CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ORLANDO F.*
(AC 46830)

Moll, Seeley and Prescott, Js.

Syllabus

Convicted, after a jury trial, of robbery in the first degree and other crimes, the defendant appealed. He claimed, inter alia, that the trial court improperly admitted into evidence, pursuant to *State* v. *Gore* (342 Conn. 129), testimony by B, a nonpercipient witness, identifying him from surveillance video footage she was shown in the courtroom during the trial. *Held*:

This court declined to review the defendant's argument that the trial court should have considered that the manner in which B was shown the video was suggestive because it was the first time she had seen the footage, there having been nothing in the record to establish when B had first viewed the video evidence.

This court was not persuaded that the circumstances of the defendant's case warranted the trial court's consideration of B's purported bias against him and that the admission of her testimony would result in an undue restriction of the defendant's constitutional right to confront B, as those matters, which pertained to trial tactics and the weight to be accorded to her testimony, were beyond *Gore*'s requirement that, in determining whether a witness is more likely to correctly identify the defendant than is a jury, the trial court should consider factors pertaining to the witness' familiarity

* In accordance with our policy of protecting the privacy interests of the victims of domestic violence, we decline to identify the defendant or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e; see also footnote 9 of this opinion.

with the defendant and his appearance, as well as the video's quality and the extent to which it depicts the defendant.

The trial court did not abuse its discretion in admitting B's identification testimony, which was more probative than it was prejudicial in light of her past history and familiarity with the defendant, with whom she had two children, and the defendant provided no authority to show that B's testimony was rendered unduly prejudicial because his counsel might have had to inquire into prior domestic violence between B and the defendant to be able to fully establish her bias against him.

Even if this court were to assume that the admission of B's identification testimony was improper, the defendant did not establish that he was harmed by the trial court's failure to preclude that testimony, as the state presented a strong case against the defendant that included DNA evidence, surveillance video footage, and testimony from the victim and B, and defense counsel was permitted unfettered cross-examination of B.

The defendant could not establish that the trial court committed plain error by failing to instruct the jury about how to use B's identification testimony, as *Gore* does not require trial courts to instruct juries concerning nonpercipient witnesses.

Argued February 4—officially released June 3, 2025

Procedural History

Substitute information charging the defendant with the crimes of attempt to commit robbery in the first degree, larceny in the third degree, robbery in the first degree, assault in the second degree and reckless endangerment in the first degree, brought to the Superior Court in the judicial district of Middlesex and tried to the jury before *Oliver*, *J.*; thereafter, the court denied the defendant's motion to preclude certain evidence; verdict and judgment of guilty of attempt to commit robbery in the first degree, robbery in the first degree and reckless endangerment in the first degree, and sentence enhanced for the commission of robbery involving an occupied motor vehicle, from which the defendant appealed to this court. *Affirmed*.

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Alexander A. Kambanis, deputy assistant state's attorney, with whom, on the brief, were *Michael A. Gailor*, state's attorney, and *Steven M. Lesko*, assistant state's attorney, for the appellee (state).

Opinion

SEELEY, J. The defendant, Orlando F., appeals from the judgment of conviction, rendered after a jury trial, of attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (3), robbery in the first degree in violation of § 53a-134 (a) (3) and reckless endangerment in the first degree in violation of General Statutes § 53a-63. On appeal, the defendant claims that the trial court improperly (1) admitted into evidence testimony by a lay witness who identified him from a surveillance video recording during trial and (2) committed plain error by improperly instructing the jury about that witness' identification. We disagree and, accordingly, affirm the judgment of the court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. On the evening of July 25, 2020, the victim and the defendant used a dating application called Grindr[1] to plan to meet for a sexual encounter. The two men had not interacted previously through the dating application, and the defendant used the false name of "John" while interacting with the victim. They initially agreed that the victim would use his car to pick up the defendant on Main Street in Cromwell; however, the defendant sent the victim a text message while he was on the way, asking, instead, to be picked up on New Lane

[1] Grindr "is a web-based dating application . . . for gay and bi-sexual men." *Herrick* v. *Grindr, LLC*, 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018), aff'd, 765 Fed. Appx. 586 (2d Cir.), cert. denied, U.S. , 140 S. Ct. 221, 205 L. Ed. 2d 135 (2019).

Street in Cromwell.[2] When the victim arrived at New Lane Street in the early morning of July 26, 2020, the defendant approached the victim's vehicle, entered it, and sat in the passenger seat.[3]

The victim and the defendant engaged in "normal conversation" for about twenty to thirty seconds as the victim drove toward an intersection. When the victim turned right at the intersection, the defendant held a kitchen knife to the victim's face and instructed him to drive to a bank. The victim, worried because he did not have money in the bank, told the defendant that he was between jobs, after which the defendant instructed him to drive to the highway. The victim continued driving and offered the defendant his cell phone. When he handed his cell phone to the defendant, the victim tried to disarm the defendant by grabbing the blade of the knife, at which point he dropped his phone. Thereafter, the victim stopped the car, opened the driver's side door, and fled, screaming for help. When he turned around to see if the defendant was chasing him, he saw that the defendant had gotten into the driver's seat of the car. The victim, who did not want the defendant to steal his car, went back toward the car and tried to open the rear driver's side door, which was locked. He then opened the driver's side door and attempted to pull the defendant out of the vehicle, but the defendant proceeded to drive away while the victim was holding onto the car.[4] The victim continued trying to pull the

[2] The jury reasonably could have found that the defendant resided on Main Street in Cromwell at the time of the crime.

[3] The defendant's profile on Grindr did not contain photographs. The defendant, however, did send the victim a photograph of himself. On the basis of that photograph and the victim's observation of the defendant when he entered the victim's car, the victim described the defendant as a light-skinned Hispanic male, who was bald with wide eyes and olive skin and wore a track suit.

[4] Specifically, the victim testified that he was between the open driver's side door and the driver's seat of the car, with one hand on top of the car, one hand holding onto the open door, one foot inside of the car, and one foot hanging out of the car.

defendant out of the car; however, the defendant subsequently bit the victim's right forearm and accelerated the vehicle, which caused the victim to let go of the car and fall into the street, landing on the road.

The victim thereafter stood up, noticed that he was covered in blood and missing a shoe, and saw the defendant drive away in his vehicle. While yelling for help, the victim ran down the street to a gas station and asked the clerk to call the police. When officers from the Cromwell Police Department arrived at the gas station, they observed the victim as being upset and having ripped clothing, one shoe, a lacerated right hand, and multiple scrapes. The victim told the officers that his car had been stolen by a person who tried to stab him and that he had been thrown out of the moving vehicle. He also provided them with a description of the perpetrator. Paramedics arrived and treated the victim at the scene before transporting him by ambulance to a hospital.[5]

Shortly afterward, the detective assigned to the case, Elizabeth Jones, interviewed the victim at the hospital. While there, she swabbed the bite wound on the victim's forearm for DNA and took a buccal swab from the interior of the victim's mouth. The swabs were sent for DNA testing at the state forensic laboratory. Subsequently, Jones obtained surveillance video footage from a residential security camera on New Lane Street (New Lane Street video footage) that showed the victim picking up a bald man wearing a tank top and shorts on July 26, 2020.[6] After the victim's stolen vehicle was

[5] At trial, the victim testified that he suffered several injuries during the incident, including "third degree road burn on [his] sides . . . rear . . . leg . . . calf . . . and on [his] hand"; "a gash [to his] head"; "a knife cut in [his] hand"; and a bite wound to his right forearm. Photographs of his injuries were admitted into evidence.

[6] More specifically, the New Lane Street video footage consists of three videos taken from residential security cameras positioned at different angles toward New Lane Street. The videos show a bald man, who was wearing a tank top and shorts and walking on New Lane Street at night, step out into

found on Campfield Avenue in Hartford on July 27, 2020, Jones swabbed the interior of the vehicle for DNA evidence. During her investigation, Jones viewed surveillance video footage from a residential security camera near where the victim's vehicle was found, which showed the vehicle being left at that location on July 26, 2020, by a bald man with a clearly visible chest tattoo who was wearing a tank top and shorts (Campfield Avenue video footage).[7] Upon being shown the video footage, Jones recorded it on her police department issued cell phone. After the police identified the defendant as a suspect, they obtained and executed a search warrant for the defendant's "saliva secretions and buccal cell samples . . . for the purpose of DNA identification and comparison . . . ." The police also obtained a search warrant for the contents of the defendant's cell phone, which they had seized when executing the warrant to obtain the DNA samples.

At the state forensic laboratory, the sample taken from the victim's bite wound tested positive for amylase, a component of saliva. An extraction from the sample collected from the victim's bite wound yielded a DNA profile that contained a mixture from two males and included the defendant's DNA profile. A forensic examiner concluded from the DNA analysis, after

the road in front of an approaching sedan. After the vehicle stops, the man enters it through the passenger side, and the vehicle drives away.

[7] In particular, the Campfield Avenue video footage consists of cell phone recordings of three videos playing on a computer screen, which were taken by residential security cameras positioned at different angles toward Campfield Avenue. The videos show what appears to be the same sedan depicted on the New Lane Street video footage coming to a stop at a well lit area on Campfield Avenue on July 26, 2020, at which point a bald man wearing a tank top and shorts, with a clearly visible chest tattoo, begins to wipe down the steering wheel and other areas of the vehicle's interior, before exiting the vehicle and walking on the sidewalk until he is out of view. From a different angle, the same man then can be seen pacing for a time in the yard of the residence where the cameras were located and on the sidewalk.

assuming that the victim was one of the two contributors, that the DNA profile was at least 100 billion times more likely to occur if it came from the defendant and the victim, rather than from the victim and another unknown individual, and that the mixture contained more of the defendant's DNA profile than it did the victim's.[8] Moreover, an analysis of the contents of the defendant's cell phone revealed that he had not made or received any phone calls between 1:30 and 3:30 a.m. on July 26, 2020, during which time the victim was attacked and his car was stolen, although an "excess" of calls had been made from or received by the defendant's cell phone before and after that time frame.

The defendant was arrested and subsequently charged in an amended long form information with attempt to commit robbery in the first degree in violation of §§ 53a-49 (a) (2) and 53a-134 (a) (3), larceny in the third degree in violation of General Statutes § 53a-124 (a) (1), robbery in the first degree in violation of § 53a-134 (a) (3), assault in the second degree in violation of General Statutes § 53a-60 (a) (2) and reckless endangerment in the first degree in violation of § 53a-63.

Prior to the commencement of a jury trial in this case, the state disclosed its intention to call as a witness

[8] In addition, extractions from the swabs collected from the inside of the victim's vehicle, namely, on the driver's side door handle and steering wheel, yielded DNA profiles containing mixtures of three and five persons, respectively. The defendant's DNA profile could not be eliminated as a contributor to both mixtures. With respect to the sample collected from the driver's side door handle, a forensic examiner concluded from the DNA analysis, after assuming that the victim was one of three contributors, that the DNA profile was at least 100 billion times more likely to occur if it had come from the defendant, the victim and one unknown individual, than if it had come from the victim and two unknown individuals. As to the sample collected from the steering wheel, a forensic examiner concluded from the DNA analysis, after assuming that the victim was one of five contributors, that the DNA profile was at least twenty-one billion times more likely to occur if it had come from the defendant, the victim and three unknown individuals, than if it had come from the victim and four unknown individuals.

B, a former romantic partner of the defendant and the mother of two of his children.[9] On January 17, 2023, the defendant filed a motion in limine in which he sought to preclude B from identifying him as the person in the Campfield Avenue video footage, arguing that, under the totality of the circumstances test set forth in *State* v. *Gore*, 342 Conn. 129, 150–51, 269 A.3d 1 (2022), any such testimony should be excluded as a result of her "undeniable bias toward the defendant . . . ." On January 24, 2023, the second day of trial, the court held a hearing on the defendant's motion in limine outside the presence of the jury. At the hearing, the prosecutor called B as a witness and showed her the Campfield Avenue video footage. After she viewed the footage, B testified, inter alia, that she was "1025 percent . . . sure" that the defendant is the person in the footage. Following cross-examination of B and arguments of counsel, the court denied the defendant's motion in limine. Thereafter, the jury was brought back into the courtroom, and B identified the defendant as the person in the Campfield Avenue video footage.

At trial, the state also presented testimony from, inter alia, Jones; the victim; John Dibiase, the Cromwell resident who provided the police with the New Lane Street video footage, which was admitted into evidence; Javier Ortiz, the Hartford resident who allowed the police to record the Campfield Avenue video footage, which was admitted into evidence; Jennifer Green, the state forensic examiner who tested the samples taken from the victim's bite wound and vehicle; and Frances Rue, the state forensic examiner who conducted the DNA analyses of the samples. At the conclusion of trial, the jury found the defendant not guilty of the larceny and assault charges, and guilty of the remaining three charges. On

[9] In accordance with our policy of protecting the privacy interests of the victims of domestic violence, we decline to identify B, who was the victim of an assault in another criminal case involving the defendant.

April 18, 2023, the court, *Oliver*, *J.*, sentenced the defendant to a total effective term of nineteen years of incarceration, followed by four years of special parole with recommended special conditions.[10] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court abused its discretion by permitting B to identify him in court as the person in the Campfield Avenue video footage. We are not persuaded.

We first set forth our standard of review and legal principles that govern our resolution of this claim. "Whether to admit opinion testimony identifying an individual in a surveillance video or photograph is an evidentiary ruling that will not be disturbed unless it amounts to an abuse of discretion." *State* v. *Sumler*, 217 Conn. App. 51, 62, 287 A.3d 211 (2022), cert. denied, 346 Conn. 914, 290 A.3d 376 (2023). In *State* v. *Gore*, supra, 342 Conn. 129, our Supreme Court held "that opinion testimony that relates to the identification of persons depicted in surveillance video or photographs is not inadmissible solely because it embraces an ultimate issue. Lay opinion testimony identifying a person in surveillance video or photographs is admissible if that testimony meets the requirements of § 7-1 of the Connecticut Code of Evidence. That is, such testimony is admissible if the opinion is 'rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.' Conn. Code Evid. § 7-1." (Footnote omitted.) *State* v. *Gore*, supra, 148.

[10] Because the defendant's conviction of robbery in the first degree as charged involved the robbery of an occupied motor vehicle, the defendant's sentence was subject to a mandatory, nonsuspendible three year enhancement pursuant to General Statutes § 53a-136a.

Our Supreme Court explained further that, "as a general rule, nonpercipient lay opinion testimony identifying a defendant in surveillance video or photographs is admissible only if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph [or video] than is the jury. . . . In making this determination, courts evaluate the totality of the circumstances. . . . Courts consider the following four factors relevant to determining whether the witness is more likely to correctly identify the defendant than is the jury: (1) the witness' general level of familiarity with the defendant's appearance . . . (2) the witness' familiarity with the defendant's appearance, including items of clothing worn, at the time that the surveillance video or photographs were taken . . . (3) a change in the defendant's appearance between the time the surveillance video or photographs were taken and trial, or the subject's use of a disguise in the surveillance footage . . . and (4) the quality of the video or photographs, as well as the extent to which the subject is depicted in the surveillance footage." (Citations omitted; internal quotation marks omitted.) Id., 150–51.

With respect to the issue of the witness' familiarity with the defendant's appearance, our Supreme Court held that "the low threshold for general familiarity applied in virtually all jurisdictions that have considered the admissibility of lay witness identifications of a defendant in surveillance video or photographs does not afford sufficient protection to criminal defendants against good faith mistaken identifications. We believe that the better rule is to require, in order for the witness' general familiarity with the defendant's appearance to weigh in favor of admissibility, that the proponent of the testimony demonstrate that the witness possesses more than a minimal degree of familiarity with the defendant. We acknowledge that we are eschewing the

bright line rule applied by other jurisdictions in favor of one that relies on trial courts to exercise their discretion to determine whether this factor supports admissibility. That determination will rest on the facts and circumstances of each case." Id., 158–59. "Because we consider the totality of the circumstances to determine whether opinion testimony identifying an individual is admissible, no single factor is dispositive." *State* v. *Sumler*, supra, 217 Conn. App. 64.

Having delineated the totality of the circumstances test of *Gore*, we now set forth the following additional facts related to the trial court's denial of the defendant's motion in limine and admission of B's identification testimony. In his motion in limine, the defendant conceded that the first two prongs of the *Gore* test, both of which relate to the witness' familiarity with the defendant, were satisfied and argued, instead, that her testimony would not be helpful to the jury, as the video footage was of good quality and sufficient for the jury to draw its own conclusion, and that nothing had changed about his appearance.

At the hearing outside the presence of the jury, defense counsel argued that, because *Gore* adopted a test based on the totality of the circumstances, B's purported bias against the defendant needed to be considered, and that her testimony supported weighing the third and fourth *Gore* factors in the defendant's favor. Defense counsel further argued that "admitting [B's] testimony puts this defendant in a position of doing [one of] two things—either he doesn't question [her] because of all the baggage that's going to come with it, and because of opening evidentiary doors into another criminal case . . . [or] [h]is second option is to do exactly that and have a trial within a trial about [her] feelings about [the defendant] and about another criminal case that is pending in this courthouse; I don't think

that's fair to [the] defendant. . . . One thing that *Gore* comes down to . . . is whether . . . the witness' testimony is going to help the jury. Now, I would argue that any help that [B] can give this jury will be greatly outweighed by the prejudice and greatly outweighed by the disservice that she does to this jury, by the wasting time [and] by the prejudice to this defendant. So, I would ask that that testimony be precluded."

The court inquired of defense counsel as to why he was limiting his options "to either . . . not questioning [B] at all, or having a trial within a trial, specifically referring to the charges, as opposed to doing . . . 80 to 85 percent of what [he had done at the hearing] without the jury present, just not mentioning the charges . . . ." Defense counsel responded: "I understand that you're the gatekeeper. My concern is opening the door, right? If I ask too many questions of [B] as to her bias with my client, I risk opening the door to the state standing up and saying . . . [i]sn't it because he beat you? Isn't it because he assaulted you in May, 2022? And have all of that evidence come in." The court then heard from the prosecutor, who countered that all of the *Gore* factors except the third one weighed in the state's favor and that a witness' bias goes to the weight of the evidence, not its admissibility, as *Gore* and its progeny do not discuss bias as a factor to be considered when determining admissibility.

After hearing argument from both the prosecutor and defense counsel, the court orally denied the defendant's motion in limine, first addressing the issue of bias raised by the defendant and then applying the four factors set forth in *Gore*.[11] As to the issue of bias, the court stated:

[11] Although it ruled that B's identification testimony was admissible, the court specifically addressed defense counsel's concerns about the potential for opening the door to testimony about the basis for B's alleged bias toward the defendant, stating to the prosecutor that, "as to any thought of the state getting into any domestic violence issues or the pending charges, or the reason why she might have certain feelings against the defendant, if you think you might be getting anywhere near nudging open a door that you

"Bias obviously relates to credibility, [and] credibility is always an issue. So, the court does weigh bias in terms of admissibility and [during] the weight versus admissibility analysis, and then of course whether this testimony would be more prejudicial than probative." In applying the *Gore* factors, the court determined that (1) factor one weighed in favor of admissibility because "[B has] not been challenged on her approximate ten year familiarity with the defendant off and on since high school, and it seems continuously for approximately the last three to four years, living together during that time, [and] having two children in common with him. And as it relates to the last contact, last seeing him approximately three months ago . . . [on] Halloween [of] 2022"; (2) factor two weighed in favor of admissibility because "[B] obviously lived with the defendant, including [before, during and after] the time he's alleged to have committed these offenses . . . . According to her testimony, although . . . the court would find fairly common the clothing worn, [the court notes her] testimony as to [the defendant's] tendency to wear the white tank top in the summer, khakis and/or basketball

think was initially cracked open by counsel, I'd ask you suggest a recess; we'll take it up outside the presence of the jury."

After the court made that statement, the following exchange occurred between defense counsel and the court:

"[Defense Counsel]: And just, Your Honor, in line with that . . . in light of your ruling on this, you had indicated that . . . there's a middle ground where I could ask some questions similar to the ones that I asked her in voir dire.

"The Court: I think more than middle. I think if you're getting to the part of naming specific charges, you take that risk yourself. I've had . . . other hearings and had you argue plenty of times, and I know you have lots—a lot of criminal experience, especially in examining witnesses, and you know how to tread the line. I certainly do not agree that you're limited to either not questioning her at all, or going all out and knocking, kicking open every door so that you invite [the prosecutor] to get into the specifics of the, I guess, the [pending domestic violence assault case], and I don't know the other charges, strangulation. I don't think those are your only options. I think you've done pretty much what you could do in front of the jury, apart, perhaps, from mentioning the charges, as you could do."

shorts in the summer, and [to wear what] she characterized as slides"; (3) factor three weighed against admissibility because "[B] testified that, other than having apparently taken off some weight between the time of the video and today, there's been no change in [the defendant's] appearance"; and (4) factor four weighed in favor of admissibility because "the video is clear, but in terms of being zoomed in and being able to identify the defendant's face, it is not so clear . . . [a]s to find that . . . [B's] testimony would not aid the jury in its fact-finding mission as to identification; [the video] is certainly not hopelessly obscure . . . ." Thus, the court denied the defendant's motion in limine, concluding that "the testimony of . . . [B] would aid the jury in its fact-finding duties as to the identification of [the] individual depicted in [the] three [video] clips contained in the exhibit."

Later that day, B testified before the jury, inter alia, that she had known the defendant off and on for about ten years and that the two of them formerly were in an intimate relationship for about three years, during which time they lived together and had two children. She testified further that there has been no marked change in the defendant's appearance since 2020; that the defendant typically wore khaki or basketball shorts, tank tops, and slides during the summer; and that she was "very certain" that the defendant was the person depicted in the Campfield Avenue video footage based on what the person was wearing, the body type of the person, and a visible tattoo of her daughter's name on the person's chest. She also testified that, sometime in July, 2020, she had picked up the defendant at a location near where the victim's vehicle was recovered in Hartford. B acknowledged on cross-examination that she previously had stated that she never wanted the defendant to be around her children again and that she wanted him to pay for what he had done to her.

A

On appeal, the defendant does not challenge the trial court's application of the *Gore* factors. Rather, in support of his claim that the court abused its discretion in admitting B's identification testimony, he makes three arguments, two of which concern the court's failure to consider certain additional factors during its *Gore* analysis, and the last of which relates to the prejudicial nature of B's identification testimony. We address these arguments in turn.

1

The defendant first argues that, in conducting its *Gore* analysis, the court should have considered the suggestive way in which B was shown the video footage, namely, the fact that she was shown the video footage in the courtroom during the defendant's trial. In support of this contention, the defendant, in effect, asserts that the suggestiveness issues that arise when an *eyewitness* makes an identification of a defendant for the first time in court; see *State* v. *Dickson*, 322 Conn. 410, 446, 141 A.3d 810 (2016), cert. denied, 582 U.S. 922, 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017);[12] also are present when a nonpercipient witness is first shown a video in a courtroom and makes an identification of a defendant in court from that video. According to the defendant, "the manner in which" the video evidence was "first shown to" B resulted in her having an "expectation that

[12] In *Dickson*, our Supreme Court addressed the inherent suggestiveness of first-time, in-court identifications by eyewitnesses. See *State* v. *Dickson*, supra, 322 Conn. 422–23. After finding that "[first-time] in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court"; id., 426; the court concluded "that *any* [first-time] in-court identification by a witness who would have been unable to reliably identify the defendant in a nonsuggestive out-of-court procedure constitutes a procedural due process violation." (Emphasis in original.) Id., 426 n.11.

the video would depict [the defendant] . . . .'' In other words, when B ''saw the video [evidence] in the courtroom and, of course, knew that [the defendant] was on trial,'' she would have ''had every reason to expect that she was being shown the video because the prosecutor believed it depicted [the defendant].'' Thus, the defendant asserts, the ''court should have considered whether this expectancy reduced the potency of [B's] familiarity . . . .''

The state counters, inter alia, that the record is inadequate to review any argument concerning the manner in which B was first shown the video footage, as there is no evidence in the record concerning whether the evidentiary hearing was the first time that B saw the Campfield Avenue video footage. We agree with the state.

''It is the responsibility of the appellant to provide an adequate record for review.'' Practice Book § 61-10 (a); *State* v. *Walker*, 319 Conn. 668, 678, 126 A.3d 1087 (2015). This rule recognizes that our role as a reviewing court ''is not to guess at possibilities, but to review claims based on a complete factual record developed by the trial court. . . . [Otherwise], we are left to guess or speculate as to the existence of a factual predicate.'' (Internal quotation marks omitted.) *State* v. *Kalican*, 110 Conn. App. 743, 755, 955 A.2d 1261, cert. denied, 289 Conn. 949, 960 A.2d 1038 (2008). ''It is axiomatic that this court will not resort to speculation and conjecture in avoidance of an inadequate record.'' *State* v. *Durdek*, 184 Conn. App. 492, 505, 195 A.3d 388, cert. denied, 330 Conn. 934, 194 A.3d 1197 (2018). ''[A] lack of pertinent factual findings and legal conclusions will render a record inadequate. . . . Similarly, ambiguity in a record can render it inadequate.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Ruscoe*, 119 Conn. App. 834, 841, 989 A.2d 667, cert. denied, 296 Conn. 903, 992 A.2d 330 (2010).

In the present case, the defendant concedes in his principal appellate brief that "[t]here is no evidence about whether [his trial] was the first time [that B] saw the video." The factual predicate for the defendant's argument is that B was shown the Campfield Avenue video footage for the first time at his trial. Nothing in the record, however, establishes when B first viewed this video evidence, and, therefore, we would be "left to guess or speculate as to the existence of a factual predicate"; (internal quotation marks omitted) *State* v. *Kalican*, supra, 110 Conn. App. 755; if we addressed this argument. See *State* v. *Salerno*, 36 Conn. App. 161, 166, 649 A.2d 801 (1994) ("it is not the function of this court to find facts"), appeal dismissed, 235 Conn. 405, 666 A.2d 821 (1995); see also *State* v. *Gasser*, 74 Conn. App. 527, 535, 812 A.2d 188 (concluding that defendant failed to present adequate record for review because resolving his claim on basis of record presented would require court to "speculate as to [a] factual determination"), cert. denied, 262 Conn. 954, 818 A.2d 781, cert. denied, 540 U.S. 823, 124 S. Ct. 153, 157 L. Ed. 2d 43 (2003).[13] We, therefore, decline to consider this argu-

[13] Even if the record contained the factual predicate necessary for this court to consider this argument, it would nevertheless fail on the merits because the defendant's assertion that "[t]he same suggestiveness problem [associated with eyewitness identifications] arises when a [nonpercipient] witness is shown a video [in court] and asked whether it depicts the defendant" ignores the important distinctions between identification testimony from an *eyewitness* and identification testimony from a *nonpercipient* witness. See *State* v. *Gore*, supra, 342 Conn. 150 (observing that "identifications of a defendant in surveillance video or photographs differ from eyewitness identifications" because "[a]n eyewitness . . . testifies regarding something that the jury cannot itself observe," whereas "a witness who identifies the defendant in surveillance video or photographs testifies regarding material that the jury also is able to observe").

In *Gore*, our Supreme Court addressed the concern raised by the defendant's argument as to a witness' "expectancy," stating: "We particularly note that, although familiarity increases the accuracy of identifications, these identifications are not immune from detracting factors such as expectations (the belief that one will come across a familiar face), the presence of a disguise, cross-racial identifications, and an increased distance between the witness and the target individual. . . . Requiring more than a minimal degree of familiarity provides greater assurance that a witness' identification

ment.[14] See, e.g., *D2E Holdings, LLC* v. *Corp. for Urban Home Ownership of New Haven*, 212 Conn. App. 694, 709, 277 A.3d 261 (record was inadequate to consider arguments raised on appeal), cert. denied, 345 Conn. 904, 282 A.3d 981 (2022).

2

Next, the defendant argues that the trial court should have considered B's purported bias during its totality of the circumstances analysis under *Gore*. Specifically, he contends that the "court was privy to more information about the then pending charges than the jury would be and therefore was better positioned than the jury to find that [B's] bias outweighed any benefit of her familiarity" with the defendant. He further asserts that he "could not expose the reason why [B] was biased against him and might identify him as the person in the video without fully informing the jury that [B] alleged he had strangled her and that criminal charges were pending." Therefore, he argues that the court should have considered his inability to fully cross-examine the witness regarding her bias as part of its admissibility analysis under *Gore*. Notably, the defendant does not

of a defendant in surveillance footage will be less affected by these detractors." (Citation omitted.) *State* v. *Gore*, supra, 342 Conn. 163. For that reason, the court "decline[d] to join the majority of jurisdictions that adhere to a minimum threshold for general familiarity and [held] that the degree of a witness' familiarity with a defendant goes to the admissibility of the witness' identification of the defendant in surveillance video or photographs. In order for the witness' general familiarity with the defendant's appearance to weigh in favor of admitting such testimony, the proponent of the testimony must demonstrate that the witness possesses more than a minimal degree of familiarity with the defendant. Some illustrative examples of persons who may satisfy this standard are friends, longtime acquaintances, neighbors, coworkers, family members, and former classmates." Id., 163–64. Accordingly, our Supreme Court addressed this argument in establishing the test set forth in *Gore*. We, therefore, find this argument unavailing.

[14] We note, however, that the test established in *Gore* was designed precisely to address situations like the one in the present case, in which a nonpercipient witness makes an in-court identification from a surveillance photograph or video. See footnote 13 of this opinion.

argue that his constitutional right of confrontation was violated; rather, he suggests that it was unduly restricted by the court's decision to admit B's identification testimony, and he cites *United States* v. *Calhoun*, 544 F.2d 291, 297 (6th Cir. 1976),[15] for the proposition that "defense counsel should not be forced to [choose] between 'the rock and the whirlpool' when cross-examining a nonpercipient witness who knows of the defendant's past misconduct or convictions." We are not persuaded.

First, the court, at least to some extent, did consider bias in its determination. As we noted in part I of this

[15] In *Calhoun*, the United States Court of Appeals for the Sixth Circuit held that it was an abuse of discretion for the trial court to have admitted testimony from the defendant's parole officer, who identified the defendant as the perpetrator shown in a bank surveillance photograph. See *United States* v. *Calhoun*, supra, 544 F.2d 294–95. The Sixth Circuit found that the "main defect" in permitting such testimony was that "[t]he defendant could not explore the possible motives his parole officer might harbor in positively identifying him as the robber." Id., 295.

In the present case, the state has directed our attention to *Commonwealth* v. *Guillaume*, Docket No. 13-P-1401, 2015 WL 808462 (Mass. App. February 27, 2015) (decision without published opinion, 87 Mass. App. 1107, 25 N.E.3d 912), review denied, 471 Mass. 1105, 31 N.E.3d 586 (2015), in which the Appeals Court of Massachusetts noted that "*Calhoun* appears to stand alone among the [f]ederal courts" and that, instead, "the general view . . . is to inquire whether 'the probative value of the testimony outweighed any prejudicial effect and also that any limitation on cross-examination resulted from a tactical decision by the defendant.' " Id., *3. We agree with the characterization of *Calhoun* by the Appeals Court of Massachusetts and similarly decline to follow *Calhoun*. See, e.g., *United States* v. *Contreras*, 536 F.3d 1167, 1171–72 (10th Cir. 2008) (disagreeing with *Calhoun* and rejecting claim that defendant was unduly prejudiced as result of inability to cross-examine witness fully and holding, instead, that trial court did not abuse its discretion in admitting testimony from defendant's probation officer identifying defendant as perpetrator of robbery from surveillance video footage), cert. denied, 555 U.S. 1117, 129 S. Ct. 942, 173 L. Ed. 2d 142 (2009); *United States* v. *Farnsworth*, 729 F.2d 1158, 1161 (8th Cir. 1984) (rejecting holding of *Calhoun* because court "disagree[d] that the constraints on cross-examination in this situation are so extreme that the admission of a parole officer's identification is per se an abuse of discretion"); *People* v. *Thompson*, 49 N.E.3d 393, 406 (Ill. 2016) (agreeing with "overwhelming majority of federal courts" that have declined to follow per se rule of *Calhoun* finding abuse of discretion when law enforcement officers provide identification testimony).

opinion, on the issue of bias, the court stated: "Bias obviously relates to credibility, [and] credibility is always an issue. So, the court does weigh bias in terms of admissibility and [during] the weight versus admissibility analysis, and then of course whether this testimony would be more prejudicial than probative." Moreover, as a general rule, a witness' potential bias goes to the weight, not the admissibility, of the witness' testimony. See, e.g., *State* v. *Harris*, 277 Conn. 378, 390, 890 A.2d 559 (2006) ("allegations of witness bias affect the *weight* that the fact finder gives to the evidence, not its *admissibility*" (emphasis in original)); *State* v. *Warren*, 100 Conn. App. 407, 420, 919 A.2d 465 (2007) ("bias did not affect the admissibility of the [challenged evidence] but was a matter concerning the weight the fact finder should afford it"); see also *State* v. *Gore*, supra, 342 Conn. 150 (*Gore* factors apply when determining *admissibility* of "nonpercipient lay opinion testimony identifying a defendant in surveillance video or photographs").

To the extent that the defendant argues that the bias of a nonpercipient witness and "the expected cross-examination of the witness" should be considered as part of a *Gore* totality of the circumstances analysis—an issue that Connecticut courts have not yet considered—we reject this argument and decline to impose additional requirements into the test set forth by our Supreme Court in *Gore*. In reaching this decision, we are guided, in part, by case law from federal courts, which have addressed the issue concerning bias in relation to nonpercipient witnesses. Our examination of this aspect of the defendant's argument involves a matter of law subject to plenary review. See, e.g., *State* v. *Parker*, 201 Conn. App. 435, 447, 242 A.3d 132 (2020) ("whether trial court correctly applied legal standard raises question of law subject to plenary review").

In *United States* v. *Jackman*, 48 F.3d 1, 4 (1st Cir. 1995), the United States Court of Appeals for the First Circuit was presented with an issue of first impression in that circuit concerning the admissibility of opinion testimony identifying a defendant from surveillance photographs. The defendant in *Jackman* had been charged in connection with the robbery of a bank in Massachusetts. Id., 2. Because he previously had been tried and convicted of a bank robbery in Connecticut, the trial court admonished the prosecutor not to make any references to the Connecticut bank robbery. Id., 3. The defendant's former wife and two acquaintances identified the defendant from a photograph taken of the perpetrator of the Connecticut robbery before viewing and identifying him from photographs taken of the Massachusetts robber. Id., 2. Following his conviction for the Massachusetts robbery, the defendant appealed, arguing, inter alia, that the testimony of the three nonpercipient witnesses should have been excluded because it was not helpful to the jury and was not susceptible to cross-examination. Specifically, the defendant asserted that, due to the trial court's ruling precluding the prosecutor from referencing the Connecticut robbery, he could not effectively cross-examine those witnesses about the effect their viewing of the surveillance photograph from the Connecticut robbery had on their subsequent in-court identification of him from the Massachusetts photographs. Id., 6. In rejecting this argument, the court held: "The court's ruling . . . could not possibly be construed as meaning that the *defendant* could not elicit testimony related to the Connecticut bank robbery on cross-examination. Defendants are often confronted with witnesses who possess knowledge of the defendant's past criminal history, knowledge that cannot be introduced by the prosecution. Although such knowledge could potentially be a source of bias infecting the [witness'] testimony, we know of

no evidentiary doctrine that would ordinarily exclude such testimony simply because cross-examination by the defendant about that knowledge could be highly damaging to his case. Thus, [the defendant's] failure to cross-examine these witnesses on this issue was not ordained by the court, but was instead a tactical decision. See [*United States* v. *Wright*, 904 F.2d 403, 406 (8th Cir. 1990)] (defendant's decision not to cross-examine law enforcement officers for bias was tactical decision) . . . ." (Citation omitted; emphasis in original.) *United States* v. *Jackman*, supra, 6.

Similarly, in *United States* v. *Allen*, 787 F.2d 933, 934 (4th Cir. 1986), vacated on other grounds, 479 U.S. 1077, 107 S. Ct. 1271, 94 L. Ed. 2d 132 (1987), "[t]he main issue on appeal concern[ed] the propriety of testimony by a police officer and a parole officer identifying [the defendants] as the individuals appearing in bank surveillance photographs." On appeal, the defendants argued that the identification testimony was "unfairly prejudicial because [the] defendants were limited in their cross-examination for fear of revealing their prior criminal activities." Id., 935. That claim arose "from a perceived inability to probe [the] witnesses for bias. Such a probe, [the defendants claimed], would inescapably divulge to the jury the reason for the asserted bias—the witness' knowledge of [the] defendants' prior criminal activity. [The] [d]efendants claim[ed] [that] this limitation on cross-examination made the testimony unfairly prejudicial to their case." Id., 937. The United States Court of Appeals for the Fourth Circuit rejected this argument, stating that any "[l]imitation of cross-examination was . . . the result of a tactical choice by [the] defendants similar to those frequently faced at trial. Nothing in the [Federal] Rules of Evidence or any other source is intended to relieve criminal defendants from difficult strategic decisions. The decision of a criminal

defendant to take the stand on his own behalf, for example, may result in revelation of prejudicial material a defendant would like to suppress. Courts, however, have felt no obligation to make the choice of a defendant to testify risk-free. See, e.g., *Harris* v. *New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971). [T]he [d]efendants chose to limit cross-examination, and we see no reason to insulate them from the natural consequences of that choice." *United States* v. *Allen*, supra, 937; see also *United States* v. *Stormer*, 938 F.2d 759, 763 (7th Cir. 1991).

In the present case, the trial court did not place any restrictions on the defendant's cross-examination and, in fact, remarked that it believed that defense counsel had cross-examined B to the fullest extent possible, apart from mentioning the other charges. Nothing in the case law from other jurisdictions addressing the issue of bias in relation to nonpercipient witnesses supports a determination that bias should factor into a court's analysis under *Gore* of the *admissibility* of testimony from a nonpercipient witness, which would be a departure from our long-standing evidentiary rule that bias concerns the weight to be afforded to a witness' testimony and *not its admissibility*. See, e.g., *State* v. *Harris*, supra, 277 Conn. 390. Likewise, the defendant has provided no authority demonstrating that a nonpercipient witness' identification testimony should be excluded when, as here, a defendant faces a difficult tactical decision regarding the scope of cross-examination of that witness' alleged bias.[16]

[16] In his appellate reply brief, the defendant asserts that this court should consider *People* v. *Mosley*, 41 N.Y.3d 640, 239 N.E.3d 928, 215 N.Y.S.3d 303 (2024), in which the Court of Appeals of New York held that the lower court had abused its discretion in admitting testimony from a nonpercipient witness, who was a police officer, because (1) "the [state] did not establish that [the witness] was sufficiently familiar with [the defendant] to render his identification helpful to the jury"; id., 650; and (2) "the [state] failed to demonstrate that the jury needed [the witness'] help." Id., 651. In reaching that decision, the court noted that "[t]he admission of [the witness'] testimony in this case illustrates the challenges of cross-examination inherent

Moreover, our Supreme Court in *Gore* specifically stated that, "[i]n light of our restriction of this type of testimony to witnesses who possess more than a minimal degree of familiarity with the defendant, we deem it unnecessary at this time to require any additional procedural protections in this context. Requiring more than a minimal degree of familiarity in order for this prong to weigh in favor of admissibility significantly reduces the risk of mistaken identifications." *State* v. *Gore*, supra, 342 Conn. 161. Despite this clear statement from our Supreme Court declining "to require additional

in lay opinion identification testimony *from law enforcement*" and, thus, "caution[ed] trial courts to admit this kind of identification testimony only in limited and necessary circumstances with all appropriate safeguards . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 652. We conclude that *Mosley* is inapposite to the present case.

In *Mosley*, a police officer had identified the defendant from "a grainy video of a man running through the street and firing three shots into a van." Id., 643. That video was the only evidence tying the defendant to the crime. Id. During voir dire, outside the presence of the jury, the witness, a homicide detective, explained that he had met the defendant when the defendant was brought to the police precinct as a suspect in a different crime. Id. He described his interactions with the defendant at the precinct but could not recall having any " 'street interactions' " with the defendant. Id., 644. The trial court instructed the witness to avoid mentioning the unrelated criminal investigation in order to avoid "airing prejudicial information about other police interactions before the jury . . . ." Id. The witness thereafter testified that he knew the defendant from " 'canvassing' in the area around where the shooting took place," which overstated his familiarity with the defendant and resulted in the defense being unable to thoroughly cross-examine him about this aspect of his familiarity with the defendant. Id., 652.

On appeal in *Mosley*, the court noted the attendant issues that may arise when a nonpercipient witness is a member of law enforcement; see, e.g., *Commonwealth* v. *Pleas*, 49 Mass. App. 321, 327, 729 N.E.2d 642 ("[i]dentification testimony from a police officer who is so designated increases the potential for inappropriate prejudice to the defendant"), review denied, 432 Mass. 1105, 733 N.E.2d 1066 (2000); and concluded that the witness was not sufficiently familiar with the defendant to render the witness' identification helpful to the jury. See *People* v. *Mosley*, supra, 41 N.Y.3d 648–50.

The facts of the present case differ from *Mosley* in that the nonpercipient witness, B, was not a member of law enforcement, there was no issue about B's familiarity with the defendant, there was no indication that B had mispresented her relationship with the defendant such that defense counsel could not fully cross-examine her about her familiarity with the defendant, and B's identification was not the only evidence linking the defendant to the robbery of the victim.

procedural protections in this context"; id.; the defendant, nonetheless, argues that the circumstances of his case warrant considerations in addition to the ones set forth in *Gore* before a trial court can admit identification testimony from a nonpercipient witness, mainly because the witness in this case, B, was adverse to him. We are not persuaded, especially when the additional considerations the defendant advocates for concern either a matter of trial tactics or the weight to be afforded to evidence, not its admissibility.

3

Finally, the defendant argues that the trial court's admission of B's identification testimony was an abuse of its discretion because the testimony was more prejudicial than probative.[17] We disagree.

Pursuant to § 4-3 of the Connecticut Code of Evidence, "[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." As noted by our Supreme Court in *State* v. *Hill*, 307 Conn. 689, 59 A.3d 196 (2013), the "four factors relevant

[17] In the present case, the court did not make an express finding regarding the probative versus prejudicial value of B's identification testimony. It did, however, state in its decision denying the defendant's motion in limine that "[b]ias obviously relates to credibility, [and] credibility is always an issue. So, the court does weigh bias in terms of admissibility and [during] the weight versus admissibility analysis, and then of course whether this testimony would be more prejudicial than probative." See parts I and I A 2 of this opinion. In light of this statement, the court necessarily must have found B's identification testimony more probative than prejudicial when it decided that the testimony was admissible. See *M. C.* v. *A. W.*, 226 Conn. App. 444, 452, 319 A.3d 183 (2024) ("the court's decision 'may include implicit findings that it resolved any credibility determinations and any conflicts in testimony in a manner that supports its ruling' "). The defendant has not raised any argument in this appeal concerning the court's failure to make an express finding concerning the probative versus prejudicial value of the testimony. We, therefore, review the court's implicit finding for an abuse of discretion.

to determining whether the admission of otherwise probative evidence is unduly prejudicial . . . are: '(1) where the facts offered may unduly arouse the [jurors'] emotions, hostility or sympathy, (2) where the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) where the evidence offered and the counterproof will consume an undue amount of time, and (4) where the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it.' " Id., 698. "Evidence is prejudicial when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence." (Internal quotation marks omitted.) *State* v. *Graham*, 200 Conn. 9, 12, 509 A.2d 493 (1986); see also E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 4.5.1, pp. 151–52. "Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted." (Internal quotation marks omitted.) *State* v. *Jones*, 351 Conn. 324, 332, 330 A.3d 118 (2025). "Because of the difficulties inherent in this balancing process, the trial court's decision will be reversed only whe[n] abuse of discretion is manifest or whe[n] an injustice appears to have been done. . . . On review by [an appellate court], therefore, every reasonable presumption should be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *State* v. *Raynor*, 337 Conn. 527, 562, 254 A.3d 874 (2020).

In light of B's past history and familiarity with the defendant, her identification testimony was probative evidence of the identity of the person in the Campfield Avenue video footage.[18] In fact, the defendant concedes

[18] See, e.g., *State* v. *Gore*, supra, 342 Conn. 164 ("When a witness who is familiar with the defendant's appearance views surveillance video or photographs that may or may not depict him, that witness brings to the task of identification an ability the jury cannot acquire in the context of a criminal trial. The witness' process of recognition is informed by having

that B's "testimony was probative to the extent that the trial court believed her familiarity with [the defendant] gave her a 'wealth of experience' that rendered her testimony helpful to the jurors." In arguing that B's identification testimony was unduly prejudicial, the defendant raises similar arguments regarding bias and his ability to cross-examine B fully, namely, that he "could not challenge [B's] credibility without the jurors learning, at minimum, that [his former girlfriend], the mother of his daughter, hated and feared him." Applying the four factors set forth in *Hill*, we are not persuaded. B's identification testimony consisted merely of her statements that she was familiar with the defendant from a prior romantic relationship with him and that she believed the person depicted in the Campfield Avenue video footage was the defendant. Although she acknowledged on cross-examination that she previously had stated that she never wanted the defendant to be around her children again and testified further that she wanted him to pay for what he had done to her, that testimony would not have unduly aroused the emotions of the jurors, nor did it create a side issue. Her testimony also did not consume a large amount of time or unfairly surprise the defendant.

The defendant's contention that B's testimony was unduly prejudicial due to the fact that he could not

observed the defendant in different contexts, over an extended period of time. That wealth of experience renders the testimony helpful to the jury."); see also *United States* v. *Wiley*, 78 F.4th 1355, 1362 (11th Cir. 2023) ("familiarity derived from a [witness'] close relationship to, or substantial and sustained contact with, the defendant weighs heavily in favor of admitting the [witness'] identification testimony" (internal quotation marks omitted)); *Hardy* v. *State*, 804 So. 2d 247, 270–71 (Ala. Crim. App. 1999) (same), aff'd sub nom. *Ex parte Hardy*, 804 So. 2d 298 (Ala. 2000), cert. denied, 534 U.S. 1043, 122 S. Ct. 621, 151 L. Ed. 2d 543 (2001); *Commonwealth* v. *Pleas*, 49 Mass. App. 321, 326–27, 729 N.E.2d 642 (nonpercipient witness identification testimony "is admissible . . . when the witness possesses sufficiently relevant familiarity with the defendant that the jury cannot also possess" (internal quotation marks omitted)) (quoting *United States* v. *Jackman*, supra, 48 F.3d 4–5), review denied, 432 Mass. 1105, 733 N.E.2d 1066 (2000).

cross-examine her fully regarding the prior domestic violence incident and the pending criminal charges against him is unavailing. As we have stated, any limitation on the defendant's cross-examination of B was a tactical choice of the defendant, which did not render B's testimony unfairly prejudicial. See, e.g., *United States* v. *Contreras*, 536 F.3d 1167, 1172 (10th Cir. 2008) (rejecting claim that identification testimony of nonpercipient witness was unfairly prejudicial because defendant could not fully cross-examine witness, as defendant made tactical decision not to cross-examine witness, which did not result in unfair prejudice), cert. denied, 555 U.S. 1117, 129 S. Ct. 942, 173 L. Ed. 2d 142 (2009). The defendant has provided no authority demonstrating that B's testimony, which itself was not unduly prejudicial, was rendered prejudicial as a result of the fact that his counsel might have to inquire into the issue of domestic violence between B and the defendant to be able to establish fully B's bias against the defendant.

Accordingly, the defendant has failed to establish his claim that B's testimony was more prejudicial than probative, and we conclude that the court's admission of B's identification testimony did not constitute an abuse of its discretion.

B

Even if this court were to assume, arguendo, that the admission of B's identification testimony was improper, any such error was harmless, as the defendant has failed to demonstrate that he was harmed by the trial court's failure to preclude B's identification testimony. See, e.g., *State* v. *Outlaw*, 350 Conn. 251, 283, 324 A.3d 107 (2024) ("[t]he question that is ultimately before [a reviewing court] is whether the admission of [the] evidence, even if [the court] were to assume it was

improper, was harmful"); see also *State* v. *Johnson*, 351 Conn. 53, 72, 328 A.3d 143 (2025).

The defendant does not claim that the trial court's ruling amounted to a constitutional violation. "[W]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case depends [on] a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Outlaw*, supra, 350 Conn. 283–84; see also *State* v. *Lindsay*, 143 Conn. App. 160, 170, 66 A.3d 944 ("[a] determination of harm requires [a reviewing court] to evaluate the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial" (internal quotation marks omitted)), cert. denied, 310 Conn. 910, 76 A.3d 626 (2013).

After reviewing the totality of the evidence adduced at trial, we conclude that the defendant has failed to meet his burden of demonstrating that he was harmed by the admission of B's identification testimony.[19] First,

[19] The defendant argues that the admission of B's testimony harmed him because, inter alia, "[a]bsent [her] testimony, the state's case was weak," given that the victim failed to pick the defendant's photo out of a photo-

the state presented testimony from forensic examiners at the state laboratory, along with a supplemental DNA report, confirming that amylase—a component of saliva—containing the defendant's DNA profile was found on the bite wound on the victim's arm, that the defendant's DNA profile could not be eliminated as a contributor to the samples collected from the interior of the victim's car, and that the mixture extracted from the victim's bite wound contained more of the defendant's DNA profile than it did the victim's.[20] See *Maryland* v. *King*, 569 U.S. 435, 442, 451, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013) (acknowledging "DNA testing's unparalleled ability both to exonerate the wrongly convicted and to identify the guilty," and "the unparalleled accuracy DNA [evidence] provides" (internal quotation marks omitted)); *State* v. *Quail*, 168 Conn. App. 743, 766, 148 A.3d 1092 (recognizing that, "in particular criminal convictions, DNA evidence may be the most compelling evidence of an accused's guilt"), cert. denied, 323 Conn. 938, 151 A.3d 385 (2016); see also *People* v. *Lazarus*, 238 Cal. App. 4th 734, 788, 190 Cal. Rptr. 3d 195 (2015) ("[t]he evidence . . . combined with the presence of [the defendant's] DNA on a wound inflicted on the victim during her struggles with her assailant . . . provided convincing evidence of [the defendant's] guilt"), review denied, California Supreme Court, Docket No. S229527 (October 28, 2015); *State* v. *Price*, Docket No. W2009-00083-CCA-R3-CD, 2010 WL 376625, *8 (Tenn. Crim. App. February 3, 2010) (concluding that

graphic array shown to him by the police, the DNA evidence was found on the victim's skin, as opposed to somewhere "where it could not [have] come from another source," and, although the defendant "generally fit [the victim's] description of the culprit," there was another suspect who also fit that description.

[20] In support of his argument, the defendant asserts that "an inculpatory DNA result is not itself sufficient evidence that the defendant committed a crime." We find this assertion inapplicable under the circumstances of this case, as it fails to take into account the other substantial circumstantial evidence before the jury, in addition to the DNA evidence.

evidence "was more than sufficient to establish the defendant's identity as the perpetrator" when, inter alia, "[t]he perpetrator bit the victim's arm . . . and the DNA profile obtained from saliva in the bite wound was . . . conclusively matched to the defendant's DNA"), appeal denied, Tennessee Supreme Court, Docket No. W2009-00083-SC-R11-CD (June 17, 2010). The DNA evidence presented by the state constituted strong evidence of the defendant's guilt.

The defendant attempts to discount the significance of the DNA evidence by suggesting that "the DNA could have been [the result of a] secondary transfer, or left in [the victim's] car on some prior occasion." This suggestion, however, is belied by the victim's testimony. In particular, the victim testified that he met the defendant for the first time on July 26, 2020, the night of the incident, and did not know the defendant at any point prior to the incident, that he never gave the defendant permission to drive his car, and that, to his knowledge, the defendant had never been in his car prior to the incident. "[T]he determination of the credibility of a witness is solely the function of the jury." (Internal quotation marks omitted.) *State* v. *Leniart*, 333 Conn. 88, 142, 215 A.3d 1104 (2019) The jury, therefore, was entitled to credit the victim's testimony. See, e.g., *State* v. *Holmgren*, 197 Conn. App. 203, 209, 231 A.3d 379 (2020).

In addition to the DNA evidence, the state presented other evidence in support of the defendant's guilt, apart from the challenged testimony of B. For example, at trial, the victim testified that he was robbed by a bald man with an olive skin tone whom he had picked up on New Lane Street in the early morning of July 26, 2020, and that the man initially had asked to be picked up on Main Street. Jones testified that the defendant had lived on Main Street at the time of the crime and that an analysis of the contents of his cell phone

revealed that he was not active on the phone between 1:30 and 3:30 a.m. on July 26, 2020—the time frame during which the crime occurred—although he did make and receive calls before and after that time frame. Furthermore, the state submitted into evidence a police photograph of the defendant in which his chest tattoo is visible, as well as the New Lane Street and Campfield Avenue video footage, which showed a bald man wearing a tank top and shorts getting into a sedan on New Lane Street in the early morning of July 26, 2020—consistent with the victim's testimony—and what appeared to be the same vehicle being dropped off in Hartford later that morning by a bald man wearing a tank top and shorts, with a visible chest tattoo. Moreover, B testified that, in or about July, 2020, she had picked up the defendant at a location near where the victim's car was found in Hartford. The defendant has not challenged that testimony.

In sum, contrary to the defendant's argument, the state's overall case against the defendant was quite strong due to the DNA and circumstantial evidence presented, aside from B's identification testimony. It is also noteworthy that the trial court permitted defense counsel to engage in unfettered cross-examination of B—a factor that weighs against concluding that the claimed error harmed the defendant. See *State* v. *Outlaw*, supra, 350 Conn. 283–84. In light of the other compelling evidence on which the jury could have based its verdict, we cannot conclude that B's identification testimony substantially swayed the jury's verdict. See, e.g., *State* v. *Lindsay*, supra, 143 Conn. App. 170; see also *State* v. *Outlaw*, supra, 283–84. Accordingly, the defendant has not met his burden of demonstrating that he was harmed by the court's admission of B's identification testimony.

II

The defendant next claims that the court committed plain error by failing to give the jury an instruction

regarding B's identification testimony. Specifically, he argues that "[t]he jury was given no guidance about how to use B's testimony. It was not told how to assess the quality of the video. It was not told how to weigh the significance of B's familiarity with [the defendant]. . . . Although [the defendant] did not ask for a specific instruction about identification and did not object to the . . . court's instruction as given,[21] the . . . court should have recognized that the jury needed guidance about using B's testimony and about the risk that she might be mistaken, despite her familiarity with [the defendant]. The failure to give such an instruction was plain error."[22] (Citations omitted; footnote added.) We disagree.[23]

[21] It is well established in Connecticut that unpreserved claims of improper jury instructions are reviewable under *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), unless they have been induced or implicitly waived. See *State* v. *Kitchens*, 299 Conn. 447, 468, 10 A.3d 942 (2011). "Connecticut courts have deemed a claim of instructional error implicitly waived when the defense failed to take exception to, and acquiesced in, the jury instructions following one or more opportunities to review them." Id., 480. The fact that a challenge to a jury instruction has been implicitly waived under *Kitchens*, as in the present case, however, does not foreclose "appellate relief under the plain error doctrine." *State* v. *McClain*, 324 Conn. 802, 808, 155 A.3d 209 (2017). We, therefore, address the defendant's claim of plain error.

[22] The defendant also asserts that the court did not instruct the jury in accordance with model criminal jury instruction § 2.6-4 pertaining to an eyewitness' identification of a defendant, which provides: "You may also consider the strength of the [witness'] initial identification of the defendant, including the degree of certainty expressed by the witness at the time of that identification. Certainty, however, does not necessarily mean accuracy. You should also take into account the circumstances under which the witness first viewed and identified the defendant and the suggestibility, if any, of the procedure used in that viewing." See Connecticut Criminal Jury Instructions 2.6-4, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited May 28, 2025). We find no merit to this claim, as the present case involves an identification by a nonpercipient witness, not an eyewitness. See footnote 14 of this opinion.

[23] The defendant also requests, in a cursory fashion, that this court exercise its supervisory authority over the administration of justice to craft a cautionary instruction that addresses "the increasingly common situation of nonpercipient witness[es] making identifications from video[s]." In his appellate briefs, the defendant has failed to set forth the standard under which this

We first set forth the standard of review and legal principles that govern claims of plain error. Our review "with respect to whether to reverse a trial court's judgment under the plain error doctrine is plenary." *State* v. *Kyle A.*, 348 Conn. 437, 446, 307 A.3d 249 (2024). "[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. . . . It is axiomatic that, [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. . . . Put another way, plain error review is reserved for only the most egregious errors." (Citation omitted; internal quotation marks omitted.) Id., 445.

To prevail on an unpreserved claim under the plain error doctrine, "the defendant must satisfy the two-pronged plain error test. First, the defendant must establish that there was an obvious and readily discernable error . . . ." (Internal quotation marks omitted.) *State* v. *Diaz*, 348 Conn. 750, 762, 311 A.3d 714 (2024). "Second, the defendant must establish that the obvious and readily discernable error was so harmful or prejudicial that it resulted in manifest injustice. . . .

court may invoke its supervisory authority, to provide any legal analysis of the applicable law to the facts of this case, and to explain why this is an appropriate case for this court to exercise its supervisory powers. "We are not required to review issues that have been improperly presented to this court through an inadequate brief . . . . Analysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *State* v. *Colon*, 232 Conn. App. 122, 130 n.9, A.3d (2025), petition for cert. filed (Conn. May 21, 2025) (No. 240375). Therefore, we decline to review the defendant's claim that we should exercise our supervisory powers. See id. (declining to review claim as to supervisory authority because it was inadequately briefed).

In sum, reversal is required only if the alleged error is *both* so clear *and* so harmful that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 763; see also *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017) ("plain error . . . is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings" (internal quotation marks omitted)).

"When reviewing the challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate [on] legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *Inzitari*, 351 Conn. 86, 103–104, 329 A.3d 215 (2025), petition for cert. docketed (U.S. May 14, 2025) (No. 24-7203).

We conclude that, because the defendant has not demonstrated the existence of " 'an obvious and readily discernable error' "; *State* v. *Diaz*, supra, 348 Conn. 762; in the trial court's jury instructions, his claim of plain error fails. Our Supreme Court "has explained that whether an error is clear is premised on the law existing at the time of trial. See *State* v. *Darryl W.*, 303 Conn. 353, 374, 33 A.3d 239 (2012) ('[i]t is axiomatic that the trial court's proper application of the law existing at the time of trial cannot constitute reversible error under

the plain error doctrine' . . .); *State* v. *Diaz*, 302 Conn. 93, 104 n.8, 25 A.3d 594 (2011) (same) . . . ." (Citation omitted.) *State* v. *Turner*, 334 Conn. 660, 683–84, 224 A.3d 129 (2020). For example, in *State* v. *Christopher S.*, 338 Conn. 255, 293–94 n.12, 257 A.3d 912 (2021), the defendant requested that our Supreme Court exercise its supervisory authority over the administration of justice to require trial courts to instruct juries concerning statements obtained by custodial interrogation and also claimed that the trial court's failure to provide such an instruction constituted plain error. In rejecting the claim of plain error, our Supreme Court stated: "Given that the defendant is asking us to invoke our supervisory authority to require a jury instruction that was not previously required, we fail to see how the trial court's failure to sua sponte give that instruction constituted plain error." Id., 294 n.12.

When our Supreme Court decided *Gore* in 2022, prior to the defendant's trial in the present case in 2023, it noted only that a "trial court *may* provide a cautionary jury instruction. See, e.g., *State* v. *Harris*, [330 Conn. 91, 134–35, 191 A.3d 119 (2018)] ('it *may* be appropriate for the trial court to craft jury instructions to assist the jury in its consideration of [the reliability of eyewitness testimony]')." (Emphasis added.) *State* v. *Gore*, supra, 342 Conn. 163. The defendant, therefore, cannot establish that the court committed plain error in failing to provide the jury with an instruction that it was not required to give and that our Supreme Court has stated *may* be appropriate in a given case. See *State* v. *Christopher S.*, supra, 338 Conn. 293–94 n.12; see also *State* v. *Kyle A.*, supra, 348 Conn. 447–48 (trial court did not commit plain error in failing to give jury instruction that has been deemed discretionary in nature and is not mandatory).

Our Supreme Court has "emphasize[d] that it has been especially rare for a jury instruction to be so

clearly improper that our courts have deemed plain error review necessary to correct it. See *State* v. *Kelly*, 256 Conn. 23, 58 n.18, 770 A.2d 908 (2001).This court has done so when the trial court has affirmatively misstated the law; see *State* v. *Preyer*, 198 Conn. 190, 198–200, 502 A.2d 858 (1985) (concluding that trial court committed plain error when it incorrectly instructed jury that cohabitation was not defense to charge of sexual assault in first degree); and when it has failed to comply with a statute that mandates a particular instruction. See *State* v. *Ruocco*, 322 Conn. 796, 801–802, 144 A.3d 354 (2016) (concluding that trial court committed plain error when it failed to instruct jury, as required by statute, that it could not draw unfavorable inferences from defendant's failure to testify). We do not suggest that there are no other circumstances in which an instruction could constitute plain error, but the reluctance with which we have chosen that course underscores that plain error is reserved for only the most egregious defects." *State* v. *Kyle A.*, supra, 348 Conn. 448. In the present case, the defendant has not argued that the instructions given misstated the law or were inaccurate; rather, he contends that the court "should have recognized that the jury needed guidance about using [B's] testimony and about the risk that she might be mistaken, despite her familiarity with [the defendant]." We cannot conclude that the court's failure to provide the jury with such an instruction constitutes the type of egregious defect or " 'truly extraordinary' situation" warranting reversal under the plain error doctrine.[24] *State* v. *Kyle A.*, supra, 448. Accordingly, the

[24] On January 31, 2025, the defendant's appellate counsel filed a notice of supplemental authority alerting this court to two Massachusetts cases concerning jury instructions pertaining to identifications from a video recording. See *Commonwealth* v. *Fisher*, 492 Mass. 823, 216 N.E.3d 1218 (2023); *Commonwealth* v. *Belnavis*, 104 Mass. App. 798, 244 N.E.3d 1052 (2024). We do not find these cases pertinent to the issue before us—whether the trial court committed plain error in failing to provide the jury with an instruction on nonpercipient witness identifications.

defendant's claim that the court committed plain error by failing to give the jury an instruction concerning nonpercipient witnesses fails.[25]

The judgment is affirmed.

In this opinion the other judges concurred.

KEYIN WORTH *v.* CHRISTOPHER J. PICARD ET AL.
(AC 46144)

Moll, Cradle and Clark, Js.*

Syllabus

The plaintiff appealed from the judgment of the trial court dismissing her action against the defendants for damages arising from her ejection from a residence during the enforcement of a summary process execution for possession. During the pendency of the appeal, the parties entered into a settlement agreement, and the trial court granted the defendants' motions to enforce the agreement, from which the plaintiff filed an amended appeal.

[25] Although we reject this claim and decline to invoke the "*extraordinary* remedy"; (emphasis in original; internal quotation marks omitted) *State* v. *Carlson*, 226 Conn. App. 514, 546, 318 A.3d 283, cert. denied, 350 Conn. 911, 324 A.3d 143 (2024); of exercising our supervisory authority in the manner requested by the defendant, we encourage the Judicial Branch's Criminal Jury Instruction Committee to develop a model jury instruction for use in similar situations. Also, to avoid similar claims in the future, we urge trial courts, henceforth, to provide juries with a cautionary instruction in cases in which a lay witness identifies a defendant in court from a surveillance video or photograph. See *State* v. *Gore*, supra, 342 Conn. 163 (recognizing that trial courts "may provide a cautionary jury instruction" in cases involving lay opinion testimony identifying a defendant via surveillance video footage); see also *People* v. *Mosley*, 41 N.Y.3d 640, 650, 239 N.E.3d 928, 215 N.Y.S.3d 303 (2024) (noting that, when court admits nonpercipient identification testimony, "as a best practice, it would be appropriate for . . . [it] to provide cautionary jury instructions, both at the time of the testimony and during the final charge, explaining to the jury that [nonpercipient] [witness] identification testimony is mere opinion testimony that [the jury] may choose to accept or reject, and reminding the jurors that because they are the finders of fact, it is their opinion as to whether the defendant is depicted in the surveillance footage that matters").

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

She claimed, inter alia, that the court improperly granted the defendants' motions because the draft settlement documents the defendants submitted to her did not reflect material aspects of the parties' agreement. *Held*:

The trial court properly granted the defendants' motions to enforce the settlement agreement, as any dispute as to purported deficiencies in the draft settlement documents was immaterial to the formation of the settlement agreement, and, thus, this court affirmed the judgment of the trial court dismissing the plaintiff's action.

Argued February 11—officially released June 3, 2025

Procedural History

Action to recover damages for, inter alia, conversion, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *D'Andrea*, *J.*, granted the motion to dismiss filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to this court; thereafter, the court, *Cordani*, *J.*, granted the defendants' motions to enforce a settlement agreement, and the plaintiff filed an amended appeal. *Affirmed*.

Keyin Worth, self-represented, the appellant (plaintiff).

Benjamin T. Staskiewicz, for the appellees (named defendant et al.).

Peter T. Fay, for the appellee (defendant AllPoints Realty, Inc.).

David S. Doyle, for the appellee (Mortgage Contracting Services, LLC).

Opinion

PER CURIAM. The dispositive issue in this appeal filed by the self-represented plaintiff, Keyin Worth, is whether the trial court, following an *Audubon* hearing,[1] properly granted motions to enforce a settlement agreement filed by the defendants, Christopher J. Picard,

[1] "An *Audubon* hearing is conducted to decide whether the terms of a settlement agreement are sufficiently clear and unambiguous so as to be enforceable as a matter of law." (Internal quotation marks omitted.) *307 White Street Realty, LLC* v. *Beaver Brook Group, LLC*, 216 Conn. App. 750, 757 n.5, 286 A.3d 467 (2022); see also *Audubon Parking Associates Ltd.*

AllPoints Realty, Inc. (AllPoints), Mortgage Contracting Services, LLC (MCS), Silver and Oak Realty CT, LLC (Silver and Oak), Jonathan Gineo, and Michael Garcarz.[2] We conclude that the trial court properly granted the motions to enforce the settlement agreement and, therefore, affirm the judgment of the trial court.

The following procedural history is relevant to our resolution of this appeal. In 2018, the plaintiff commenced an action against Picard, Edward DiLieto, and Willie Davis, Jr.[3] See *Worth* v. *Picard*, Superior Court, judicial district of Waterbury, Docket No. CV-18-5021726-S (2018 action).[4] The plaintiff asserted various claims predicated on allegations that, on or around March 27, 2018, during the enforcement of a summary process execution for possession that resulted in her ejection from a Wolcott property at which she resided,[5]

Partnership v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 811–12, 626 A.2d 729 (1993).

[2] The plaintiff also named as defendants in the present action (1) Gail Caroll, in her capacity as the fiduciary of the estate of Laura G. Urban, against whom the plaintiff subsequently withdrew the present action, and (2) four nonappearing Doe defendants. In the interest of simplicity, we refer to Picard, AllPoints, MCS, Silver and Oak, Gineo, and Garcarz individually by name and collectively as the defendants.

[3] The plaintiff named Picard, who is a member of the bar of this state, as a defendant in the 2018 action "as attorney and as individual." (Internal quotation marks omitted.) *Worth* v. *Picard*, 218 Conn. App. 549, 550 n.2, 292 A.3d 754 (2023). Additionally, the plaintiff named DiLieto and Davis, Jr., both of whom are state marshals, as defendants in the 2018 action in their respective individual and official capacities. Id. In the interest of simplicity, we do not distinguish between these various capacities when referring to these individuals.

[4] The plaintiff also named as defendants in the 2018 action (1) Edmar Services, LLC, against which the plaintiff subsequently withdrew the 2018 action, and (2) nonappearing entities identified only as "Trucking and Moving Providers."

[5] In 2016, nonparty Bank of New York Mellon, formerly known as the Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2007-OH1, Mortgage Pass-Through Certificates, Series 2007-OH1, commenced a summary process action against the plaintiff with respect to the Wolcott property. On May 19, 2017, the trial court, *Avallone, J.*, rendered a judgment of possession against the plaintiff, and, on March 15, 2018, a summary process execution for possession was issued.

some of her personal possessions were misappropriated.

Meanwhile, in June, 2021, while the proceedings in the 2018 action were ongoing, the plaintiff commenced the present action. In her revised first amended verified complaint dated October 24, 2021, the plaintiff asserted various claims predicated on allegations that some of her personal possessions were misappropriated in connection with her eviction from the Wolcott property. On December 30, 2021, Picard, Silver and Oak, Gineo, and Garcarz filed an amended motion to dismiss the present action,[6] inter alia, on the basis of the prior pending action doctrine. On January 5, 2022, the plaintiff filed a memorandum of law in opposition to the amended motion to dismiss. On December 16, 2022, the trial court, *D'Andrea*, *J.*, granted the amended motion to dismiss pursuant to the prior pending action doctrine, dismissing the present action in its entirety.[7]

[6] On June 23, 2021, Picard, alone, filed a motion to dismiss the present action, which motion was later amended on September 8, 2021.

[7] Additionally, the moving defendants requested a prohibitory order preventing the plaintiff from commencing any new actions associated with the Wolcott property or any alleged losses from the disposition of her personal belongings in connection with her eviction from the Wolcott property. In granting the amended motion to dismiss, the court entered the following order: "The plaintiff . . . is precluded from filing any new actions against the defendants. Should the plaintiff attempt to file any new actions, all proposed filings will be reviewed by this court. If the court, after review, deems the filings to contain frivolous allegations or should they obviously fail to state claims upon which relief can be granted, or they contain allegations similar to the allegations contained in this case and previous case so that they are in effect adjudicating the same underlying rights, any proposed actions will be rejected by the clerk's office at the direction of the court and returned to the plaintiff. The court will not open a file as an official record within the Judicial Branch as it has been done in the past without this review. In the event that the proposed filing is not one as described above and states a claim upon which relief may be granted, the court will process the filings in the usual manner."

In her principal appellate brief, the plaintiff makes a brief reference to the court's "filing injunction" with no accompanying substantive legal analysis challenging its propriety. Thus, insofar as the plaintiff attempts to raise a claim of error as to the court's prohibitory order, we deem any such claim

On January 4, 2023, the plaintiff filed this appeal.[8]

In connection with this appeal, appellate preargument conferences (PACs) were held by the Honorable Richard N. Palmer on April 13, May 23 and June 14, 2023. On October 13, 2023, DiLieto and Davis, Jr. (marshal defendants) filed in the 2018 action a motion to enforce an alleged settlement agreement that had been reached during the course of the PACs and requested that the court conduct an *Audubon* hearing. On November 3, 2023, AllPoints filed in the present action a motion to enforce the alleged settlement agreement, which MCS adopted in its own motion on November 14, 2023. On November 27, 2023, Picard, Silver and Oak, Gineo, and Garcarz filed a separate motion to enforce the alleged settlement agreement. The plaintiff filed objections to these motions to enforce.

On January 26, 2024, the court, *Cordani*, *J.*, held an *Audubon* hearing encompassing the motions to enforce the settlement agreement filed in both the present action and the 2018 action. The hearing was attended by respective counsel for (1) the marshal defendants,

to be abandoned as inadequately briefed. See *Long Manor Owners' Assn., Inc.* v. *Alungbe*, 218 Conn. App. 415, 422–23, 292 A.3d 85 ("Both this court and our Supreme Court repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . In addition, although we acknowledge that self-represented litigants are afforded some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Citations omitted; internal quotation marks omitted.)), cert. denied, 348 Conn. 909, 303 A.3d 10 (2023); see also *Worth* v. *Picard*, 218 Conn. App. 549, 551 n.3, 292 A.3d 754 (2023).

[8] On December 28, 2022, the plaintiff filed a motion to reargue/reconsider the judgment of dismissal, which the court summarily denied thereafter.

(2) MCS, (3) AllPoints, and (4) Picard, Garcarz, Gineo, and Silver and Oak. The plaintiff did not attend the hearing; nevertheless, the court decided to "proceed in her absence, finding that she's apparently intentionally waived the right to participate in the hearing."[9] Several exhibits, including email correspondence, were admitted into the record, and the court heard testimony from (1) Attorney Joseph B. Burns, the marshal defendants' counsel, and (2) Attorney Peter T. Fay, AllPoints' counsel.

On February 7, 2024, the court issued a memorandum of decision granting the defendants' motions to enforce the settlement agreement.[10] The court made the following factual findings. Although they were not parties to the present action, the marshal defendants were invited to attend the May 23 and June 14, 2023 PACs to determine "whether a global resolution could be achieved because the [2018 action and the present action] were closely related." At the June 14, 2023 PAC, the plaintiff, the defendants, and the marshal defendants agreed to "a full and final settlement agreement," pursuant to

[9] On January 25, 2024, the plaintiff filed a notice indicating that she would not participate in the *Audubon* hearing in light of this pending appeal, as well as an amended appeal that she intended to file. Notwithstanding the plaintiff's failure to attend the hearing, the court stated in its decision granting the defendants' motions to enforce the settlement agreement that it had considered the plaintiff's written objections to the motions.

[10] The court simultaneously granted the marshal defendants' motion to enforce the settlement agreement, which is not at issue in this appeal. See footnote 17 of this opinion.

Additionally, we note that the court's decision, as well as the trial court case detail, appear to indicate that the court granted only AllPoints' motion to enforce the settlement agreement, with no accompanying grants of the separate motions filed by (1) MCS (which had adopted AllPoints' motion) and (2) Picard, Garcarz, Gineo, and Silver and Oak. The court stated, however, that its decision "applie[d] to the defendants' motions to enforce a settlement agreement in both [the 2018 action and the present action] . . . ." We interpret the court's decision to have granted all of the respective motions to enforce the settlement agreement filed by the defendants in the present action.

which (1) the defendants and the marshal defendants, collectively, would pay the plaintiff a total of $168,000, (2) the plaintiff would execute a full and final general release in favor of (a) the defendants, including their (i) attorneys and law firms and (ii) insurers, (b) the marshal defendants, including their (i) attorneys and law firms and (ii) insurers, and (c) the Bank of New York (BNY),[11] including its affiliates, subsidiaries, predecessors, and successors,[12] (3) the defendants and the marshal defendants would execute a full and final general release in favor of the plaintiff,[13] and (4) the terms of the settlement would be confidential.[14] Following the June 14, 2023 PAC, "the parties went away to document the foregoing agreement. The terms of the agreement

[11] This entity's full name is the Bank of New York Mellon, formerly known as the Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2007-OH1, Mortgage Pass-Through Certificates, Series 2007-OH1. See footnote 5 of this opinion.

[12] The court further found that the settlement agreement "provided for a standard general release from the plaintiff to the specified parties as follows: 'The plaintiff hereby forever releases each defendant in the 2018 [action] and in the [present action], the attorneys and law firms representing each of the foregoing defendants in the foregoing litigations, each insurance company insuring the foregoing defendants and/or attorneys, and [BNY], its affiliates, subsidiaries, predecessors, and successors from all claims, causes of action, damages, and demands that the plaintiff had, whether known or unknown, as of June 14, 2023, including without limitation all claims and causes of action asserted in the 2018 [action] and the [present action].' "

[13] The court further found that the settlement agreement "provided for a standard general release from the defendants [and the marshal defendants] to the plaintiff as follows: 'Each defendant in the 2018 [action] and in the [present action] forever releases the plaintiff from all claims, causes of action, damages, and demands that each such defendant had, whether known or unknown, as of June 14, 2023, including without limitation all claims and causes of action arising out of the 2018 [action] and the [present action].' "

[14] The court further found that (1) a "potential settlement agreement" had been reached during the May 23, 2023 PAC, pursuant to which the plaintiff would have been paid a total of $120,000, but a dispute arose as to whether the plaintiff would execute a general release in favor of BNY, and (2) "the payment was specifically increased [from $120,000 to $168,000 in the full and final settlement agreement] as further compensation for the inclusion of [BNY] and its related parties in the release."

were simple, clear and unambiguous. All parties understood the simple, unambiguous terms of the settlement agreement. The settlement agreement was also consistent with the situation that the parties found themselves in and represented a reasonable and standard resolution to the situation." As the court further determined, "[t]he settlement agreement was voluntarily and knowingly reached by the parties at the [June 14, 2023] PAC. There was a meeting of the minds of all parties that a full and final settlement agreement on the terms found by the court was reached. The settlement agreement was completely made in the presence of [Justice Palmer] during a PAC wherein the very purpose of the PAC was to strive for a settlement. Accordingly, the settlement agreement was made directly and completely within the confines of the court processes and in the presence of Justice Palmer." The defendants and the marshal defendants drafted and submitted proposed releases to the plaintiff; however, upon receipt of the proposed releases, the plaintiff refused to proceed with the settlement.

Following the *Audubon* hearing, "the court [was] convinced that the parties voluntarily and knowingly agreed to a definitive settlement of the 2018 [action] and the [present action] on the terms specified by the court in its factual findings, namely, a total aggregate payment of $168,000, the exchange of general releases as specified in the [court's] findings of fact, and confidentiality. The terms of the settlement were definitive, simple, clear, and unambiguous. [The motions to enforce raised matters] in equity and ask[ed] that the court use its equitable powers to enforce a settlement agreement reached in a mediation of this ongoing litigation. . . . Enforcing a settlement such as this [would preserve] the integrity of the litigation process, as well as the use of settlements as a meaningful and predictable way of settling litigation. When parties settle a litigation, they are in effect contracting for the right to avoid trial.

. . . Accordingly, the court will enforce the settlement agreement reached." (Citations omitted.) The court ordered (1) the settlement agreement to be consummated per the terms found by the court and (2) the plaintiff to withdraw the 2018 action and the present action within thirty days.[15] On February 13, 2024, the plaintiff filed a motion to reconsider, which the court denied on February 20, 2024. On March 1, 2024, the plaintiff amended this appeal to encompass, inter alia, the February 7, 2024 decision.[16] Additional facts and procedural history will be set forth as necessary.[17]

[15] The court further ordered that "[t]he plaintiff must also withdraw any other litigation or claims wherein the claims are released by the general release contained within the settlement agreement."

Additionally, on April 10, 2024, in response to a motion for articulation filed by the plaintiff, the court issued an articulation stating in relevant part that "nothing in the court's decision comments upon or impacts the plaintiff's ability to make reports to the Connecticut Grievance Committee. Further, nothing in the settlement agreement reached between the parties inhibits the plaintiff's ability to file grievances."

[16] In January, 2024, the plaintiff filed two additional amended appeals, which indicated that she was challenging various decisions issued prior to the February 7, 2024 decision.

Additionally, on March 4, 2024, the plaintiff filed a motion to vacate and to set aside the February 7, 2024 decision, which the court summarily denied on March 18, 2024. On April 2, 2024, the plaintiff amended this appeal to encompass the court's denial of her motion to vacate and to set aside. Although the plaintiff acknowledges this fourth amended appeal in her supplemental appellate brief filed, with permission from this court, on June 3, 2024, as well as in her reply brief filed on October 1, 2024, she raises no cognizable claim of error as to the denial of her motion to vacate and to set aside, thereby abandoning any such claim. See *New Milford* v. *Standard Demolition Services, Inc.*, 212 Conn. App. 30, 34 n.1, 274 A.3d 911 (claims of error not briefed on appeal are deemed abandoned), cert. denied, 345 Conn. 908, 283 A.3d 506 (2022).

[17] On January 26, 2024, the plaintiff filed an appeal in the 2018 action, which she later amended to encompass the court's grant of the marshal defendants' motion to enforce the settlement agreement. On March 27, 2024, this court dismissed the original appeal filed in the 2018 action for lack of a final judgment and consolidated the amended appeal filed in the 2018 action with this appeal. On April 8, 2024, the plaintiff withdrew the amended appeal filed in the 2018 action. Thus, the plaintiff is not pursuing any claim of error in this appeal with regard to any decision in the 2018 action.

The plaintiff raises several claims of error, including that the court improperly granted the defendants' motions to enforce the settlement agreement. For the reasons that follow, we conclude that the court properly granted the defendants' motions to enforce the settlement agreement,[18] which conclusion is dispositive of this appeal.[19]

We begin by setting forth the following applicable legal principles and standard of review. "A trial court has the inherent power to enforce summarily a settlement agreement as a matter of law when the terms of

[18] In its appellate brief, AllPoints argues that this appeal is moot as to the grant of the defendants' motions to enforce the settlement agreement because the plaintiff withdrew her appeal from the simultaneous grant of the marshal defendants' motion to enforce the settlement agreement in the 2018 action; see footnote 17 of this opinion; such that, "even if the plaintiff were to prevail on this issue in the present action, the . . . decision in the [2018 action] remains in effect." See *Bongiorno* v. *J & G Realty, LLC*, 211 Conn. App. 311, 322, 272 A.3d 700 (2022) ("Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . . A determination regarding . . . [this court's] subject matter jurisdiction is a question of law . . . [and, therefore] our review is plenary. . . . [I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Internal quotation marks omitted.)); see also id., 320–21 ("[o]nce the question of the court's subject matter jurisdiction is raised, it must be resolved before the court addresses the merits of the plaintiff's claims" (internal quotation marks omitted)). AllPoints, however, is not a party to the 2018 action, and, thus, if the plaintiff were to prevail in this appeal, AllPoints would have no standing to seek to enforce the decision granting the marshal defendants' motion to enforce the settlement agreement in the 2018 action. See, e.g., *In re Leeanna B.*, 142 Conn. App. 60, 66, 62 A.3d 1135 (2013) (nonparty lacked standing to file motion for contempt). As such, we reject AllPoints' mootness argument. Moreover, to the extent AllPoints claims that the decision in the 2018 action has a preclusive effect in this action, it has failed to brief adequately that issue.

[19] Additionally, the plaintiff raises claims challenging various decisions that preceded and are unrelated to the grant of the defendants' motions to enforce the settlement agreement. In light of our conclusion that the court properly granted the defendants' motions to enforce the settlement agreement, it is unnecessary to address these additional claims.

the agreement are clear and unambiguous. . . . Agreements that end lawsuits are contracts, sometimes enforceable in a subsequent suit, but in many situations enforceable by entry of a judgment in the original suit. . . . Summary enforcement is not only essential to the efficient use of judicial resources, but also preserves the integrity of settlement as a meaningful way to resolve legal disputes. When parties agree to settle a case, they are effectively contracting for the right to avoid a trial. . . . Nevertheless, the right to enforce summarily a settlement agreement is not unbounded. The key element with regard to the settlement agreement in [*Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 812, 626 A.2d 729 (1993) (*Audubon*)] . . . [was] that there [was] no factual dispute as to the terms of the accord. Generally, [a] trial court has the inherent power to enforce summarily a settlement agreement as a matter of law [only] when the terms of the agreement are clear and unambiguous . . . and when the parties do not dispute the terms of the agreement. . . . The rule of *Audubon* effects a delicate balance between concerns of judicial economy on the one hand and a party's constitutional rights to a jury and to a trial on the other hand. . . . To use the *Audubon* power outside of its proper context is to deny a party these fundamental rights and would work a manifest injustice. . . .

"A settlement agreement is a contract among the parties. . . . In order to form a binding and enforceable contract, there must exist an offer and an acceptance based on a mutual understanding by the parties . . . . The mutual understanding must manifest itself by a mutual assent between the parties. . . . In other words, [i]n order for an enforceable contract to exist, the court must find that the parties' minds had truly met. . . . If there has been a misunderstanding between the parties, or a misapprehension by one or both so that

their minds have never met, no contract has been entered into by them and the court will not make for them a contract which they themselves did not make. . . . Meeting of the minds is defined as mutual agreement and assent of two parties to contract to substance and terms. It is an agreement reached by the parties to a contract and expressed therein, or as the equivalent of mutual assent or mutual obligation. . . . This definition refers to fundamental misunderstandings between the parties as to what are the essential elements or subjects of the contract. It refers to the terms of the contract, not to the power of one party to execute a contract as the agent of another. . . .

"A contract is not made so long as, in the contemplation of the parties, something remains to be done to establish the contractual relation. The law does not . . . regard an arrangement as completed which the parties regard as incomplete. . . . In construing the agreement . . . the decisive question is the intent of the parties as expressed. . . . The intention is to be determined from the language used, the circumstances, the motives of the parties and the purposes which they sought to accomplish. . . . Furthermore, [p]arties are bound to the terms of a contract even though it is not signed if their assent is otherwise indicated. . . .

"Finally, [t]he fact that parties engage in further negotiations to clarify the essential terms of their mutual undertakings does not establish the time at which their undertakings ripen into an enforceable agreement . . . [and we are aware of no authority] that assigns so draconian a consequence to a continuing dialogue between parties that have agreed to work together. We know of no authority that precludes contracting parties from engaging in subsequent negotiations to clarify or to modify the agreement that they had earlier reached. . . . More important . . . [when] the general terms on which the parties indisputably had agreed . . .

included all the terms that were essential to an enforceable agreement . . . [u]nder the modern law of contract . . . the parties . . . may reach a binding agreement even if some of the terms of that agreement are still indefinite." (Footnote omitted; internal quotation marks omitted.) *Edgewood Properties, LLC* v. *Dynamic Multimedia, LLC*, 226 Conn. App. 583, 611–14, 319 A.3d 123, cert. denied, 350 Conn. 905, 323 A.3d 344 (2024). "The test of disputation . . . must be applied to the parties at the time they entered into the alleged settlement. To hold otherwise would prevent any motion to enforce a settlement from ever being granted." (Internal quotation marks omitted.) *Meridian Partners, LLC* v. *Dragone Classic Motorcars, Inc.*, 171 Conn. App. 355, 364–65, 157 A.3d 87 (2017).

"When a party challenges the trial court's legal conclusion that the agreement was summarily enforceable, we must determine whether that conclusion is legally and logically correct and whether [it finds] support in the facts set out in the memorandum of decision . . . . In addition, to the extent that the [party's] claim implicates the court's factual findings, our review is limited to deciding whether such findings were 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. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 824, 277 A.3d 200 (2022).

We discern the plaintiff's principal claim as to the court's grant of the defendants' motions to enforce the settlement agreement to be that no agreement was

reached because the draft settlement documents submitted by the defendants to the plaintiff following the June 14, 2023 PAC did not reflect material aspects of the agreement, such as the parties executing mutual releases. The plaintiff contends that (1) "[t]here was absolutely no meeting of the mind[s] *after* the opposing attorneys represented their proposed settlements [following the June 14, 2023 PAC], as such [she] called for an IMPASSE"; (emphasis added); and (2) the purported "[o]ne-sided" draft settlement documents "attempt[ed] to alter *the agreed-upon terms* [and] prompt[ed] [her to call] an IMPASSE since the proposed document[s] [did not] reflect their original understanding of the settlement." (Emphasis added.) The plaintiff's contention that there was no meeting of the minds *after* the parties entered into the settlement at the June 14, 2023 PAC ignores the principle, as stated herein, that "[t]he test of disputation . . . must be applied to the parties at the time they entered into the alleged settlement." (Internal quotation marks omitted.) *Meridian Partners, LLC* v. *Dragone Classic Motorcars, Inc.*, supra, 171 Conn. App. 364–65. Therefore, any dispute as to purported deficiencies in the draft settlement documents is immaterial to the formation of the settlement agreement at the June 14, 2023 PAC, as found by the court.[20] Moreover, the plaintiff cites to no evidence to support her claim that releases beyond those found by the trial court were contemplated at the PAC, and the record in fact supports the court's related findings. In short, we reject the plaintiff's contention that the defendants' draft settlement documents circulated following the June 14,

[20] Insofar as the plaintiff is under the misapprehension that the court's decision required her to execute the draft settlement documents submitted by the defendants, we note that the court's decision did not direct the parties to execute any particular documents; rather, the court ordered the parties to consummate the settlement agreement per the terms found by the court, which included the execution of releases, ostensibly leaving it to the parties to cooperate in drafting and executing documents attendant to the agreement.

2023 PAC undermined the formation of the settlement agreement, with the terms detailed by the court, at the June 14, 2023 PAC.

We briefly address two other cognizable claims that we distill from the plaintiff's appellate briefs, which are not models of clarity.[21] First, the plaintiff contends that, following the June 14, 2023 PAC, "there was a proposed resolution, some of which the parties tentatively agreed upon, subject to opposing attorneys' further submission of proposed written settlement agreements for [her] review," but that "[n]o specific terms and conditions were agreed [to], nothing was in writing for confirmation, nothing was signed, no written term sheet or other written agreement was created at the end of the [June 14, 2023] PAC . . . and nothing was reported to any court to be placed on the record." To the extent that the plaintiff attempts to challenge the court's factual findings regarding the formation of the agreement, the evidence admitted into the record during the *Audubon* hearing supports the court's determination that the parties entered into a settlement agreement with specific

[21] Insofar as the plaintiff attempts to raise any other claims of error attendant to the grant of the defendants' motions to enforce the settlement agreement, we deem them to be abandoned as inadequately briefed. See *Long Manor Owners' Assn., Inc.* v. *Alungbe*, 218 Conn. App. 415, 422–23, 292 A.3d 85 ("Both this court and our Supreme Court repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . In addition, although we acknowledge that self-represented litigants are afforded some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Citations omitted; internal quotation marks omitted.)), cert. denied, 348 Conn. 909, 303 A.3d 10 (2023); see also *Worth* v. *Picard*, 218 Conn. App. 549, 551 n.3, 292 A.3d 754 (2023).

terms. Moreover, "the fact that the settlement agreement was not reduced to writing or signed by the parties does not preclude it from binding the parties." *Nanni* v. *Dino Corp.*, 117 Conn. App. 61, 67, 978 A.2d 531 (2009).

Second, the plaintiff contends that the court (1) admitted exhibits into the record during the *Audubon* hearing "without foundation and testimon[y]" and (2) improperly entered into evidence her "copyrighted professional webpage . . . ." These claims are unavailing. "The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *Edgewood Properties, LLC* v. *Dynamic Multimedia, LLC*, supra, 226 Conn. App. 607. Prior to considering the admission of exhibits during the *Audubon* hearing, the court stated that, because the hearing was not a contested hearing and no exhibits were being admitted by agreement, the defendants would be required to lay a foundation for their proposed exhibits through testimony. The court proceeded to admit several exhibits offered by the defendants after proper foundations, through testimony, had been laid. Thus, the plaintiff's contention that the court admitted exhibits at the *Audubon* hearing "without foundation and testimon[y]" fails. Additionally, contrary to the plaintiff's second contention, her "copyrighted professional webpage" was not admitted into evidence; rather, the exhibit at issue—exhibit I—was marked as, and remained, an exhibit for identification only because the court determined that the defendants had failed to lay an appropriate foundation for its admission.

The judgment is affirmed.

JOHN VIVO III *v.* COMMISSIONER OF CORRECTION (AC 47144)

Elgo, Clark and Prescott, Js.

Syllabus

The petitioner, who previously had been convicted of, inter alia, murder, appealed following the denial of his petition for certification to appeal from the judgment of the habeas court denying in part his petition for a writ of habeas corpus. He claimed, inter alia, that the court abused its discretion by denying his petition for certification to appeal. *Held*:

The habeas court did not abuse its discretion in denying the petitioner certification to appeal, as the petitioner failed to show that his claim involved issues that were debatable among jurists of reason, that a court could resolve them in a different manner or that they were adequate to deserve encouragement to proceed further.

The habeas court properly concluded that the petitioner's second habeas counsel did not render ineffective assistance by failing to raise a claim that the petitioner's trial counsel failed to adequately advise him regarding the state's plea offers, as the petitioner failed to demonstrate that the habeas court used an incorrect legal standard in its analysis of the question of whether he was prejudiced by the assumed deficient performance of trial counsel.

Argued March 27—officially released June 3, 2025

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, *Bhatt*, *J.*; judgment dismissing in part and denying in part the petition; thereafter, the court, *Bhatt*, *J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Naomi T. Fetterman, assigned counsel, for the appellant (petitioner).

Timothy F. Costello, supervisory assistant state's attorney, with whom, on the brief, were *Joseph T.*

Corradino, state's attorney, and *Jonathan R. Formichella*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, John Vivo III, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying in part, dismissing in part, and granting in part his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court abused its discretion by denying his petition for certification to appeal and that the court improperly concluded that his second habeas counsel did not render ineffective assistance by failing to raise a claim that his trial counsel failed to adequately advise him regarding the state's plea offers. We conclude that the habeas court properly denied the petition for certification to appeal and, therefore, dismiss this appeal.

The petitioner's underlying criminal conviction stems from events that took place on the evening of February 23, 1994, and were described by our Supreme Court as follows: "Yolanda Martinez and William Terron were crossing a courtyard at the Evergreen Apartments in Bridgeport when the [petitioner] and two other persons, armed with semiautomatic weapons, ran up to them. Martinez identified the two others as Joel Rodriguez and Eric Floyd. The [petitioner] pulled Terron near a fence where he shot Terron ten times, killing him. At the same time, Rodriguez shot Martinez in the hand and in the upper right arm, before he and Floyd ran to a nearby car. The [petitioner] then ran over to where Martinez lay on the ground and shot her in the legs three times. The [petitioner] thereafter joined the others, and they fled in a car." *State* v. *Vivo*, 241 Conn. 665, 667, 697 A.2d 1130 (1997). The petitioner's first trial ended in a mistrial. Following a second jury trial, the petitioner

was convicted of murder in violation of General Statutes § 53a-54a (a), assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and commission of class A and class B felonies with a firearm in violation of General Statutes § 53-202k. The court, *Gormley*, *J.*, sentenced the petitioner to sixty years of incarceration for murder, ten years of incarceration for assault in the first degree, and five years of incarceration for the commission of class A and class B felonies with a firearm, which sentences were ordered to run consecutively for a total effective term of seventy-five years. His conviction was affirmed on direct appeal.[1] See id.

The petitioner subsequently filed a petition for a writ of habeas corpus that was denied by the habeas court, *Hon. Richard M. Rittenband*, judge trial referee. On appeal, this court reversed the judgment only as to the petitioner's conviction under § 53-202k, reasoning that, "[a]lthough the petitioner's total effective sentence was proper, the judgment must be modified to reflect the fact that § 53-202k does not constitute a separate offense." *Vivo* v. *Commissioner of Correction*, 90 Conn. App. 167, 177, 876 A.2d 1216, cert. denied, 275 Conn. 925, 883 A.2d 1253 (2005). It therefore remanded the case with direction to vacate that conviction and to resentence the petitioner to a total effective term of seventy-five years of incarceration. See id.

The petitioner also filed a second petition for a writ of habeas corpus. The habeas court, *Schuman*, *J.*, denied the petition, and the appeal from that denial was dismissed. See *Vivo* v. *Commissioner of Correction*, 115 Conn. App. 901, 971 A.2d 97, cert. denied, 293 Conn. 903, 975 A.2d 1279 (2009).

The petitioner filed a motion to correct an illegal sentence arguing that his seventy-five year sentence

[1] The petitioner's direct appeal was transferred from this court to our Supreme Court.

was illegal. The court, *Devlin*, *J.*, denied the motion in part, vacated the conviction under § 53-202k,[2] and resentenced the petitioner to sixty years of incarceration on the murder conviction and ten years on the assault conviction, enhanced to fifteen years pursuant to § 53-202k, to run consecutively to the sentence on the murder conviction, for a total effective sentence of seventy-five years of incarceration. See *State* v. *Vivo*, Superior Court, judicial district of Fairfield, Docket No. CR-94-95080 (July 29, 2011). The judgment was affirmed on appeal. See *State* v. *Vivo*, 147 Conn. App. 414, 418, 81 A.3d 1241 (2013), cert. denied, 314 Conn. 901, 99 A.3d 1170 (2014), cert. denied, 574 U.S. 1126, 135 S. Ct. 1164, 190 L. Ed. 2d 920 (2015). The petitioner filed a second motion to correct an illegal sentence, which was denied by the court, *Devlin*, *J.*, and that denial was affirmed on appeal. See *State* v. *Vivo*, 179 Conn. App. 906, 176 A.3d 1261, cert. denied, 328 Conn. 939, 184 A.3d 759, cert. denied, 586 U.S. 929, 139 S. Ct. 349, 202 L. Ed. 2d 246 (2018). The petitioner thereafter filed a third motion to correct an illegal sentence, which the court, *Devlin*, *J.*, dismissed for lack of subject matter jurisdiction, and this court subsequently affirmed that dismissal on appeal. See *State* v. *Vivo*, 197 Conn. App. 363, 372, 231 A.3d 1255 (2020).

On February 15, 2013, the petitioner filed a subsequent petition for a writ of habeas corpus. In his 2022 revised amended petition, he claimed, inter alia, that his trial counsel, Attorney Dante Gallucci, rendered

[2] In that motion, the petitioner claimed that he was never resentenced following the resolution of the first habeas appeal. In response, Judge Devlin stated that, following the remand, the habeas court, *Bryant*, *J.*, had resentenced the petitioner to a total effective sentence of seventy-five years of incarceration but that it did not appear that the judgment mittimus was modified to reflect the vacated conviction. Judge Devlin assumed, without deciding, that this resentencing was insufficient, scheduled a resentencing hearing, vacated the § 53-202k conviction, and sentenced the petitioner to a total effective sentence of seventy-five years of incarceration.

ineffective assistance by failing to adequately advise him regarding certain plea offers. Specifically, he contended that, under the circumstances of this case, his trial counsel had an affirmative obligation to advise him to accept the plea offers. See *Maia* v. *Commissioner of Correction*, 347 Conn. 449, 472–73, 298 A.3d 588 (2023) (explaining that it constitutes deficient performance for "counsel to fail to recommend that a client accept a plea offer if, after considering the circumstances of the case, he believes that a conviction is virtually inevitable and the attendant sentence will likely substantially exceed the pending offer"). The petitioner also alleged that Attorney Sean Crowshaw and Attorney Arnold Amore, who represented him at the time of his first and second habeas petitions, respectively, were ineffective for failing to adequately pursue claims that, inter alia, the petitioner had received ineffective assistance of trial counsel with respect to the plea offers.

At the start of the habeas trial, the parties stipulated that, sometime between April, 1994, and May, 1995, the state made a plea offer to the petitioner pursuant to which he would plead guilty to the charge of murder and receive a sentence of forty-five years of incarceration and that, in or around June, 1995, the state made another plea offer pursuant to which the petitioner would plead guilty to the charge of murder and receive a sentence of forty years of incarceration. The court, *Bhatt*, *J.*, denied the petition as to the petitioner's claim that his second habeas counsel rendered ineffective assistance of counsel relating to the plea offers.[3] The court stated that the petitioner's trial counsel, Gallucci,

[3] The court dismissed as being barred by res judicata counts one through four of the habeas petition, which claimed ineffective assistance of trial counsel, appellate counsel, and first habeas counsel.

The court agreed with the petitioner's claim that his second habeas counsel was ineffective in connection with his sentence enhancement under § 53-202k, granted the petition in part as to that claim, and ordered the trial court to conduct further sentencing proceedings.

"adequately conveyed the forty-five and forty year offers to [the petitioner], explaining to him the state's case, the maximum penalties, and his opinion on the outcome of the trial. He left it up to [the petitioner] to make the final decision. There is no deficient performance. [The petitioner] also cannot prove prejudice because the evidence establishes that [he] would not have accepted any offer that involved a plea to the charge of murder. The state was not coming off murder. This is further supported by [Crowshaw's] testimony that, based on his conversations with [the petitioner], he believed [the petitioner] did not want an offer and instead wanted to go to trial. There is also no evidence that there actually was a twenty-five or thirty year offer. [Gallucci] testified that he suggested thirty years to see what number [the petitioner] would take and that it was not an actual offer made by the state or the court. [Former Senior Assistant State's Attorney C. Robert] Satti [Jr.] did not recall making any such offer before the retrial. The court credits their testimony. Thus, [the petitioner] cannot prove deficient performance as to any prior counsel and he cannot prove prejudice." The petitioner filed a petition for certification to appeal, which the court denied. This appeal followed.

We begin with the following standard of review. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the [denial] of his petition for [a writ of] 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 [to appeal] 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 the 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." (Internal quotation marks omitted.) *Baltas* v. *Commissioner of Correction*, 210 Conn. App. 167, 171–72, 269 A.3d 957, cert. denied, 342 Conn. 911, 271 A.3d 1039 (2022). We, therefore, consider the merits of the petitioner's underlying claim, which is that the habeas court erred when it concluded that his second habeas counsel did not render ineffective assistance by failing to raise a claim that trial counsel failed to adequately advise him regarding the state's plea offers.

"To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], by demonstrating that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . .

"[T]o satisfy the prejudice prong of the *Strickland* test when the ineffective advice of counsel has led a defendant to reject a plea offer, the habeas petitioner

must show [1] that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), [2] that the court would have accepted its terms, and [3] that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. . . . These factors focus on whether counsel's constitutionally ineffective performance affected the outcome of the plea process . . . and the ultimate conviction or sentence imposed. . . .

"The ultimate question of whether a habeas petitioner's sixth amendment rights have been violated is a mixed determination of law and fact that requires the application of legal principles to the historical facts of [the] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . . In the context of rejected plea offers, however, the specific underlying question of whether there was a reasonable probability that a habeas petitioner would have accepted a plea offer but for the deficient performance of counsel is one of fact, which will not be disturbed on appeal unless clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Barlow* v. *Commissioner of Correction*, 343 Conn. 347, 355–57, 273 A.3d 680 (2022).

"[A] petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of [trial] counsel must essentially satisfy *Strickland* twice: he must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his [trial] counsel was ineffective. . . . We have characterized this burden as presenting a herculean task . . . ." (Citation omitted; internal quotation marks omitted.) *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431,

439, 119 A.3d 607 (2015). Accordingly, in order to prevail on his claim, the petitioner must satisfy *Strickland* as to his trial counsel, his first habeas counsel, and his second habeas counsel.

On appeal, we need not address both prongs of *Strickland*. See *Soto* v. *Commissioner of Correction*, 215 Conn. App. 113, 120, 281 A.3d 1189 (2022) ("[t]he petitioner's failure to prove either [the performance prong or the prejudice prong] is fatal to a habeas petition" (internal quotation marks omitted)). Because we conclude that the petitioner failed to establish that the habeas court improperly determined that the petitioner had not proven prejudice, we limit our focus to that prong.

The petitioner argues that the court improperly analyzed the prejudice prong. Specifically, he contends that the court improperly failed to assume for purposes of deciding the prejudice prong that trial counsel's performance was constitutionally deficient because he was obligated to advise the petitioner to accept the plea offers but failed to do so. In other words, the petitioner argues that the habeas court's prejudice determination was flawed because the "question [was] not whether, independently, [the petitioner] was prepared to accept an offer that involved a plea to the charge of murder, but rather, had [Gallucci] advised [the petitioner that he should accept the plea offer], whether . . . [the petitioner] would have accepted the plea offer." We are not persuaded by this claim because we do not construe the court's memorandum of decision in the same manner as the petitioner.

The petitioner's claim that the court applied an incorrect legal standard requires us to interpret the decision rendered by the court. A question of whether a court used a proper standard and our interpretation of the court's decision are questions over which we employ

plenary review. See *Thoma* v. *Watson*, 228 Conn. App. 537, 555, 325 A.3d 955 (2024).

The court stated the correct standard. Quoting *Lafler* v. *Cooper*, 566 U.S. 156, 164, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), it stated, inter alia, that to satisfy the prejudice prong of the *Strickland* test when the ineffective advice of counsel has led to the rejection of a plea offer, a habeas petitioner must show that but for the ineffective advice of counsel there is a reasonable probability that he would have accepted the plea. The court did not repeat this standard when analyzing the prejudice prong. The court's findings that the petitioner "would not have accepted any offer that involved a plea to the charge of murder" and that "[t]he state was not coming off murder" persuades us that the court considered the proper standard when reaching its decision regarding prejudice. The court makes clear from its findings that because the petitioner did not want to plead guilty to murder, and because the state was not willing to extend a plea offer that did not require the petitioner to plead guilty to the charge of murder, the petitioner would not have accepted *any* plea deal that the state was willing to offer, even if his trial counsel had recommended to him that he should accept the state's plea offers.

Even if, however, we assume that the court's analysis was ambiguous, it is the burden of the petitioner to show that the court applied an improper standard. See, e.g., *Blumenthal* v. *Kimber Mfg., Inc.*, 265 Conn. 1, 9, 826 A.2d 1088 (2003). The petitioner did not request an articulation pursuant to Practice Book § 66-5 and has not pointed to anything in the court's decision, nor have we found anything, to suggest that the court applied an improper standard. "In the absence of any evidence that the court engaged in an improper legal analysis, we presume that the court knew the law and applied it correctly." *Roberto A.* v. *Commissioner of Correction*,

229 Conn. App. 104, 118, 325 A.3d 1192, cert. denied, 350 Conn. 935, 327 A.3d 384 (2024).

The court's findings regarding the petitioner's unwillingness to accept an offer that would have required him to plead guilty to the charge of murder and the state's unwillingness to extend a plea offer that would not have required the petitioner to plead guilty to the charge of murder are supported by the record. At the habeas trial, the petitioner's trial counsel, Gallucci, testified that "this was never a discussion about years. [The petitioner] didn't want to plead to anything. He never wanted to plead to anything. His position was he was innocent. That wasn't him. He had an alibi." He further testified that he asked the petitioner, "Would you plead for thirty years? And he was adamant that he did not want to plead to a homicide. . . . [H]e rejected the whole idea of pleading to a homicide" but "the state was adamant that they would never come off murder." Crowshaw, the petitioner's first habeas counsel, testified that the petitioner had told him that he did not want to accept a plea offer at his first criminal trial or, after the mistrial, at his second criminal trial.

The testimony of Gallucci and Crowshaw supports a factual determination by the habeas court that the petitioner had insisted he was innocent, that he was adamant about not pleading guilty to a murder charge, that the state was not willing to offer a deal that did not require him to plead guilty to the charge of murder and, therefore, that the petitioner was not willing to accept the plea offers made by the state under any circumstances. These findings are immutable regardless of whether his trial counsel had recommended that he accept the plea offer.

Indeed, the court credited the testimony of Gallucci and Crowshaw. See *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 637, 153 A.3d 1264 (2017) (habeas

court is sole arbiter of credibility of witnesses and weight to be given to their testimony). The court did not credit the petitioner's testimony that he would have accepted the forty or forty-five year plea offers if Gallucci had advised him to accept the plea offers. "This court does not retry the case or evaluate the credibility of the witnesses." (Internal quotation marks omitted.) *Smith* v. *Commissioner of Correction*, 141 Conn. App. 626, 632, 62 A.3d 554, cert. denied, 308 Conn. 947, 67 A.3d 290 (2013).

Accordingly, because the petitioner has failed to demonstrate that the habeas court improperly analyzed the question of whether he was prejudiced by the assumed deficient performance of counsel, we conclude that the court properly determined that he failed to establish that his trial counsel rendered ineffective assistance of counsel. Because the petitioner has not established that his trial counsel was ineffective, he also cannot establish that his first or second habeas counsel rendered ineffective assistance by failing to raise claims relating to counsel's advice about the state's plea offers.

On the basis of the record, the petitioner's appellate claim is not debatable among jurists of reason, a court could not resolve the issue in a different manner, and the question does not deserve encouragement to proceed further. Accordingly, we conclude that the court did not abuse its discretion by denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

PATRICK WALSH *v.* COMMISSIONER OF CORRECTION (AC 46876)

Alvord, Clark and Prescott, Js.

Syllabus

The petitioner, who previously had been convicted, following a jury trial, of murder, appealed, on the granting of certification, from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. He claimed, inter alia, that the court improperly dismissed count one of his petition on the ground that it was barred by the doctrine of res judicata. *Held*:

The habeas court improperly dismissed count one of the petition on the ground that it was barred by the doctrine of res judicata, as the operative petition in the present case raised a legal ground for relief different from that raised in a previous petition.

Pursuant to the Supreme Court's decision in *Rose* v. *Commissioner of Correction* (348 Conn. 333), which was issued while this appeal was pending, and which held that ineffective assistance of counsel may constitute an external, objective factor sufficient to establish good cause to excuse the late filing of a habeas petition pursuant to statute (§ 52-470), the habeas court did not apply the correct legal standard when deciding whether the petitioner had demonstrated good cause and, therefore, the petitioner was entitled to a new hearing at which the court must apply the proper legal standard with respect to § 52-470 (d) and (e).

Argued January 6—officially released June 3, 2025

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Jessica M. Walker, assigned counsel, for the appellant (petitioner).

Linda F. Rubertone, special deputy assistant state's attorney, with whom, on the brief, were *Christian Watson*, state's attorney, and *Angela Macchiarulo*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Patrick Walsh, appeals, following the granting of certification to appeal, from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly (1) dismissed count one of his petition on the ground that it was barred by the doctrine of res judicata and (2) concluded that he failed to establish good cause for his late filed petition. With respect to both claims, we conclude that the judgment of the habeas court must be reversed and the case remanded for a new good cause hearing.[1]

The following facts and procedural history are relevant to our resolution of the present appeal. In 1998, the jury was unable to reach a unanimous verdict in the petitioner's criminal trial. Following a retrial in 1999, a jury found the petitioner guilty of murder in violation of General Statutes § 53a-54a, and he was sentenced to fifty-five years of incarceration. On direct appeal, this court affirmed the petitioner's conviction, and our Supreme Court subsequently denied his petition for certification to appeal. See *State* v. *Walsh*, 67 Conn. App. 776, 799, 789 A.2d 1031, cert. denied, 260 Conn. 906, 795 A.2d 546 (2002).

The petitioner filed his first petition for a writ of habeas corpus in October, 2002. He withdrew that petition in 2004 prior to trial. The petitioner filed his second habeas petition in August, 2007, and he amended that

[1] In light of our resolution of the petitioner's first two claims, we need not address his third claim that the habeas court erred in excluding the testimony of James Walsh.

petition in April, 2010 (second petition). The second petition alleged that his trial counsel provided ineffective assistance with respect to the state's plea offer extended during his criminal trial. The habeas court, *Schuman*, *J.*, denied the second petition, and the petitioner appealed to this court, which dismissed the appeal. See *Walsh* v. *Commissioner of Correction*, 136 Conn. App. 901, 43 A.3d 838 (2012). While his appeal from the judgment denying the second petition was pending, the petitioner filed his third habeas petition in May, 2011 (third petition). He amended the third petition in July, 2015. Prior to the start of trial in August, 2015, he withdrew the third petition.

The petitioner commenced the underlying habeas action in March, 2016, and filed the operative petition on March 21, 2023 (operative petition). Therein, the petitioner alleged in relevant part that his trial counsel had rendered ineffective assistance, his appellate counsel had rendered ineffective assistance, his habeas counsel had rendered ineffective assistance, the prosecuting authority had failed to disclose materially favorable evidence, and the prosecuting authority had knowingly presented materially false testimony.

The respondent, the Commissioner of Correction, filed a motion pursuant to General Statutes § 52-470 (d) and (e)[2] for an order to show cause as to why the

[2] General Statutes § 52-470 provides in relevant part: "(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; [or] (2) October 1, 2014 . . . . For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. . . .

"(e) . . . If . . . the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. . . ."

operative petition should not be dismissed as untimely. In response, the petitioner filed an objection. On March 15, 2023, the court, *Newson*, *J.*, issued notice to the parties that it would hold a hearing on the respondent's order to show cause. In addition, on March 31, 2023, the court issued notice to the parties that it would hold a hearing on the motion, raised sua sponte by the court, to dismiss count one on the ground of res judicata, pursuant to Practice Book § 23-29. Following the hearing, the court received written submissions from the parties on the question of res judicata. In June, 2023, the court issued a memorandum of decision dismissing the first count on the ground of res judicata and concluding, as to the remaining counts, that the petitioner failed to establish good cause for his late filed petition. The court subsequently granted the petition for certification to appeal the dismissal. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner first claims that the habeas court improperly dismissed count one of his operative petition. Specifically, the petitioner asserts that count one was not barred by res judicata because the operative petition sought a different form of relief than his second petition. We agree.

The following additional facts and procedural history are relevant to this claim. In count one of his operative petition, the petitioner alleged that his criminal trial counsel rendered deficient performance by failing, inter alia, to conduct an adequate investigation, to adequately argue and oppose the prosecution's motion in limine, to properly question potential jurors, to present certain testimony or evidence relating to the petitioner's defense, and to request a limiting instruction.[3]

[3] The petitioner's request for relief in the operative petition included the following: "(1) directing the sentencing court to vacate the judgment in *State* v. *Walsh*, Superior Court, judicial district of Hartford, Docket No. CR-

In the petitioner's second petition, he raised claims of ineffective assistance of counsel in the plea bargain context. He alleged that his trial counsel were ineffective because they, inter alia, failed to "meaningfully engage in plea bargaining subsequent to his first trial, which resulted in a mistrial"; "failed to timely advise [him] of the state's position regarding plea negotiations prior to the time of trial"; "failed or neglected to convey to the petitioner the trial court's position regarding the proposed plea agreement as well as the likely consequences of an adverse decision by the jury"; "provided erroneous advice and guidance to the petitioner regarding the plea offer"; "neglected or failed to conduct reasonable research or investigation in a timely manner regarding the petitioner's eligibility for parole based upon the proposed plea agreement and newly enacted No. 95-225 of the 1995 Public Acts"; "specifically, directly and erroneously informed the petitioner that if he accepted the plea offer that he would be subject to Public Act 95-225 and, as such, would be required to serve 85 percent of his sentence before being eligible for parole"; "neglected or failed at any time to properly advise the petitioner that he was not subject to provisions of Public Act 95-225 and, as such, was not required to serve 85 percent of his sentence before being eligible for parole"; and "neglected or failed to provide correct or meaningful advice to the petitioner upon which the petitioner could make an informed decision regarding the plea offer extended by the prosecution." The petitioner further alleged that "had he been provided correct and meaningful advice he would have made an informed decision and would have accepted the state's

95-156657, within ninety days or some other certain and reasonable period of time; (2) directing the respondent to release the petitioner from confinement unless the sentencing court in *State* v. *Walsh*, supra, vacates the judgment within ninety days or some other certain and reasonable period of time; and (3) ordering whatever other relief that law and justice require."

offer had he been aware that he would not have been subject to the requirements of Public Act 95-225."[4]

The habeas court dismissed count one of the operative petition on the ground of res judicata, stating: "In [count] one of the [operative petition], as in the [second petition], the legal ground being raised is the alleged ineffectiveness of criminal trial counsel. . . . On their face, none of the allegations contained in the [operative] petition contain facts or evidence not reasonably available at the time of the [second] petition. . . . At argument, the petitioner also failed to proffer any credible argument that the information supporting the allegations in the [operative] petition contained any assertion of fact that was not reasonably available to prior habeas counsel—meaning that it could have been discovered through the exercise of due diligence—when the [second] petition was litigated in 2011. In fact, a fair reading of the current allegations of ineffective assistance against criminal trial counsel is that they focus entirely on claims that they failed to properly handle witnesses, evidence and other matters that occurred during the criminal trial. In the end, the present claim of ineffective assistance is merely a reworded and hyper-expanded version of the previously litigated claim of ineffective assistance against trial counsel. . . .

"The relief sought in the [second] petition and the current matter, although not using identical language, do seek identical relief. . . . In both actions, the petitioner sought to have his convictions vacated, for the

[4] The petitioner's request for relief in his second petition included the following: (1) "[t]hat the petitioner be brought before the court so that justice may be done"; (2) "[t]hat the petitioner be given the opportunity to present testimony regarding the foregoing issues to [the habeas court]"; (3) "[t]hat the petitioner be granted a new trial"; (4) "[t]hat the petitioner's appellate rights be restored"; (5) "[t]hat the petitioner be released from custody"; [and] (6) "[s]uch other and further relief as the court deems appropriate."

matter to be returned to the trial court, and for other relief that law and justice require. Based on the foregoing, therefore, [count] one is dismissed on grounds of res judicata . . . .'' (Citations omitted; footnote omitted; internal quotation marks omitted.)

The following legal principles govern our analysis of the petitioner's claim. ''Whether a habeas court properly dismissed a claim on the ground of res judicata is a question of law over which our review is plenary.'' *Cator* v. *Commissioner of Correction*, 229 Conn. App. 393, 407, 327 A.3d 1028 (2024), cert. denied, 351 Conn. 919, 333 A.3d 105 (2025). ''The doctrine of res judicata provides that a former judgment serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which were actually made or which might have been made. . . . The doctrine . . . applies to criminal as well as civil proceedings and to state habeas corpus proceedings. . . . However, [u]nique policy considerations must be taken into account in applying the doctrine of res judicata to a constitutional claim raised by a habeas petitioner. . . . Specifically, in the habeas context, in the interest of ensuring that no one is deprived of liberty in violation of his or her constitutional rights . . . the application of the doctrine of res judicata . . . [is limited] to claims that have actually been raised and litigated in an earlier proceeding. . . .

''In the context of a habeas action, a court must determine whether a petitioner actually has raised a new legal ground for relief or only has alleged different factual allegations in support of a previously litigated claim. . . . Identical grounds may be proven by different factual allegations, supported by different legal arguments or articulated in different language. . . . They raise, however, the same generic legal basis for the same relief.'' (Internal quotation marks omitted.) Id., 406–407. In contrast, ''two grounds are not identical

if they seek different relief." (Internal quotation marks omitted.) *Kondjoua* v. *Commissioner of Correction*, 201 Conn. App. 627, 634, 243 A.3d 352 (2020), cert. denied, 336 Conn. 907, 243 A.3d 1181 (2021).

The relief available to, and sought by, the petitioner in the second petition was different from the relief sought in the operative petition. The second petition alleged ineffective assistance of counsel with respect to the state's plea offer and counsel's parole eligibility advice.[5] "The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms. In some cases, the sole advantage a defendant would have received under the plea is a lesser sentence. This is typically the case when the charges that would have been admitted as part of the plea bargain are the same as the charges [that] the defendant was convicted of after trial. In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea [offer]. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.

"In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones [of] which a defendant was convicted after trial, or if a mandatory sentence

[5] Although the petitioner's second petition requested a new trial, a new trial was not an available remedy. See *Carter* v. *Commissioner of Correction*, 133 Conn. App. 387, 394–97, 35 A.3d 1088 (explaining how relief petitioner is entitled to can be different from relief sought in habeas petition), cert. denied, 307 Conn. 901, 53 A.3d 217 (2012).

confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. . . . In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." (Internal quotation marks omitted.) *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 353–54, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013).

In contrast, the operative petition alleges a claim of ineffective assistance of counsel on the basis of deficient performance at trial, for which the appropriate remedy would be a new trial. See, e.g., *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 30, 188 A.3d 1 (2018), cert. denied, 586 U.S. 1068, 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019). The petitioner thus raised a legal ground for relief in the operative petition different from that raised in the second petition. We therefore conclude that the habeas court improperly dismissed count one on the ground of res judicata.

II

The petitioner next claims that the habeas court improperly concluded that he failed to establish good cause for his late filed petition. In light of our Supreme Court's recent decision in *Rose* v. *Commissioner of Correction*, 348 Conn. 333, 304 A.3d 431 (2023), which recognized that ineffective assistance of counsel may constitute good cause for the delay in filing, and this court's subsequent decisions applying *Rose*,[6] we conclude that the judgment of the habeas court must be

[6] See *Ibrahim* v. *Commissioner of Correction*, 229 Conn. App. 658, 327 A.3d 437 (2024); *Coney* v. *Commissioner of Correction*, 225 Conn. App. 450, 315 A.3d 1161 (2024); *Michael G.* v. *Commissioner of Correction*, 225 Conn. App. 341, 314 A.3d 659 (2024); *Rapp* v. *Commissioner of Correction*, 224

reversed and the case remanded for a new good cause hearing.[7]

The following additional facts and procedural history are relevant to this claim. At the show cause hearing and in his memorandum of law submitted to the habeas court, the petitioner asserted that good cause to excuse the delay in filing his petition existed because, inter alia, "(1) his prior counsel was ineffective in failing to properly analyze his case, raise pertinent claims, and prepare for the August, 2015 habeas trial, thereby forcing the petitioner to withdraw a timely filed petition; [and] (2) his prior counsel potentially gave affirmative mis-advice about the application of § 52-470 to his case . . . ." The habeas court disagreed with the petitioner and concluded: "The argument was also made that the petitioner 'has never had the opportunity' to litigate the matters raised in the [operative] petition. That argument, however, inaccurately states what has happened. The petitioner did have *the opportunity* to bring forth and litigate whatever claims counsel believed should be pursued and for which he believed there was evidence to support at the trial of his [second petition], but counsel *decided*, whether for strategic or other reasons, to pursue only the claim regarding the plea offer. In other words, there was nothing beyond the petitioner and counsel's control that prevented other matters from being litigated.

Conn. App. 336, 311 A.3d 249, cert. denied, 349 Conn. 909, 314 A.3d 601 (2024); *Hankerson* v. *Commissioner of Correction*, 223 Conn. App. 562, 308 A.3d 1113 (2024).

[7] The petitioner also argues that the habeas court erred in assessing the good cause issue because (1) "it required the petitioner to show good cause for an eighteen year delay, rather than for the eighteen month period between the filing deadline and the petitioner's filing" and (2) "it failed to recognize that [a witness'] unavailability at the time the petitioner withdrew his prior habeas corpus action—coupled with his subsequent availability—constituted good cause." Because we conclude that the judgment of the habeas court must be reversed and the case remanded for a new good cause hearing, we need not address these arguments.

"Further, there is no rule or requirement that habeas counsel raise every theoretical claim that one could make regarding every inconsequential error that may have occurred during a fast-moving criminal trial. That the petitioner may have disagreed with his lawyer's ultimate choice of issues on the prior habeas is also not relevant to this discussion, since it is always the lawyer's discretion to decide which claims to pursue." (Emphasis in original.)

Approximately five months after the habeas court released its memorandum of decision and while this appeal was pending, "our Supreme Court issued its decision in *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 333. In *Rose*, the court discussed several factors relevant to the good cause determination under § 52-470 (e). . . . These factors include, but are not limited to: (1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition. . . . No single factor is dispositive, and, in ascertaining whether good cause exists, the habeas court must consider all relevant factors in light of the totality of the facts and circumstances presented. . . .

"In determining whether deficient performance of counsel may constitute good cause under § 52-470 (e), our Supreme Court turned to the distinction between internal and external factors that cause or contribute to the failure to comply with a procedural rule. . . . Specifically, the court noted that, in the context of the procedural default doctrine, [*i*]*neffective assistance of counsel is an objective factor external to the defense*

because the [*s*]*ixth* [*a*]*mendment itself requires that responsibility for the default be imputed to the* [*s*]*tate*. . . . In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of [the] petitioner's right to counsel, so that the error must be seen as an external factor, i.e., imputed to the [s]tate. . . . Although a petitioner is bound by his counsel's inadvertence, ignorance, or tactical missteps . . . *a petitioner is not bound by the ineffective assistance of his counsel*. . . . It then concluded: [c]onsistent with this authority, we conclude that ineffective assistance of counsel is an objective factor external to the petitioner that may constitute good cause to excuse the late filing of a habeas petition under the totality of the circumstances pursuant to § 52-470 (c) and (e)." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Ibrahim* v. *Commissioner of Correction*, 229 Conn. App. 658, 662–64, 327 A.3d 437 (2024).

As noted previously, our Supreme Court issued its decision in *Rose* while this appeal was pending. Accordingly, the habeas court, through no fault of its own, did not apply the correct legal standard set forth in *Rose* when deciding whether the petitioner had demonstrated good cause for the late filing of his petition. "As noted by the court in *Rose*, actions of counsel that are ineffective under the sixth amendment cannot be imputed to the petitioner and, therefore, the ineffective assistance of counsel constitutes an external, objective factor sufficient to establish good cause for the untimely filing." Id., 664. In the operative petition in the present case, the petitioner has alleged that the delayed filing of the habeas petition was the result of ineffective assistance of counsel. Accordingly, the petitioner is entitled to a new hearing[8] at which the habeas court must apply

[8] The respondent argues that the proper remedy is for the judgment to be "reversed, as to counts two through five of the [operative] petition, and the matter remanded for an articulation of the court's factual findings consistent with the correct legal standards set forth by our Supreme Court." "We are not persuaded by the efforts of the respondent to distinguish the

the proper legal standard with respect to § 52-470 (d) and (e).

The judgment is reversed and the case is remanded to the habeas court for a new hearing and good cause determination under § 52-470 (d) and (e).

In this opinion the other judges concurred.

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present case from *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 333, and its progeny, and note that we are bound to follow the precedent from both our Supreme Court and other panels of this court. . . . Accordingly, we follow the path of those cases and remand the case for a new hearing and good cause determination." *Ibrahim* v. *Commissioner of Correctio*n, supra, 229 Conn. App. 660 n.2.