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

Alvord, Suarez and Palmer, Js.

Syllabus

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

1. The habeas court abused its discretion in denying the petition for certification to appeal; the resolution of the petitioner's claims of prosecutorial impropriety were debatable among jurists of reason, could be resolved by a court in a different manner and were adequate to deserve encouragement to proceed further.
2. The petitioner could not prevail on his claim that he was deprived of his due process right to a fair trial, which was based on his assertion that N and M had rendered ineffective assistance by failing to raise claims of prosecutorial impropriety:

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

   b. The petitioner's claim that the prosecutor improperly expressed his

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

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

d. Two remarks of the prosecutor that sought to convince the jury that it was required to find the petitioner guilty unless it concluded that the state's witnesses had lied were improper, although other remarks that the petitioner challenged conveyed no such suggestion to the jury.

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

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

3. The habeas court did not abuse its discretion in denying the petitioner's motion to open the evidence to allow him additional time to uncover evidence of an undisclosed deal between R and the state for his testimony against the petitioner; the petitioner was aware at his second criminal trial that R had been facing criminal charges that were dropped following his statement to the police identifying the petitioner as the shooter, as defense counsel emphasized these facts in closing argument, and, even

though the habeas court had granted the petitioner's motion to reconsider its original decision on his habeas petition, in light of the context of the case, the court was not required to grant the motion to open, which was filed eleven months after the habeas trial concluded.

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

Procedural History

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

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

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

Opinion

PALMER, J. In 1998, a jury found the petitioner, Daryl Valentine, guilty of two counts of murder and other offenses stemming from a 1991 altercation outside a diner in New Haven during which three men were shot, two of them fatally. The petitioner's conviction was affirmed on direct appeal and, thereafter, he filed a petition for a writ of habeas corpus, which was denied. He subsequently filed the present habeas action, which was dismissed in part and denied in part. Following the denial of his petition for certification to appeal, the petitioner appeals from the judgment of the habeas court, claiming that the court (1) abused its discretion in denying his petition for certification to appeal, (2) improperly concluded, first, that the petitioner's due process rights were not violated by improprieties of the trial prosecutor during closing argument and, relatedly, that he was not deprived of his right to the effective assistance of counsel by virtue of the failure of appellate counsel and first habeas counsel to raise that due process claim on direct appeal and in the first habeas petition, respectively, and (3) improperly denied his motion to open the evidence. We agree with the petitioner that the habeas court abused its discretion in denying the petition for certification to appeal. We nevertheless agree with the respondent, the Commissioner of Correction, that the petitioner has neither established that prosecutorial improprieties deprived him of his right to a fair trial nor has he demonstrated that appellate counsel and first habeas counsel were ineffective in failing to raise that claim. We also conclude that the denial of the petitioner's motion to open the evidence was not an abuse of discretion. Accordingly, we affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of this appeal. In 1994, following a jury trial, the petitioner was convicted of two counts of murder, one count of attempt to commit assault in the first degree and one count of carrying a pistol without a permit. The petitioner appealed from the judgment of conviction to our Supreme Court, which determined that the trial court improperly had precluded the petitioner from adducing certain extrinsic evidence offered to impeach a key witness' identification of the petitioner as the shooter. *State* v. *Valentine*, 240 Conn. 395, 402–405, 692 A.2d 727 (1997). Concluding that the error was harmful, our Supreme Court reversed the judgment of conviction and remanded the case for a new trial. Id., 419. Following a second trial in 1998, a jury again found the petitioner guilty of the same four charges. *State* v. *Valentine*, 255 Conn. 61, 64, 762 A.2d 1278 (2000). On appeal, our Supreme Court affirmed the judgment of conviction and set forth the following facts, which the jury reasonably could have found from the evidence: "On September 21, 1991, shortly before 3 a.m., Andrew

Paisley, [Harry] Poole, and Christopher Roach arrived at the Athenian Diner, located on Whalley Avenue in New Haven. The diner was very busy, and a large crowd of people was waiting outside. As the three men approached the front of the diner, they saw people fighting on the steps of the diner. [Byron] McFadden, a witness for the state, heard an individual whom he identified as Tyrone Adams say: 'Shoot him, shoot him, [expletive] it, shoot him.' Shortly afterward, the [petitioner] came around from the side of the diner and fired several gunshots that hit and fatally wounded both Paisley and Poole. The [petitioner] then ran to a parked car and got into the front passenger seat. Roach chased after him and approached the driver's side of the car. The [petitioner] shot Roach twice in the forearm through the open driver's side window and the car sped away. . . .

"On September 21, 1991, Tara Brock, Regina Coleman, and Kristina Higgins were sitting in a parked car in the Athenian Diner parking lot when they witnessed the shooting. That same day, [Detective Joseph Greene of the New Haven Police Department], the lead detective in the shooting, spoke to Coleman at her home based on a tip that she may have been present during the shooting. Coleman told Greene that she was at a party at the time of the shooting and did not know what had happened. On September 26, 1991, Higgins provided the police with a tape-recorded statement in which she identified the [petitioner] as the shooter. She also identified the [petitioner] in a photographic array. On September 28, 1991, Greene brought Coleman to the police station for questioning. At the station, Coleman also gave the police a tape-recorded statement in which she identified the [petitioner] as the shooter. She also positively identified the [petitioner] from a photographic array. On October 1, 1991, Higgins signed a typewritten version of her recorded statement. On October 10, 1991, however, Coleman refused to sign a typewritten version of the recorded statement that she had given to the police.

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

continued to interrogate her and had pressured and bribed her to elicit the statement.

"During the [petitioner's] second trial,[1] Higgins maintained that Greene had coerced her to fabricate her tape-recorded statement. The trial court again admitted her statement for substantive purposes under *Whelan* and also admitted her prior trial testimony for impeachment purposes. Coleman testified that she did not remember the shooting or giving a recorded statement. She also testified that she did not recall testifying in the first trial against the [petitioner]. She did, however, acknowledge that she had identified the [petitioner] in a photographic array. The state introduced her statement as a prior inconsistent statement for impeachment purposes. Coleman testified that she did not remember saying that the tape-recorded statement was untrue nor did she remember whether Greene had told her what to say or had pressured her in any way. She also testified that Greene had not offered her any money, although she wished that he had. The trial court admitted her prior testimony for substantive purposes under *Whelan*." (Footnote added; footnote omitted.) *State* v. *Valentine*, supra, 255 Conn. 64–66.

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

On August 3, 2012, the petitioner filed his second petition for a writ of habeas corpus, which was amended on October 16, 2017 (amended petition). The amended petition, which is the operative petition for purposes of this appeal, alleges that the petitioner's right to the effective assistance of counsel was violated as a result of the failure of appellate counsel, Attorney G. Douglas Nash of the Office of the Public Defender (appellate counsel),[2] and first habeas counsel, Mullaney, to raise a claim in the petitioner's direct appeal and in his first habeas petition, respectively, that the petitioner's right to due process was violated as a result of prosecutorial improprieties during the criminal trial. The amended petition also raises a freestanding due process claim predicated on those alleged prosecutorial improprieties.[3]

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

assistance of his appellate counsel and first habeas counsel, respectively.

In a memorandum of decision filed March 19, 2021,[4] the habeas court agreed with the petitioner in part and found several instances of prosecutorial impropriety during closing argument. The habeas court also concluded, however, that the improprieties did not deprive the petitioner of a fair trial. In light of that determination, the habeas court further held that the failure of appellate counsel and first habeas counsel to raise a due process claim did not constitute deficient performance or result in prejudice to the petitioner and, therefore, the petitioner could not prevail on his claims of ineffective assistance of those counsel.

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

I

DENIAL OF PETITION FOR CERTIFICATION TO APPEAL

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

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the [disposition] of his . . . petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*,

229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he . . . must demonstrate that the denial of his . . . petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he . . . must then prove that the decision of the habeas court should be reversed on its merits. . . .

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

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Crenshaw* v. *Commissioner of Correction*, 215 Conn. App. 207, 215–16, 281 A.3d 546, cert. denied, 345 Conn. 966, 285 A.3d 389 (2022).

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

II

INEFFECTIVE ASSISTANCE OF APPELLATE AND FIRST HABEAS COUNSEL

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

Whether a habeas court properly dismissed or denied

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

"The petitioner's right to the effective assistance of counsel is assured by the sixth and fourteenth amendments to the federal constitution, and by article first, § 8, of the constitution of Connecticut." (Internal quotation marks omitted.) *Pierce* v. *Commissioner of Correction*, 100 Conn. App. 1, 10, 916 A.2d 864, cert. denied, 282 Conn. 908, 920 A.2d 1017 (2007). "Our Supreme Court has adopted [the] two part analysis [set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] in reviewing claims of ineffective assistance of appellate counsel. . . . The first part of the *Strickland* analysis requires the petitioner to establish that appellate counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . The right to counsel is not the right to perfect representation. . . . [Although] an appellate advocate must provide effective assistance, he is not under an obligation to raise every conceivable issue. A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions. . . . Indeed, [e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. . . . Most cases present only one, two, or three significant questions. . . . The effect of adding weak arguments will be to dilute the force of the stronger ones. . . . Finally, [i]f the issues not raised by his appellate counsel lack merit, [the petitioner] cannot sustain even the first part of this dual

burden since the failure to pursue unmeritorious claims cannot be considered conduct falling below the level of reasonably competent representation." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 131 Conn. App. 805, 808–809, 29 A.3d 166 (2011).

Our Supreme Court has distinguished the standards of review for claims of ineffective assistance of trial counsel and appellate counsel as they pertain to the prejudice prong of *Strickland*. See *Small* v. *Commissioner of Correction*, 286 Conn. 707, 721–24, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). "For claims of ineffective appellate counsel, the second prong [of *Strickland*] considers whether there is a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have prevailed in his direct appeal, i.e., reversal of his conviction or granting of a new trial. . . . This requires the reviewing court to [analyze] the merits of the underlying claimed error in accordance with the appropriate appellate standard for measuring harm." (Citation omitted; internal quotation marks omitted.) *Williams* v. *Commissioner of Correction*, 169 Conn. App. 776, 793, 153 A.3d 656 (2016). "On appeal, the petitioner must overcome the presumption that, under the circumstances, the challenged action might be considered sound [appellate] strategy. . . . *Otto* v. *Commissioner of Correction*, 161 Conn. App. 210, 226, 136 A.3d 14 (2015), cert. denied, 321 Conn. 904, 138 A.3d 281 (2016); see also *Alterisi* v. *Commissioner of Correction*, 145 Conn. App. 218, 227, 77 A.3d 748 (tactical decision of appellate counsel not to raise particular claim ordinarily matter of appellate tactics and not evidence of incompetency), cert. denied, 310 Conn. 933, 78 A.3d 859 (2013)." (Internal quotation marks omitted.) *Salters* v. *Commissioner of Correction*, 175 Conn. App. 807, 829–30, 170 A.3d 25, cert. denied, 327 Conn. 969, 173 A.3d 954 (2017); see also *Camacho* v. *Commissioner of Correction*, 148 Conn. App. 488, 496, 84 A.3d 1246 ("The determination of which issues to present, and which issues not to present, on an appeal is by its nature a determination committed to the expertise of appellate counsel, and not to his client. . . . [A] habeas court will not, with the benefit of hindsight, second-guess the tactical decisions of appellate counsel." (Citation omitted; internal quotation marks omitted.)), cert. denied, 311 Conn. 937, 88 A.3d 1227 (2014).

With respect to the petitioner's claim of ineffective assistance of first habeas counsel, "[o]ur Supreme Court, in *Lozada* v. *Warden*, 223 Conn. 834, 843, 613 A.2d 818 (1992), established that habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing what is commonly known as a habeas on a habeas, namely, a second petition for a writ of habeas corpus . . . challenging

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

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

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

"Furthermore, for any ineffective assistance claim, we also are cognizant that the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential. . . . Because of the difficulties inherent in making the evalu-

ation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Emphasis in original; internal quotation marks omitted.) *Edwards* v. *Commissioner of Correction*, 141 Conn. App. 430, 438–39, 63 A.3d 540, cert. denied, 308 Conn. 940, 66 A.3d 882 (2013).

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

The petitioner points to seventeen statements that he claims deprived him of a fair trial. At the outset, we note that, at trial, defense counsel objected to only two of the alleged improprieties, both of which pertained to the prosecutor's references to facts not in evidence,[6] and, in each such case, the trial court sustained the petitioner's objection and gave the jury a curative

instruction as requested by the petitioner. As to five of the challenged statements, all of which were made by the prosecutor during rebuttal closing argument and were found by the habeas court to constitute improprieties, the respondent concedes that they were improper. Those five statements by the prosecutor, which include the two remarks to which defense counsel objected, are (1) a comment that "[j]ustice for [the] victims and for society requires that you find the [petitioner] in this case guilty of the murders he committed and the shootings that he did";[7] (2) a remark that "several of you gave looks that said, we don't believe that one,"[8] which the prosecutor made in reference to the response of defense witness Brock that the police "just kind of asked [her] to go there" after she was questioned "about why she would go back to the police department after they had been so mean to her the first time [she went there]"; (3) a statement, made immediately after commenting about defense witness Crystal Green[9] and the changes in her life since the time of the shooting, that "I think that I noticed a whole bunch of you being as impressed as I was [with Green]";[10] (4) a comment that the petitioner's codefendant, Adams, "ha[d] been charged with the same murder";[11] and (5) a reference to the petitioner's height and weight, which were not in evidence, when the prosecutor, after recounting the unchallenged testimony of a witness describing the shooter as "brown skinned, 165, or 160 to 165, five foot seven or five foot eight, burgundy colored sweatshirt with a hood and dark pants," stated, "[w]hat a coincidence, the shooter just happens to have the same height, weight, build, and skin tone, and clothing as the [petitioner] had on that night . . . ."[12] In light of the respondent's concession regarding the improper nature of these five comments, we need not consider that issue further. See *State* v. *Thompson*, 266 Conn. 440, 461–62, 832 A.2d 626 (2003) ("[T]he state concedes that some of the remarks of the assistant state's attorney were improper. . . . It is not necessary, therefore, for us to determine whether [those] particular remarks were improper.").

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

Before addressing those claimed improprieties, we summarize the principles governing claims of prosecutorial impropriety. "In analyzing [such] claims . . . we engage in a two step analytical process. . . . The two

steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . [W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . .'' (Internal quotation marks omitted.) *State* v. *Sinclair*, 173 Conn. App. 1, 16–17, 162 A.3d 43 (2017), aff'd, 332 Conn. 204, 210 A.3d 509 (2019).

In assessing whether a defendant's right to a fair trial has been violated, appellate courts consider the factors set forth in *State* v. *Williams*, 204 Conn. 523, 529 A.2d 653 (1987) (*Williams* factors). Those factors include ''[1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case.'' (Citations omitted.) Id., 540. As our Supreme Court has observed, in applying these factors, the reviewing court should be mindful of the fact that ''it is not the prosecutor's conduct alone that guides [the] inquiry, but, rather, the fairness of the trial as a whole.'' (Internal quotation marks omitted.) *State* v. *Weatherspoon*, 332 Conn. 531, 556, 212 A.3d 208 (2019).

Although the petitioner preserved his claims of prosecutorial impropriety with respect to only two of the seventeen statements by the prosecutor that he now challenges on appeal, it is not necessary for this court to apply the four-pronged *Golding* test[13] to his unpreserved claims. As our Supreme Court has explained, ''[t]he reason for this is that the defendant in a claim of prosecutorial [impropriety] must establish that the prosecutorial [impropriety] was so serious as to amount to a denial of due process . . . . In evaluating whether the [impropriety] rose to this level, we consider the factors enumerated . . . in *State* v. *Williams*, [supra, 204 Conn. 540]. . . . The consideration of the fairness of the entire trial through the *Williams* factors duplicates, and, thus makes superfluous, a separate application of the *Golding* test.'' (Footnote omitted; internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 35, 100 A.3d 779 (2014). Nevertheless, that ''does not mean . . . that the absence of an objection at trial does not play a significant role in the application of the *Williams* factors. To the contrary, the determination of whether a new trial or proceeding is warranted depends, in part, on whether defense counsel has made a timely objection to any [incident] of the prosecutor's improper [conduct]. When defense counsel does not object, request a curative instruction or move for a mistrial, he presum-

ably does not view the alleged impropriety as prejudicial enough to seriously jeopardize the defendant's right to a fair trial. . . . [Thus], the fact that defense counsel did not object to one or more incidents of [impropriety] must be considered in determining whether and to what extent the [impropriety] contributed to depriving the defendant of a fair trial and whether, therefore, reversal is warranted." (Internal quotation marks omitted.) Id., 36–37.

This court previously has recognized that "[p]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . [B]ecause closing arguments often have a rough and tumble quality about them, some leeway must be afforded to the advocates in offering arguments to the jury in final argument. [I]n addressing the jury, [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." (Citation omitted; internal quotation marks omitted.) *State* v. *Sinclair*, supra, 173 Conn. App. 17. "Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence upon jurors. His conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment. If the accused [is] guilty, he should [nonetheless] be convicted only after a fair trial, conducted strictly according to the sound and well-established rules which the laws prescribe. While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider. . . .

"Just as the prosecutor's remarks must be gauged in the context of the entire trial, once a series of serious improprieties has been identified [appellate courts]

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

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

A

Whether Habeas Court Applied Correct Standard

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

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

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

Our review of the relevant case law reveals that, as in *Thompson*, both our Supreme Court and this court frequently have considered whether a challenged remark of a prosecutor was responsive to a defense theory or argument in determining whether the remark was improper in the first instance. See, e.g., *State* v. *Singh*, supra, 259 Conn. 716 n.22 (concluding that challenged comment of prosecutor was not improper because "comment was invited by defense counsel's argument"); *State* v. *Burton*, 258 Conn. 153, 166–69, 778 A.2d 955 (2001) (rejecting claim that prosecutor improperly vouched for credibility of state's witnesses

because challenged statements were made in response to defendant's attack on credibility of victim and victim's friend); *State* v. *Joseph R. B.*, 173 Conn. App. 518, 534, 164 A.3d 718 (challenged comment of prosecutor was invited by argument of defense counsel and, thus, was not improper), cert. denied, 326 Conn. 923, 169 A.3d 234 (2017); *State* v. *Fasanelli*, 163 Conn. App. 170, 176, 182, 133 A.3d 921 (2016) (certain comments by prosecutor that allegedly denigrated defense counsel were not improper because they were based on evidence and "attacked only the theory of defense," not defense counsel); *State* v. *Morgan*, 70 Conn. App. 255, 294–95, 797 A.2d 616 (remarks of prosecutor were not improper because they "were fair descriptions of the evidence presented and fair criticisms of the defendant's theory of defense"), cert. denied, 261 Conn. 919, 806 A.2d 1056 (2002).

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

B

Expressions of Personal Opinion Regarding the Credibility of Witnesses

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

The general rules governing claims of this kind are clear. "[A] prosecutor may not express his own opinion, directly or indirectly, as to the credibility of the witnesses. . . . Nor should a prosecutor express his opinion, directly or indirectly, as to the guilt of the defendant." (Internal quotation marks omitted.) *State* v. *Santiago*, supra, 269 Conn. 735. This prohibition is necessary because "[s]uch expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position." (Internal quotation marks omitted.) Id. "[T]he prosecutor's opinion carries with it the imprimatur of the [state] and may induce the jury to trust the [state's] judgment rather than its own view of the evidence. . . . Moreover, because the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions." (Citation omitted; internal quotation marks omitted.) *State* v. *Thompson*, supra, 266 Conn. 462.

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

"A prosecutor's mere use of the words 'honest,' 'credible,' or 'truthful' does not, per se, establish prosecutorial impropriety. In *State* v. *Luster*, [279 Conn. 414, 438 n.7, 902 A.2d 636 (2006)], this court found no prosecutorial impropriety when the prosecutor pointed to a witness' testimony and stated that "'[the witness] was, I think, if you will look at his testimony, honest and open with [us.'" This] court reasoned that the prosecutor had not made bald assertions that the state's witnesses had been honest such that his remarks might constitute the 'unsworn and unchecked testimony' suggestive of a prosecutor's 'special position' and his 'access to matters not in evidence,' which a jury may infer to have 'precipitated the [prosecutor's] personal opinions' of the witness' veracity. . . . Id., 435. Instead, the prosecutor in that case had referred to the facts adduced at trial, the witness' demeanor on the witness stand, and testimony indicating that its witness, unlike the other witnesses, had no personal connection to either the victim or the defendant. Id., 439." (Citation omitted.) *State* v. *Ciullo*, supra, 314 Conn. 41.

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

The second statement that the petitioner challenges as an improper expression of personal opinion is the comment, "[w]ell, I think that's true," which the prosecutor made during argument discussing Coleman's testimony that she "didn't want to get involved . . . ." The habeas court also found no impropriety with respect to this remark, stating: "[T]he prosecutor made this statement in the midst of his argument to the jury about the evidentiary value [the jury] should afford Coleman's prior testimony in light of her testimony at the criminal trial wherein she testified that she was coerced into making the statements that implicated the petitioner in the shooting. The case centered on credibility determinations of several witnesses and certain statements made by those witnesses. Coleman was instrumental to both sides' theories of the case because she was one of the witnesses that identified the petitioner as the shooter in her written statement, but she testified at trial that she was coerced into giving her statement and that she did not remember the substantive portions of her statement. In context, the prosecutor's statement about the truth of her statements amount[s] to no more than imprecise use of the [first] person in arguing the credibility of certain portions of Coleman's prior testimony based on the evidence corroborating that testimony. Moreover, in making this statement the prosecu-

tor is arguing that certain portions of Coleman's prior testimony [are] more credible than others, not that Coleman is more credible than any other witnesses. Accordingly, the court finds that this statement does not constitute an expression of the prosecutor's personal opinion as to Coleman's credibility." We agree with the habeas court's conclusion.

This court has stated previously that " '[t]he mere use of phrases such as "I would think," "I would submit," and "I really don't think," does not transform a closing [argument] into the improper assertions of personal opinion by [a prosecutor].' . . . '[U]se of the personal pronoun I is a normal and ordinary use of the English language. If courts were to ban the use of it, prosecutors would indulge in even more legalese than the average lawyer, sounding even more stilted and unnatural.' " (Citation omitted.) *State* v. *Tate*, 85 Conn. App. 365, 375, 857 A.2d 394, cert. denied, 272 Conn. 901, 863 A.2d 696 (2004); see also *State* v. *Wickes*, 72 Conn. App. 380, 397, 805 A.2d 142 (prosecutor's statement in rebuttal closing argument—" 'I think there's plenty of motive here' "—was not improper when examined in context in which it was made, that is, in direct response to defendant's closing argument that he had no motive to commit crimes charged, and given "latitude afforded counsel in argument"), cert. denied, 262 Conn. 914, 811 A.2d 1294 (2002). Moreover, as our Supreme Court has explained, "the state may argue that its witnesses testified credibly, if such an argument is based on reasonable inferences drawn from the evidence." *State* v. *Warholic*, 278 Conn. 354, 365, 897 A.2d 569 (2006); see also *State* v. *Wickes*, supra, 388 ("although a prosecutor may not interject personal opinion about the credibility or truthfulness of a witness, he may comment on the credibility of the witness as long as the comment reflects reasonable inferences from the evidence adduced at trial").

Although our Supreme Court has cautioned prosecutors "to avoid using phrases that begin with the pronoun I, such as I think or I believe"; (internal quotation marks omitted) *State* v. *Gibson*, 302 Conn. 653, 660, 31 A.3d 346 (2011); it has recognized that "the use of the word I is part of our everyday parlance and . . . because of established speech patterns, it cannot always easily be eliminated completely from extemporaneous elocution." (Internal quotation marks omitted.) Id. Thus, for example, in *Gibson*, the court concluded that the prosecutor's rhetorical question and answer, " '[d]id the defendant wilfully [fail] to appear in court . . . . I think he did,' " did not constitute an improper expression of personal opinion but, rather, was merely an "[attempt] to persuade the jury to draw this inference from the circumstantial evidence of intent that he had just recited . . . ." Id., 661; see also *State* v. *Luster*, supra, 279 Conn. 436 ("if it is clear that the prosecutor is arguing from the evidence presented at trial, instead

of giving improper unsworn testimony with the suggestion of secret knowledge, his or her occasional use of the first person does not constitute [prosecutorial impropriety]").

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

C

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

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

The following general principles guide our analysis of this claim. Although it is improper for a prosecutor to convey his personal views regarding the credibility of witnesses; see, e.g., *State* v. *Elmer G.*, 176 Conn. App. 343, 375–76, 170 A.3d 749 (2017), aff'd, 333 Conn. 176, 214 A.3d 852 (2019); it is also well established that "a prosecutor may argue about the credibility of witnesses, as long as [the prosecutor's] assertions are based on evidence presented at trial and reasonable inferences that jurors might draw therefrom. . . . [I]t is [also] permissible for a prosecutor to explain that a witness either has or does not have a motive to lie." (Citation omitted; internal quotation marks omitted.) *State* v. *Williams*, 200 Conn. App. 427, 440, 238 A.3d 797, cert. denied, 335 Conn. 974, 240 A.3d 676 (2020). Further, "[i]n claims of improper vouching, our Supreme Court has noted that the degree to which a challenged statement is supported by the evidence is an important factor in determining the propriety of that statement. [Thus, our] Supreme Court [has] stated that [a] prosecutor may properly comment on the credibility of a witness where . . . the comment reflects reasonable inferences from the evidence adduced at trial." (Internal quotation marks omitted.) *Ayuso* v. *Commissioner of Correction*, 215 Conn. App. 322, 378–79, 282 A.3d 983, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022).

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

1

The petitioner first takes issue with the following statement made by the prosecutor during rebuttal closing argument: "That's this evil case that we're all cook-

ing together to trick you in some way into convicting [the petitioner]; well, come on, you got it all because we gave it to you." According to the petitioner, the statement was an inappropriate use of sarcasm intended to malign the defense theory that the police officers had coerced statements from witnesses to falsely implicate the petitioner. He further argues that "[t]he effect of [the] argument was to align the prosecutor with the police and suggest that, if a conspiracy occurred, the prosecutor would have been involved," and that "it amounted to improper vouching for the officers' credibility . . . ."

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

"It is well settled that [a] prosecutor may not seek to sway the jury by unfair appeals to emotion and prejudice . . . . [O]ur Supreme Court has recognized that repetitive and excessive use of sarcasm is one method of improperly swaying the fact finder. . . . Additionally, we have recognized that the excessive use of sarcasm may improperly influence a jury. . . . A prosecutor's frequent and gratuitous use of sarcasm can [call on] the jurors' feelings of disdain, and likely sen[d] them the message that the use of sarcasm, rather than reasoned and moral judgment, as a method of argument [is] permissible and appropriate for them to use. . . . Although we neither encourage nor condone the use of sarcasm, we also recognize that not every use of

rhetorical language or device is improper. . . . The occasional use of rhetorical devices is simply fair argument." (Internal quotation marks omitted.) Id. Thus, for example, in *Turner*, this court concluded that a lone sarcastic remark by the prosecutor during rebuttal argument did not rise to the level of impropriety. Id., 566. Likewise, in the present case, we conclude that the prosecutor's isolated use of sarcasm in referring to the defense theory of the case was not improper. The comment was a legitimate attempt by the prosecutor to undercut the petitioner's claim that the police, aided by the prosecutor, were following a script for the purpose of falsely incriminating the petitioner, and despite the sarcastic nature of the remark, it did not constitute improper vouching for the police witnesses.

2

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

In finding no impropriety with the prosecutor's comments, the habeas court explained: "Here, the transcript does not support the petitioner's characterization of the prosecutor's statement as instructing the jury as to the credibility of the testifying officers because of their roles as police officers. The prosecutor's comments were responsive to the defense theory that the testifying police officers had taken part in a conspiracy to coerce statements from witnesses to implicate the petitioner and testify falsely to achieve the desired result of the conspiracy, which was to convict the petitioner. . . . 'The prosecutor's remark . . . was a reasonable response to one of the primary theories advanced by the defense in the case, namely, that the *Whelan* statements were the product of police coercion. It was within the realm of proper argument for the prosecutor to suggest, in rebuttal of that theory, that the police were not motivated by a desire to see the [petitioner] convicted regardless of his guilt, but rather were motivated by a desire to apprehend the person actually responsible and bring him to justice.' . . . *State* v. *Thompson*, [supra, 266 Conn. 469]. Considering these statements in context demonstrates that the prosecutor argued the police officers' experience and career longevity to demonstrate their motive to provide truthful testimony, based on the evidence before the jury. See *State* v. *Stevenson*, 269 Conn. 563, 585, 849 A.2d 626 (2004). Therefore, the prosecutor relied upon reasonable inferences of motive to make these statements, rather than

his own personal opinion. Accordingly, the court finds that the petitioner failed to persuade the court that the prosecutor instructed the jury that the testifying officers were more credible than lay witnesses because they were police officers."

Before we address the merits of this claim, we take note of the general rule that "[i]t is improper to suggest that the jury should accord greater weight to the testimony of police officers on account of their occupational status." *State* v. *Thompson*, supra, 266 Conn. 469. For that reason, "Connecticut courts routinely instruct juries that they should evaluate the credibility of a police officer in the same way that they evaluate the testimony of any other witness, and that the jury should neither believe nor disbelieve the testimony of a police official just because he is a police official."[18] (Internal quotation marks omitted.) Id. Nevertheless, not all prosecutorial argument that seeks to bolster the credibility of the police is impermissible. For example, in *Thompson*, the defendant challenged as improper a remark of the prosecutor that the police wanted "to see that justice [was] served" and "that the person that killed [the victim was] brought to justice." (Internal quotation marks omitted.) Id. In evaluating the claimed impropriety, our Supreme Court explained that the remark was an appropriate response to the defense theory of the case that the police had coerced witnesses to testify falsely against the defendant in order to ensure that he was found guilty. Id.

As in *Thompson*, we must evaluate the challenged comment of the prosecutor in the present case in the context in which it was made, including, of course, the defense theory of the case and defense counsel's closing argument. During that argument, defense counsel addressed the testimony of Higgins and her allegations of misconduct by the police, stating in part: "Higgins, she testifies in court she made the statement that's attributed to her. They are their words, not hers, and she explains why. She was addicted to cocaine. She was fed information about the case. She was offered moneys about the case and, in fact, [was] given moneys. By the way, you don't believe that police officers who gave—who, in fact, gave her money would admit to that on the [witness] stand. That's criminal conduct. These are officers, remember, who have been in the department for twenty-five to twenty-eight years." In his rebuttal argument, the prosecutor responded to these remarks of defense counsel by urging the jury to draw a different inference about the testimony of the veteran police officers, that is, that their longevity on the police force was reason to believe that they would be strongly disposed to tell the truth rather than to lie. Under such circumstances, in which defense counsel first suggested that the testifying officers' many years of service militated against their credibility, the prosecutor's responsive comment was fair argument to counter defense

counsel's contention.

D

The Claimed *Singh* Violations

The petitioner next points to five statements of the prosecutor that he claims violated the rule set forth in *State* v. *Singh*, supra, 259 Conn. 712, and *State* v. *Williams*, 41 Conn. App. 180, 184–85, 674 A.2d 1372, cert. denied, 237 Conn. 925, 677 A.2d 950 (1996), namely, that it is improper for a prosecutor to assert, in closing argument, that, to find the defendant guilty, the jury must find that witnesses had lied.[19] The five challenged statements (1) "If you conclude that [Detectives Robert] Coffey, Greene, and [Anthony] Dilullo came into this court and right up there perjured themselves in front of you, sworn police officers perjured themselves right here in court, all three of them, then you have to acquit the [petitioner]. But if they didn't perjure themselves, all three of them, then Coleman and Higgins' statements were the truth";[20] (2) "[I]n order for [the petitioner] to avoid conviction here even . . . McFadden has to be a liar"; (3) "Twenty-seven years on the force. They are going to perjure themselves for one case where you got three odd witnesses"; (4) "And to buy that argument it isn't enough to say the police made mistakes. For his arguments, you have to find that they perjured themselves. . . . They are evil. That's what you have to find"; and (5) "On the other side, remember that everybody has to have lied. Everybody. All the cops, all the eyewitnesses . . . McFadden . . . Roach, and they all have to have lied with a common purpose, and that is to put this innocent man behind bars for killing two people." As claimed by the petitioner, the prosecutor's "repeated arguments linking an acquittal to perjury were improper." We agree with the petitioner's claim as it pertains to the first two challenged comments but reject the claim insofar as the remaining three statements are concerned.

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

therein, the prosecutor advocated for the jury to believe the state's theory of the case and to make the credibility assessments that would support the state's theory of the case. The court finds that the prosecutor's statements did not distort the state's burden of proof and, pursuant to *Singh*, the prosecutor did not engage in impropriety by arguing that the jury must conclude that one side of conflicting accounts must be wrong. Accordingly, the court finds that the claimed statements do not rise to the level of impropriety."

Our Supreme Court has "admonished prosecutors to avoid statements to the effect that if the defendant is innocent, the jury must conclude that witnesses have lied. . . . The reason for this restriction is that [t]his form of argument . . . involves a distortion of the government's burden of proof. . . . Moreover, like the problem inherent in asking a defendant to comment on the veracity of another witness, such arguments preclude the possibility that the witness' testimony conflicts with that of the defendant for a reason other than deceit." (Internal quotation marks omitted.) *State* v. *Jones*, 320 Conn. 22, 35–36, 128 A.3d 431 (2015). In *Singh*, for example, the prosecutor stated during closing argument: "So everyone else lies. [The witnesses] . . . all must be lying because you're supposed to believe this defendant . . . . Again, remember that if you buy the argument that [the witness] couldn't have done it, couldn't have seen what he says he saw, then you have to conclude that [the witness] lied." (Internal quotation marks omitted.) *State* v. *Singh*, supra, 259 Conn. 705–706. The essence of the prosecutor's argument in *Singh* was "that the only way the jury could conclude that the defendant [committed the offense charged, arson in the first degree] was if it determined that five government witnesses had lied." Id., 710. In rejecting the state's contention that there was nothing wrong with the prosecutor's statements, the court in *Singh* reasoned that such argument precluded the possibility that a witness was simply mistaken rather than deceitful.[21] Id., 710. Similarly, in *State* v. *Thompson*, supra, 266 Conn. 440, our Supreme Court found a violation of *Singh* based upon the following statement of the prosecutor in rebuttal closing argument: " 'For you to believe that the defendant is innocent, you must believe that [two of the witnesses were] both lying. You must believe that when they got up on the stand and took that oath, they committed perjury.' " Id., 470.

In contrast, in *State* v. *Santiago*, supra, 269 Conn. 743–44, the court agreed with the state's contention that the prosecutor did not improperly suggest to the jury that to find the defendant not guilty it had to find that the state's witnesses were lying. In *Santiago*, the prosecutor made the following comment during closing argument: "[D]id [the witness] lie? Did all these witnesses get together and lie? The police lied. That's what they want us to believe." (Emphasis omitted; internal

quotation marks omitted.) Id., 744. In distinguishing those remarks from the comments made in *Thompson* and *Singh*, the court in *Santiago* explained that the remarks subject to review in that case were not improper under *Singh* because it was the defendant himself who had initially suggested that the witnesses were lying, and the prosecutor's statements merely summarized the defendant's own contention in that regard. Id.

In the present case, as in *Santiago*, the fourth and fifth challenged statements were merely shorthand summaries of the petitioner's theory of defense and, when considered in the context in which they were made, did not violate *Singh*. In making those comments, the prosecutor did not urge or otherwise encourage the jury to believe that it could find the petitioner not guilty only if it found that the state's witnesses had lied. The challenged comments, rather, were simply responsive to the petitioner's contention at trial that the witnesses were liars. When, as here, the defense is founded on the theory that the testimony of the state's witnesses was all a lie, coerced and scripted by law enforcement officials, it is not improper for the prosecutor to acknowledge that theory and attempt to dissuade the jury from crediting it, so long as, in doing so, the prosecutor's comments do not contravene the rule of *Singh*. Similarly, the petitioner's claim of a *Singh* violation with respect to the third challenged comment also fails because it conveys no suggestion that the jury could find the petitioner not guilty only if the state's witnesses were lying.

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

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

E

Arguing Facts Not in Evidence

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

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

1

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

We agree with the conclusion of the habeas court rejecting the petitioner's claim. With respect to the first statement, the court concluded that "the prosecutor [was] arguing Coleman's credibility by highlighting inconsistencies and reasonable inferences to be drawn therefrom. . . . With respect to [the second] statement, the prosecutor [was] arguing Green's credibility to the jury and referencing evidence that supports his argument of the lack of credibility due to the importance

of her testimony to the defense theory. Both statements taken in context amount to no more than witness credibility arguments, which are also attempts to rebut the defense theory that the police officers and the prosecution engaged in a conspiracy to falsely convict the petitioner for a double homicide. Neither statement raises information that can be construed as facts not in evidence, but rather [the statements] address reasonable inferences . . . [which] can be drawn from the evidence presented to the jury and also address reasonable inferences that could be drawn from the evidence presented to the jury to contradict the defense theory."

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

2

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

The habeas court disagreed that the prosecutor's comments were improper and explained as follows: "The petitioner argues that these statements claim that the [petitioner] had frightened the witnesses. However, the context in which the statements were made reveals that the prosecutor made no claims that the petitioner engaged in any action to frighten these witnesses. The first statement in context reveals it is a clause in a larger statement as to the credibility battle between recanting witnesses and the police officers who took

the initial statements in the double homicide. Both statements spoke to a generalized fear of involvement in a double homicide case and invited the jury to draw a reasonable inference from the evidence presented about witness reluctance to cooperate."

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

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

F

Williams Factors

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

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

As previously noted, our assessment of the degree of harm resulting from the prosecutor's improprieties is guided by the *Williams* factors, which, to reiterate, require us to determine the extent to which the impropriety was invited by the defense; the severity, frequency and centrality of the impropriety; the strength of any curative measures taken by the court; and the strength of the state's case. In conducting that analysis, we are mindful that "the burden is on the defendant to show . . . that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 58. "[T]he touchstone of due process analysis in cases of alleged prosecutorial [impropriety] is the fairness of the trial, and not the culpability of the prosecutor. . . . The issue is whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . In determining whether the defendant was denied a fair trial [by virtue of prosecutorial impropriety] we must view the prosecutor's comments in the context of the entire trial. . . . [I]t is not the prosecutor's conduct alone that guides our inquiry, but, rather, the fairness of the trial as a whole." (Citation omitted; internal quotation marks omitted.) *State* v. *Medrano*, 131 Conn. App. 528, 538–39, 27 A.3d 52 (2011), aff'd, 308 Conn. 604, 65 A.3d 503 (2013); see also *State* v. *Warholic*, supra, 278 Conn. 396

("[t]he question of whether the defendant has been prejudiced by prosecutorial [improprieties], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties" (internal quotation marks omitted)).

1

Whether the Improprieties Were Invited

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

2

Frequency and Severity of Improprieties

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

We also do not perceive the prosecutor's nine improprieties as severe, a conclusion we reach for several reasons. First, the fact that defense counsel did not object to seven of the prosecutor's improper comments when they were made "suggests that defense counsel did not believe that [they were] unfair in light of the record of the case at the time. . . . Moreover . . . defense counsel may elect not to object to arguments that he or she deems marginally objectionable for tactical reasons, namely, because he or she does not want to draw the jury's attention to it or because he or she wants to later refute that argument. . . . Accordingly . . . counsel's failure to object at trial, while not by itself fatal to a defendant's claim, frequently will indicate on appellate review that the challenged comments [did] not rise to the magnitude of constitutional error . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 576. Indeed, our Supreme Court recently has underscored the fact that, "[i]n determining whether the prosecutorial impropriety was severe . . . it [is] *highly significant* that defense counsel failed to object to . . . the improper [remarks], [to] request curative instructions, or [to] move for a mistrial." (Emphasis added; internal quotation marks omitted.) *State* v. *Gonzalez*, 338 Conn. 108, 149, 257 A.3d 283 (2021).

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

Furthermore, with respect to the *Singh* violations, our Supreme Court has stated that the harm from such a violation "may be ameliorated by the defense's own claim, be it implicit or explicit, that the opposing witnesses lied." *State* v. *Stevenson*, supra, 269 Conn. 594. In *Stevenson*, for example, the prosecutor's violation of *Singh* was not deemed harmful because it was invited by the claim of the defense that the state's witnesses were lying. That "lack of harmfulness combined with the defendant's failure to object" led our Supreme Court to conclude that the impropriety was not severe. Id.; see also *State* v. *Weatherspoon*, supra, 332 Conn. 557 ("[T]he defendant himself, by virtue of his defense, claimed that the witnesses against him were lying. . . . Thus, the prosecutor's attempt[s] to characterize [the defendant's] defense in this manner was invited and, therefore, not harmful under . . . *Singh*." (Citation omitted; internal quotation marks omitted.)); *State* v. *Warholic*, supra, 278 Conn. 399–400 (harm from *Singh* violation ameliorated by claim of defense that witness lied).

Although the prosecutor's comment that justice required the jury to find the petitioner guilty was objectionable both because it appealed to the jurors' emotions and represented an expression of the prosecutor's personal opinion, that lone reference to justice was not a theme of the prosecutor's argument and therefore not likely to have resulted in undue prejudice to the petitioner. The other improprieties also were not severe insofar as they concerned comments about witness tes-

timony that was not key to significant issues in the case,[26] or statements to which counsel objected and curative instructions were given, or remarks that were invited by defense evidence and argument.

3

Centrality to Critical Issues in the Case

Only two of the improprieties related to a critical issue in the case, namely, the credibility of Higgins' recantation of her statement identifying the petitioner as the shooter. In particular, the prosecutor suggested that Higgins had repudiated her statement because of fear despite the absence of evidence to support that assertion. As we have explained, however, the prosecutor never implicated the petitioner in any misconduct toward Higgins and, in fact, he expressly disavowed any claim that the petitioner or his family had done anything to cause the state's witnesses to be afraid. Accordingly, we are satisfied that any prejudice resulting from the prosecutor's reference to fear in the present case was not substantial.

4

Curative Instructions

We next consider the strength of the curative measures taken by the court. In the present case, defense counsel objected to two of the nine instances of improper argument by the prosecutor—each involved a comment about facts not in evidence—and, thereafter, the court promptly instructed the jury to disregard the offending comments. Specifically, when the jury was brought back into the courtroom for final instructions, the court stated: "[J]ust before we begin with the final instructions, ladies and gentlemen, I want to be sure you don't have any misimpressions from the final argument which you heard first. There has been no evidence of the nature of the charges against . . . Adams during the prior proceedings presented to you, and also there has been no evidence presented to you concerning the [petitioner's] height and weight at the time of the . . . alleged offenses." Defense counsel raised no objection to the curative instruction, which is indicative that counsel thought it was adequate. See *State* v. *Lynch*, 123 Conn. App. 479, 505, 1 A.3d 1254 (2010) ("[t]he absence of an objection to the court's curative instruction often is an indication of the instruction's adequacy" (internal quotation marks omitted)). "In the absence of an indication to the contrary, we presume that the jury followed the [curative] instructions given to it by the court." (Internal quotation marks omitted.) Id., 506. Thus, the court's curative measures were sufficient to remedy any potential prejudice that otherwise might have resulted from those remarks. See *State* v. *Warholic*, supra, 278 Conn. 401 ("recogniz[ing] that a prompt cautionary instruction to the jury regarding improper prosecutorial remarks or questions can obvi-

ate any possible harm to the defendant" (internal quotation marks omitted)).

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

Given the petitioner's failure to object to the improprieties at trial, we "may presume that he did not consider [them] to be seriously prejudicial at the time they were made." *State* v. *Satchwell*, 244 Conn. 547, 572, 710 A.2d 1348 (1998). Significantly, our Supreme Court has stated that "[t]he failure by the defendant to request specific curative instructions frequently indicates on appellate review that the challenged instruction did not deprive the defendant of a fair trial. . . . *State* v. *Stevenson*, supra, 269 Conn. 597–98; see also *State* v. *Ritrovato*, [280 Conn. 36, 68, 905 A.2d 1079 (2006)] (prosecutorial [impropriety] claims [are] not intended to provide an avenue for the tactical sandbagging of our trial courts . . .)." (Footnote omitted; internal quotation marks omitted.) *State* v. *Angel T.*, 292 Conn. 262, 291–92, 973 A.2d 1207 (2009).

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

5

Strength of State's Case

Finally, we examine the strength of the state's case. Although no physical evidence tied the petitioner to the shooting,[27] three eyewitnesses—all of whom were personally acquainted with the petitioner—identified him as the shooter. At one time or another, however,

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

Nevertheless, as our Supreme Court has observed, our courts have "never stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial [impropriety] did not deprive the defendant of a fair trial." (Internal quotation marks omitted.) *State* v. *Courtney G.*, supra, 339 Conn. 365–66. In the present case, the state's evidence, though not extremely strong, "was not so weak as to be overshadowed by the prosecutorial improprieties." (Internal quotation marks omitted.) Id. The statements and testimony of the three eyewitnesses implicating the petitioner in the shootings were generally consistent in material respects. In addition, the jury reasonably could have concluded that the statements that Coleman and Higgins gave to the police were truthful and that their recantations at trial lacked credibility. Indeed, in Coleman's case, her recantation testimony defies credulity: she implausibly stated that she could not recall whether she testified at the petitioner's first trial, whether she was present when the shootings took place, whether she gave a statement to the police, whether she told the police that a blue vehicle in the police garage looked like the one she saw the petitioner get into at the diner after the shooting, and whether she told her neighbor that she saw the petitioner shoot the victims. It is evident, as well, that the jury was not persuaded by the petitioner's contention that the police were involved in egregious misconduct in furtherance of an elaborate conspiracy to frame the petitioner for crimes he did not commit.

Although all relevant considerations must be evaluated in ascertaining prejudice under the *Williams* factors, our Supreme Court has observed that one such

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

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

III

DENIAL OF MOTION TO OPEN EVIDENCE

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

The following additional facts and procedural history are relevant to this claim. In his amended habeas petition, the petitioner alleged that Roach had received consideration from the state in exchange for testifying against the petitioner and that the state violated his right to due process by (1) failing to disclose information about any benefits that Roach had received and

(2) adducing and failing to correct false testimony from Roach about that consideration. The petitioner, however, did not present any evidence concerning those claims at the habeas trial.

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

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

With respect to the alleged newly discovered evidence, the petitioner made the following assertions in his motion to open: "Prior to the habeas trial, the undersigned counsel retained a private investigator to look into, inter alia, evidence about whether . . . Roach had been offered consideration in exchange for providing a statement and testifying against the petitioner. At that time, the undersigned counsel had reason to believe that Roach had been arrested and incarcerated—while the petitioner's criminal case was pending—on charges relating to a shooting on Munson Street in New Haven that Roach committed. The investigation did not uncover any evidence of Roach's arrest or a conviction involving Roach.

"Thereafter, after the evidence had closed at the habeas trial, the petitioner reached out to the New Haven Office of the Public Defender to determine whether it could provide any additional information about Roach's arrest and incarceration. An investigator from the Office of the Public Defender was able to provide the undersigned counsel with Department of Correction records that reflected that Roach was

arrested on December 29, 1992, discharged on bond on February 3, 1993, and that he did not return to [the] custody [of the Department of Correction]. As a result of the discovery of this information, the undersigned counsel hired another private investigator, Cristina Lougal, to look into . . . Roach's arrest. The second investigator attempted to obtain records pertaining to . . . Roach's case directly from the clerk's office at geographical area [number twenty-three]. The clerk's office informed . . . Lougal that there was information relating to . . . Roach, but that the information [was] nondisclosable.

"In light of the circumstances, it appears that . . . Roach was arrested and had a criminal proceeding in late 1992 and early 1993, but that the criminal proceeding ended in either a nolle prosequi or a dismissal, which resulted in the records of his arrest and criminal proceeding being unavailable. . . . In light of the seriousness of the charges that . . . Roach was facing, this information strongly lends itself to an inference that the nolle prosequi or dismissal of . . . Roach's case was done in exchange for consideration in the form of his testimony against the [petitioner]. Further information to confirm that fact would likely be found in the Superior Court record or the transcripts from the proceedings. The Superior Court record is currently unavailable to the petitioner for the reasons stated above. The transcripts are similarly unavailable because, without the Superior Court record, the petitioner cannot know the dates on which . . . Roach's proceeding was heard or the judge before whom it was heard. Without that information, the petitioner cannot order the transcripts." (Citation omitted.)

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

process was violated'). The change in the law warrants the reopening of evidence in this case."

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

Our review of the record reveals that the habeas court did not abuse its broad discretion in denying the petitioner's motion to open, which was filed nearly eleven months after the conclusion of the habeas trial. Notably, the court already had rendered a decision in the matter in December, 2020, and, although it subsequently granted the petitioner's motion to reconsider that decision, the time for taking evidence in the case had long since passed. Furthermore, the record establishes that the petitioner was aware that Roach had been facing criminal charges prior to implicating the petitioner in the shootings and that those charges were dropped following his statement to the police identifying the petitioner as the shooter.[28] Indeed, defense counsel emphasized these facts in closing argument, stating to the jury that, when "facing an exposure of some twenty-seven years in prison . . . [t]hat's when he decides to talk in custody [about the petitioner] . . . and what does he get? He gets a get out of jail free card. As soon as he gives the statement, as soon as he testifies, he walks out of jail, and his charges are dropped. End of story. Not a bad deal." Finally, although the petitioner's motion to open expresses the hope that he would uncover evidence of an undisclosed deal between Roach and the state if given some additional time to do so, the court was not required to permit the petitioner that opportunity in the context of the present case in light of the fact that the trial had been completed many months earlier.[29] For all of these reasons, the petitioner has failed to demonstrate that the court's decision denying his motion to open was a manifest abuse of discretion.

IV

CONCLUSION

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

The judgment is affirmed.

In this opinion the other judges concurred.

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

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

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

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

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

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

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

In addressing a similar comment in *State* v. *Francione*, 136 Conn. App. 302, 46 A.3d 219, cert. denied, 306 Conn. 903, 52 A.3d 730 (2012), this court explained: "We consider the repeated references to 'justice,' given their context, to be improper. Lawyers frequently invoke 'justice' in arguing their cases. Asking a jury, in a general, amorphous sense, to do 'justice' is not improper. But a lawyer crosses the line when arguing that 'justice' requires a *particular* result in a *particular* case, e.g., conviction of the defendant. This is simply another way of telling a jury that its verdict will be *unjust* if it does not find the defendant guilty. We cannot countenance such an

argument. In this case, the comments that the jury 'should do justice for those firefighters who risked their lives' and 'for those neighbors who came out to help that night,' and that 'justice demand[s]' and 'require[s]' the jury to find the defendant guilty amounted to improper appeals to emotions . . . [and therefore] overstepped the bounds of legitimate argument." (Citations omitted; emphasis in original.) Id., 323–24.

[8] The habeas court agreed with the petitioner that this statement was improper, explaining that, in making the statement, "the prosecutor invaded the fact-finding duty of the jury by providing unsworn and unchecked testimony about information outside of the evidence to bolster his credibility argument regarding certain evidence in order to get the jury to find certain facts consistent with his argument. The prosecutor's description of the jurors' assessment of testimony was not evidence properly presented to the jury, and, therefore, any presentation of such information constituted an improper presentation of matters which the jury had no right to consider."

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

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

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

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

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

[14] With respect to the issue of cause and prejudice, we note that the petitioner conceded in the habeas court that his claim of ineffective assistance of appellate counsel could have been raised in the prior habeas proceeding and that his due process claim could have been raised on direct appeal or in the prior habeas proceeding. The petitioner maintained, however, that he had established cause and prejudice for failing to do so because appellate counsel and first habeas counsel rendered ineffective assistance by virtue of their failure to raise a due process claim predicated on the prosecutor's improprieties during closing argument. The habeas court, having found that those alleged improprieties did not deprive the petitioner of a fair trial, concluded that the failure of counsel to raise a due process claim did not constitute deficient performance, and, therefore, the petitioner could not demonstrate cause and prejudice. Accordingly, the court concluded that the petitioner's ineffective assistance of appellate counsel and due process claims were procedurally defaulted. In reviewing that conclusion, we must determine whether the claimed prosecutorial improprieties violated the petitioner's right to due process. If they did, the petitioner also will have established that the failure of counsel to raise a due process claim constituted ineffective assistance, which, in turn, necessarily would be sufficient to demonstrate cause and prejudice.

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

[16] This conclusion in no way alters the analysis under the two part test for claims of prosecutorial impropriety, nor does it conflict with our Supreme Court's holding in *State* v. *Wilson*, supra, 308 Conn. 440–42. In *Wilson*, the prosecutor used the phrase, "a 'piece of work,' " to describe a defense

witness, and, in defending the use of that phrase on appeal, the state argued that, because defense counsel had used the same phrase in reference to a *state's* witness, the prosecutor's use of that phrase was invited and, as a result, not improper. Id., 440–41. Our Supreme Court rejected the state's contention, explaining that "it is well settled that [impropriety] is [impropriety], regardless of its ultimate effect on the fairness of the trial; whether that [impropriety was harmful and thus] caused or contributed to a due process violation is a separate and distinct question . . . . Therefore, insofar as the state claims that the prosecutor's use of the [subject] phrase . . . was not improper because the defendant invited it, the state conflates the first and second steps of the . . . analysis, namely, the finding of an impropriety and its harmfulness." (Citation omitted; internal quotation marks omitted.) Id., 441–42. Our Supreme Court then concluded, in assessing the harmfulness of the prosecutor's improper remarks under the *Williams* factors, that the prosecutor's use of the phrase " 'a piece of work,' " though improper, was invited by defense counsel; id., 448–49; a consideration that mitigated the harm flowing from the prosecutor's use of the phrase. What distinguishes *Wilson* from the present case is that the prosecutor's reference to a defense witness as " 'a piece of work' " in *Wilson* constituted improper name-calling, regardless of whether it was invited. See id., 440.

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

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

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

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

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

witnesses had lied; the fact that the comments were responsive to such a defense theory is relevant, rather, to determining the extent of any harm that may have resulted from such statements.

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

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

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

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

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

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

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

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