bedroom.

Conn. Dept. of Correction, Objective Classification Manual § III (D) (6), pp. 36, 37. Contrary to the habeas court's finding, therefore, although inmates are no longer assessed for their sex offender treatment need, the score assigned to the petitioner is reserved expressly for inmates with a "known history of sexual offenses"; id.; which is simply another way of saying inmates who are known sex offenders.

[4] As we explain more fully in part III of this opinion, we have long held that article first, § 9, of the Connecticut constitution is the criminal due process clause of our state constitution and that it affords no greater protections than the protections afforded under the federal constitution. See, e.g., *State* v. *Jenkins*, 298 Conn. 209, 259 n.39, 3 A.3d 806 (2010).

After repeatedly accusing M of having an affair, the petitioner "made her take off her clothing and [lie] on her back," whereupon he digitally penetrated her vagina and anus looking for " 'used condoms.' " Later, the petitioner became suspicious that another man had been using his video game system "and stuck [his] fingers inside [M's] vagina and anus again." When the petitioner continued to accuse her of having an affair, M, out of annoyance, lied to the petitioner that, in fact, she was having an affair with one of his friends, which caused the petitioner to become violent and to pour soda on M.

M informed the police that, following the soda incident, she went downstairs to shower and to get away from the petitioner. While she was showering, the petitioner entered the bathroom and threw cat litter, milk, flour and paint on her. He also slammed the shower door repeatedly in an apparent effort to "smash it." The petitioner then forced M back into the bedroom and onto the bed. When M attempted to get out of the bed, the petitioner restrained her and punched her in the face. M was able to summon the police when the petitioner left to use the bathroom. According to the responding officers, the house was in "shambles" when they arrived on the scene, with damage, "including but not limited to . . . broken doors, smashed glass windows, and red liquid splattered on [the] floor later identified as paint." The officers also observed bruising on M's arms and above her right eye. While being transported to a hospital, M informed the paramedics that the petitioner had sexually assaulted her, a claim she repeated to police officers when they interviewed her a short time later.

In the petitioner's statement to the police, he admitted to " 'getting high' " on cocaine and to questioning M about whether she was having an affair. The petitioner also stated that, throughout the night, as he lay in bed next to M, he touched the inside and outside of

her vagina despite her saying " 'no' " and that she was not in the mood, pushing his fingers away, and clenching her legs. The petitioner stated that, when M said "no," he would stop for a while before trying again, which happened "several times" throughout the night, and that, at one point, M "got [so] tired of him putting his fingers in her vagina [that] she . . . threw her phone at him." The petitioner stated that "he then took [the] phone and snapped it in half."

M subsequently recanted her statement to the police. In a notarized letter dated August 17, 2011, she stated that she "[did] not wish to pursue any . . . charges against [the petitioner]," that "the police report [concerning the night in question was] inaccurate" and that the petitioner "never sexually assaulted [her]." M explained that she and the petitioner "are very sexually active and [that] any marks [on her body that evening] came from [their] sexual activity . . . ." M further stated that her "face was injured when [she] came out of the shower and slipped on the wet floor," and that the petitioner "was not present" when she fell and "at no time tried to harm [her]." She concluded by asserting that "from the day [she] met [the petitioner] he [has] NEVER EVER [been] violent" and "has never laid a hand on [her] in any way." (Emphasis in original.)

On February 21, 2012, the prosecutor informed the trial court that she had met with M, who informed her that "she was abusing substances" on the night in question, that she no longer recalled her conversation with the police, and that she "now believes that something different happened [from the sexual assault that] was alleged to have happened . . . ." The prosecutor informed the court that M also stated that, "when she sobered up, she saw [that] what really happened . . . was not [that the petitioner had] sexually assault[ed] her," that, "when she . . . slipped and hit her head [in the bathroom] . . . she had a seizure and sometimes

. . . seizures make her believe things that are not actually true," and that she "has no memory of whatever she told the police, but [now] believes it to be . . . incorrect." Accordingly, the state entered a nolle prosequi on the charge of sexual assault in a spousal relationship. *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 671. The petitioner thereafter pleaded guilty to unlawful restraint in the first degree, failure to appear, and violation of probation, for which he was sentenced to an effective term of three years and six months of incarceration. *Anthony A.* v. *Commissioner of Correction*, 159 Conn. App. 226, 229, 122 A.3d 730 (2015) (*Anthony A. I*), cert. denied, 326 Conn. 668, 166 A.3d 614 (2017).

Upon his incarceration, the petitioner was classified pursuant to the department's administrative directive 9.2, which requires that "[e]ach inmate under the custody of the [respondent] . . . be classified to the most appropriate assignment for security and treatment needs to promote effective population management and preparation for release from confinement and supervision." Conn. Dept. of Correction, Administrative Directive 9.2 (1) (effective July 1, 2006) (Administrative Directive 9.2). An inmate's classification is based on the individual risk and needs of the inmate, which are determined by an assessment of seven risk factors and seven needs factors. Administrative Directive 9.2 (8) (A) and (B). For each factor, an inmate is assigned a score of 1 to 5, with 1 representing the lowest score and 5 representing the highest score. Administrative Directive 9.2 (6). Among the seven needs factors, inmates are assessed for their sex treatment need (STN). Administrative Directive 9.2 (8) (B) (6). An inmate's risk and needs level is used to determine "appropriate confinement location, treatment, programs, and employment assignment whether in a facility or the community." Administrative Directive 9.2 (3)

(A). Inmates are further provided an "overall classification assessment score" of 1 to 5 that corresponds to the highest rating assigned to any of the seven risk factors. Administrative Directive 9.2 (6) and (8) (C). "No inmate with [an STN] score of 2 or greater [may] be assigned an overall score below level 3 without authorization from the [respondent] or designee." Administrative Directive 9.2 (8) (C).

The department's Objective Classification Manual (manual) details the process for assigning an STN score. The manual provides that an inmate's STN score indicates whether they have "a record or known history of problem sexual behavior." Conn. Dept. of Correction, Objective Classification Manual § III (D) (6), p. 35 (2012) (Classification Manual). The manual further provides that, in assigning an STN score, the department may rely on "information acquired through [c]ourt [t]ranscripts, [presentence] [i]nvestigations (PSI), police reports, [department] [r]eports, Department of Children [and] Families . . . reports, etc." Id. "Information from charges which were nolled, acquitted, dismissed, withdrawn or dropped, which is part of a crime resulting in a conviction, [also] may be used to determine needs scores based [on] the description of the crime from [the relevant] police reports, [PSIs], or other reliable investigative reports." (Emphasis omitted.) Id., § III (A), p. 5. The manual further provides that a hearing is required before an STN score can be assigned based on "non-conviction information . . . ." Id., § III (D) (6), p. 36. An inmate who receives an STN score of 2 or higher "shall be referred to [the] sex treatment program staff for evaluation." Id. "Upon receipt of a referral, the sex offender program staff . . . conduct[s] an assessment to determine the inmate's eligibility to participate in sex offender programs. Inmates [are] prioritized for services based on clinical needs, motivation, available resources and release date." Conn. Dept. of Correction,

Administrative Directive 8.13 (7) (effective October 31, 2007).

On August 7, 2012, the petitioner learned that the department had assigned him an STN score of 3, which, under the manual, is given to inmates who "have a current conviction, pending charge or known history of sexual offenses involving physical contact with the victim(s) . . . ." Classification Manual, supra, § III (D) (6), p. 36. The petitioner's score was based on his and M's initial statements to the police recounting the events culminating in the petitioner's arrest on July 19, 2011. Because of his score, the petitioner's offender accountability plan (OAP) recommended that he participate in "sex treatment," stating that a failure to do so would "negatively impact" the petitioner's ability to earn risk reduction credit[5] and to participate in "supervised community release and/or parole." "The petitioner refused to sign the [OAP] and requested a hearing to prove that he had not sexually assaulted [M]. He claimed that the sex offender designation and treatment recommendation should be removed from his [OAP]. The department responded: 'You had a hearing on [July 7, 2012], and it was found to be verified in the police report that there was [nonconsensual] sexual contact. Therefore, your [STN] score . . . is accurate and will not be changed.' The petitioner's repeated efforts to modify his [OAP] to delete the sex offender designation were all unsuccessful." (Footnotes omitted.) *Anthony A.* v. *Commissioner of Correction*, supra, 159 Conn. App. 230.

On February 20, 2013, the then self-represented petitioner filed a petition for a writ of habeas corpus in which he claimed that he was incorrectly classified as a sex offender without due process of law. *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 672.

[5] Risk reduction credit is credit an eligible inmate may earn "toward a reduction of [his or her] sentence . . . ." General Statutes § 18-98e (a).

The habeas court concluded that the petitioner did not have a protected liberty interest in not being wrongly classified as a sex offender and dismissed the petition. Id., 673. The Appellate Court reversed the judgment and remanded the case to the habeas court, concluding that the petitioner did have such a protected liberty interest. Id., 674. This court thereafter affirmed the Appellate Court's judgment. Id., 686. In so doing, we explained that the Appellate Court, in reaching its decision, "first considered whether the petition had been rendered moot by the petitioner's release from prison prior to oral argument. . . . The [Appellate Court] observed that the petitioner had informed the court that, after his release, he had been arrested in connection with new charges and was being detained at New Haven Correctional Center. . . . Because of the petitioner's new arrest, the Appellate Court reasoned that there was a reasonable possibility that, should he return to prison, he will again be classified as being in need of sex offender treatment because the department [had] assigned him [an STN] score with a recommended sex offender treatment referral during his previous incarceration. . . . The [Appellate Court] concluded, therefore, [and we agreed] that the collateral consequences exception to the mootness doctrine applied." (Citations omitted; internal quotation marks omitted.) Id., 673–74; see id., 674 n.6.

On or about June 16 and 26, 2017, the petitioner pleaded guilty to the new charges and was sentenced to concurrent terms of incarceration. Following his return to the respondent's custody, on November 29, 2017, the petitioner was notified that a hearing would be held on December 27, 2017, to determine whether he would be assigned an STN score of greater than 1 based on his July 19, 2011 arrest for sexual assault in a spousal relationship. The petitioner was advised that, in making its determination, the department would rely

on the police report of that arrest as well as the petitioner's "CT State Rap Sheets." In advance of the hearing, the petitioner submitted an inmate request form requesting that, at his hearing, he be permitted to argue on his own behalf, to present documentary evidence, to present live witness testimony, and to be represented by counsel. The petitioner received a response from Elizabeth Tugie, the counselor supervisor of offender classification and population management at the department, granting his requests to argue on his own behalf and to present documentary evidence but denying his requests to present live witness testimony, stating that it was "[in]consistent with institutional safety concerns," and to be represented by counsel, stating that the hearing was "not intended to be adversarial but . . . to ensure that you are properly classified."

At his classification hearing, the petitioner denied sexually assaulting M, stating that M could not recall events from the night in question because she had been drinking and she suffers from seizures. The petitioner further stated that he and M had engaged in " 'normal sexual relations,' " that he "never touched [her] sexually without her consent and [that he] stopped touching her when she pulled away." In support of these assertions, the petitioner submitted several documents, including M's August 17, 2011 letter recanting her July 19, 2011 statement to the Meriden police and the transcript of his February 21, 2012 plea hearing, at which the prosecutor informed the trial court about M's recantation. The petitioner also submitted a letter from his former defense counsel that described an August 23, 2011 meeting counsel had with M, during which M "was adamant that [the petitioner] did not sexually assault her" and that "she did not want to press charges" against him. The letter further stated that M also informed counsel that she "wanted the protective order that was entered against [the petitioner] dropped."

Following the hearing, Tugie, who served as the hearing officer, notified the petitioner that he met "the requirements for assignment of an [STN] score as outlined in the [manual]" and, accordingly, that she had assigned him an STN score of "3VN."[6] The notice stated that, in arriving at her decision, Tugie had reviewed, in addition to the petitioner's July 19, 2011 arrest record, the petitioner's complete Connecticut criminal record, including "numerous corresponding police reports and arrest warrant applications . . . ." The notice further stated that Tugie's supervisor, David Maiga, had reviewed and approved the petitioner's assigned STN score and that, pursuant to the department's administrative directive 9.6, the petitioner could appeal the score, which he did. On March 5, 2018, Tugie and Maiga considered and denied the appeal after discussing it for approximately "thirty seconds." As a result of his STN score of 3, the petitioner could not be placed in a facility lower than level three without authorization from the respondent or the respondent's designee; see Administrative Directive 9.2 (8) (C); which rendered the petitioner, a veteran of the Iraq war, ineligible for a veterans program available only at a level two facility. Also, in light of his STN classification, the petitioner was once again referred to the sex treatment program staff for evaluation but refused to participate in that evaluation on the ground that the department incorrectly had labeled him a sex offender.[7] On March 20, 2018, the

[6] The manual defines the subcode "V" as: "Verified: Information used to classify the individual is documented in the official record and is considered accurate." Classification Manual, supra, § III (D) (6), p. 38. The manual further defines the subcode "N" as "[d]enot[ing] [that the] score [is] based on [nonconviction] information." Id.

[7] The habeas court found that the petitioner was referred to have his sexual treatment needs determined and that he "was determined [not to] require sexual offender treatment, and none was ordered or required by [the department]." That finding is contrary to the evidence presented to the habeas court. The petitioner testified that, as a result of his classification, he was asked to participate in an evaluation to determine whether he would receive sex treatment but that he refused to do so because he was "not a

petitioner was found guilty of refusing to sign his OAP. As punishment, the petitioner forfeited twenty-five days of earned risk reduction credit and was prospectively barred from earning additional risk reduction credit until he signed the OAP. The petitioner's refusal to sign the OAP also negatively impacted his eligibility for parole and community release.

On April 18, 2018, the petitioner, now represented by counsel, filed a third amended petition for a writ of habeas corpus in which he alleged that, in assigning his 2017 STN score, the department violated his constitutional right to procedural due process in the following ways: (1) by providing him inadequate notice of the evidence to be relied on in deciding his score; (2) by precluding him from presenting live witness testimony at the classification hearing; (3) by not having the hearing administered by an impartial decision maker; and (4) by basing the classification decision on insufficient evidence and failing to assess the credibility of M's allegations of sexual assault.[8] The petitioner further

sex offender." Tugie also testified that, although not certain, she did not believe that the petitioner met with the sex treatment program staff for an evaluation because the petitioner had refused to sign his OAP. Similarly, Maiga testified that, following his classification, a sex treatment referral was added to the petitioner's OAP. The petitioner refused to sign that OAP. According to Maiga, had the petitioner signed his OAP, he would have met with the sex treatment program staff to determine if he needed treatment. Accordingly, contrary to the finding of the habeas court, the petitioner was not evaluated by the sex treatment program staff for his sexual treatment needs, and, therefore, it was never determined that he did not require sex treatment.

[8] The petitioner also alleged that the department violated his right to procedural due process by not allowing him to be represented by counsel at his hearing, not providing him the opportunity to cross-examine his accusers, not providing him a sufficient explanation of the reasons for its classification decision, ignoring medical evidence he submitted, not providing a reasonable explanation for ignoring that evidence, and not adequately assessing the credibility or reliability of hearsay statements relied on to reach its classification decision. The petitioner failed to address these claims in his posttrial brief, and, accordingly, the habeas court deemed them abandoned. The petitioner does not raise any of those claims on appeal, and we do not discuss them.

alleged that, by classifying him as a sex offender, even though he had never committed or been convicted of a sex offense, the department violated his constitutional right to substantive due process as well as his right not to be "punished, except in cases clearly warranted by law" under article first, § 9, of the Connecticut constitution.[9]

A trial was held on the petition on July 10 and 30, 2018, at which Tugie testified that the petitioner's STN score was assigned based on nonconviction information, which she described as information relating to a crime of which an inmate has been convicted indicating that the inmate, in the course of committing that crime, engaged in conduct that constitutes "some semblance" of a sex offense, even though the inmate was not convicted of a sex offense. Tugie testified that, in assigning the petitioner his score, she had credited M's original statement to the police concerning the events of July 19, 2011, over M's subsequent recantation of that statement. Tugie further testified that, although the score was based on the petitioner's July 19, 2011 arrest for sexual assault in a spousal relationship, after the hearing, she requested and reviewed reports of other incidents of domestic disputes between the petitioner and M in order to assess the reliability of M's recantation. Tugie acknowledged that the petitioner was never notified that she would review these other records in making her decision. Tugie explained that, in her experience, it is "common for victims of domestic violence to recant their statements out of fear . . . [or] sometimes coercion" and that these other reports confirmed for her that M's recantation was not reliable.[10] Tugie noted,

[9] The petitioner further alleged a violation of his constitutional right to be free from cruel and unusual punishment but abandoned that claim in his posttrial brief.

[10] Tugie testified that she had training as a "domestic violence facilitator" but did not provide any specific details as to what that role is or what the training for it entailed. It is unclear from the record whether the training Tugie received qualified her to assess the reliability of M's recantation in light of domestic disputes between the petitioner and M.

moreover, that she took into account the petitioner's own statements to the police following his July 19, 2011 arrest in determining the petitioner's score.

Tugie's supervisor, Maiga, also testified at the habeas trial. Maiga stated, among other things, that the department no longer classifies inmates as "sex offenders" but, rather, as inmates "having a sexual treatment need."[11] Maiga further testified that he first became aware of the petitioner's case following the Appellate Court's decision in *Anthony A. I* and that he and Tugie had discussed the impact of that decision on the department's classification policies before assigning the petitioner an STN score in 2017. Maiga explained that, under administrative directive 9.2 (8) (C), the petitioner was required to reside at a level three or higher facility based on his STN score and that such facilities are some of the more secure and restrictive housing options within the department.

Finally, the petitioner called Amanda Kingston, a forensic psychiatrist, to testify about an independent review of the petitioner's medical record she conducted to determine if he had a need for sex offender treatment. Kingston's conclusions are summarized in a report dated February 9, 2018, which was entered into evidence. In her report, Kingston noted that, although the petitioner previously has received several psychiatric diagnoses, his "psychiatric records do not indicate any history of problem sexual behaviors . . . ." The report concludes that the July 19, 2011 incident between the petitioner and M "appears to have occurred in the setting of psychosis due to [the petitioner's] underlying schizoaffective disorder [as] exacerbated by his cocaine use at the time" and does not "indicate an underlying sexual disorder or paraphilia." Kingston opined that "sexual offender treatment would not address the underlying risk factors that led to [the petitioner's] sex-

[11] See footnote 3 of this opinion.

ual behaviors in 2011" and that treatment focused on his underlying risk factors would be more appropriate.[12] Kingston testified that, due to time constraints, she was unable to interview the petitioner before drafting her report but that she did interview him twice after completing it and that those interviews had not changed her opinion.

On February 25, 2019, the habeas court issued a memorandum of decision in which it denied the petitioner's habeas petition. With respect to the petitioner's procedural due process claim, the court applied the standard set forth in *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), in which the United States Supreme Court held that "due process requires procedural protections before a prison inmate can be deprived of a protected liberty interest"; *Superintendent* v. *Hill*, 472 U.S. 445, 453, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985); which include "(1) advance written notice of the [action to be taken]; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and [to] present documentary evidence . . . and (3) a written statement by the [fact finder] of the evidence relied on and the reasons for the . . . action." Id., 454. The habeas court then considered and rejected each of the petitioner's contentions regarding the inadequacy of the process he was provided prior to being classified as a sex offender. With respect to the petitioner's claim that Tugie improperly refused to allow him to present live testimony at the

[12] On July 17, 2018, the petitioner became parole eligible. In advance of his parole eligibility, the petitioner refused a sex offender evaluation by the Board of Pardons and Paroles (board). As a result, David Rentler, the supervising psychologist for the board, was asked to review the petitioner's case to determine whether that evaluation would be required before the petitioner may receive a parole hearing. Rentler concluded that the evaluation was not required because the petitioner's conduct did "not appear to have an underlying sexual motivation" but, rather, resulted from "paranoia and suspicious beliefs likely induced by [drug use]."

hearing, the court observed that "it is not [the department's] policy to permit live witness testimony because of safety and security concerns" and that "the petitioner does not have a due process right to present the testimony of live witnesses, in particular not civilians such as [M], who is the protected person in a criminal protective order issued by a court.[13] The [department] had a reasonable basis to exclude such witnesses and properly used discretion when denying the petitioner's request to present live witnesses at the classification hearing." (Footnote added.)

The habeas court also rejected the petitioner's contention that there was insufficient evidence to support his STN score. The court explained that, in the prison context, due process is satisfied so long as there is " 'some evidence' " in the record supporting the challenged decision and that, in the present case, that standard was more than met in light of M's detailed statement to the police recounting the petitioner's sexual misconduct and "the petitioner's own statement regarding [his] several attempts at initiating sex by digitally penetrating [M's] vagina, despite her saying no, repeatedly." (Internal quotation marks omitted.) In reaching its decision, the habeas court rejected the petitioner's contention that, under *Luna* v. *Pico*, 356 F.3d 481, 489 (2d Cir. 2004), and *Sira* v. *Morton*, 380 F.3d 57, 78 (2d Cir. 2004), Tugie was required to conduct an independent investigation into M's "background and reputation for truthfulness" before she could rely on M's recanted statement, stating that the cited cases established no such requirement.

The habeas court next addressed the petitioner's contention that the department improperly failed to notify

[13] It is undisputed that the petitioner did not seek to call M as a witness, only his former defense counsel, the police officers who took M's statement, and Kingston.

him that it would consider his entire criminal record, not just the record of his July 19, 2011 arrest, in determining his STN score. The court concluded that the notification received by the petitioner, which stated that the department would consider his "CT State Rap Sheets," provided sufficient notice that "any law enforcement documents relating to his arrests and convictions could be reviewed." The court also credited Tugie's testimony that the petitioner's STN score was not based on any records other than his July 19, 2011 arrest record. To the extent Tugie reviewed any of the petitioner's other criminal records, the court concluded that it was strictly for purposes of deciding whether M's recantation was reliable. Finally, the court summarily rejected the petitioner's contention that Tugie and Maiga were not impartial decision makers, stating that there was simply no evidence to support that claim.

With respect to the petitioner's claim that the sex offender classification violated his right to substantive due process, the habeas court explained that, because the petitioner is not a member of a protected class, the department needed only a rational basis for classifying him as a sex offender, and that the department's "interest in managing the inmate population, assessing inmates for treatment while incarcerated, and facilitating their eventual transition back into society in a manner that safeguards society from repeat offenses" provided such a basis. In reaching its determination, the court rejected the petitioner's contention that "his classification is inherently suspect because he has mental disabilities [and because] the classification procedures target individuals with mental disabilities," stating that the petitioner had failed to present "any evidence that sexual disorders are mental disabilities" or that the "[department's classification system] targets such individuals." The court also rejected the petitioner's claim that his STN score constituted punishment

not clearly warranted by law in violation of article first, § 9, of the Connecticut constitution, concluding that the petitioner was not being punished as a result of his STN score but, rather, for refusing to sign his OAP.

On appeal to this court, the petitioner renews his claims before the habeas court that his classification as a sex offender violated his procedural and substantive due process rights, as well as his right not to be "punished, except in cases clearly warranted by law," under article first, § 9, of the Connecticut constitution.

I

We begin with the petitioner's claim that the habeas court incorrectly concluded that he received all the process he was due prior to being classified as a sex offender. The petitioner contends that the department's "blanket policy" against live witness testimony violated *Wolff*'s mandate that inmates must be allowed to present live testimony unless doing so would "be unduly hazardous to institutional safety or correctional goals." *Wolff* v. *McDonnell*, supra, 418 U.S. 566. The petitioner further contends that the habeas court incorrectly determined that the department provided prior written notice of the evidence it would rely on in assigning him his STN score because the notification he received stated that, in addition to his July 19, 2011 arrest record, the department would review his "CT State Rap Sheets." The petitioner further contends that the habeas court incorrectly determined that Tugie and Maiga were impartial decision makers despite the fact that (1) they were aware of and had discussed his case following the Appellate Court's decision in *Anthony A. I*, and (2) they, rather than a disinterested decision maker, ruled on his appeal from the decision that they themselves had made. Finally, the petitioner contends that the habeas court incorrectly determined that Tugie was not required to undertake an independent credibility

assessment of M before crediting her July 19, 2011 statement to the police, a mistake the petitioner claims was compounded by the habeas court's clearly erroneous factual finding regarding M's reason for recanting that statement, namely, her inability to recall the events in question.

The respondent argues in response that the habeas court correctly determined that the petitioner received all of the protections he was due under *Wolff*, including adequate notice of the evidence the department would rely on in deciding his classification. The respondent contends that *Wolff* did not establish an absolute right to present live witness testimony, that Tugie testified that department "policy does not permit live witness testimony because of safety and security concerns," and that, under *Wolff*, it was proper for the habeas court to defer to that policy. The respondent further argues that the habeas court properly rejected the petitioner's claim that Tugie and Maiga were not impartial decision makers in light of the petitioner's failure to present any evidence to support that claim. Finally, the respondent argues that the habeas court correctly determined that there was sufficient evidence to support the petitioner's STN score in light of M's detailed statement to the police describing the petitioner's sexual misconduct and the petitioner's own statement, which largely corroborated M's statement.

We conclude that, although the petitioner was afforded some of the procedural protections required by *Wolff*, it is clear that he was not provided all of them. In particular, he was not provided (1) an opportunity to call witnesses in his defense, (2) adequate notice of the information to be relied on in determining his classification, (3) and an impartial decision maker to rule on his appeal.

Whether the department violated the petitioner's procedural due process rights presents a question of law

over which our review is plenary. See, e.g., *State* v. *Harris*, 277 Conn. 378, 393, 890 A.2d 559 (2006). It is well established that "[t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Faraday* v. *Commissioner of Correction*, 288 Conn. 326, 338, 952 A.2d 764 (2008).

In *Wolff*, the United States Supreme Court held that, when a disciplinary hearing may result in the loss of good time credits, due process requires that an inmate receive (1) advance written notice of the disciplinary charges, (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and to present documentary evidence in his defense, (3) an impartial decision maker, and (4) a written statement by the fact finder of the evidence relied on and the reasons for the disciplinary action. *Wolff* v. *McDonnell*, supra, 418 U.S. 563–66, 571. In *Superintendent* v. *Hill*, supra, 472 U.S. 445, the Supreme Court expanded these protections to include a requirement that the fact finder's decision be supported by "some evidence" in the record. Id., 454. We previously have explained that "[the some evidence] standard is a lenient one, requiring only a modicum of evidence to support the challenged decision. [Id., 455]. Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. Id., 455–56; see also *Castro* v. *Terhune*, 712 F.3d 1304, 1314 (9th Cir. 2013) (characterizing test as minimally stringent)." (Internal quota-

tion marks omitted.) *Vandever* v. *Commissioner of Correction*, 315 Conn. 231, 245, 106 A.3d 266 (2014).

Although *Wolff* does not expressly require prior notice of the evidence to be relied on at the hearing; see *Wolff* v. *McDonnell*, supra, 418 U.S. 563; courts have recognized that such a requirement is implicit in the statement in *Wolff* that the notice must "inform [an inmate] of the charges [against him] . . . to enable him to marshal the facts and prepare a defense." Id., 564; see also, e.g., *Vitek* v. *Jones*, 445 U.S. 480, 494–96, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980) (before prisoner may be transferred to mental hospital, *Wolff* requires prior "disclosure to the prisoner . . . of the evidence being relied upon" to support transfer); *Meza* v. *Livingston*, 607 F.3d 392, 409 (5th Cir. 2010) (concluding that, under *Wolff*, before parolee was labeled sex offender and required to participate in sex offender therapy, he was entitled to "disclosure of the evidence being presented against [him] to enable him to marshal the facts asserted against him and prepare a defense").

Federal courts uniformly have held that the due process requirements in *Wolff* apply to proceedings to determine whether an inmate who has not previously been convicted of a sex offense may be classified as a sex offender for purposes of rehabilitation, treatment, or parole. See, e.g., *Renchenski* v. *Williams*, 622 F.3d 315, 331 (3d Cir. 2010) (before inmate may be labeled sex offender and required to participate in sex therapy, he is entitled to " 'an effective but informal hearing,' " which includes protections outlined in *Wolff*), cert. denied, 563 U.S. 956, 131 S. Ct. 2100, 179 L. Ed. 2d 926 (2001); *Meza* v. *Livingston*, supra, 607 F.3d 410 ("[b]ecause [a parolee's] interest in being free from sex offender conditions is greater than an inmate's interest in [good time] credits, [the parolee] is owed, at a minimum, the same process due to inmates under *Wolff*"); *Gwinn* v. *Awmiller*, 354 F.3d 1211, 1218–19 (10th Cir.)

(because classification as sex offender reduces rate at which inmate can earn good time credits, inmate is entitled to procedural protections in *Wolff*), cert. denied, 543 U.S. 860, 125 S. Ct. 181, 160 L. Ed. 2d 100 (2004); *Neal* v. *Shimoda*, 131 F.3d 818, 831 (9th Cir. 1997) (because classification of inmate as sex offender and mandatory successful completion of sex offender treatment program as precondition for parole eligibility implicate protected liberty interest, inmate is entitled to procedural protections in *Wolff*).

Although the court in *Wolff* cautioned that "[p]rison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority"; *Wolff* v. *McDonnell*, supra, 418 U.S. 566; it held that "inmate[s] facing disciplinary proceedings should be allowed to call witnesses"; id., 566; and recommended that prison officials who deny them that right "state [their] reason[s] for [doing so], whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases." Id. Thus, courts have interpreted *Wolff* as establishing a right to call witnesses, albeit one that can be denied for good reason. See, e.g., *Ponte* v. *Real*, 471 U.S. 491, 495, 105 S. Ct. 2192, 85 L. Ed. 2d 553 (1985) ("[c]hief among the due process minima outlined in *Wolff* was the right of an inmate to call and present witnesses . . . in his defense before the disciplinary board"); id., 499 (declining to place burden on inmate to show why action of prison officials refusing to call witnesses was arbitrary or capricious); *Renchenski* v. *Williams*, supra, 622 F.3d 331 (recognizing inmate's right to "present witness testimony . . . except upon a finding, not arbitrarily made, of good cause for not permitting such presentation" (internal quotation marks omitted)); *Meza* v. *Livingston*, supra, 607 F.3d 409 (inmate was entitled to "a hearing at which [he] is permitted to . . . call wit-

nesses"); *Gwinn* v. *Awmiller*, supra, 354 F.3d 1219 (inmate was entitled to "opportunity to present witnesses and evidence" in defense of charges); *Neal* v. *Shimoda*, supra, 131 F.3d 831 (stating that hearings to classify inmates as sex offenders do not implicate same safety concerns present in *Wolff* such that "an inmate whom the prison intends to classify as a sex offender is entitled to a hearing at which he must be allowed to call witnesses and present documentary evidence in his defense").

In the present case, it is undisputed that the department denied the petitioner's request to call witnesses without knowing who the witnesses were or what they would say, or considering whether their presence would be "unduly hazardous to institutional safety or correctional goals . . . ." *Wolff* v. *McDonnell*, supra, 418 U.S. 566. As previously indicated, the petitioner had planned to call his former defense counsel, the police officers who took M's statement, and Kingston, the forensic psychiatrist who interviewed him. According to Tugie, it did not matter whom he planned to call because the department's policy is not to allow live witness testimony under any circumstance.[14] Tugie also testified, however, that the department routinely allows police officers, lawyers, and medical staff into its facilities to meet with inmates, a practice that belies the safety and security concerns invoked to deny the peti-

[14] Contrary to the habeas court's determination, the witnesses the petitioner sought to present at his hearing, in particular the police officers who took M's statement and the petitioner's former defense counsel, to whom M retracted her sexual assault allegation, were relevant to the department's classification decision because each of those witnesses could have provided testimony that described the context and, thus, the reliability of both M's allegation and subsequent recantation. As previously indicated, Tugie testified that she conducted additional research into the petitioner's arrest record following the classification hearing to assist her in deciding the credibility of M's recantation and, therefore, the credibility of the petitioner's assertions that M's initial statement to the police was the product of her drug and alcohol use on the night in question.

tioner's request to call police officers, a lawyer, and a medical professional as witnesses at his hearing. Under *Wolff*, in the absence of a showing by the department that their presence at the prison would have been unduly hazardous to institutional safety concerns, the petitioner should have been permitted to call these witnesses. See, e.g., *Redding* v. *Fairman*, 717 F.2d 1105, 1114 (7th Cir. 1983) (although "prison officials have the discretion to refuse inmates' requests for witnesses to protect institutional safety or to keep the length of the hearing within reasonable limits . . . in this case no witnesses were allowed to testify at either hearing, and there is no indication that the requests were unreasonable"), cert. denied, 465 U.S. 1025, 104 S. Ct. 1282, 79 L. Ed. 2d 685 (1984).[15]

We also agree with the petitioner that the department did not provide him with adequate notice of the evidence it would use in determining his classification. As previously indicated, Tugie testified that, after the classification hearing had concluded, she conducted additional research into the petitioner's criminal record, which included reviewing all of the petitioner's arrest records, in order to assess the reliability of M's recantation. She further testified that she never notified the petitioner that the facts of his past arrests would be used against him. Under *Wolff*, the petitioner was entitled to this information so as to allow him "a chance to marshal the facts in his defense . . . ." *Wolff* v. *McDonnell*, supra, 418 U.S. 564; see also *Vitek* v. *Jones*, supra, 445 U.S. 494–96.

We disagree with the habeas court that the department satisfied the notice requirements of *Wolff* by noti-

[15] To reiterate, it is undisputed that the petitioner did not seek to call M, a person protected under a criminal protective order, as a witness. See footnote 13 of this opinion. Had the petitioner sought to do so, we would be presented with entirely different circumstances than those of the present case.

fying the petitioner that his "CT State Rap Sheets" would be reviewed as part of the decision-making process. It is well established that a "rap sheet" is a criminal history report produced by the state police containing no specific details about the underlying facts of any of the listed charges or convictions. See *United States Dept. of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 752, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989) ("[r]ap sheets . . . contain certain descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subject"). Police reports, on the other hand, are quite detailed and may contain incomplete or factually inaccurate information.

The petitioner next argues that the decision to classify him as a sex offender was not rendered by impartial decision makers because Tugie and Maiga discussed his case following the release of the decision in *Anthony A. I.* We disagree. Although "*Wolff* holds that prisoners are entitled to impartial [decision makers]"; *White* v. *Indiana Parole Board*, 266 F.3d 759, 767 (7th Cir. 2001); courts have interpreted this requirement as "prohibit[ing] only those officials who have [had] a direct personal or otherwise substantial involvement, such as major participation in a judgmental or decision-making role, in the circumstances underlying the charge from sitting on the disciplinary body." (Internal quotation marks omitted.) *Redding* v. *Fairman*, supra, 717 F.2d 1113. The record contains no evidence of any personal involvement by Tugie or Maiga in the factual circumstances on which they based their initial decision to classify the petitioner as a sex offender; nor has the petitioner identified any other evidence that could possibly call into question their ability to impartially carry out their classification duties. See, e.g., *Gwinn* v. *Awmiller*, supra, 354 F.3d 1221 (no due process viola-

tion even though hearing officer was named in inmate's action challenging prison classification system because evidence "[did] not indicate that [the officer] was incapable of fairly weighing the evidence presented . . . and determining whether [the inmate] had actually committed the alleged [misconduct]"); id., 1220–21 (noting that "courts should be alert not to sustain routine or pro forma claims of disqualification" because, "[f]rom a practical standpoint, [unwarranted disqualifications] . . . would heavily tax the working capacity of the prison staff" (internal quotation marks omitted)).

We agree with the petitioner, however, that Tugie and Maiga were not impartial decision makers when they ruled on the petitioner's appeal from their own initial classification decision. Although we are mindful not to overburden prison officials with needless disqualifications, the due process principle of fairness required that a different decision maker decide the merits of that appeal. See, e.g., *Withrow* v. *Larkin*, 421 U.S. 35, 58 n.25, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) ("[W]hen review of an initial decision is mandated, the [decision maker] must be other than the one who made the decision under review. . . . Allowing a [decision maker] to review and evaluate his own prior decisions raises problems . . . ." (Citations omitted.)); cf. *Reilly* v. *District Court*, 783 N.W.2d 490, 498 (Iowa 2010) (impartial decision maker was provided when inmate had "the opportunity to appeal the [disciplinary] decision to the deputy warden, who was not at the original hearing").

Finally, although, for the reasons previously stated, we conclude that the petitioner was denied due process of law because of the manner in which the department conducted his classification hearing, we agree with the habeas court that there was sufficient evidence in the record to support the department's classification decision. As we have explained, "the requirements of due process are satisfied if . . . there is any evidence in

the record that could support the conclusion reached . . . .'' (Citation omitted.) *Superintendent* v. *Hill*, supra, 472 U.S. 455–56. In the present case, the evidence consisted of M's detailed statement to two police officers (and the paramedics who attended her) that the petitioner had sexually assaulted her, and the petitioner's own statements to the police that corroborated some of M's account. As previously indicated, the petitioner informed the police that he continued to touch M's vagina despite her pushing him away, telling him '' 'no,' '' clenching her legs, and even throwing a phone at him. When combined with M's account, there was more than enough evidence to support the department's decision that the petitioner had likely committed a sex offense. See, e.g., *Vandever* v. *Commissioner of Correction*, supra, 315 Conn. 245 (''[the some evidence] standard is a lenient one'').

In arguing to the contrary, the petitioner cites *Luna* v. *Pico*, supra, 356 F.3d 481 and *Sira* v. *Morton*, supra, 380 F.3d 57, which he claims required Tugie to conduct an independent credibility assessment of M before crediting her statement. Both cases are readily distinguishable. In *Luna*, the court held that the evidence used to find an inmate, Alejandro Luna, guilty at two separate disciplinary hearings of assaulting a fellow inmate, Hector Lopez, failed to satisfy the '' 'some evidence' '' standard. *Luna* v. *Pico*, supra, 485, 489. The court stated that, at most, the evidence consisted of a bald accusation from Lopez, who later refused to testify at Luna's hearing. Id., 489. The court held that, under these circumstances, ''[d]ue process require[d] that there be some 'independent credibility assessment' '' of Lopez before crediting his bare accusation. Id., 489–90. In *Sira*, an inmate, Rubin Sira, following a disciplinary hearing, was found guilty of organizing inmates to participate in a prison demonstration. *Sira* v. *Morton*, supra, 65. The evidence relied on to find him guilty was supplied

by two prison officials who shared information they had learned from five confidential informants, none of whom testified at the hearing. Id., 63–65. Because the information provided to the prison officials by four of the informants constituted hearsay evidence and the fifth informant provided only conclusory accusations, the court determined that that evidence was not reliable and could not satisfy the "some evidence" standard in the absence of a credibility assessment of those informants and their underlying sources. Id., 79–81.

The present case is unlike *Luna* and *Sira* because, as previously explained, M initially provided a detailed, firsthand account to the police of the petitioner's sexual misconduct, which the petitioner himself partially corroborated in his own statement to the police. Accordingly, we conclude that there was sufficient, reliable evidence to support the petitioner's classification. We nonetheless acknowledge that, although there was sufficient evidence to support the classification, the testimony that the petitioner would have presented had he been allowed to do so may have cast that evidence in a different light sufficient to persuade Tugie that his sex offender classification was unwarranted. Moreover, as previously explained, because the petitioner was not afforded an opportunity to call witnesses in his defense, adequate notice of the evidence to be relied on by the department in making its classification decision, and an impartial decision maker ruling on his appeal, the department's classification of him as a sex offender violated his right to procedural due process.

II

We next address the petitioner's claim that the habeas court incorrectly concluded that the department did not violate his state constitutional right to substantive due process by classifying him as a sex offender. The petitioner argues that the department's system of classi-

fying prisoners as being in need of sex offender treatment "[is] subject to strict scrutiny under the state constitution because [it] targets a suspect class, namely, persons with mental disabilities," and that the classification system cannot withstand such scrutiny because "classif[ying] . . . the petitioner as having [an STN] score of 3, despite the fact that he has no need for [sex] treatment, is not narrowly tailored to further [the department's legitimate interest]" in "rehabilitating . . . and preparing [inmates] for reentry into society." The petitioner further argues that, "even if [his] claim is subject to rational basis review, the [department's] decision to classify [him] as a sex offender still violates substantive due process because the classification bears no reasonable relationship to any state purpose." We disagree.

"The substantive component of the [due process clause] . . . protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." (Internal quotation marks omitted.) *Greater New Haven Property Owners Assn.* v. *New Haven*, 288 Conn. 181, 201, 951 A.2d 551 (2008). "Despite the important role of substantive due process in securing our fundamental liberties, that guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. . . . Rather, [the guarantee] has been held to protect against only the most arbitrary and conscience shocking governmental intrusions into the personal realm that our [n]ation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." (Internal quotation marks omitted.) Id., 202.

"[S]ubstantive due process analysis . . . provides for varying levels of judicial review to determine whether a state [policy] passes constitutional muster

in terms of substantive due process. . . . Similar to the analysis followed to determine equal protection challenges, [policies] that [impair] a fundamental constitutional right [or target] a suspect class . . . require that this court apply strict scrutiny to determine whether the [policy] passes [constitutional] muster . . . .'' (Citation omitted; internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 408, 119 A.3d 462 (2015); see also *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 831, 860 A.2d 715 (2004) (under strict scrutiny standard, ''state must demonstrate that the challenged [policy] is necessary to the achievement of a compelling state interest'' (internal quotation marks omitted)). Our state constitution provides: ''No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.'' Conn. Const., amend. XXI. We previously have held that ''[this] explicit prohibition of discrimination because of physical [or mental] disability defines . . . constitutionally protected class[es] of persons whose rights are protected by requiring encroachments on these rights to pass a strict scrutiny test.'' *Daly* v. *DelPonte*, 225 Conn. 499, 513–14, 624 A.2d 876 (1993).

''In the absence of a claim of deprivation of a fundamental right [or the targeting of a suspect class], we have scrutinized such questions under a rational basis test. . . . [Under that standard] [t]he party claiming a constitutional violation bears the heavy burden of proving that the challenged policy has no reasonable relationship to any legitimate state purpose . . . .'' (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Matos*, 240 Conn. 743, 750, 694 A.2d 775 (1997); see also *Ramos* v. *Vernon*, 254

Conn. 799, 841, 761 A.2d 705 (2000) ("[e]qual protection rational basis review is for all material purposes . . . indistinguishable from the analysis in which we would engage pursuant to a [substantive] due process claim" (internal quotation marks omitted)).

We agree with the habeas court that there is simply no evidence that the petitioner was classified as a sex offender on the basis of mental disability or psychiatric illness. The habeas court credited Tugie's testimony that her decision to classify the petitioner as a sex offender was based on M's statement to the police that he sexually assaulted her and the petitioner's own statement to the police corroborating, in part, M's account. Tugie's reliance on this information was consistent with her testimony that an STN score that is assigned on the basis of nonconviction information means a score assigned on the basis of information contained in an official report relating to a crime of which an inmate has been convicted indicating that the inmate, in the course of committing that crime, engaged in conduct that bears "some semblance" of a sex offense. The petitioner has identified nothing in the record to suggest that Tugie considered his mental disability. Accordingly, because the petitioner was classified based on neutral considerations that do not target a suspect class, the petitioner's claim is subject to rational basis review. See, e.g., *United States* v. *LeMay*, 260 F.3d 1018, 1030 (9th Cir. 2001) ("[s]ex offenders are not a suspect class"), cert. denied, 534 U.S. 1166, 122 S. Ct. 1181, 152 L. Ed. 2d 124 (2002).

The petitioner contends that the department's classification decision cannot withstand rational basis review because its practice of "leaving the [sex offender classification] in place for an inmate without [sex] treatment needs bears no reasonable relationship to [a department purpose]," that the procedure by which classifications are made, without input from a sex offender treatment

professional, is arbitrary, and that the restrictions on those inmates classified as sex offenders, precluding them from residing in a facility with a security level lower than three, is "entirely unrelated to treatment needs." These arguments are unavailing.

As previously indicated, the habeas court found that the petitioner's sex offender classification was "not punishment, but [a component] of [the department's] efforts to treat and rehabilitate [him]." Administrative directive 9.2 (1) explains that the policy served by classification, including sex offender classification, is "to promote effective population management and preparation for release from confinement and supervision." Sex offender classification, moreover, "focus[es] on the level of sexual [reoffense] risk and address[es] program intervention needs." Classification Manual, supra, § III (D) (6), p. 35. The department's interests in effective population management and rehabilitation are both legitimate and rationally related to its classification policy and procedure. See *McKune* v. *Lile*, 536 U.S. 24, 33, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002) ("[t]herapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism").

Accordingly, although the petitioner had every right to contest being classified as a sex offender on the basis of nonconviction information; see parts I and III of this opinion; the department's policy and process for classifying him as such do not come close to shocking the conscience. See *Waldman* v. *Conway*, 871 F.3d 1283, 1293 (11th Cir. 2017) (holding that classification of prisoner convicted of kidnapping minor as sex offender and conditions imposed thereto, including "requirement that he attend sex offender classes or therapy and his ineligibility for work release . . . are not so egregious as to shock the conscience" (internal quotation marks omitted)); *Coleman* v. *Dretke*, 395 F.3d 216,

224–25 (5th Cir. 2004) (denying claim that imposition of sex offender registration and therapy as conditions to parole of inmate not convicted of sex offense violates substantive due process because "sex offender treatment serves the government interest in protecting members of the community from future sex offenses" and therapy condition was not imposed "with the intent to injure"), cert. denied, 546 U.S. 938, 126 S. Ct. 427, 163 L. Ed. 2d 325 (2005). We therefore reject the petitioner's substantive due process claim.

III

We turn, finally, to the petitioner's claim that the habeas court incorrectly concluded that the department did not violate his right not to be "punished, except in cases clearly warranted by law," under article first, § 9, of the Connecticut constitution, by classifying him as a sex offender on the basis of nonconviction information. As previously indicated, the habeas court rejected the petitioner's claim that his classification was "punishment" in violation of article first, § 9, concluding, instead, that "[t]he petitioner ha[d] punished himself by not signing his OAP and then receiving a disciplinary ticket for that refusal. . . . The negative consequences emanating from his own decision [not to] sign the OAP have resulted in the loss of [risk reduction credit] previously earned, the inability to earn [risk reduction credit], and inability to be confined in a lower security level facility where additional programs are available." (Citation omitted.) The habeas court also rejected the petitioner's contention that the restrictions imposed on him were not warranted by law within the meaning of article first, § 9, because "he has never been convicted of a sex offense and . . . there is insufficient credible evidence that [he ever engaged in] acts of sexual violence against [M]." The habeas court concluded, rather, that the evidence was more than sufficient to support

a finding that the petitioner had engaged in acts of sexual misconduct against M.

On appeal, the petitioner renews his claim before the habeas court that "[his] punishment . . . in the form of his classification as a sex offender is not warranted by law because [he] has never been convicted of a sex offense and there is not sufficient credible evidence to conclude that he ever committed a sex offense." We conclude that the petitioner's sex offender classification violated article first, § 9, because the petitioner was not afforded the process he was due under *Wolff* prior to receiving that classification.

Article first, § 9, of the Connecticut constitution provides that "[n]o person shall be arrested, detained or punished, except in cases clearly warranted by law." We previously have held that this provision is the criminal due process clause of our state constitution and that it provides no greater protections than those available under the federal constitution. See, e.g., *State* v. *Jenkins*, 298 Conn. 209, 259 n.39, 3 A.3d 806 (2010) ("the defendant's reliance on [article first, § 9] is, in essence, superfluous, because, in the search and seizure context, [that section] is our criminal due process provision that does not provide protections greater than those afforded by either the fourth amendment [to the federal constitution] or its coordinate specific state constitutional provision, article first, § 7"); *State* v. *Mikolinski*, 256 Conn. 543, 555, 775 A.2d 274 (2001) ("[w]e have generally characterized article first, § 9, as one of our state constitutional provisions guaranteeing due process of law" (internal quotation marks omitted)); *State* v. *Lamme*, 216 Conn. 172, 184, 579 A.2d 484 (1990) (because article first, § 9, affords no greater rights than federal constitution, "the principles underlying constitutionally permissible *Terry*[16] stops . . . define when

[16] *Terry* v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d (1968).

[investigative] detentions are 'clearly warranted by law' under article first, § 9" (footnote added)).

"Read in its entirety, the text [of article first, § 9] indicates that the [meaning] to be assigned to the phrase 'clearly warranted by law' depends on the particular liberty interest that is at stake. Such a construction is, of course, entirely consonant with the general contours of a constitutional safeguard rooted in flexible principles of due process." Id., 178. Thus, we have held that "[t]he historical roots of [the phrase] 'except in cases clearly warranted by law' appear . . . to provide protection for personal freedom through a blend of statutory and constitutional rights that, like the text of . . . article first, § 9, incorporates no single constitutional standard." Id., 179.

In the present case, the liberty interest at stake is a prisoner's right not to be incorrectly classified as a sex offender and subjected to all the burdens attendant to that classification. See, e.g., *Renchenski* v. *Williams*, supra, 622 F.3d 326 ("[i]t is largely without question . . . that the sex offender label severely stigmatizes an individual, and that a prisoner labeled as a sex offender faces unique challenges in the prison environment"). In determining what protections attach to that right, "we [must remember] that one cannot automatically apply procedural rules designed for free citizens in an open society . . . to the very different situation presented by a disciplinary proceeding in a state prison. . . . Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." (Internal quotation marks omitted.) *Vandever* v. *Commissioner of Correction*, supra, 315 Conn. 244; see also *Bell* v. *Wolfish*, 441 U.S. 520, 546, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) ("[a] detainee simply does not possess the full range

of freedoms of an unincarcerated individual"); *Roque* v. *Warden*, 181 Conn. 85, 93, 434 A.2d 348 (1980) ("[p]risoners retain rights under the due process clause . . . but these rights are subject to reasonable restrictions imposed by the nature of the institution to which they have been lawfully committed" (citations omitted)). In other words, what is "warranted by law"; Conn. Const., art. I, § 9; for an incarcerated person is simply not the same as what is warranted for an unincarcerated person. As we explained in part I of this opinion, however, one of the rights that a prisoner retains while incarcerated is the right not to be classified as a sex offender on the basis of nonconviction information, without first being afforded the procedural protections set forth in *Wolff*. Because the petitioner did not receive the full panoply of those protections, we conclude that his classification violated article first, § 9, of our state constitution.

The judgment is reversed and the case is remanded to the habeas court with direction to issue a writ of habeas corpus and to direct the respondent to expunge the petitioner's STN score.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* COURTNEY G.*
(SC 20290)

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

Syllabus

Convicted of multiple counts of first degree sexual assault and risk of injury to a child in connection with the sexual abuse of S, the daughter of the

* 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.

defendant's girlfriend, N, the defendant appealed. S first disclosed the abuse, which began when she was eight years old, at a meeting with several members of her family, including N, that occurred when S was seventeen. At trial, S testified that she was crying during the meeting. Thereafter, the trial court, over defense counsel's objection, allowed N to testify about S's demeanor during the meeting, and N also testified that S had been crying. The defendant testified at trial and denied any inappropriate contact with S. In response to a question from the prosecutor, the defendant stated that he had an interest in the case insofar as he did not want to go to jail and leave his children behind. During closing and rebuttal arguments, the prosecutor stated that the defendant, having been present in the courtroom and having listened to S and N testify, displayed a "lack of outrage" at the accusations against him. The prosecutor also purported to summarize the reasonable doubt standard, telling the jury that proof beyond a reasonable doubt is based on common sense and life experience and determined by a totality of the evidence rather than "just . . . one picky little point." The prosecutor also remarked on defense counsel's failure to cross-examine S, calling S's testimony "unchallenged and uncontroverted." On appeal, the defendant claimed that the trial court improperly admitted N's testimony about S's out-of-court demeanor and that the prosecutor made certain improper remarks during closing and rebuttal arguments. *Held*:

1. There was no merit to the defendant's claim that the admission of N's testimony regarding S's out-of-court demeanor was improper because any error relating to the admission of that testimony was harmless: N's testimony that S was crying during the family meeting was unlikely to have substantially swayed the jury's verdict because it was cumulative of other properly admitted evidence, namely, S's own uncontested testimony, of peripheral importance to the state's case, and did not relate to the elements of the crimes charged; moreover, defense counsel did not object to S's testimony that she cried during the family meeting, and counsel had the unfettered opportunity to cross-examine N on that point.
2. The defendant could not prevail on his claim that the prosecutor engaged in certain improprieties during closing and rebuttal arguments:

   a. The prosecutor did not violate the defendant's right to confrontation by commenting on his "lack of outrage" because that remark was a permissible comment on the defendant's testimonial demeanor: although it was unclear whether the prosecutor was referring to the defendant's demeanor while testifying, which is a permissible subject of commentary insofar as it constitutes evidence on which the jury may properly rely in assessing the defendant's credibility, or his courtroom demeanor unrelated to his demeanor while testifying, which is an improper subject of commentary, this court concluded that, when the prosecutor's remark was viewed in context, the jury reasonably would have construed it as

a reference to the defendant's testimonial demeanor, as the prosecutor immediately followed her remark with a description of the defendant's testimony on the witness stand; moreover, defense counsel did not object to the remark and, during his own closing argument, apparently construed it as a reference to the defendant's demeanor on the witness stand.

b. Certain remarks made by the prosecutor were not improper: the prosecutor's remarks regarding the defendant's "lack of outrage" did not improperly appeal to the jurors' emotions and passions but, instead, asked the jurors to assess the defendant's credibility in light of his testimonial demeanor and implicitly urged them to infer, on the basis of their common sense and experience, that an innocent man falsely accused of sexually assaulting a child would have exhibited outrage while testifying; moreover, the prosecutor did not improperly dilute the presumption of innocence or infringe on the defendant's right to testify by referring to the defendant's interest in the case or improperly express her personal opinion on the defendant's credibility by questioning inconsistencies in the defendant's testimony that he never was alone with S, as those comments were based on the defendant's properly admitted testimony and the inferences that reasonably could be drawn therefrom rather than on the prosecutor's personal opinion; furthermore, it was clear from the context that the prosecutor was referring to defense counsel's closing argument, and not to the defendant's testimony, when she stated that the jury could not consider the statement that the defendant is an innocent man wrongly accused, and, because that statement was consistent with both the law and the trial court's instructions, it did not improperly mislead the jury; in addition, the prosecutor's comments regarding S's lack of motive to lie and testimonial demeanor were not expressions of her personal opinion but called on the jurors to draw inferences based on their common sense and life experience, and, accordingly, the prosecutor did not improperly vouch for S's credibility.

c. Two of the prosecutor's remarks were improper: the prosecutor's description of the reasonable doubt standard was an improper statement of the law, as a reasonable doubt may be based on a single point, so long as that point has a foundation in the evidence and produces a real and honest doubt in the jurors' minds, or on an evidentiary consideration outside of the jurors' own common sense or life experience, and, in light of the fundamental role the reasonable doubt standard plays in the criminal justice system, counsel should utilize a previously approved definition or the one set forth in the trial court's jury instructions instead of paraphrasing the standard; moreover, the prosecutor improperly mischaracterized the evidence and risked diluting the state's burden of proof by informing the jury that S's testimony was "unchallenged and uncontroverted," because, although defense counsel did not cross-examine S, the defendant, during his testimony, expressly denied touching S inappropriately, and, contrary to the prosecutor's suggestion, defense

counsel was not required to cross-examine S in order to undermine her credibility or to prove the defendant's innocence.

d. Applying the factors set forth in *State* v. *Williams* (204 Conn. 523), this court could not conclude that the prosecutor's improper statements deprived the defendant of his right to a fair trial: neither of the improprieties were invited by the defense, they were isolated and infrequent, and the state's case was not so weak as to be overshadowed by them; moreover, defense counsel did not object to the prosecutor's misstatement of the reasonable doubt standard, that impropriety was not blatantly egregious or inexcusable, and was counterbalanced by defense counsel's frequent description of the high burden imposed on the state, and the trial court's instruction to the jury, which accurately described the reasonable doubt standard and directed the jurors to disregard counsel's recitation of the law to the extent that it differed from the court's own instructions, served to cure the impropriety; furthermore, although the prosecutor's improper reference to S's unchallenged and uncontroverted testimony was central to one of the critical issues in the case, namely, S's credibility in light of the lack of physical evidence or eyewitnesses, the trial court promptly issued the curative instruction requested by defense counsel, that instruction specifically targeted the impropriety, and, when that impropriety was viewed in the context of the whole trial, its impact was minimal, especially in light of the jury's finding of not guilty on certain other charges.

Argued October 22, 2020—officially released June 21, 2021**

Procedural History

Substitute information charging the defendant with three counts each of the crimes of sexual assault in the first degree 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 *B. Fischer*, *J.*; verdict and judgment of guilty of two counts each of sexual assault in the first degree and risk of injury to a child, from which the defendant appealed to this court. *Affirmed.*

Alice Osedach, senior assistant public defender, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's

** June 21, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

attorney, and *Maxine Wilensky*, senior assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. Following a jury trial, the defendant, Courtney G., was convicted of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that (1) the trial court improperly admitted evidence of the victim's out-of-court demeanor, and (2) the prosecutor made improper remarks during closing argument and rebuttal in violation of his sixth amendment right to confrontation and his fourteenth amendment right to a fair trial. We affirm the judgment of conviction.

The jury reasonably could have found the following facts. The victim, S, was born in October, 1997. When S was four years old, her mother, N, began dating the defendant. By 2005, the defendant, N, and S lived together in an apartment on Poplar Street in New Haven. One day, when S was eight years old, she was home alone with the defendant while her mother was at work. S took a shower and then went into her bedroom to get dressed. S was wearing a tank top and underwear when the defendant approached her and asked her to come into the living room so he could apply lotion to her body. The defendant took S's hand and brought her into the living room, where he removed her tank top and applied lotion to her back, arms, and chest. The defendant then pushed S down onto the couch, removed her underwear, pushed her legs open, and licked her vagina. S was scared, and she tried to move the defendant's head away but was unable to do so. When the defendant was done, he told S not to say anything because her mother "would kill him." The

defendant sexually assaulted S in this manner more than once when they lived on Poplar Street.

When S was in seventh or eighth grade, she and her family, which included N, the defendant, and her two younger siblings, moved to an apartment on Read Street in New Haven. When S lived on Read Street, the defendant would enter S's bedroom and ask to see her naked. On more than one occasion, the defendant picked S up, brought her to his bedroom, put her on the bed, and held her down while he licked her vagina.

In March, 2015, when S was seventeen years old, she and her family lived in an apartment on Winchester Avenue in New Haven. S's bedroom was in the dining room, and a black curtain was hung in the doorway to separate the dining room from the kitchen. On March 8, 2015, S and her cousin, T, who was one year older than S, were getting ready to go out. T showered and then went into the dining room to dress while S showered. T was naked, except for her bra, and she sat on S's bed to put on her underwear. At this point, the defendant, who was in the kitchen, asked T if he could ask her a question. T responded in the affirmative, and the defendant told T she had to "promise that [she] wouldn't tell anybody about what he's about to ask." The defendant then asked T if she "shaved." T responded "no . . . ." The defendant asked T if he "can . . . see." T replied "[n]o. That's not appropriate."

After T was dressed, she went into the kitchen and noticed that she "could see straight through" the black curtain into the dining room. In light of T's state of undress and the ability to "see pretty much everything" in the dining room from the kitchen, T realized that the defendant had been referring to her vagina when he asked her if she shaved. Upset, T went into the bathroom to report the defendant's question to S. When S heard what the defendant had asked T, S began to cry.

That night, T made a series of phone calls to her mother, her aunt, and N. After receiving T's phone call, N was shocked and angry. N called the defendant at work and informed him that their relationship was over and that he should "come get [his] stuff." The defendant asked N, "why, [is it] because [he] asked [T] if she was a shaver?" Shortly after speaking to N, the defendant texted S and asked her if he was "a dead man walking."

The next day, there was a family meeting at which S, N, T, S's grandmother, and S's aunts were present. At the meeting, S disclosed that the defendant also had asked her if she shaved her vagina. S also revealed that the defendant had touched her breasts. S was "too scared" to disclose any further details of the defendant's sexual abuse because this was her "first time talking about it" and "everybody was staring at [her] . . . ." S and the others were crying during the meeting. A few days later, S and her mother reported the sexual abuse to the police.

The defendant was arrested and charged with three counts of sexual assault in the first degree in violation of § 53a-70 (a) (1) and three counts of risk of injury to a child in violation of § 53-21 (a) (1). Following a jury trial, at which the defendant testified, the jury found the defendant not guilty of one count of sexual assault in the first degree and one count of risk of injury to a child but found the defendant guilty of the remaining charges.[1] The trial court sentenced the defendant to a total effective sentence of twenty years of imprisonment,

[1] Each count of sexual assault and risk of injury corresponded to a different time period and location: counts one and two were predicated on the defendant's conduct "on dates in 2005, in the area of Poplar Street," counts three and four "on dates between 2009 [and] 2010, in the area of Read Street," and counts five and six "on dates [between] 2011 [and] 2014, in the area of Winchester Avenue . . . ." The jury found the defendant not guilty of the crimes charged in counts five and six but found the defendant guilty of the crimes charged in counts one through four.

execution suspended after fifteen years, followed by fifteen years of probation. This appeal followed.[2]

I

The defendant first claims that the trial court improperly admitted N's testimony that S was crying during the March, 2015 family meeting because evidence of S's demeanor at the meeting was irrelevant and, even if relevant, more prejudicial than probative. The following additional facts and procedural history are relevant to our resolution of the defendant's claim.

Prior to trial, the defendant filed a motion in limine to preclude the state "from offering any 'demeanor evidence' unless the defendant opens the door by challenging [S's] testimony or credibility regarding any out-of-court statements or delayed reporting." (Footnote omitted.) Specifically, the defendant sought to exclude "testimony from witnesses concerning their observations of [S's] emotional state at the time of the disclosure, for example, whether [S] was crying, shaking, trembling, scared, or other similar information." The defendant filed a memorandum of law in support of his motion, in which he argued that, pursuant to *State* v. *Burney*, 288 Conn. 548, 954 A.2d 793 (2008), and *State* v. *Daniel W. E.*, 322 Conn. 593, 142 A.3d 265 (2016), evidence of a complainant's demeanor at the time of a delayed disclosure of sexual assault is inadmissible "unless the defendant opens the door by challenging the complainant's testimony or credibility regarding any out-of-court statements or delayed reporting. The demeanor testimony has minimal, if any, probative value unless the defendant challenges the complainant's credibility regarding any out-of-court statements or delayed reporting." The defendant further argued that evidence of S's demeanor at the time of her disclosure would be

[2] The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3).

unduly prejudicial because it "is likely to enflame the emotions, passions and sympathy of the jury."

At trial, S testified during the state's case-in-chief that she first reported the defendant's sexual abuse at the family meeting in March, 2015, when she told her mother, grandmother, aunts, and cousin that the defendant had touched her breasts. S further testified that, at the time of her disclosure, she, along with everyone else present at the meeting, was crying. Defense counsel did not object to or move to strike S's testimony regarding her demeanor at the time of her disclosure. Additionally, defense counsel did not cross-examine S and, therefore, did not challenge her credibility on the basis of her delayed disclosure of the abuse.

On the second day of the defendant's trial, the state presented the testimony of S's mother, N. In light of the defendant's pending motion in limine, the state made an offer of proof outside the presence of the jury regarding N's testimony of S's demeanor at the family meeting. During the offer of proof, N testified that she, S, and everybody else at the family meeting had been crying. Following the offer of proof, defense counsel objected to the admission of N's demeanor testimony, pointing out that he had not challenged S's credibility, and, "[a]s a result, this highly prejudicial, highly inflammatory testimony simply is not probative of anything at this point" pursuant to *Burney* and *Daniel W. E.* The state disagreed, arguing that nothing in *Burney* or *Daniel W. E.* precludes a witness from testifying about his or her observations. The trial court agreed with the state that N was not a constancy of accusation witness but, rather, a lay witness who was "entitled to testify to what she observed if it's . . . relevant evidence." The trial court found that N's proffered testimony was "relevant evidence for th[e] jury to consider" and that the probative value of N's testimony outweighed its prejudicial effect. Therefore, the trial court overruled defense counsel's

objection and permitted N to testify as to her observation of S's demeanor, but cautioned that it would not permit N to testify as to her "observations of other people in the room . . . ." Thereafter, the prosecutor asked N in front of the jury: "What did you notice about [S's] emotional state during the [family meeting]?" N responded that "[s]he was crying."

At the defendant's sentencing, defense counsel moved for a new trial, arguing, among other things, that "the court's evidentiary ruling concerning the admission of evidence for [S's] demeanor . . . was an error and warrant[s] a new trial." The trial court denied the motion. On appeal, the defendant renews his claim that the trial court improperly admitted N's testimony regarding S's demeanor at the family meeting, alleging that it was irrelevant and unduly prejudicial.

"We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion." *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007). "The trial court is given broad discretion in determining the relevancy of evidence and . . . in balancing the probative value of proffered evidence against its prejudicial effect." (Citations omitted; internal quotation marks omitted.) *State* v. *Willis*, 221 Conn. 518, 522, 605 A.2d 1359 (1992). "[I]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Ayala*, 333 Conn. 225, 243–44, 215 A.3d 116 (2019).

We need not address whether the trial court abused its discretion in admitting N's testimony regarding S's demeanor because, even if we assume, without deciding, that an evidentiary error occurred, the defendant

has failed to fulfill his burden of establishing harm. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case depends [on] a number of factors, such as the importance of the . . . testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) Id., 231–32.

N's testimony regarding S's demeanor at the family meeting was duplicative of S's testimony, which was admitted into evidence without objection or contradiction. Because N's demeanor testimony was cumulative of other properly admitted evidence, it was unlikely to have substantially swayed the jury's verdict. See, e.g., *State* v. *Bouknight*, 323 Conn. 620, 628, 149 A.3d 975 (2016) (improper admission of evidence was harmless because it was "cumulative of other properly admitted evidence" and "there was no evidence offered to contradict it" (internal quotation marks omitted)); *State* v. *Dehaney*, 261 Conn. 336, 364, 803 A.2d 267 (2002) ("[i]t is well recognized that any error in the admission of evidence does not require reversal of the resulting judgment if the improperly admitted evidence is merely

cumulative of other validly admitted testimony" (internal quotation marks omitted)), cert. denied, 537 U.S. 1217, 123 S. Ct. 1318, 154 L. Ed. 2d 1070 (2003). Furthermore, although N was an important witness for the state, the specific statement at issue (i.e., "[s]he was crying") did not pertain to the elements of the crimes charged and was of peripheral importance to the state's case. Lastly, N's demeanor testimony was brief and subject to unfettered cross-examination. On this evidentiary record, we conclude that the allegedly improper admission of N's demeanor testimony was harmless.[3]

II

The defendant next claims that the prosecutor violated his sixth amendment right to confrontation and his fourteenth amendment right to a fair trial by making improper remarks during closing argument and rebuttal. Specifically, the defendant contends that the prosecutor violated his sixth amendment right to confrontation by commenting on his "lack of outrage" at trial. The defendant also contends that the prosecutor violated his fourteenth amendment right to a fair trial by (1) appealing to the emotions and passions of the jurors, (2) informing the jury that he had "a big, big interest in the outcome of this case," (3) improperly expressing a personal opinion on the defendant's credibility, (4) misleading the jury on the law and the evidence, (5)

[3] The defendant contends that "[t]he state's case cannot be considered a strong one [because] there was no corroborating physical evidence or witnesses to [S's] claims." See, e.g., *State* v. *Fernando V.*, 331 Conn. 201, 215–16, 202 A.3d 350 (2019) ("the state's case . . . was not an exceedingly strong one in light of the absence of corroborating physical evidence or any witnesses to the alleged sexual assaults" (internal quotation marks omitted)); *State* v. *Favoccia*, 306 Conn. 770, 809, 51 A.3d 1002 (2012) (describing sexual assault cases that "[lack] physical evidence" and "[turn] entirely on the credibility of the complainant" as "not automatically . . . weak, [but] also not particularly strong" (internal quotation marks omitted)). We explain in part II C of this opinion why this factor—the strength of the state's case—does not weigh in favor of finding the alleged evidentiary error to be harmful.

vouching for the credibility of the witnesses, (6) misstating the reasonable doubt standard, and (7) shifting or diluting the state's burden of proof.[4] For the reasons that follow, we conclude that two of the prosecutor's statements were improper but that the improprieties did not deprive the defendant of his fourteenth amendment right to a fair trial.

"In analyzing claims of prosecutorial impropriety, 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 a constitutionally protected right. (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 560, 34 A.3d 370 (2012). The standard governing our review of a prosecutorial impropriety claim depends on the nature of the constitutional right allegedly violated. "[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show, not only that the remarks were improper, but also that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." Id., 562–63. "On the other hand . . . if the defendant raises a claim that the prosecutorial improprieties infringed a specifically enumerated constitutional right, such as the fifth amendment right to remain silent or the sixth amendment right to confront one's accusers, and the defendant meets his burden of establishing the constitutional violation, the burden is

[4] Defense counsel did not object to many of the alleged instances of prosecutorial impropriety, but, "under settled law, a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test." (Internal quotation marks omitted.). *State* v. *Payne*, 303 Conn. 538, 560, 34 A.3d 370 (2012).

then on the state to prove that the impropriety was harmless beyond a reasonable doubt." Id., 563. "Regardless of the type of constitutional right at stake, the burden is always on the defendant to show that the prosecutor's impropriety resulted in the violation of a constitutional right." *State* v. *Jose R.*, 338 Conn. 375, 386–87, 258 A.3d 50 (2021).

In the present case, the alleged prosecutorial improprieties occurred during closing argument and rebuttal. It is well established that "prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however, counsel] 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 [on] the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence [on] jurors. . . . 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 [on], or to suggest

an inference from, facts not in evidence, or to present matters [that] the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 37–38, 100 A.3d 779 (2014).

A

We first address whether the prosecutor violated the defendant's sixth amendment right to confrontation[5] by commenting on the defendant's "lack of outrage" at trial. The defendant contends that it is unclear whether the prosecutor was referring to his demeanor while testifying as a witness, while observing the testimony of other witnesses, or both, but argues that, regardless of the precise demeanor to which the prosecutor was referring, her remarks improperly infringed on his constitutional right to be present in the courtroom and to confront the witnesses against him. The state responds that the prosecutor's remarks, when construed in context, were not improper because they referred to the defendant's testimonial demeanor, which "is one of the key factors for a jury to evaluate in its credibility determinations." We agree with the state.

The following additional facts are relevant to this claim. The defendant was present in the courtroom throughout the trial and testified on his own behalf. The defendant denied sexually assaulting S or touching her in an inappropriate manner, stating that S's allega-

[5] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The sixth amendment, which is made applicable to the states through the due process clause of the fourteenth amendment; see *Pointer* v. *Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); encompasses a criminal defendant's "right to be present at trial . . . ." *State* v. *Jarzbek*, 204 Conn. 683, 697–98, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988); see also *Illinois* v. *Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) ("[o]ne of the most basic of the rights guaranteed by the [c]onfrontation [c]lause is the accused's right to be present in the courtroom at every stage of his trial").

tion of sexual abuse "disgusted me. It made me sick 'cause I never did anything like that." At another point in his testimony, the defendant explained that, when he heard about S's allegation of sexual abuse, he felt "sickened" and "disgusted" because he "raised her since she was four and . . . would never do anything to her."

During closing argument, the prosecutor pointed out that the defendant had "listened to all of the witnesses in this case. He listened to [S], he listened to [T], he listened to [N]. There was a lack of outrage on his part. Sure, he said, oh, it's disgusting, and, oh, whatever else he said, but there was no true, true outrage. Ask yourselves, wouldn't you be outraged? There was also an inability on the defendant's part to cite a motive for [S] to make this up. Remember his cross-examination. I start to question him, and suddenly he's not as sure as he was on direct."

Defense counsel addressed in his closing argument the prosecutor's comments regarding the defendant's lack of outrage, stating: "I want to talk about my client . . . and his testimony. The [prosecutor] said he wasn't outraged enough. If he had been too enraged, she'd say look at his reaction. Look at this angry, big, strong, 240 pound man. What's he supposed to do? They don't like his reaction. What's the—actually, what is the appropriate reaction?" Defense counsel further argued that the defendant "denies these allegations. He took [the] stand. And [the prosecutor] may not like the way he appeared. Maybe [he] wasn't outraged enough."

It is axiomatic that a criminal defendant who exercises "his fifth amendment right to testify on his own behalf . . . opens the door to comment on his veracity." *State* v. *Alexander*, 254 Conn. 290, 297, 755 A.2d 868 (2000). "An accused who testifies subjects himself to the same rules and tests [that] could by law be applied to other witnesses." (Internal quotation marks omitted.) Id., 298. If a defendant chooses to testify, it is the jury's

duty to assess the defendant's "credibility . . . by observing firsthand [his] conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Andrews*, 313 Conn. 266, 303, 96 A.3d 1199 (2014). Because a defendant's testimonial demeanor is evidence on which the jury may rely in assessing credibility, a prosecutor permissibly may comment on the defendant's testimonial demeanor in closing argument and rebuttal. See *State* v. *Luster*, 279 Conn. 414, 440, 902 A.2d 636 (2006) (prosecutor's comment that defendant was "coy, evasive, and trying to squirm" was not improper because it was merely descriptive of "the defendant's demeanor during cross-examination, which the jury had observed and could assess independently" (internal quotation marks omitted)); see also *United States* v. *Schuler*, 813 F.2d 978, 981 n.3 (9th Cir. 1987) ("When a defendant chooses to testify, a jury must necessarily consider the credibility of the defendant. In this circumstance, courtroom demeanor has been allowed as one factor to be taken into consideration.").

There are limits, however, to this kind of commentary. First, although a prosecutor may invite the jury to draw reasonable inferences from a defendant's testimonial demeanor, "he or she may not invite sheer speculation unconnected to evidence." (Internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 587, 849 A.2d 626 (2004). Second, a defendant's courtroom demeanor "[un]related to a defendant's demeanor while testifying" is "not a part of the evidence in the record and, therefore, [is] not a proper subject of the prosecutor's closing argument." *State* v. *John B.*, 102 Conn. App. 453, 465 and n.5, 925 A.2d 1235, cert. denied, 284 Conn. 906, 931 A.2d 267 (2007);[6] see also *United States* v.

[6] In *State* v. *John B.*, supra, 102 Conn. App. 453, the Appellate Court did not address whether a prosecutor's improper remarks regarding a defendant's nontestimonial courtroom demeanor violate the sixth amendment. In light of our conclusion that the prosecutor's comments were not an improper remark on the defendant's nontestimonial courtroom demeanor, we need not address this issue.

Schuler, supra, 813 F.2d 981 n.3 (distinguishing between prosecutor's permissible statements concerning defendant's testimonial demeanor and impermissible statements concerning defendant's nontestimonial courtroom demeanor). Accordingly, a prosecutor's reliance "in argument on the defendant's courtroom demeanor [off the witness stand is] not proper because it constitute[s] argument on matters extrinsic to the evidence." *State* v. *John B.*, supra, 465; see also *United States* v. *Mendoza*, 522 F.3d 482, 491 (5th Cir.) (agreeing with "other circuits . . . that courtroom demeanor of a [nontestifying] criminal defendant is an improper subject for comment by a prosecuting attorney"), cert. denied, 555 U.S. 915, 129 S. Ct. 269, 172 L. Ed. 2d 200 (2008); *United States* v. *Pearson*, 746 F.2d 787, 796 (11th Cir. 1984) (holding that "the defendant's behavior off the witness stand" was not evidence before jury about "which the prosecutor was free to comment").

To resolve the defendant's claim on appeal, we must determine whether the prosecutor's references to the defendant's "lack of outrage" were permissible comments on his testimonial demeanor[7] or improper comments on his nontestimonial courtroom demeanor. The parties agree that the prosecutor's comments were ambiguous and that it is unclear whether the prosecutor

[7] The defendant contends that, even if the prosecutor's comments are construed as a reference to his testimonial demeanor, they nonetheless were improper because it would be speculative "to expect the defendant to show outrage or anger . . . while . . . testifying." The state responds that the defendant's claim is inadequately briefed because the defendant failed to provide further analysis beyond this conclusory assertion. The state is correct that the defendant has cited no authority and provided no analysis in support of his claim. This fact might constitute inadequate briefing; see, e.g., *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016); but we take it as an indication of the weakness of the claim and choose to reject the claim on its merits. Regardless of whether the prosecutor's remarks regarding the defendant's demeanor while testifying were persuasive to the jury, they were within the permissible bounds of fair comment on witness credibility. Defense counsel responded by offering a different perspective, and it was left to the jury to decide whether the prosecutor or defense counsel, if either, provided a helpful explanation.

was referring to the defendant's testimonial demeanor, nontestimonial courtroom demeanor, or both. We have previously stated that, when assessing the propriety of a prosecutor's statements, "we do not scrutinize each individual comment in a vacuum but, rather, review the comments complained of in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 9, 124 A.3d 871 (2015). We also do "not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (Internal quotation marks omitted.) Id.

When the prosecutor's statements regarding the defendant's "lack of outrage" are examined in context, we conclude that the jury reasonably would have construed them as a reference to the defendant's testimonial demeanor. The prosecutor immediately followed her observation regarding the defendant's "lack of outrage" with a description of the defendant's testimony on the witness stand, pointing out: "Sure, he said, oh, it's disgusting, and, oh, whatever else he said, but there was no true, true outrage." The plain inference that the prosecutor was referring to the defendant's testimonial demeanor was reinforced by her subsequent exhortation to the jury to "[r]emember [the defendant's] cross-examination."

Defense counsel did not object to the prosecutor's challenged remarks, which suggests that he "did not believe [them to be improper] in light of the record of the case at the time." (Internal quotation marks omitted.) *State* v. *Medrano*, 308 Conn. 604, 612, 65 A.3d 503 (2013). Furthermore, it appears that defense counsel construed the prosecutor's statements regarding the defendant's "lack of outrage" to refer to the defendant's testimonial demeanor on the witness stand. During closing argument, defense counsel stated: "I want to talk

about my client . . . *and his testimony*. The [prosecutor] said he wasn't outraged enough." (Emphasis added.) Defense counsel reminded the jury that the defendant had "denie[d] these allegations. *He took* [*the*] *stand.* And [the prosecutor] may not like the way he appeared. Maybe [he] wasn't outraged enough." (Emphasis added.) Under these circumstances, we conclude that the prosecutor's challenged comments were not improper references to the defendant's nontestimonial courtroom demeanor but, instead, were permissible references to the defendant's testimonial demeanor. We therefore reject the defendant's sixth amendment claim.

B

We next address whether the prosecutor made improper remarks during closing argument and rebuttal in violation of the defendant's due process right to a fair trial under the fourteenth amendment to the United States constitution.[8] We begin our analysis with the defendant's due process challenge to the prosecutor's remarks regarding his "lack of outrage" at trial. In addition to claiming that the prosecutor's statements violated the defendant's sixth amendment right to confrontation; see part II A of this opinion; the defendant claims that they also improperly appealed to the emotions and passions of the jurors in violation of the defendant's general due process right to a fair trial. We disagree.

Although "[a] prosecutor may not appeal to the emotions, passions and prejudices of the jurors"; (internal quotation marks omitted) *State* v. *Ciullo*, supra, 314 Conn. 56; he or she may "argue about the credibility of witnesses" and "appeal to [the jurors'] common sense in closing remarks," so long as the prosecutor's arguments

[8] The fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

"are based on evidence presented at trial and reasonable inferences that jurors might draw therefrom." (Internal quotation marks omitted.) *State* v. *O'Brien-Veader*, 318 Conn. 514, 547, 122 A.3d 555 (2015). The defendant's demeanor "while . . . testifying [is] not only visible to the jurors but [is] properly before them as evidence of [his] credibility." *State* v. *Gilberto L.*, 292 Conn. 226, 247, 972 A.2d 205 (2009). The prosecutor did not disparage the defendant or appeal to the jurors' emotions by commenting inappropriately on his testimonial demeanor but, instead, asked "the jurors to draw inferences from the evidence that had been presented at trial regarding the actions of the defendant . . . based on the jurors' judgment of how a reasonable person would act under the specified circumstances." *State* v. *Bell*, 283 Conn. 748, 773, 931 A.2d 198 (2007). Specifically, the prosecutor asked the jurors to assess the defendant's credibility in light of his demeanor on the witness stand and implicitly urged the jurors to infer, on the basis of their common sense and experience, that an innocent man falsely accused of sexually assaulting a child would have exhibited outrage while testifying. Because the prosecutor's argument was rooted in the evidence, we perceive no impropriety. See *State* v. *Long*, 293 Conn. 31, 60, 975 A.2d 660 (2009) ("[t]he prosecutor's remark that it would be '[q]uite the feat, perhaps, for somebody of [the victim's] age' to concoct such a detailed and specific accusation, and then be able to direct a demonstration of it in court, was not [an] improper" appeal to jurors' emotions because it "neither disparaged the defendant nor painted [the victim] as particularly vulnerable or deserving of sympathy"); *State* v. *Warholic*, 278 Conn. 354, 377–78, 897 A.2d 569 (2006) (prosecutor's statements urging jurors to asses victim's "credibility by recognizing the emotional difficulty that [he] subjected himself to by making the allegations of sexual assault" was proper "because

it asked the jurors to assess [the victim's] credibility on the basis of their common sense and life experience").

The defendant next claims that the prosecutor improperly diluted the presumption of innocence and infringed on his right to testify by implying that his testimony was not credible because he had "a big, big interest in the outcome of this case." The following additional facts are relevant to this claim.

The defendant testified at trial, and the prosecutor asked the defendant on cross-examination: "You have an interest in this case [because] [y]ou don't want . . . to go to jail, right?" The defendant responded: "I don't want my kids to be without me. . . . Who—who wants to go to jail? Nobody wants to go to jail." The prosecutor again asked the defendant, "[s]o, you have an interest in this case," to which the defendant replied, "[i]f you want to put it like that, yes."

During closing argument, the prosecutor stated: "Let's talk about the defendant. He has a big, big interest in the outcome of this case. What you have to ask yourself, what interest does [S] have?" The prosecutor reiterated during rebuttal that the defendant "has an interest in this case. He told you that."

As we previously explained, a criminal defendant "who testifies subjects himself to the same rules and tests [that] could by law be applied to other witnesses." (Internal quotation marks omitted.) *State* v. *Alexander*, supra, 254 Conn. 298. One such rule is that a prosecutor permissibly may comment on a witness' motive to lie, "as long as the remarks are based on the ascertainable motives of the witnesses rather than the prosecutor's personal opinion." (Internal quotation marks omitted.) *State* v. *Long*, supra, 293 Conn. 45; see also *State* v. *Warholic*, supra, 278 Conn. 372 ("we have allowed prosecutors to argue that the defendant and his witnesses may have a motive to lie in order to keep either them-

selves, or their friend or loved one, free from punishment"); *State* v. *Stevenson*, supra, 269 Conn. 584–85 ("the [prosecutor's] remark on rebuttal, suggesting that the police and the victims had no reason to lie, while the defendant and his friends and family did," was not improper because it was based "on the ascertainable motives of the witnesses"). Thus, a prosecutor's comment regarding a defendant's motive to lie on the witness stand is not improper if it is "based on the evidence presented to the jury and inferences that reasonably could be drawn from that evidence." *State* v. *Long*, supra, 46.

In the present case, the defendant admitted that he had an interest in the outcome of the case because he did not want to go to jail and did not want his children to be without him. Given that the defendant's interest in the outcome of the case properly was admitted into evidence for the jury's consideration, we conclude that the prosecutor's statement regarding the defendant's interest in the case was not improper.[9]

[9] The defendant contends that the prosecutor's statement was improper under *State* v. *Medrano*, supra, 308 Conn. 604, in which we exercised our supervisory authority over the administration of justice to "direct our trial courts in the future to refrain from instructing jurors, when a defendant testifies, that they may specifically consider the defendant's interest in the outcome of the case and the importance to him of the outcome of the trial." Id., 631. We disagree. In *Medrano*, we held that, although a jury charge regarding a criminal defendant's interest in the outcome of the case does not "[undermine] the presumption of innocence" or a defendant's "rights under the federal and state constitutions to a fair trial and to testify in his own defense"; id., 622; there is "a danger of juror misunderstanding" when the trial court's instruction is "viewed in isolation from the qualifying language concerning evaluating the defendant's credibility in the same manner as the testimony of other witnesses . . . ." Id., 629–30. We therefore "instruct[ed] the trial courts to use the general credibility instruction to apply to a criminal defendant who testifies." Id., 631.

Our holding in *Medrano* was predicated on the trial court's role as a neutral and detached arbiter of justice and its duty to instruct the jurors on the law in a fair, impartial, and dispassionate manner. Although a prosecutor is a minister of justice; see id., 612; she is not neutral, detached, impartial, or dispassionate. Instead, a prosecutor is an advocate with a professional obligation to argue zealously, albeit fairly, on behalf of the state. "The

The defendant also claims that the prosecutor improperly expressed her personal opinion on the defendant's credibility when she made the following statements: (1) "The only thing that the defendant probably said that was true, and obviously credibility is up to you, that was true besides his name, his weight, and his height was it was disgusting." And (2) "Oh, my brother was always there. Every day? Oh, yes, every day. That's not believable." As we previously explained, we do not review the propriety of a prosecutor's statements "in a vacuum but, rather . . . in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Felix R.*, supra, 319 Conn. 9.

As the defendant points out in his brief, "[t]his whole case depended on credibility, as there was no physical or corroborating evidence" confirming or denying the sexual abuse of S. It therefore is not surprising that both the prosecutor and defense counsel focused heavily in their closing arguments on the relative credibility of the defendant and S. The prosecutor's first remark that the defendant's only truthful statement "besides his name, his weight, and his height was it was disgusting" was made at the beginning of her closing argument. The prosecutor continued: "In this closing argument, I will be reminding you of certain things, and I will be asking you certain things. I will also be citing to the evidence and the law. I am a representative of the state of Connecticut. My beliefs—personal beliefs or anything like that as to credibility—do not matter. My job here is to recite the evidence and how it applies to the law. You are the judge of credibility. I will be suggesting

parameters of the term zealous advocacy are . . . well settled," and it "is not improper for the prosecutor to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . ." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 40, 41. Because the defendant's interest in the case was adduced at trial, there was nothing improper about the prosecutor's reference to that evidence in her closing argument.

certain ways that you can judge that credibility, certainly, but it's not any personal belief on behalf of the state or personally myself."

Later in closing argument, the prosecutor pointed out various, specific inconsistencies in the defendant's version of events. The prosecutor mentioned the defendant's testimony that he rarely was home alone with S,[10] stating: "He wants you to believe [that it is] true that he spent no time or very little time with [S]. They lived together from, what, she was four to seventeen. [N] worked nights. Sometimes he worked days, sometimes he worked nights, but he was definitely alone with her. Remember the go around that he and I had about . . . Poplar Street. Oh, my brother was always there. Every day? Oh, yes, every day. That's not believable. He has nothing and no one to corroborate his story. Not his mom, not his brother, not [N], not [S], not [T], no one. [S] has [T] and [N]."

"[A] prosecutor may not express his [or her] own opinion, directly or indirectly, as to the credibility of the witnesses" because "[s]uch expressions of personal

[10] During cross-examination, the following colloquy occurred between the prosecutor and the defendant:

"[The Prosecutor]: And when [N] was working, there were times where you didn't work. Yes, no?

"[The Defendant]: On Poplar Street, yes.

"[The Prosecutor]: Okay. And you were home alone with [S]?

"[The Defendant]: And my brother.

"[The Prosecutor]: Was he there every single time?

"[The Defendant]: He lived four houses away, yes.

"[The Prosecutor]: So, he was there every time you had a day off and you were with [S]?

"[The Defendant]: We used to have video game wars on college football NCAA 2005, yes.

"[The Prosecutor]: Every time?

"[The Defendant]: I didn't have a job at the time. He was always there.

"[The Prosecutor]: So, you were never alone with [S] during that time period?

"[The Defendant]: Occasionally."

opinion are a form of unsworn and unchecked testimony . . . .'' (Internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 583. It is ''particularly difficult for the jury to ignore'' a prosecutor's expression of personal opinion because a ''prosecutor's opinion carries with it the imprimatur of the [state]'' and the inference that it is based on ''matters not in evidence . . . .'' (Internal quotation marks omitted.) Id. ''However, [i]t is not improper for the prosecutor to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand. The [prosecutor] should not be put in the rhetorical straitjacket of always using the passive voice, or continually emphasizing that he [or she] is simply saying I submit to you that this is what the evidence shows, or the like.'' (Internal quotation marks omitted.) Id., 583–84.

We conclude that the prosecutor's challenged comments were not improper expressions of personal opinion but, rather, permissible comments on the evidence presented at trial and the reasonable inferences that may be drawn therefrom. The prosecutor marshaled the evidence in support of her argument that the defendant's testimony was not believable, asking the jurors to consider, on the basis of their own common sense and experiences, whether it was reasonable to believe that the defendant never was alone with S because his brother was ''always there . . . every day.'' The prosecutor pointed out that the defendant's version of events was not corroborated by the witnesses or the evidence adduced at trial, but portions of S's testimony were corroborated by T and N. Additionally, the prosecutor

repeatedly reminded the jury that it was "the judge of credibility" and that her suggestions as to "certain ways that you can judge that credibility" were not to be construed as the expression of "any personal belief on behalf of the state or [herself] personally . . . ." Given the context in which the challenged statements were made, we conclude that they were not improper. See *State* v. *Gibson*, 302 Conn. 653, 661, 31 A.3d 346 (2011) (prosecutor's statement, " '[d]id the defendant wilfully [fail] to appear in court . . . I think he did,' " was not improper expression of personal opinion because prosecutor "was attempting to persuade the jury to draw this inference from the circumstantial evidence of intent that he had just recited"); *State* v. *Stevenson*, supra, 269 Conn. 584 (prosecutor's description of "the defendant's explanation as to how he obtained money to buy drugs as 'totally unbelievable' " was not improper expression of personal opinion but, "[r]ather . . . a comment on the evidence presented at trial, and it posited a reasonable inference that the jury itself could have drawn without access to the [prosecutor's] personal knowledge of the case").

The defendant next claims that the prosecutor improperly misled the jury on the law and the evidence when she stated during rebuttal: "*He* also said that he is an innocent man wrongly accused. You're not to consider that either because that's not evidence, and it's improper. It's not the standard by which you judge the facts of this case." (Emphasis added.) It is clear from the context in which the prosecutor's statement was made that the first "he" to whom she referred was not the defendant but, rather, defense counsel. During his closing argument, defense counsel stated that the defendant was "an innocent man wrongfully accused [of] a crime he did not commit . . . ." The prosecutor responded to this statement during rebuttal, stating: "[Defense counsel] talked about his family, he and his

family. It's not evidence. Who cares? And I don't mean to be flip about it, but, really, that's . . . not an issue here. He is asking you to go outside the evidence and find reasonable doubt outside of what this courtroom holds. You cannot do that. He also said that he is an innocent man wrongly accused. You're not to consider that either because that's not evidence, and it's improper." Thus, the prosecutor was informing the jury that defense counsel's statement that the defendant is "an innocent man wrongly accused" was not evidence on which the jury could rely to reach a verdict. The prosecutor's statement was consistent with the law and the trial court's instruction that "[a]rguments by counsel are not evidence. The law prohibits either the state's attorney or defense counsel from giving personal opinions as to whether the defendant is guilty or not guilty. It is not their assessment of the evidence that matters; it is only yours." See, e.g., *State* v. *Roman*, 224 Conn. 63, 68, 616 A.2d 266 (1992) ("statements of counsel are not evidence"), cert. denied, 507 U.S. 1039, 113 S. Ct. 1868, 123 L. Ed. 2d 488 (1993). We therefore reject the defendant's claim.

The defendant also claims that the prosecutor improperly vouched for S's credibility by commenting on her lack of motive to lie and her demeanor on the witness stand.[11] We disagree. Although a prosecutor may not express a personal opinion as to a witness' credibility, he or she "may argue that a witness has no motive to lie . . . and may ask the jurors to draw inferences that are based on their common sense and life experience." (Citation omitted; internal quotation

[11] Specifically, the defendant challenges the following two statements: (1) "At one point, [S] cried. Let me ask you this. Do you think it's hard to lie—well, let me ask you this. If—do you think or ask yourself how hard it is to fake emotion like you saw on the witness stand. You have to be a darn good actress to do that." And (2) "Well, motive—one of the things about looking at [S's] credibility, you have to look at her motive to lie, and, in this case, the state submits she had none."

marks omitted.) *State* v. *Elmer G.*, 333 Conn. 176, 205, 214 A.3d 852 (2019). Furthermore, as we have discussed, a witness' demeanor while testifying is "visible to the jurors" and "properly before them as evidence of . . . credibility." *State* v. *Gilberto L.*, supra, 292 Conn. 247; see id., 247–48 (holding that prosecutor properly commented on victim's testimonial demeanor and lack of motive to lie); see also *State* v. *Elmer G.*, supra, 205–206 (same). It was not improper for the prosecutor to comment on S's testimonial demeanor and to appeal to the jurors' common sense regarding her credibility.[12]

Unlike those previously addressed, the defendant's final two claims of prosecutorial impropriety have merit. The first involves the defendant's claim that the prosecutor misstated the law governing the state's burden of proving the defendant guilty beyond a reasonable doubt when she stated: "You look at the evidence, and you decide if the state has proven it beyond a reasonable doubt. Proof beyond a reasonable doubt is based on a cumulative totality of the evidence. It's just not one picky little point. It is a doubt based upon common sense, life experience, and it's on credibility." We agree with the defendant that the prosecutor's description of the reasonable doubt standard was improper.

[12] The defendant also claims that the prosecutor improperly vouched for T's credibility when she made the following remark: "Wouldn't it shock you like it shocked [T] that somebody you had grown up around makes that comment to you, and, honestly, [T] was a lovely girl, but did she seem bright enough to be able to craft a lie such as this?" For the reasons explained in this opinion, we reject this claim. See *State* v. *Elmer G.*, supra, 333 Conn. 205–206 (prosecutor's statements that " '[i]f a young girl such as [the victim] wanted to fabricate a lie, is this the lie [she] would fabricate' " and " 'I would submit to you that there is no young girl that wants to fabricate an untruth of this extent and this magnitude' " were not improper); *State* v. *Felix*, 111 Conn. App. 801, 810, 812, 961 A.2d 458 (2008) (prosecutor's comment that state's witnesses were " 'not smart enough to lie' " was not improper because "[t]he prosecutor was entitled to apply common sense to the facts in evidence and to highlight [the witnesses'] motives to tell the truth").

The reasonable doubt standard plays a fundamental role in our criminal justice system. "The [reasonable doubt concept] provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle [the] enforcement [of which] lies at the foundation of the administration of our criminal law. . . . At the same time, by impressing [on] the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the [reasonable doubt] standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." (Citation omitted; internal quotation marks omitted.) *State* v. *Griffin*, 253 Conn. 195, 205, 749 A.2d 1192 (2000). Therefore, it is imperative that statements describing the reasonable doubt standard be accurate, "clear and unequivocal . . . ." (Internal quotation marks omitted.) Id.

It is axiomatic that "prosecutors are not permitted to misstate the law" or to "distort the government's burden of proof . . . because such statements are likely to improperly mislead the jury." (Citation omitted.) *State* v. *Otto*, 305 Conn. 51, 77, 43 A.3d 629 (2012). This court consistently has defined reasonable doubt as "a real doubt, an honest doubt, a doubt [that] has its foundation in the evidence or lack of evidence, as a doubt for which a valid reason can be assigned, and as a doubt [that] in the serious affairs [that] concern you in [everyday] life you would pay heed and attention to . . . ." (Internal quotation marks omitted.) *State* v. *Ferguson*, 260 Conn. 339, 371, 796 A.2d 1118 (2002); see also Connecticut Criminal Jury Instructions 2.2-3, available at https://www.jud.ct.gov/JI/criminal/Criminal.pdf (last visited June 18, 2021). Thus, contrary to the prosecutor's assertion, a reasonable doubt may be based on "one picky little point," so long as the "point" produces in the jurors' minds a real and honest doubt with a foundation in the evidence or lack thereof, and amounts

to an articulable doubt about which the jurors would pay heed in the serious affairs of life. See *State* v. *Ferguson*, supra, 371. Also contrary to the prosecutor's formulation, a reasonable doubt may be based on an evidentiary consideration that does not emanate from the jurors' own "common sense and life experience."[13] We therefore conclude that the prosecutor's description of the reasonable doubt standard was improper.

We take this opportunity to admonish prosecutors and defense counsel alike that they generally should avoid paraphrasing the reasonable doubt standard. The reasonable doubt standard is both critically important and, at the same time, "defies easy explication." *Victor* v. *Nebraska*, 511 U.S. 1, 5, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994); see also *State* v. *Jackson*, 283 Conn. 111, 117, 925 A.2d 1060 (2007) ("[t]he perfect definition of reasonable doubt . . . is as uncertain as its place in American jurisprudence is certain" (internal quotation marks omitted)), quoting *Chalmers* v. *Mitchell*, 73 F.3d 1262, 1266 (2d Cir.), cert. denied, 519 U.S. 834, 117 S. Ct. 106, 136 L. Ed. 2d 60 (1996). If a prosecutor or defense counsel wishes to describe the reasonable doubt standard for the jury in closing argument, he or she should utilize a previously approved definition or the one set forth in the trial court's jury instructions. Freelance attempts to explain the reasonable doubt standard should be avoided because they run the risk of confusing or misleading the jury. See, e.g., *State* v. *Jackson*, supra, 125 ("[a]ttempts to explain the term

[13] Indeed, in a case such as the present one, in which expert testimony was admitted regarding a victim's delayed disclosure of sexual assault, some of the evidence on which the jury may rely to reach a verdict is, by definition, beyond the common knowledge of the average layperson. See, e.g., *State* v. *Iban C.*, 275 Conn. 624, 639, 881 A.2d 1005 (2005) (Expert testimony is admissible only on "matters [that] are not beyond the ken of the average juror . . . . When inferences or conclusions are so obvious that they could be as easily drawn by the jury as the expert from the evidence, expert testimony regarding such inferences is inadmissible" (Citation omitted.)).

reasonable doubt [will] not usually result in making it any clearer [in] the minds of the [jurors]" (internal quotation marks omitted)); *State* v. *Griffin*, supra, 253 Conn. 209 n.15 ("[A]ttempts to clarify the meaning of the phrase reasonable doubt by explanation, elaboration or illustration . . . more often than not tend to confuse or mislead. . . . Thus, we have repeatedly stated that attempts to clarify reasonable doubt should be avoided because they often tend to obfuscate that concept." (Citations omitted; internal quotation marks omitted.)).

The defendant's second valid claim of impropriety relates to the prosecutor's comment on defense counsel's failure to cross-examine S or to challenge her credibility, which the defendant contends improperly diluted the state's burden of proof.[14] We agree. The following additional facts are relevant to this claim. At trial, defense counsel declined to cross-examine S. During closing argument, the prosecutor stated: "Remember, important, the defendant never once, never once challenged [S's] credibility. He asked her no questions. Her testimony stands practically unchallenged and uncontroverted." Defense counsel responded to this statement during his closing argument, pointing out: "[The defense has] the right not to present any evidence. And we nevertheless did. I didn't cross-examine [S]. I hope you'll think to yourself that there may be some reasons why, but we did present a defense. [The defendant] testified, and he denied the allegations. He wanted you to hear straight from his mouth that he did not do this. He did not do this."

[14] Additionally, the defendant claims that the prosecutor improperly diluted the state's burden of proof by commenting on the defendant's failure to "cite a motive for [S] to make this up." Because a prosecutor permissibly may comment on the weaknesses in the defendant's case; see, e.g., *State* v. *Andrews*, supra, 313 Conn. 308; as well as the lack of evidence indicating that a victim has a motive to lie; see, e.g., *State* v. *Elmer G.*, supra, 333 Conn. 205; we reject this claim.

Following oral argument, defense counsel requested a curative instruction in light of the prosecutor's remark "that defense counsel didn't present any cross or challenge" to S's testimony, arguing that the prosecutor's remark was "improper" and "flip[ped] the . . . burden" of proof. The trial court agreed to issue a curative instruction and subsequently instructed the jury: "If there was any confusion in closing argument raised by [the prosecutor] in . . . closing argument on who has the burden of proof in a criminal matter, it is the state of Connecticut, the prosecutor, [who] has the burden of proving the defendant guilty. As I've indicated to you before, the defendant has no obligation to present any evidence or question any witness. I will charge you on this burden of proof during my charge in a few minutes." Nonetheless, at the defendant's sentencing, defense counsel moved for a new trial, arguing in pertinent part that the prosecutor's statement "constituted improper prosecutorial impropriety, specifically . . . the state's argument switched the burden of proof; it commented on the defense's right not to present a defense or [not] to present any evidence whatsoever." The trial court denied the defendant's motion.

We conclude that the prosecutor committed an impropriety when she informed the jury that S's testimony was "unchallenged and uncontroverted." To begin with, the prosecutor's statement twice mischaracterized the evidence because, contrary to the prosecutor's assertion, S's credibility *was* challenged and controverted. See, e.g., *State* v. *Patterson*, 170 Conn. App. 768, 792–93, 156 A.3d 66 (prosecutorial statements mischaracterizing evidence were improper), cert. denied, 325 Conn. 910, 158 A.3d 320 (2017); *State* v. *Sargent*, 87 Conn. App. 24, 39–40, 864 A.2d 20 (same), cert. denied, 273 Conn. 912, 870 A.2d 1082 (2005). Defense counsel elected not to cross-examine S, but cross-examination is not the only method by which to

challenge a witness' testimony—admission of documentary or physical evidence or the in-court testimony of other witnesses, for example, may be used to contradict a witness' testimony. In this case, the defendant testified that he never sexually assaulted S or touched her in an inappropriate manner, thereby directly challenging and controverting S's testimony. In addition, the prosecutor's statement ran the risk of diluting the state's burden of proving the defendant guilty beyond a reasonable doubt by suggesting that the defendant was required to cross-examine S in order to undermine her credibility and to prove his innocence. See *State* v. *Otto*, supra, 305 Conn. 77 ("prosecutors are not permitted to misstate the law" or to "distort the government's burden of proof"). See generally *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) ("the [d]ue process [c]lause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). Particularly when we consider the prosecutor's remark in connection with her inaccurate description of the reasonable doubt standard, we conclude that it was improper. But cf. *State* v. *Ciullo*, supra, 314 Conn. 38–39 (prosecutor's statement that "the 'testimony [of the defendant and his son] does nothing at all to create a doubt in this case' " was not improper because both prosecutor and defense counsel "accurately stated the burden of proof in their two hours of closing arguments" and trial court "accurately charged the jury with the correct burden of proof").

C

Having determined that two of the prosecutor's statements were improper; see part II B of this opinion; we next address whether those improprieties deprived the defendant of his due process right to a fair trial. The defendant bears the burden of demonstrating that, when "considered in light of the whole trial, the impro-

prieties were so egregious that they amounted to a denial of due process." *State* v. *Payne*, supra, 303 Conn. 563. "[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 *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that [impropriety] was objected to at trial. . . . Those 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. *McCoy*, 331 Conn. 561, 571–72, 206 A.3d 725 (2019). Ultimately, "[t]he issue is 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.) Id., 571.

It is undisputed that the prosecutorial improprieties were not invited by the conduct or argument of defense counsel. Turning to the severity of the prosecutorial improprieties, we must consider whether defense counsel objected to the improper remarks, requested curative instructions, or moved for a mistrial. See, e.g., *State* v. *Fauci*, 282 Conn. 23, 51, 917 A.2d 978 (2007). Additionally, "we look to whether the [improprieties were] blatantly egregious or inexcusable." Id. Defense counsel did not object to the prosecutor's misstatement of the reasonable doubt standard, which "demonstrates that defense counsel presumably [did] not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial." (Internal quotation marks omitted.) Id. Furthermore, the prosecutor's misstatement of the law governing reasonable doubt was isolated, was not blatantly egregious or inex-

cusable, and was counterbalanced by defense counsel's frequent description of the "very high burden" of proof imposed on the state by the reasonable doubt standard.[15] The trial court instructed the jurors that, if counsel's recitation of the law differed from the trial court's jury instructions, they must "dismiss from [their] minds what counsel has said to the extent that it differs from what [the court is] telling [them]." Lastly, the trial court's instructions on the law accurately, clearly, and unequivocally described the reasonable doubt standard to the jury.[16] We therefore conclude that the prosecu-

[15] In closing argument, defense counsel informed the jury that it "simply need[ed] to determine if the state proved all the elements of the charges beyond a reasonable doubt. You don't need to figure out what happened. You are simply determining if the state met its burden. If you have any uncertainty, if you feel like you weren't sure, if you have a moment of hesitation, if you're not confident about the decision, your job is easy and you must find [the defendant] not guilty." At another point in closing argument, defense counsel argued that, "if you think for a moment or have any hesitation that [S] is not telling the truth, then you must return a verdict of not guilty. That is . . . reasonable doubt. If you have a brief hesitation, if you pause, that is exactly what a reasonable doubt is. The evidence does not prove beyond a reasonable doubt that [the defendant] is guilty of these crimes." Finally, defense counsel stated: "[I]f you have a—a moment of hesitation, if you don't know, a feeling in your stomach, if you don't—you are not confident, then that's a reasonable doubt. I'm sure that you will thoughtfully consider all of the evidence of this case. I know you will hold the state to its burden." Defense counsel's description of the reasonable doubt standard as "a moment of hesitation" or "a feeling in your stomach" did not comport with the trial court's reasonable doubt instruction or any previously approved definitions and, therefore, like the prosecutor's description of the reasonable doubt standard, was improper.

[16] The trial court instructed the jury: "The state's obligation is to prove each and every element of the crime charge[d] beyond a reasonable doubt.

"And that brings us to reasonable doubt. Now, what does this mean, beyond a reasonable doubt? The phrase reasonable doubt has no technical or unusual meaning. The meaning of reasonable doubt could be arrived at by emphasizing the word reasonable. It is not a surmise, a guess, or mere conjecture. It is such a doubt as in the serious affairs that concern you, you would heed; that is, such a doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance. It is not hesitation springing from any feelings of pity or sympathy for the accused, or any other person who might be affected by your decision. It is, in other words, a real doubt, an honest doubt, a doubt which has its foundation in the

tor's improper comment on the reasonable doubt standard was not frequent or severe and, although improper, was cured by the trial court's jury instructions. See, e.g., *State* v. *Stevenson*, supra, 269 Conn. 598 ("the [trial] court's instructions, when viewed in light of the other *Williams'* factors, were sufficient to cure any harm to the defendant caused by the [prosecutorial impropriety]").

With respect to the prosecutor's improper statement describing S's testimony as "unchallenged and uncontroverted," we note that defense counsel requested a curative instruction, which the trial court issued. See part II B of this opinion. Given the isolated nature of the prosecutor's comment and the trial court's prompt and effective curative instruction,[17] which specifically targeted the prosecutorial impropriety, we conclude that that this impropriety was not frequent or severe and was cured by the trial court. See, e.g., *State* v. *Ceballos*, 266 Conn. 364, 413, 832 A.2d 14 (2003) ("[A]

evidence or lack of evidence. It is doubt that is honestly entertained and is reasonable in light of the evidence after a fair comparison and careful examination of the entire evidence. Proof beyond a reasonable doubt does not mean proof beyond all doubt. The law does not require absolute certainty on the part of the jury before it returns a verdict of guilty. Absolute certainty in the affairs of life is almost never attainable. The state does not have to prove guilt beyond all doubt or to a mathematical certainty or to an absolute certitude.

"The law requires, after hearing all the evidence, if there is something in that evidence or lack of evidence which leaves in the minds . . . of the jury as reasonable men and women a reasonable doubt about the guilt of the accused, then the accused must be given the benefit of that doubt and acquitted. If there is no reasonable doubt then the accused must be found guilty. Since the burden is [on] the state to prove the defendant guilty beyond a reasonable doubt of every essential element of the crime charged, the defendant has a right to rely [on] a failure of the prosecution to establish such proof. Proof beyond a reasonable doubt is proof that precludes every reasonable hypothesis, except guilt, and is inconsistent with any other rational conclusion."

[17] The jury's verdict of not guilty on two of the six charges "speaks to the strength and efficacy of the curative measures adopted." *State* v. *Ciullo*, supra, 314 Conn. 60.

prompt cautionary instruction to the jury regarding improper prosecutorial remarks or questions can obviate any possible harm to the defendant. . . . Moreover, [i]n the absence of an indication to the contrary, the jury is presumed to have followed [the trial court's] curative instructions." (Citations omitted; internal quotation marks omitted.)).

We next address whether the prosecutorial improprieties were central to the critical issues in the case. In light of the lack of eyewitnesses and physical evidence, the critical issue in the case was the credibility of S's testimony regarding the occurrence of the sexual assaults. One of the two instances of prosecutorial impropriety was central to this critical issue. Nonetheless, when viewed in the context of the entire trial, we conclude that "the impact of these . . . improprieties was minimal"; *State* v. *Ciullo*, supra, 314 Conn. 60; in light of the jury's verdict of not guilty on one count of sexual assault and one count of risk of injury to a child. The record "clearly demonstrat[es] the jurors' ability to filter out the allegedly improper statements and make independent assessments of credibility"; id.; and, therefore, we conclude that the prosecutor's improper statements did not prejudice the defendant. See *State* v. *Long*, supra, 293 Conn. 53 (jury's verdict of not guilty on some charges "is a strong indication that the defendant was not prejudiced by" prosecutorial impropriety).

Lastly, we consider the strength of the state's case. As we explained in *State* v. *Felix R.*, supra, 319 Conn. 1, "[t]he sexual abuse of children is a crime which, by its very nature, occurs under a cloak of secrecy and darkness. It is not surprising, therefore, for there to be a lack of corroborating physical evidence . . . . Given the rarity of physical evidence in [sexual assault cases involving children], a case is not automatically weak just because a child's will was overborne and he or she submitted to the abuse . . . ." Id., 18. "[W]e have never

stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial [impropriety] did not deprive the defendant of a fair trial." (Internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 596. In the present case, we conclude that the state's case was "not so weak as to be overshadowed" by the prosecutorial improprieties. *State* v. *Carlos E.*, 158 Conn. App. 646, 669, 120 A.3d 1239, cert. denied, 319 Conn. 909, 125 A.3d 199 (2015). We are confident on this record that the defendant was not deprived of his due process right to a fair trial.

The judgment is affirmed.

In this opinion the other justices concurred.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE *v.* CAROL J. ROTHERMEL (SC 20463)

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

Syllabus

Pursuant to statute (§ 49-15 (a) (1)), "[a]ny judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified . . . provided no such judgment shall be opened after the title has become absolute in any encumbrancer . . . ."

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant. The trial court rendered a judgment of strict foreclosure, and, while negotiating over the next five years, the parties filed numerous motions to open the judgment, each prior to the passage of the law day. The court thereafter opened the judgment for a final time and set the law day for March 12, 2019. Before that date, the plaintiff's loan servicer, S Co., sent the defendant letters erroneously stating that a "foreclosure sale" of the property would occur on March 13, 2019. On the evening of March 12, the defendant called S Co. and was told that the foreclosure sale was scheduled for the following day. The defendant then contacted a new attorney, who, on March 13, filed a motion to open the judgment, claiming that the defendant's reliance

on S Co.'s misrepresentations caused her not to file the motion before the passage of the law day. The trial court denied the defendant's motion, concluding that it did not have jurisdiction to open the judgment under § 49-15 and that the equities of the case did not warrant granting relief. After the defendant appealed to the Appellate Court, the plaintiff filed a motion to dismiss the appeal on the ground that the appeal was moot because the passage of the law day precluded the defendant from obtaining any practical relief. The Appellate Court dismissed the defendant's appeal, and the defendant, on the granting of certification, appealed to this court, claiming that the Appellate Court had improperly dismissed her appeal because § 49-15 did not render her equitable claims moot and that the trial court had abused its discretion in denying her motion to open. *Held*:

1. The Appellate Court improperly dismissed the defendant's appeal as moot in light of the equitable nature of her claims: although § 49-15 generally precludes a judgment of strict foreclosure from being opened after title vests absolutely in an encumbrancer, which occurs when the law day passes, under the common law of this state, courts may, in rare and exceptional cases, exercise a limited form of continuing jurisdiction over a motion to open a judgment of strict foreclosure after the passage of the law day; in the present case, the defendant's motion to open the judgment raised a colorable claim in equity, namely, that her reliance on S Co.'s erroneous written and oral misrepresentations justified the court's exercise of its inherent, continuing jurisdiction, that claim, if meritorious, could have afforded the practical relief sought, and, accordingly, the defendant's appeal was not moot.
2. The trial court did not abuse its discretion in denying the defendant's motion to open the judgment, as equity did not warrant granting the relief sought: the trial court's conclusion that the expiration of the defendant's right to redemption was caused, at least in part, by her own inaction was supported by the court's factual findings that the defendant was not confused by S Co.'s letters, that she was represented by an attorney who had informed her of the correct law day, that the trial court previously had granted numerous motions to open the judgment during the parties' negotiations, that the defendant had corrected a similar misstatement about the law day made by S Co., and, that even if the defendant was confused about the law day, her counsel was not; moreover, the defendant did not claim that she lacked the ability or resources to unilaterally file her own prevesting motion to open, and this court's review of the record indicated that the trial court's factual findings, including that the defendant's choice not to affirmatively protect her rights by filing a prevesting motion while negotiating with the plaintiff was dilatory and cavalier, were not clearly erroneous.

Argued December 9, 2020—officially released June 23, 2021*

* June 23, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant was defaulted for failure to plead; thereafter, the court, *Mintz*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; subsequently, the court, *Genuario*, *J.*, denied the defendant's motion to open the judgment, and the defendant appealed to the Appellate Court, which dismissed the appeal, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Christopher G. Brown, for the appellant (defendant).

Geraldine A. Cheverko, for the appellee (plaintiff).

Jeffrey Gentes and *J.L. Pottenger*, *Jr.*, filed a brief for the Housing Clinic of the Jerome N. Frank Legal Services Organization as amicus curiae.

Opinion

KAHN, J. The principal issue in this appeal is whether General Statutes § 49-15 (a) (1), which provides in relevant part that no judgment of strict foreclosure "shall be opened after the title has become absolute in any encumbrancer," deprives the trial and appellate courts of subject matter jurisdiction over a motion to open a judgment that, although filed after the law days have passed, invokes the trial court's continuing equitable authority. The defendant, Carol J. Rothermel, appeals from the judgment of the Appellate Court dismissing her appeal from the trial court's denial of such a motion. In the present appeal, the defendant argues that (1) the Appellate Court's dismissal was improper because § 49-15 did not render her equitable claims moot, and (2) the trial court abused its discretion by denying her motion to open the judgment. The plaintiff, U.S. Bank

National Association,[1] argues in response that the prohibition on postvesting motions to open a judgment set forth in § 49-15 implicates the subject matter jurisdiction of our state courts and that, in any event, the defendant is not entitled to equitable relief on the merits. Although we agree with the defendant that the Appellate Court improperly dismissed her appeal in light of the equitable nature of the particular claims at issue, we conclude that the trial court did not abuse its discretion by denying the underlying motion to open the judgment.

The following facts and procedural history are relevant to our resolution of the present appeal. In 2006, the defendant purchased a parcel of real property improved with a single family home in the town of New Canaan. In order to obtain funds for that transaction, the defendant signed a note promising to pay principal and interest on a loan of one million dollars to the plaintiff's predecessor in interest and then secured that note by mortgaging the property. The defendant defaulted on the note in 2012, and the plaintiff commenced the present action approximately ten months later. Although the defendant initially chose to proceed in a self-represented capacity, she subsequently retained the services of an attorney.

The trial court first rendered a judgment of strict foreclosure on January 13, 2014. Over the next five years, the parties filed a total of seventeen motions to open the judgment prior to the passage of the law day. The court granted fifteen of those motions, each of which was filed by the plaintiff with the defendant's consent.[2]

[1] The full name of the plaintiff is U.S. Bank National Association, as Trustee on Behalf of the Holders of the Adjustable Rate Mortgage Trust 2007-1, Adjustable Rate Mortgage-Backed Pass-Through Certificates, Series 2007-1.

[2] The defendant filed the remaining two motions to open the judgment. The trial court denied one of those motions but, nonetheless, extended the law day sua sponte. The defendant's other motion was rendered moot because the trial court granted a motion to open the judgment filed by the plaintiff that was pending at the same time.

The parties used this additional time to engage in a series of discussions relating to modification of the mortgage, short payoff, and other forms of loss mitigation. After opening its judgment the final time, the trial court set the law day for March 12, 2019.[3]

The equitable claims raised by the defendant stem primarily from a series of communications between her and the plaintiff's loan servicer, Select Portfolio Servicing, Inc. (servicer), that occurred shortly before the passage of the law day and the expiration of her right to redemption. Specifically, a letter from the servicer to the defendant dated February 20, 2019, erroneously stated that a "previously scheduled foreclosure sale" of the property had been postponed until March 13, 2019,[4] and that the plaintiff was "continuing to evaluate [the defendant's] application for foreclosure prevention assistance." The letter then stated: "Please know that if you have submitted a complete application, we will not proceed with a foreclosure sale. If there is a pending foreclosure sale date, we will instruct our attorney to take appropriate steps to postpone such sale [date] including, where necessary, filing a motion with the court." On March 9, 2019, the defendant received a second letter from the servicer stating: "Your request for workout assistance on the above referenced account has expired. This is either because we did not receive the required payment or because we did not receive the signed agreement. We continue to welcome an opportunity to discuss options to resolve this matter so that possible legal action can be avoided." On that same date, the defendant also received an e-mail from her own attorney informing her that the trial court had set the law day for March 12, 2019.

[3] The complaint does not identify any subsequent encumbrancers.

[4] Before the trial court, the plaintiff's attorney conceded that the present case does not involve a foreclosure by sale and that the law day was March 12, 2019. She argued before the trial court that "when [the letter said] sale, [it meant] vesting day," and that the servicer "just [didn't] speak Connecticut."

Three days later, on the evening of the law day itself, the defendant called the servicer and was told once again that the "foreclosure sale" was scheduled for the following day.[5] See footnote 16 of this opinion. Immediately after that call, the defendant contacted a new attorney who filed a motion to open the judgment the next morning, March 13, 2019. That motion claimed that the defendant's reliance on the servicer's misrepresentations had caused her failure to file a motion to open before the passage of the law day. The plaintiff subsequently filed an objection, arguing that, under § 49-15, the trial court was "without jurisdiction to disturb the judgment, but, even if the court did have jurisdiction, it would be inequitable for the court to grant the defendant's motion."

The trial court held an evidentiary hearing on the defendant's motion and requested supplemental briefs from both parties. In a memorandum of decision denying the motion, the trial court concluded that it did not have "jurisdiction or authority" to open the judgment under § 49-15 and that the equities of the case did not warrant granting relief inconsistent with that rule.[6] In reaching this conclusion, the trial court found, as a matter of fact, that the defendant became aware of her law day no later than March 9, 2019, and that she had not been confused by the letters sent by the servicer.[7]

[5] The defendant testified that she had responded to this misstatement in the following manner: "I said, you know, wait a second, I said it's today. They said no it's not, it's tomorrow."

[6] At the hearing on the defendant's motion to open the judgment, trial court made the following statement with respect to its own understanding of the intersection between the limitations imposed by § 49-15 and its own continuing equitable jurisdiction: "[In] most circumstances, the court does not have jurisdiction to open the judgment after the law day has passed and title has vested. There is case law to the extent that, under some rare and unique circumstances . . . [t]here is jurisdiction to open the judgment."

[7] Specifically, the trial court stated: "[I]t is difficult . . . to find that a defendant, who has successfully been able to open judgments of strict foreclosure and extend law days up to sixteen times, would be unaware of the difference between a strict foreclosure, and a foreclosure by sale and

The trial court also found that, even if there had been some level of confusion, the defendant had acted in a "dilatory and cavalier" manner by unnecessarily delaying the filing of her own motion to open the judgment.

The defendant appealed from the trial court's denial of her motion to open the judgment to the Appellate Court. The plaintiff filed a motion to dismiss that appeal, arguing that, under § 49-15, the passage of the law day precluded the defendant from obtaining any practical relief and, as a result, rendered the appeal moot. The defendant filed no objection, and the Appellate Court summarily dismissed the appeal. The defendant's attorney later filed a motion for reconsideration, indicating that electronic service of the plaintiff's motion to dismiss had accidently been routed to the "spam" folder of his e-mail and that, as a result, the motion had escaped his notice until after it had been ruled on. The motion for reconsideration then continued to address the substance of the plaintiff's jurisdictional claim. The Appellate Court ultimately granted that motion for reconsideration but denied the defendant further relief.

This court granted the defendant's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly dismiss as moot the defendant's appeal from the trial court's denial of a motion to open the judgment of strict foreclosure, raising equitable grounds involving alleged misrepresentations by the plaintiff relating to the strict foreclosure proceedings, when the motion to open was filed by the defendant one day after title vested in the plaintiff?" And (2) "If the answer to the first question is 'no,' did

between a law day and a sale day." Although the defendant is technically correct that the motions to open the judgment actually granted by the trial court in the present case had been filed by the plaintiff, we do not believe that this fact negates the trial court's general observation that the repetitious opening of judgment and setting of law days over a period of five years would have afforded the defendant with some level of familiarity with the process.

the trial court properly deny the defendant's motion to open the judgment of strict foreclosure . . . ?" *U.S. Bank National Assn.* v. *Rothermel*, 335 Conn. 910, 228 A.3d 95 (2020). We address these certified questions in turn.

I

We begin by addressing the defendant's contention that the Appellate Court improperly dismissed her appeal as moot. The defendant, citing *Wells Fargo Bank, N.A.* v. *Melahn*, 148 Conn. App. 1, 85 A.3d 1 (2014), argues that practical relief remained available to her because, notwithstanding the restrictions imposed by § 49-15, courts of this state continue to possess an inherent, equitable authority to open a judgment of strict foreclosure in certain cases after the passage of the law days. For the reasons that follow, we agree with the defendant that the common law of this state does, in fact, support a limited exercise of jurisdiction over a narrow class of equitable claims raised in postvesting motions to open and that, as a result, her appeal was not moot.

We begin by setting forth the standard of review and general principles of law relevant to our discussion of this issue. "Whether an action is moot implicates a court's subject matter jurisdiction and is therefore a question of law over which we exercise plenary review." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 301 Conn. 323, 332, 21 A.3d 737 (2011); accord *U.S. Bank National Assn.* v. *Crawford*, 333 Conn. 731, 750, 219 A.3d 744 (2019). Our case law firmly establishes that "[a] case is considered moot if [a] court cannot grant the appellant any practical relief through its disposition of the merits . . . ." (Internal quotation marks omitted.) *JP Morgan Chase Bank, N.A.* v. *Mendez*, 320 Conn. 1, 6, 127 A.3d 994 (2015).

"The law governing strict foreclosure lies at the crossroads between the equitable remedies provided by the judiciary and the statutory remedies provided by the legislature. . . . Because foreclosure is peculiarly an equitable action . . . the court may entertain such questions as are necessary to be determined in order that complete justice may be done. . . . In exercising its equitable discretion, however, the court must comply with mandatory statutory provisions that limit the remedies available . . . . It is our adjudicatory responsibility to find the appropriate accommodation between applicable judicial and statutory principles. Just as the legislature is presumed to enact legislation that renders the body of the law coherent and consistent, rather than contradictory and inconsistent . . . [so] courts must discharge their responsibility, in case by case adjudication, to assure that the body of the law—both common and statutory—remains coherent and consistent." (Citations omitted; footnote omitted; internal quotation marks omitted.) *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 256–57, 708 A.2d 1378 (1998).

Our discussion of the jurisdictional issue in the present case, therefore, must be framed by the text of § 49-15 (a) (1), which provides in relevant part: "Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, *provided no such judgment shall be opened after the title has become absolute in any encumbrancer* . . . ."[8] (Emphasis added.)

[8] General Statutes § 49-15 (a) (2) sets forth the following exception: "Any judgment foreclosing the title to real estate by strict foreclosure may be opened after title has become absolute in any encumbrancer upon agreement of each party to the foreclosure action who filed an appearance in the action and any person who acquired an interest in the real estate after title became

In Connecticut, the passage of the law days in an action for strict foreclosure extinguishes a mortgagor's equitable right of redemption and vests absolute title in the encumbrancer. See, e.g., *New Milford Savings Bank* v. *Jajer*, supra, 244 Conn. 256 n.11. The Appellate Court has previously read § 49-15 (a) (1) in a manner that generally prohibits mortgagors from obtaining practical relief after the passage of the law days and, as a result, has concluded that both postvesting motions to open a judgment and subsequent appeals related to them are moot.[9] See *Real Estate Mortgage Network, Inc.* v. *Squillante*, 184 Conn. App. 356, 360–61, 194 A.3d 1262, cert. denied, 330 Conn. 950, 197 A.3d 390 (2018); *Citigroup Global Markets Realty Corp.* v. *Christiansen*,

absolute in any encumbrancer, provided (A) such judgment may not be opened more than four months after the date such judgment was entered or more than thirty days after title became absolute in any encumbrancer, whichever is later, and (B) the rights and interests of each party, regardless of whether the party filed an appearance in the action, and any person who acquired an interest in the real estate after title became absolute in any encumbrancer, are restored to the status that existed on the date the judgment was entered."

[9] Questions related to a trial court's jurisdiction over a case normally can, and should, be treated as analytically distinct from questions related to appellate jurisdiction. See, e.g., *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 534 n.22, 911 A.2d 712 (2006). They spring from different sources and, in most contexts, are not coterminous. Generally, the Appellate Court has jurisdiction to review final judgments of the Superior Court; see General Statutes § 51-197a (a); even when the question at issue is whether the trial court properly dismissed the case for lack of jurisdiction. See, e.g., *Harvey* v. *Dept. of Correction*, 337 Conn. 291, 303–304, 253 A.3d 931 (2020) (affirming judgment of Appellate Court, which upheld trial court's dismissal of complaint on ground of sovereign immunity); *Lazar* v. *Ganim*, 334 Conn. 73, 77, 220 A.3d 18 (2019) (affirming trial court's judgment of dismissal for lack of standing). The rule that § 49-15 deprives an appellate tribunal of jurisdiction over *an appeal* in an action for strict foreclosure after the passage of the law day; see, e.g., *Barclays Bank of New York* v. *Ivler*, 20 Conn. App. 163, 167, 565 A.2d 252, cert. denied, 213 Conn. 809, 568 A.2d 792 (1989); is rooted in concerns related to mootness, rather than the existence of a final judgment. Although the Appellate Court has jurisdiction to review a trial court's decision that constitutes a final judgment, it may lack jurisdiction to entertain that decision if it determines that the matter is moot under § 49-15.

163 Conn. App. 635, 640–41, 137 A.3d 76 (2016); *Ocwen Federal Bank, FSB* v. *Charles*, 95 Conn. App. 315, 324–25, 898 A.2d 197, cert. denied, 279 Conn. 909, 902 A.2d 1069 (2006); *Provident Bank* v. *Lewitt*, 84 Conn. App. 204, 210–11, 852 A.2d 852, cert. denied, 271 Conn. 924, 859 A.2d 580 (2004); *First National Bank of Chicago* v. *Luecken*, 66 Conn. App. 606, 612, 785 A.2d 1148 (2001), cert. denied, 259 Conn. 915, 792 A.2d 851 (2002); *Barclays Bank of New York* v. *Ivler*, 20 Conn. App. 163, 167, 565 A.2d 252, cert. denied, 213 Conn. 809, 568 A.2d 792 (1989); *Merry-Go-Round Enterprises, Inc.* v. *Molnar*, 10 Conn. App. 160, 161–62, 521 A.2d 1065 (1987). This court has reached the same conclusion. See *Connecticut National Mortgage Co.* v. *Knudsen*, 323 Conn. 684, 687 n.5, 150 A.3d 675 (2016) ("an appeal from a judgment of strict foreclosure is moot when the law days pass, the rights of redemption are cut off, and title becomes unconditional in the plaintiff" (internal quotation marks omitted)); see also *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 574–75, 953 A.2d 868 (2008).[10]

Both this court and the Appellate Court have, however, also previously recognized that trial courts possess inherent powers that support certain limited forms of continuing equitable authority; see, e.g., *Rocque* v.

[10] The exception set forth in § 49-15 (a) (2), which allows a trial court to open a judgment of strict foreclosure with the consent of interested parties; see footnote 8 of this opinion; and certain cases from this court relating to the predecessor of § 49-15; see, e.g., *Ferguson* v. *Sabo*, 115 Conn. 619, 162 A. 844 (1932), cert. denied, 289 U.S. 734, 53 S. Ct. 595, 77 L. Ed. 1482 (1933); have caused some to question whether the statutory limitation on postvesting motions is properly characterized as one implicating subject matter jurisdiction. See *In re Baby Girl B.*, 224 Conn. 263, 292, 618 A.2d 1 (1992) (citing *Ferguson* as case related to personal jurisdiction); see also *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 148 Conn. App. 8 n.8; see also 1 D. Caron & G. Milne, Connecticut Foreclosures (10th Ed. 2020) § 10-1:1.1, pp. 604–607. Because we conclude that the trial court's inherent equitable authority supported the exercise of jurisdiction in this case, we need not address the precise nature of the limitations otherwise imposed by § 49-15.

Light Sources, *Inc.*, 275 Conn. 420, 433, 881 A.2d 230 (2005); and that these powers can, in certain rare and exceptional cases, be exercised in a manner consistent with § 49-15 after the passage of the law days. This fact is, we believe, clearly demonstrated by both our decision in *New Milford Savings Bank* v. *Jajer*, supra, 244 Conn. 251, and by the Appellate Court's decision in *Wells Fargo Bank*, *N.A.* v. *Melahn*, supra, 148 Conn. App. 1. A brief review of those two decisions is instructive.

In *Jajer*, this court concluded "that § 49-15 does not deprive the trial court of jurisdiction to open a judgment of foreclosure [after the passage of the law days] to correct an inadvertent omission in a foreclosure complaint." *New Milford Savings Bank* v. *Jajer*, supra, 244 Conn. 260. The plaintiff in that case had mistakenly omitted from its complaint one of three parcels subject to the mortgage being foreclosed on. Id., 253. The trial court rendered a judgment of strict foreclosure on that complaint, the defendants failed to exercise their right to redemption, and the law day passed. Id. The plaintiff subsequently discovered its mistake and moved to open the trial court's judgment so that the underlying complaint could be amended to include the third parcel. Id., 253–54. The trial court granted that motion, permitted amendment of the complaint, and then rendered a judgment of strict foreclosure thereon. Id., 254. The defendants then appealed to the Appellate Court, which reversed the trial court's judgment on the ground that § 49-15 precluded the trial court from exercising jurisdiction over a motion to open after the law days had passed. Id., 254–55. This court reversed that decision. Id., 268. We began our analysis by reviewing the intersection between the statutory provisions governing the foreclosure process and the underlying equitable nature of such proceedings. Id., 256. In particular, we emphasized that courts adjudicating this type of claim gener-

ally have the authority to "entertain such questions as are necessary to be determined in order that complete justice may be done." (Internal quotation marks omitted.) Id. We then examined the particular facts giving rise to the mortgagee's motion to open in that case and concluded that, because title to the third parcel had not yet become absolute and the clerical error at issue was undisputed, § 49-15 did not preclude the trial court from opening the judgment of strict foreclosure even though the law day had actually passed with respect to two of the three parcels. Id., 260.

The Appellate Court's decision in *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 148 Conn. App. 1, arose from a markedly different set of facts. The plaintiff in that case had falsely certified that it had complied with the terms of a court order requiring it to provide notice to all nonappearing defendants. Id., 4–5. The trial court denied a postvesting motion seeking to open the judgment and to dismiss the underlying action filed by a defendant, who had previously been defaulted for failure to appear, on the ground that the passage of the law day categorically precluded the relief sought. Id., 3, 5–6. Despite the constraints imposed by § 49-15, the Appellate Court reversed, concluding that the trial court possessed an inherent, continuing, and equitable authority to enforce its previous order. See id., 10, 13; see also id., 10 ("'the trial court's continuing jurisdiction to effectuate its prior judgments, either by summarily ordering compliance with a clear judgment or by interpreting an ambiguous judgment and entering orders to effectuate the judgment as interpreted, is grounded in its inherent powers, and is not limited to . . . cases wherein the parties have agreed to continuing jurisdiction' "), quoting *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 246, 796 A.2d 1164 (2002). Based on the unique set of facts then before it, the Appellate Court concluded not only that

the trial court had jurisdiction to open the underlying judgment, but also that it had abused its discretion by failing to do so. *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 12–13.

Jajer and *Melahn* establish that courts may, in rare and exceptional cases, exercise a limited form of continuing jurisdiction over motions to open judgments of strict foreclosure after the passage of the law days, notwithstanding the statutory limitation imposed by § 49-15. The defendant's motion to open the judgment in the present case was predicated on a claim that she had relied on errors by the servicer. In support of her motion, the defendant made two related arguments. First, she argued that the factual basis for her claim fell within a category that was legally cognizable in equity. See, e.g., *Cavallo* v. *Derby Savings Bank*, 188 Conn. 281, 285, 449 A.2d 986 (1982) ("[f]raud, accident, mistake, and surprise are recognized grounds for equitable interference" (internal quotation marks omitted)). Second, relying on *Melahn*, she argued that the trial court should exercise its continuing jurisdiction to open the underlying judgment. Once presented with the motion, the trial court held an evidentiary hearing, solicited briefs from the parties, and issued a memorandum of decision addressing the merits of the defendant's equitable claim.[11] Although the trial court concluded

[11] In light of the underdeveloped nature of appellate case law governing forms of continuing jurisdiction in this particular context, we believe that this approach was reasonable. We caution, however, that the jurisdictional conclusion reached in the present appeal should not be taken as an invitation for parties in strict foreclosure proceedings to repackage motions to open the judgment filed after the passage of the law days in a manner that superficially invokes the inherent powers underlying *Jajer* or *Melahn*. Exceptions to the general rule against postvesting motions to open judgments of strict foreclosure are, in fact, rare and exceptional. A bare assertion that equity requires such relief is insufficient; as in the present case, the party seeking to invoke the trial court's continuing jurisdiction must base their motion to open on particularized factual allegations that could support a claim cognizable in equity. Trial courts may, under existing case law, grant motions to dismiss pursuant to § 49-15 in cases in which a claim raised in

that it lacked jurisdiction, it nonetheless went on to consider the equitable claim on the merits.[12] The jurisdictional conclusion reached by both the trial court and the Appellate Court in the present case was, therefore, premised on the conclusion that the defendant's claim in equity lacked colorability. We disagree with that premise because, as stated previously in this opinion, the defendant's motion raised a colorable claim falling within a class generally recognized in equity and sought relief through the court's inherent, continuing jurisdiction as previously established in *Melahn*. Although the claim she presented was not identical to the one raised in *Melahn*,[13] the defendant alleged that the servicer made erroneous written and oral representations that justified the court's exercise of jurisdiction to consider those equitable claims of accident or mistake, which, if meritorious, could have afforded the practical relief sought. See *State* v. *Jerzy G.*, 326 Conn. 206, 221, 162 A.3d 692 (2017) ("[i]t is a settled principle under both federal and Connecticut case law that, if a *favorable decision* necessarily could not afford the practical relief sought, the case is moot" (emphasis added)); *Milford Power Co., LLC* v. *Alstom Power, Inc.*, 263 Conn. 616, 626, 822 A.2d 196 (2003) ("[i]n deciding whether the plaintiff's complaint presents a justiciable claim, we

a postvesting motion to open fails to present colorable grounds for equitable relief under these limited exceptions, and appellate courts may continue to summarily dismiss appeals taken from those rulings. We note that such a dismissal in the Appellate Court would occur only after the appellant has been given the opportunity to submit a response to an appellee's motion to dismiss or to present argument giving reasons why the case should not be dismissed in response to the court's own motion.

[12] During the hearing on the motion, the trial court explicitly recognized that it possessed an inherent authority to open judgments of strict foreclosure, even after the passage of the law days, if equity so requires. See footnote 6 of this opinion; see also, e.g., *Citibank, N.A.* v. *Lindland*, 310 Conn. 147, 169–70 n.12, 75 A.3d 651 (2013).

[13] The claim that the defendant raised was more akin to that made in *Jajer*, as both involved an error or mistake made by the mortgagee or its representative. See *New Milford Savings Bank* v. *Jajer*, supra, 244 Conn. 253.

make no determination regarding its merits"); see also *Nielsen* v. *State*, 236 Conn. 1, 6, 670 A.2d 1288 (1996). We therefore conclude that the claim raised in the defendant's motion to open was not moot but, rather, was a recognizable claim in equity and that, as a result, the Appellate Court improperly dismissed the defendant's appeal.

II

Having resolved the jurisdictional issue, we turn to the question of whether the trial court properly denied the defendant's motion to open the judgment on its merits. The defendant's position on the question remains, as it was before the trial court, that the letters she had received from the servicer contained inadvertent errors[14] and that she had relied on those errors to her detriment. In response, the plaintiff argues that the defendant's claim is distinguishable from those raised in *Melahn* and that, in any event, the trial court correctly concluded that the facts contained within the record do not warrant an award of equitable relief. We agree with the plaintiff.

The relevant standard of review is well established. "Whether proceeding under the common law or a statute, the action of a trial court in granting or refusing an application to open a judgment is, generally, within the judicial discretion of such court, and its action will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion." (Internal quotation marks omitted.) *Hartford Federal Savings & Loan Assn.* v. *Stage Harbor Corp.*, 181 Conn. 141, 143, 434 A.2d 341 (1980); see also *Citibank, N.A.* v. *Lindland*, 310 Conn. 147, 166, 75 A.3d 651 (2013) ("[a] foreclosure action is an equitable proceeding . . . [and]

[14] We note that, during the hearing on the motion to open the judgment, the defendant's attorney expressly disclaimed any allegation of fraud by either the plaintiff or its servicer.

[t]he determination of what equity requires is a matter for the discretion of the trial court" (internal quotation marks omitted)); *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 95, 952 A.2d 1 (2008) ("We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion." (Internal quotation marks omitted.)). The trial court's findings of fact, by contrast, are subject to the clearly erroneous standard of review. See, e.g., *Reiner, Reiner & Bendett, P.C.* v. *Cadle Co.*, 278 Conn. 92, 107, 897 A.2d 58 (2006).

In her motion to open the judgment, the defendant argued that the underlying merits of her equitable claim warrant the same relief afforded in *Melahn*. We disagree. As discussed previously in this opinion, the plaintiff in *Melahn* falsely certified compliance with a court order relating to the provision of notice. *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 148 Conn. App. 4–5. The appellant in that case was a defendant who previously had been defaulted for failure to appear and who undisputedly should have received such a notice. Id., 3, 5. The force of the Appellate Court's reasoning in that case rested on the fact that opening the underlying judgment of strict foreclosure and compelling proper notice was the only way to effectively enforce the trial court's order. Id., 7–8. The defendant in the present case not only appeared, but was represented by counsel. There is no indication in the record that the plaintiff falsely certified compliance with a court order or, indeed, that it had actually failed to comply with any such order in the first instance. Thus, we agree with the trial court's conclusion that the facts of *Melahn* are distinguishable.

The factual findings made by the trial court sufficiently foreclose any other form of equitable relief.[15] As noted previously in this opinion, the trial court found that the defendant had not, in fact, been confused by the letters she had received from the servicer.[16] The fact that the defendant was represented by an attorney who had informed her of the correct law day, the fact that more than one dozen motions to open the judgment had previously been granted by the court and the fact that the defendant expressly testified to correcting the servicer about a similar misstatement made over the telephone on the evening of the law day itself; see footnote 5 of this opinion; provide more than adequate support for this finding.[17] Even if the defendant had been confused about her law day or the impact of its passage on her legal rights, she was represented by an able attorney who most certainly was not.

[15] This conclusion obviates the need for us to generate a comprehensive list of the various circumstances that may, in other cases, permit a trial court to exercise its equitable jurisdiction to open a judgment of strict foreclosure after the passage of the law day. We continue to believe that the expansion of the common law in this area is best developed through the adjudication of colorable claims; see footnote 11 of this opinion; on a case-by-case basis. *New Milford Savings Bank* v. *Jajer*, supra, 244 Conn. 257.

[16] The defendant also could not have reasonably relied on any of the statements made by the servicer during the telephone calls that she initiated on the evening of the law day itself because her opportunity to file a prevesting motion to open the judgment had already expired when the courthouse closed earlier that day. See *Real Estate Mortgage Network, Inc.* v. *Squillante*, supra, 184 Conn. App. 362; see also Practice Book § 7-17 (documents received by clerk's office after 5 p.m. deemed filed on following business day).

[17] We agree with the defendant that the wording of the letters she received does tend to suggest that the servicer lacked an accurate understanding of the strict foreclosure process in this state; see footnote 4 of this opinion; but the mere presence of those misstatements in the letters does not provide us with a reason to interfere with the trial court's factual finding that *the defendant* had not been confused as a result. See, e.g., *Reiner, Reiner & Bendett, P.C.* v. *Cadle Co.*, supra, 278 Conn. 107 ("a finding of fact is clearly erroneous when there is *no evidence* in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (internal quotation marks omitted; emphasis added)).

Although the defendant argues more broadly that the letters, when read in the context of the ongoing negotiations between the parties, contained an implicit promise by the plaintiff to forbear from future action, she does not—and indeed cannot—argue that she lacked the ability or resources to unilaterally file her own prevesting motion to open the judgment pursuant to § 49-15. See *Hoey* v. *Investors' Mortgage & Guaranty Co.*, 118 Conn. 226, 231–32, 171 A. 438 (1934) ("[The] [o]pportunity was open to [the mortgagor] . . . to have the judgment opened and modified for cause shown up to the expiration of the time fixed for redemption, but she failed to avail herself of this remedy. . . . If more favorable terms or a reduction in the judgment debt could have been obtained, loss of the remedy by [a motion to open] is attributable only to the fault of the [mortgagor] in neglecting to resort to it." (Citation omitted.)). On the basis of the record before it, the trial court found that the defendant's choice not to affirmatively protect her own rights while continuing to pursue negotiations with the plaintiff was "dilatory and cavalier . . . ." Having reviewed that same record in its entirety, we conclude that the trial court's factual findings were not clearly erroneous.

Accepting these findings as true, we see no basis to revisit the trial court's conclusion that the expiration of the defendant's right to redemption was caused, at least in part, by her own inaction. See *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 148 Conn. App. 9–10 ("[e]quity will not, save in rare and extreme cases, relieve against a judgment rendered as the result of a mistake on the part of a party or his [or her] counsel, unless the mistake is unmixed with negligence or . . . unconnected with any negligence or inattention on the part of the judgment debtor" (internal quotation marks omitted)). As a result, the defendant's claim that the trial court abused

its discretion by denying her postvesting motion to open the judgment must fail.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the trial court's denial of the defendant's motion to open the judgment on the merits.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* VICTOR M. ALICEA (SC 20399)

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

Syllabus

The defendant was convicted of two counts of assault in the first degree in connection with his conduct in cutting the victim's throat with a razor blade. At the time of the incident, the defendant and the victim were engaged in an argument at a fast-food restaurant, where they both were employed. The defendant was subsequently charged with both intentional assault and reckless assault. At trial, after the close of the state's case, the defendant moved for a judgment of acquittal, arguing that the charges were legally inconsistent because each charge required a mutually exclusive mental state. The trial court denied the motion. Subsequently, the jury found the defendant guilty of both of the charged crimes. The defendant then filed another motion for a judgment of acquittal, as well as a motion for a new trial, asserting that the jury's verdict was legally inconsistent. The trial court denied both motions and rendered a judgment of conviction on both counts. The defendant appealed to the Appellate Court, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Held* that, contrary to the defendant's claim, the jury's verdict of guilty of intentional assault and reckless assault was not legally inconsistent: the jury reasonably could have found that the defendant had intended to cause the victim serious physical injury and simultaneously disregarded the risk that his conduct would cause the victim's death, and this court had previously held that convictions involving both intentional and reckless mental states may be legally consistent when each mental state pertains to a different result; moreover, this court rejected the defendant's claim that two different injuries are required for a defendant to be convicted of two different offenses requiring proof of mutually exclusive mental states, as the relevant inquiry is whether

the opposing mental states related to the same result, not whether both convictions related to the same injury, and as such convictions are legally inconsistent only if they require that the defendant possess opposing mental states with respect to the same objective; furthermore, there was no merit to the defendant's claim that the state could not maintain on appeal that his convictions of intentional and reckless assault were consistent on the ground that the state's theory at trial contemplated those charges as alternatives, as there was no suggestion that the state had changed its factual theory of the case on appeal, and, even if the state had presented the charges as alternatives at trial, that would have been the state's legal theory of the case, convictions of intentional and reckless assault are not necessarily legally inconsistent, and the trial court properly instructed the jury on that point.

Argued November 23, 2020—officially released June 23, 2021*

Procedural History

Two part substitute information charging the defendant, in the first part, with two counts of the crime of assault in the first degree, and, in the second part, with being a persistent dangerous felony offender, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, where the first part of the information was tried to the jury before *Seeley*, *J.*; verdict of guilty; thereafter, the defendant was presented to the court on a plea of nolo contendere to the second part of the information; judgment of guilty in accordance with the verdict and plea; subsequently, the court denied the defendant's motions for a judgment of acquittal and for a new trial, and the defendant appealed to the Appellate Court, *Prescott*, *Bright* and *Eveleigh*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Jonathan R. Formichella, with whom was *James B. Streeto*, senior assistant public defender, for the appellant (defendant).

* June 23, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, and *Mark A. Stabile*, former senior assistant state's attorney, for the appellee (state).

Opinion

McDONALD, J. In *State* v. *Nash*, 316 Conn. 651, 666, 114 A.3d 128 (2015), we held that convictions of intentional assault in the first degree and reckless assault in the first degree[1] may be legally consistent when each mutually exclusive mental state pertains to a different result. Thereafter, in *State* v. *King*, 321 Conn. 135, 145, 136 A.3d 1210 (2016) (*King 2016*), we applied this rationale to again conclude that convictions of intentional and reckless assault were legally consistent. This certified appeal requires us to determine whether this precedent governs the outcome of the present case. We conclude that it does.

The defendant, Victor M. Alicea, was convicted of one count of intentional assault and one count of reckless assault. On appeal, he contends that his convictions of intentional and reckless assault are legally inconsistent, notwithstanding *Nash* and *King 2016*, because the requisite mental states are mutually exclusive under the particular circumstances of his case, which involved only one act, one victim, and one injury. The defendant claims that his case is instead governed by *State* v. *King*, 216 Conn. 585, 592–94, 583 A.2d 896 (1990) (*King 1990*), and *State* v. *Chyung*, 325 Conn. 236, 247–48, 157 A.3d 628 (2017). Accordingly, we must survey our jurisprudence regarding the legal consistency of multiple verdicts to resolve seemingly disparate language from our cases and to identify a uniform rule. In addition, this appeal requires us to examine the different

[1] Hereinafter, all references to intentional assault and reckless assault are, respectively, to intentional assault in the first degree and reckless assault in the first degree.

circumstances under which a claim of legally inconsistent verdicts implicates our "theory of the case" doctrine. We address these issues in turn.

The Appellate Court's decision sets forth the facts and procedural history; *State* v. *Alicea*, 191 Conn. App. 421, 424–26, 436–37, 215 A.3d 184 (2019); which we summarize in relevant part. The defendant and the victim, Tyrone Holmes, were employees at a Burger King restaurant. In July, 2015, the defendant was working an overnight shift when Holmes, who was not working that night, arrived and entered through the back door of the restaurant. Holmes intended to drop off supplies and "to speak with the defendant, who, he had heard, had been talking about him." Id., 424. At Holmes' request, the defendant stepped outside for a "brief discussion" with Holmes, during which the defendant "denied having talked negatively about Holmes." Id., 424–25. During the conversation, "[e]verything appeared fine to Holmes." Id., 425.

After both men went back inside the restaurant, Holmes overheard the defendant speaking on his cell phone, saying that "the defendant had a problem." Id. "Holmes told the defendant that they did not have a problem, and the defendant walked away . . . ." Id. Holmes followed, at which point they began arguing. "The defendant then pulled Holmes' head toward him and cut his throat with a razor blade." Id. Holmes initially assumed a fighting stance, thinking the defendant had punched him. After noticing that he was bleeding, however, Holmes left the restaurant. Holmes was subsequently taken to a local hospital, where an emergency medicine physician determined that he had "sustained a neck laceration that was approximately seven inches long . . . ." Id. Given the severity of his injury, Holmes was then transferred to another hospital, where he underwent surgery to repair his lacerated neck muscle and left external jugular vein.

The defendant was arrested and charged with both intentional assault and reckless assault. At trial, after the close of the state's case, the defendant moved for a judgment of acquittal. He argued, in part, that the charges were legally inconsistent because each charge required a mutually exclusive mental state. The trial court denied the motion, explaining that this court had held, in *State* v. *Nash*, supra, 316 Conn. 651, that intentional and reckless assault charges are legally consistent. See id., 666–69. Subsequently, the jury found the defendant guilty of both charges. The defendant filed a renewed motion for a judgment of acquittal and a motion for a new trial, asserting that the verdicts were legally inconsistent. The trial court denied both motions and rendered a judgment of conviction on both counts. The court then merged the convictions and sentenced the defendant to an enhanced mandatory minimum term of ten years incarceration, followed by twelve years of special parole on the count of intentional assault as a persistent dangerous felony offender.[2]

The defendant appealed from the judgment of conviction to the Appellate Court, claiming, among other things, that the trial court incorrectly had concluded that the verdicts were legally consistent. The Appellate Court subsequently affirmed the judgment of the trial court. *State* v. *Alicea*, supra, 191 Conn. App. 450. Relevant to this appeal, the Appellate Court concluded that the verdicts of guilty for both intentional assault and reckless assault were legally consistent. Id., 434. Relying on *State* v. *Nash*, supra, 316 Conn. 666–69, the court reasoned that, in order to find the defendant guilty of reckless assault, "the jury was required to find that the defendant engaged in conduct that . . . created a

[2] The defendant did not raise a claim, before the trial court or on appeal, that his federal or state constitutional protections against double jeopardy precluded his convictions. Accordingly, we express no opinion on that subject.

grave risk of death to Holmes, ultimately resulting in Holmes' serious physical injury. Such a conclusion is not inconsistent with the [jury's] finding that the defendant also intended to seriously injure Holmes," as it was required to find in order to find the defendant guilty of intentional assault. (Emphasis omitted.) *State* v. *Alicea*, supra, 434.

Thereafter, the defendant filed a petition for certification to appeal, which we granted, limited to the following issue: "Did the Appellate Court correctly conclude that the jury's verdicts of guilty of intentional assault and reckless assault were not legally inconsistent?" *State* v. *Alicea*, 333 Conn. 937, 219 A.3d 373 (2019).

On appeal, the defendant contends that the verdicts finding him guilty of intentional assault and reckless assault are legally inconsistent because their requisite mental states—intentional and reckless—are mutually exclusive. Specifically, he argues that the verdicts are inconsistent in this case because it was impossible for the jury to find both mutually exclusive mental states with respect to only one act, one victim, and one injury. In addition, he asserts that his legal inconsistency claim must be viewed in light of the state's theory of the case as presented to the jury at trial—namely, that the charges were brought in the alternative. The state contends that the Appellate Court correctly concluded that the convictions are consistent because each mental state pertains to a different *result*—in other words, the statutory objectives of each mental state are different. The state also asserts that we should not review the defendant's claim about the state's theory of the case because it is outside the scope of the certified question. In the alternative, the state strongly disputes the defendant's characterization of its theory of the case at trial.

The following legal principles guide our analysis of this claim. "A claim of legally inconsistent convictions,

also referred to as mutually exclusive convictions, arises when a conviction of one offense requires a finding that negates an essential element of another offense of which the defendant also has been convicted. . . . In response to such a claim, we look carefully to determine whether the existence of the essential elements for one offense negates the existence of [one or more] essential elements for another offense of which the defendant also stands convicted. If that is the case, the [convictions] are legally inconsistent and cannot withstand challenge. . . . Whether two convictions are mutually exclusive presents a question of law, over which our review is plenary." (Internal quotation marks omitted.) *State* v. *Chyung*, supra, 325 Conn. 245–46. "When a jury has returned legally inconsistent verdicts, there is no way for the reviewing court to know which charge the jury found to be supported by the evidence. . . . Accordingly, the court must vacate both convictions and remand the case to the trial court for a new trial." (Citation omitted; footnote omitted.) Id., 247.

In this case, the defendant was convicted of one count each of intentional assault in violation of General Statutes § 53a-59 (a) (1) and reckless assault in violation of § 53a-59 (a) (3). Section 53a-59 (a) (1) provides that an individual commits intentional assault when, "[w]ith *intent to cause serious physical injury* to another person, he causes such injury to such person . . . by means of a deadly weapon or a dangerous instrument . . . ." (Emphasis added.) Section 53a-59 (a) (3) provides that an individual commits reckless assault when, "under circumstances evincing an extreme indifference to human life he *recklessly engages in conduct which creates a risk of death* to another person, and thereby causes serious physical injury to another person . . . ." (Emphasis added.)

We have previously recognized that "the statutory definitions of 'intentionally' and 'recklessly' are mutu-

ally exclusive and inconsistent." *State* v. *King*, supra, 216 Conn. 593–94. Intentional conduct requires the defendant to possess a "*conscious objective . . . to cause*" the result described in the statute defining the offense. (Emphasis added.) General Statutes § 53a-3 (11). By contrast, reckless conduct requires that the defendant "is aware of and *consciously disregards* a substantial and unjustifiable risk" that the result described in the statute will occur. (Emphasis added.) General Statutes § 53a-3 (13). Thus, a reckless mental state is inconsistent with an intentional mental state because "one who acts recklessly does not have a conscious objective to cause a particular result." (Internal quotation marks omitted.) *State* v. *King*, supra, 594.

We have held, however, that convictions involving both intentional and reckless mental states are legally consistent in certain circumstances. For example, when each mental state pertains to a different act, a different victim, or a different injury, then the convictions are consistent. See, e.g., *State* v. *King*, supra, 321 Conn. 144 (convictions for intentional and reckless assault are legally consistent when "the jury reasonably could have found that the defendant's conduct amounted to two separate acts"); *State* v. *Hinton*, 227 Conn. 301, 315, 630 A.2d 593 (1993) (convictions for intentional and reckless assault are legally consistent when defendant intended to injure one person and recklessly disregarded risk to bystanders because "here we have two different victims and therefore two different results"). Significantly, we have also explained that convictions involving both intentional and reckless mental states may be legally consistent when each mental state pertains to a different *result*. *State* v. *Nash*, supra, 316 Conn. 666 ("there is no reason why a person cannot simultaneously act intentionally and recklessly with respect to the same conduct and the same victim if each of those two mental states pertains to a different

result" (emphasis omitted)). "[M]ental states . . . exist only with reference to particular results . . . . Thus, it is necessary to examine the mental state element as it arises in [the] particular statute defining [the] offense to determine whether actual inconsistency exists." (Internal quotation marks omitted.) Id., 668.

We find our decisions in *Nash* and *King 2016* to be particularly instructive in this case. In *Nash*, the defendant was convicted of, among other crimes, both intentional and reckless assault under § 53a-59 (a) (1) and (3) after he fired several shots into a home, one of which injured the homeowner's sister. Id., 654. We held that the defendant's convictions were not legally inconsistent. Id., 666–69. We reasoned that "the two mental states required to commit the offenses relate to different results" because, "in order to find the defendant guilty of those offenses, the jury was required to find that the defendant intended to injure another person and that, in doing so, he recklessly created a risk of that person's death." Id., 666. We concluded that "the jury reasonably could have found that the defendant simultaneously possessed both mental states . . . ." Id., 667–68. We applied *Nash* to uphold convictions of intentional and reckless assault again in *King 2016*. In that case, the defendant brandished his knife before stabbing the victim several times. *State* v. *King*, supra, 321 Conn. 138–39. We held that the convictions were not legally inconsistent because, under *Nash*, "the jury reasonably could have found that when the defendant stabbed the victim, he intended to cause serious injury to her and that he also recklessly engaged in conduct [that created] a risk of the victim's death. . . . That is, the defendant's act of stabbing the victim is consistent with two different mental states, each related to two different results." (Citation omitted; internal quotation marks omitted.) Id., 145.

In the present case, *Nash* squarely governs our examination of the mental state elements of intentional and reckless assault and demonstrates that the convictions are not legally inconsistent. In order to find the defendant guilty of both charges, the jury was required to find—with respect only to the mental state element of each charge—that the defendant (1) consciously intended to cause Holmes serious physical injury, and (2) consciously disregarded the risk that his conduct would result in Holmes' death. The jury reasonably could have found that the defendant simultaneously possessed both mental states pertaining to his singular action of cutting Holmes' throat. In other words, the jury reasonably could have found that the defendant intended to cause Holmes serious physical injury and simultaneously disregarded the risk that his conduct would cause Holmes' death. Therefore, the convictions are not legally inconsistent.

The defendant nonetheless contends that his convictions are legally inconsistent for two reasons. First, he asserts that we stated in *King 1990* and *Chyung* that the mutually exclusive mental states must pertain to distinct acts or injuries. He argues that these cases can be read consistently with *Nash* and *King 2016* by examining the respective facts of each case. He further contends that the facts of this case are more analogous to *King 1990* and *Chyung* because each of these three cases involved only one act and one injury, whereas *Nash* and *King 2016* involved multiple acts and multiple potential injuries. Second, the defendant argues that the state is bound by the theory of the case it presented at trial, namely, that the charges were alternatives. Specifically, he contends that the state cannot now argue that the convictions are legally consistent because it did not present the charges to the jury as consistent. We address each argument in turn.

First, the defendant asserts that our case law establishes that "two different injuries are required in order for a defendant to be convicted of two different offenses requiring proof of mutually exclusive mental states." (Emphasis omitted.) For this proposition, he relies on *King 1990* and *Chyung*. In *King 1990*, the defendant was convicted of, among other things, attempted murder and reckless assault for lighting a fellow prisoner's cell on fire and rigging the door to trap him inside. *State* v. *King*, supra, 216 Conn. 586–88. In *Chyung*, the defendant was convicted of murder and manslaughter in the first degree with a firearm for placing a gun into a bag, when it suddenly discharged, killing the victim. *State* v. *Chyung*, supra, 325 Conn. 241. In both cases, this court concluded that the convictions were legally inconsistent because, "[t]o return verdicts of guilty for both [charges] . . . the jury would have had to find that the defendant simultaneously acted intentionally and recklessly with regard to the same act and the same result, *i.e.*, *the injury to the victim*." (Emphasis added.) *State* v. *King*, supra, 593; accord *State* v. *Chyung*, supra, 246–48. Specifically, in *King 1990*, we reasoned that the defendant could not have both consciously intended to cause the victim's death, as required by the attempted murder conviction, while also recklessly disregarding the risk of the victim's death, as required by the reckless assault conviction. *State* v. *King*, supra, 593–94; see also *State* v. *Chyung*, supra, 247–48.

In the present case, the defendant contends that our holdings in *King 1990* and *Chyung* establish that mutually exclusive mental states are legally consistent only if they pertain to different acts or injuries because these cases define "result" as "injury to the victim." (Emphasis omitted; internal quotation marks omitted.) In addition, the defendant argues that comparing the facts of these cases with the facts of *Nash* and *King 2016* further delineates this rule. Specifically, *King 1990* and

Chyung each involved only one act—respectively, the single act of trapping the victim in the locked prison cell and the single discharge from the gun—and one injury, and, therefore, the convictions were inconsistent. By contrast, *Nash* and *King 2016* each involved multiple acts or multiple injuries—respectively, multiple shots fired and multiple stab wounds inflicted—and, therefore, the convictions were consistent. The defendant asserts that his legal inconsistency claim hinges on this factual distinction because, "[w]hen there are multiple blows, multiple stabs, multiple shots fired, or more than one victim, it is at least possible for a jury to find a defendant guilty of two conflicting [mental state] crimes, and the verdicts will not be held to be legally inconsistent." The defendant further asserts that the present case is more analogous to *King 1990* and *Chyung* because he engaged in a single act to inflict a single laceration. Therefore, he contends, the mutually exclusive mental states pertain to a single "result" and are legally inconsistent.

We are not persuaded by the defendant's interpretation of our case law. In *Nash*, we rejected the same argument the defendant raises here, reasoning that "[t]he relevant inquiry . . . is whether the opposing mental states relate to the same result, not whether both convictions relate to the same injury." *State* v. *Nash*, supra, 316 Conn. 668. The word "result" in this context referred to the result *of the requisite mental state*, or, in other words, the statutory objective associated with the respective mental state. See id., 669 and n.18. This is "separate and distinct" from the injury-in-fact element required for each conviction. Id., 669. Moreover, we explained that "[n]othing that we said in [*King 1990*] . . . should be read to mean that . . . the relevant inquiry is whether the statutes at issue require findings that the defendant caused the same injury to the victim. Rather . . . [the convictions] are

legally inconsistent only if they require that the defendant possess the opposing mental states with respect to the same *objective* . . . .'' (Emphasis added.) Id., 669 n.18. Therefore, in *Nash*, we considered and expressly rejected the same argument the defendant raises here.[3]

Additionally, the defendant overestimates the degree to which the rationales of all four cases turned on the facts of each case rather than the statutory elements of the respective charges. The defendant relies on language from *King 1990* and *Chyung* that the mental states must pertain to different *injuries*; however, the outcomes of all four cases actually hinged on the *objective* associated with each statutory, mental state element, not the acts performed by the defendants or the injuries suffered by the victims. *Nash* expressly articulated this rule, but all four cases have employed it. For example, in *King 2016*, we noted that ''the jury reasonably could have found that the defendant's conduct amounted to two separate acts''; *State* v. *King*, supra, 321 Conn. 144; but we also applied *Nash* to conclude that the verdicts would be consistent even under the theory that the defendant's conduct amounted to only one act.[4] Id., 144–45.

[3] *Chyung* repeated the same language from *King 1990* identifying the relevant ''result'' as ''the injury to the victim.'' (Internal quotation marks omitted.) *State* v. *Chyung*, supra, 325 Conn. 246, quoting *State* v. *King*, supra, 216 Conn. 593. However, contrary to the defendant's assertion, the inclusion of that quotation by this court in *Chyung* did not alter the relevant inquiry because *Nash* had clarified that language.

[4] The defendant also contends that, to the extent that we disagree with his interpretation of *Nash*, we should overrule *Nash* in favor of the language subsequently articulated in *Chyung*. Specifically, the defendant argues that *Nash* draws a distinction between the result associated with the mental state and the result of the conduct that is artificial because ''an individual who intends to cause serious physical injury . . . will necessarily consciously and intentionally create a risk of death and, therefore, cannot create such a risk unintentionally.'' In addition, the defendant notes that the ''serious physical injury'' objective associated with intentional assault is defined as ''physical injury *which creates a substantial risk of death*''; (emphasis added) General Statutes § 53a-3 (4); which is identical to the ''risk of death'' objective associated with reckless assault. We disagree for two reasons. First, § 53a-

Finally, the defendant claims that the state has impermissibly changed its theory of the case on appeal. The following additional procedural history is relevant to the defendant's argument. During trial, following the state's presentation of its case-in-chief, the defendant orally moved for a judgment of acquittal on the ground that the charges were legally inconsistent. *State* v. *Alicea*, supra, 191 Conn. App. 436. At oral argument on the motion, the prosecutor indicated that he intended to argue to the jurors that, "if they find [the defendant] not guilty [of intentional assault], that they should proceed to determine whether he's reckless . . . ." The trial court, however, concluded that the charges were legally consistent under *Nash*, and it denied the defendant's motion. Subsequently, during closing argument, the prosecutor explained to the jury that, "if you do not agree [that the state has proven intentional assault], you don't believe the evidence supports that, I submit to you that the evidence and the record show, at the very least, that [the defendant] acted recklessly." Consistent with its ruling on the defendant's motion, the trial court instructed the jury to consider each charge separately.

The defendant contends that the state argued to the jury that the charges of intentional and reckless assault were *alternatives*, meaning that the jury could not find the defendant guilty of both counts. The defendant also contends that the state argued "for the first time" in its opposition to the defendant's postverdict, renewed motion for a judgment of acquittal and to his motion

3 (4) does not limit its definition of "serious physical injury" to an injury that creates a substantial risk of death; rather, it continues, "*or* which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." (Emphasis added.) Second, contrary to the defendant's assertion, the rule from *Nash* does not lead to a bizarre result here. The jury reasonably could have found that the defendant intended to cause Holmes serious physical injury and, in doing so, disregarded the risk that such conduct would simultaneously create a risk that Holmes would die.

for a new trial that the verdicts were legally consistent under *Nash*. On appeal, the defendant argues that the state cannot change its theory of the case postverdict to avoid the verdicts' legal inconsistency. The state asserts that this issue is distinct from the legal consistency issue and, therefore, unreviewable as outside the scope of the certified question. Alternatively, the state strongly disputes the defendant's characterization of its presentation of the case to the jury, arguing that it never presented the charges to the jury as alternatives.

The "theory of the case" doctrine is rooted in the due process owed to criminal defendants. See, e.g., *Dunn* v. *United States*, 442 U.S. 100, 106, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979) ("[t]o uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process"); *State* v. *Robert H.*, 273 Conn. 56, 82, 866 A.2d 1255 (2005) ("[t]he 'theory of the case' doctrine is rooted in principles of due process of law"); see also, e.g., *State* v. *Scruggs*, 279 Conn. 698, 718, 905 A.2d 24 (2006) (under claim of insufficient evidence, "in order for any appellate theory to withstand scrutiny . . . it must be shown to be not merely before the jury due to an incidental reference, but as part of a coherent theory of guilt" (internal quotation marks omitted)).

We have at least once applied the theory of the case doctrine to a legal inconsistency analysis. In *Chyung*, the state argued on appeal that "the jury reasonably could have found that the defendant engaged in two separate acts," which would have rendered the verdicts consistent. *State* v. *Chyung*, supra, 325 Conn. 255. We reasoned that, because the state "never presented this theory to the jury during trial," it could not rely on this theory to save the otherwise legally inconsistent verdicts. Id., 255–56. This analysis was consistent with the view previously expressed by the dissent in *King*

2016 that "the legal consistency of the verdict must be considered in light of the state's theory of the case at trial." *State* v. *King*, supra, 321 Conn. 159 n.2 (*Robinson*, *J.*, dissenting). Together, these cases establish that the theory of the case doctrine may be defensively incorporated into a legal inconsistency claim; that is, a defendant may preclude the state from relying on a novel factual theory of the case on appeal because a new theory cannot transform inconsistent verdicts into consistent ones if it was not presented to the jury at trial.[5] In other words, the theory of the case doctrine is embedded in the legal inconsistency analysis to the extent necessary to tether the state to the factual theory it presented to the jury.[6]

[5] The state contends that the court in *Chyung* "made a mistake" in "departing from" the majority in *King 2016* when it declined to uphold the convictions under the state's novel factual theory of the case. We disagree with this characterization of our jurisprudence. The majority in *King 2016* avoided binding the state to either of the disputed factual theories of the case by reasoning that, even under the theory of the case that the defendant claimed the state presented to the jury, the convictions were legally consistent pursuant to *Nash*. See *State* v. *King*, supra, 321 Conn. 144–45. The dissent in *King 2016* maintained that the state should have been bound to that theory on appeal, but it agreed with the majority that the convictions were consistent under that theory. Id., 158–59 and n.2 (*Robinson*, *J.*, dissenting). This court in *Chyung* instead concluded that the convictions were legally inconsistent; we were then required to determine whether the state could rely on a novel factual theory on appeal, which was a point of tension between the majority and the dissent in *King 2016*. The court in *Chyung* resolved this tension by concluding that permitting the state to rescue otherwise inconsistent convictions by presenting a novel factual theory on appeal would deprive the defendant of due process. *State* v. *Chyung*, supra, 325 Conn. 255–56. This holding was no mistake; rather, it employed long held and uncontroversial principles of due process jurisprudence.

[6] Our cases establish a second avenue through which the theory of the case doctrine becomes relevant to a legal consistency claim. A defendant may raise an independent claim that he lacked adequate notice that he could be convicted of both charges due to some aspect of the state's legal or factual theory of the case as presented to the jury. See *State* v. *King*, supra, 321 Conn. 145, 148. This avenue is also rooted in the due process concerns that inform the theory of the case doctrine. Unlike the "defensive" posture, however, this posture is "offensive" in the sense that it provides a defendant with another independent avenue to challenge the convictions. In *King*

The defendant in this case argues that, as in *Chyung*, the state cannot maintain that his convictions are consistent on appeal because its theory of the case at trial contemplated the charges as alternatives. We review the defendant's argument to the extent that it is encompassed within his legal consistency claim and is not an attempt to raise a distinct due process claim rooted in notice considerations. See footnote 6 of this opinion. Nevertheless, the defendant's argument is unpersuasive because there is an important distinction between this case and *Chyung*. In *Chyung*, the novel theory on which the state sought to rely was factual, not legal. The state argued to the jury that the defendant's conduct was one act but then sought to avoid legal inconsistency by arguing on appeal that the defendant's conduct could constitute two acts. *State* v. *Chyung*, supra, 325 Conn. 255–56. Here, there is no suggestion that the state has changed its *factual* theory of the case on appeal, for example, to assert that the defendant's conduct constituted multiple acts or encompassed multiple victims. Even if we assume that the defendant is correct that the state presented the charges as alternatives at trial, this would have been the state's *legal* theory of the case. We need not inquire whether this legal theory represented a litigation tactic or a misapprehension of our legal consistency jurisprudence. In this case, the trial court properly instructed the jury to consider each charge separately based on its conclusion that the charges of reckless assault and intentional assault were

2016, we clarified that this due process analysis and the legal consistency analysis "are ultimately separate issues and reviewing courts should evaluate them as such." Id., 148; see also id., 159 n.2 (*Robinson*, *J.*, dissenting) (agreeing with majority that "the legal inconsistency and theory of the case issues in this appeal are doctrinally separate inquiries"). In the present case, although the defendant raised a separate due process claim before the Appellate Court; *State* v. *Alicea*, supra, 191 Conn. App. 435; he makes no such claim before this court; nor did he seek certification on such an issue.

not legally inconsistent.[7] As we have often explained, the jury is bound to apply the law as instructed by the trial court. See, e.g., *State* v. *Reynolds*, 264 Conn. 1, 131, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). Moreover, as explained, the defendant here does *not* raise a distinct claim that he lacked adequate notice that he could be convicted of both charges in light of the state's legal theory of the case at trial. See footnote 6 of this opinion.

In sum, the state is bound to the factual theory of the case that it presented to the jury at trial. Here, there is no claim that the state changed its factual theory of the case postconviction. Moreover, as the trial court correctly explained, we have repeatedly stated that convictions of intentional and reckless assault are not legally inconsistent, and the court properly instructed the jury on this point. We presume that the jury followed the trial court's instructions.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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[7] In addition, we need not consider whether *Chyung* would bar a novel legal theory raised by the state postverdict when the trial court *improperly* instructed the jury on the law. Here, the trial court *properly* instructed the jury to consider the legally consistent charges separately.