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CONNECTICUT REPORTS

Vol. 350

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

L. LEE WHITNUM BAKER *v.* SECRETARY OF THE STATE
(SC 21049)

McDonald, Alexander and Dannehy, Js.

Syllabus

The plaintiff filed the present action with this court pursuant to statute (§ 9-323), challenging the decision of the defendant secretary of the state to reject the plaintiff's registration as a write-in candidate in connection with the November, 2024 election for the office of United States representative for the Third Congressional District of Connecticut on the ground that it was untimely filed in violation of the statute ((Supp. 2024) § 9-373a) governing the registration of write-in candidates. The plaintiff sought an order directing the defendant to accept her registration, claiming that her filing was untimely because she had followed certain purportedly erroneous guidance from the defendant's office that reflected the filing deadline contained in an outdated version of § 9-373a, rather than the deadline set forth in the current version of § 9-373a. *Held*:

This case was not moot because, even though it was not heard until after election day and the statutory filing deadline had passed, practical relief was still available, insofar as allowing the plaintiff to register as a write-in candidate would, at the very least, have the effect of validating those write-in votes that may already have been cast for her, and, in the event that there was a sufficient number of write-in votes to cast serious doubt on the election's reliability, a new election could serve as a potential remedy.

The plaintiff was aggrieved by "a ruling of an election official" for purposes of establishing this court's jurisdiction under § 9-323 when the defendant declined to accept the plaintiff's untimely registration form, there having

been a colorable claim that the plaintiff's untimely filing was the result of erroneous information communicated by the defendant's office.

This court assumed without deciding that Connecticut courts have the authority to exercise their equitable powers to excuse a candidate's failure to comply with a mandatory filing deadline, such as the one set forth in § 9-373a, when such a failure to comply has been caused by the action of an election official.

Nevertheless, the plaintiff failed to prove that she was entitled to relief under the doctrine of equitable estoppel because, although the defendant erroneously quoted an outdated version of § 9-373a in a cover letter that she provided to the plaintiff, both the cover letter and the write-in candidate registration form itself clearly and unambiguously provided the correct deadline, and the plaintiff failed to exercise due diligence in resolving the apparent discrepancy between the quote from the outdated version of the statute and correct deadline that was prominently stated in the cover letter and on the registration form.

Heard November 7—officially released November 18, 2024*

Procedural History

Action seeking an order directing the defendant to accept the plaintiff's registration as a write-in candidate for the office of United States representative for the Third Congressional District of Connecticut for the 2024 general election, brought, pursuant to General Statutes § 9-323, to a panel of this court, *McDonald*, *Alexander* and *Dannehy*, *Js.*, which conducted a hearing on the plaintiff's complaint. *Judgment for the defendant.*

L. Lee Whitnum Baker, self-represented, the plaintiff.

Benjamin Abrams, assistant attorney general, with whom was *Emily Adams Gait*, assistant attorney general, for the defendant.

Opinion

PER CURIAM. This is an original jurisdiction proceeding before a panel of this court pursuant to General

* November 18, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Statutes § 9-323,[1] in which the plaintiff, L. Lee Whitnum Baker, sought an emergency hearing to challenge a ruling of an election official, the defendant, the secretary of the state, in connection with an election for federal office. The plaintiff challenges the defendant's decision to reject her registration as a write-in candidate for the office of United States representative for the Third Congressional District of Connecticut on the ground that it was untimely filed in violation of General Statutes (Supp. 2024) § 9-373a,[2] which, in connection with General Statutes § 9-265, governs write-in candidacies. In this action, the plaintiff seeks an injunction directing the defendant to accept her registration as a write-in candidate under § 9-373a. She claims that her untimely filing was the result of following guidance from a form cover letter promulgated by the defendant's office that did not update its block quotation of § 9-373a to reflect the earlier filing deadlines contained in the current stat-

[1] This action, brought directly to a judge of the Supreme Court pursuant to § 9-323 to challenge the ruling of an election official in connection with a federal election, was heard by a panel of judges of the Supreme Court, rather than a single judge, notwithstanding the filing of the complaint prior to election day. The relevant statutory language provides that § 9-323 matters brought "prior to such election" are decided by a single judge, and complaints "made subsequent to the election" are decided by a panel of three judges. General Statutes § 9-323; see *Fay* v. *Merrill*, 336 Conn. 432, 442 n.14, 246 A.3d 970 (2020) (noting that this court dismissed motion for reconsideration en banc in § 9-323 matter because "plain language of § 9-323 . . . contemplates review by more than one [judge] of the Supreme Court only in postelection matters" and does not provide for further review en banc of single judge decision). Because § 9-323 does not specifically contemplate early voting, as recently implemented by General Statutes (Supp. 2024) § 9-163aa, we look to the statutory definition of "election," which is "any electors' meeting at which the electors choose public officials by use of voting tabulators or by paper ballots as provided in section 9-272 . . . ." General Statutes § 9-1 (d). In the absence of specific guidance from a statutory amendment that addresses early voting in this context, we construe the definition of the word "election" broadly and understand § 9-323 to require assignment to a panel of three judges when a complaint is made after the commencement of early voting.

[2] Hereinafter, unless otherwise indicated, all references to § 9-373a in this opinion are to the version in the 2024 supplement to the General Statutes.

utory revision, which was amended in 2023 to accommodate the new early voting program under General Statutes (Supp. 2024) § 9-163aa. In response, the defendant asks us to dismiss this action for lack of subject matter jurisdiction under § 9-323.

We held a hearing on the plaintiff's complaint on Thursday, November 7, 2024. After that hearing, we concluded that we have subject matter jurisdiction over this proceeding and reserved judgment on the merits. We now conclude that this case does not present the type of "extraordinary circumstance," as contemplated by *Butts* v. *Bysiewicz*, 298 Conn. 665, 676 n.7, 5 A.3d 932 (2010), that would warrant equitable relief from the operation of a mandatory statutory provision based on erroneous information given to the plaintiff by an election official. The plaintiff has failed to prove entitlement to relief under the doctrine of equitable estoppel because (1) notwithstanding the defendant's erroneous quotation of an outdated version of § 9-373a in the cover letter provided to the plaintiff, both the cover letter and the registration form itself clearly and unambiguously provided the correct deadline, and (2) the plaintiff failed to exercise any due diligence in resolving the apparent inconsistency. Accordingly, we deny the plaintiff's request for injunctive relief and render judgment for the defendant.

The record reveals the following undisputed facts.[3] In connection with her statutory role as the chief elections

[3] Representations made by the parties at the hearing on the plaintiff's complaint confirmed that the facts, which are revealed in documentary exhibits and the affidavit of Attorney Gabe Rosenberg, the defendant's general counsel and chief of staff, are indeed undisputed. Although a proceeding under § 9-323 contemplates a trial-like proceeding to find any disputed facts; see, e.g., *In re Election of the United States Representative for Second Congressional District*, 231 Conn. 602, 610–11, 653 A.2d 79 (1994); insofar as the operative facts in the present case are undisputed, we render judgment as a matter of law without the need for a trial. Cf. Practice Book § 17-45 (governing proceedings on motion for summary judgment).

officer for the state of Connecticut, the defendant collects registrations of write-in candidates that are filed pursuant to § 9-373a and publishes informational material on her website about how to become a write-in candidate, along with the necessary registration form, promulgated as form ED-622a (registration form). See General Statutes § 9-265 (a) (write-in vote will only be "counted and recorded" for candidate who has registered as write-in candidate). Once all registrations are received in accordance with the deadline set by § 9-373a, the defendant compiles the names of the eligible write-in candidates for offices in each town and submits them to the various town clerks; those lists are kept available at the polls for reference, upon request, if an elector has a question about which candidates are eligible to write in on a ballot.

In August, 2024, the plaintiff went to the defendant's office and requested a registration form for her write-in candidacy for the United States House of representatives for the Third Congressional District in the November 5, 2024 election. Violet Dussault, who is a staff attorney for the defendant, spoke with the plaintiff and provided her with the registration form, as revised in August, 2024. The registration form cited § 9-373a, documented the candidate's consent "to being a write-in candidate for the office indicated [on the form] to be contested at such election," and indicated that it "must be filed with the [defendant] not earlier than August 7, 2024 and not later than 4:00 p.m. on October 7, 2024, or the registration will be void." (Emphasis in original.)

The registration form was accompanied by a cover letter from the defendant's Elections Services Division, which stated: "It is imperative that you fill out this form completely and follow the instructions. *You should also carefully peruse . . . § 9-373a, below*, which is the section of the state statutes relating to write-in candidacies. You must file the enclosed form with this office

in order to register your write-in candidacy, and the form may not be filed with this office earlier than August 7, 2024 and *not later than 4:00 p.m. on October 7, 2024* or the registration will be *void*." (Emphasis altered.) The cover letter also reproduced § 9-373a in its entirety and stated with respect to the filing deadline: "The registration shall be filed with the [defendant] not more than ninety days prior to the election at which the office is to be filled *and not later than four o'clock p.m. on the fourteenth day preceding the election*, or the registration shall be void." (Emphasis added.) The quoted language in the cover letter does not reflect the current revision of § 9-373a, which the legislature amended in 2023 when it established the early voting program. See Public Acts 2023, No. 23-5, § 9. That section now provides in relevant part: "The registration shall be filed with the [defendant] not more than ninety days prior to the election at which the office is to be filled *and not later than four o'clock p.m. on the fourteenth day preceding the commencement of the period of early voting at the election*, or the registration shall be void." (Emphasis added.) General Statutes (Supp. 2024) § 9-373a. Nevertheless, the October 7, 2024 deadline is consistent with the commencement of the early voting period on October 21, 2024. See General Statutes (Supp. 2024) § 9-163aa (a).

On October 15, 2024, the plaintiff went to the defendant's office to file the registration form, which she believed was timely under the version of § 9-373a quoted in the cover letter, and of which she had made a "mental note" in believing that the deadline was October 23, 2024. The plaintiff had also handwritten "Oct 22" on her copy of the cover letter. Taffy Womack, one of the defendant's staff members, rejected the registration form as untimely, explaining that § 9-373a had been amended to reflect early voting, with a deadline for the 2024 election of October 7, 2024, and gave the plaintiff

a copy of the revised statute.[4] Womack informed the plaintiff that, if the defendant's office "made an exception for the plaintiff . . . the others who were also late would have to be included . . . ." Indeed, twenty-nine write-in candidates participated in the November, 2024 general election and sought a variety of offices, including president of the United States, United States senator, United States representative in three of the five congressional districts, and a variety of state legislative positions. The only write-in candidacy that was rejected as untimely was that of the plaintiff.

After her attempts to obtain relief in federal court and the Superior Court were dismissed for lack of jurisdiction, the plaintiff brought this action pursuant to § 9-323, seeking an order directing the defendant to accept her registration form. She argues that she is entitled to relief from the October 7, 2024 deadline because of the "confusion" occasioned when she was "given wrong information by someone on the [defendant's] staff . . . ." In response, the state argues otherwise and contends that we lack subject matter jurisdiction under § 9-323.

I

Because subject matter jurisdiction is a threshold matter; see, e.g., *In re Ava W.*, 336 Conn. 545, 558, 248 A.3d 675 (2020); we turn first to the defendant's arguments that we lack jurisdiction because (1) this case is moot given that election day has passed, and (2) the plaintiff is not "aggrieved by [a] ruling of [an] election official" for purposes of § 9-323. In considering the defendant's jurisdictional arguments, we are guided by the "strong presumption in favor of jurisdiction,"

[4] After the error in this case was discovered, the defendant subsequently removed the outdated materials from her website so that they could be corrected. At the hearing before this court, the defendant's counsel candidly expressed regret for the confusion and eventual litigation sown by this unfortunate error.

which is "founded on this state's clearly and repeatedly . . . expressed . . . policy preference to bring about a [resolution] on the merits of a dispute whenever possible and to secure for the litigant his or her day in court." (Internal quotation marks omitted.) *Markley* v. *State Elections Enforcement Commission*, 339 Conn. 96, 111, 259 A.3d 1064 (2021). In considering whether facts alleged establish a predicate for the exercise of our jurisdiction, as in other contexts, we look only to whether the claim is "colorable," namely, "one that is superficially well founded but that may ultimately be deemed invalid . . . . For a claim to be colorable, the defendant need not convince the . . . court that he necessarily will prevail; he must demonstrate simply that he *might* prevail." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45, 213 A.3d 1110 (2019). "The ultimate legal correctness of the claim is not relevant to our jurisdictional analysis. This is consistent with the well established rule that [t]he jurisdictional and merits inquiries are separate . . . ." (Internal quotation marks omitted.) *State* v. *Ward*, 341 Conn. 142, 153, 266 A.3d 807 (2021).

With respect to mootness, the defendant argues that no practical relief is available because this case was not heard until after election day, and after the October 7, 2024 deadline for the defendant to compile names of registered write-in candidates and to provide them to town clerks for the information of electors. We disagree.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction." (Internal quotation marks omitted.) *In re Ava W.*, supra, 336 Conn. 558. "A case is considered moot if [the trial] court cannot grant the appellant any practical relief through its disposition of the merits. . . . Mootness presents a cir-

cumstance [in which] the issue before the court has been resolved or had lost its significance because [of] a change in the condition of affairs between the parties." (Citation omitted; internal quotation marks omitted.) Id. "[T]he proper inquiry with regard to mootness is not whether some change in circumstances has occurred after the claim or cause of action is asserted that forecloses any chance of success on the merits but, rather, whether that change would prevent the court from granting any and all practical relief *even assuming that the proponent is able to prevail on the merits, no matter how unlikely.*" (Emphasis in original; internal quotation marks omitted.) *M&T Bank* v. *Lewis*, 349 Conn. 9, 23–24, 312 A.3d 1040 (2024).

We are not persuaded by the defendant's mootness argument. Allowing the plaintiff to register as a write-in candidate would, at the very least, have the effect of validating those write-in votes that may already have been cast for her, which only "shall be counted and recorded" for "a person who has registered as a write-in candidate for the office pursuant to . . . [§] 9-373a . . . ." General Statutes § 9-265 (a). Furthermore, in the event that there was a sufficient number of write-in votes to put the election's reliability into serious doubt, a new election is an available—albeit sparingly and cautiously ordered—remedy under § 9-323. See *Keeley* v. *Ayala*, 328 Conn. 393, 405–406, 179 A.3d 1249 (2018).

We next turn to whether the plaintiff is "aggrieved by a ruling of an election official." The phrase "ruling of [an] election official," as used in § 9-323 and in numerous other election statutes; see, e.g., General Statutes § 9-328; General Statutes § 9-329a; has been construed "to mean some act or conduct by the [election] official that . . . interprets some statute, regulation or other authoritative legal requirement, applicable to the election process. . . . [This court] has held that this test is broad enough to include conduct that comes within

the scope of a *mandatory statute* governing the election process, even if the election official has not issued a ruling in any formal sense. . . . Thus, [w]hen an election statute mandates certain procedures, and the election official has failed to apply or to follow those procedures, such conduct implicitly constitutes an incorrect interpretation of the requirements of the statute and, therefore, is a ruling." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Wrotnowski* v. *Bysiewicz*, 289 Conn. 522, 526–27, 958 A.2d 709 (2008); see also *Caruso* v. *Bridgeport*, 285 Conn. 618, 647, 941 A.2d 266 (2008); *Bortner* v. *Woodbridge*, 250 Conn. 241, 268, 736 A.2d 104 (1999).

We disagree with the defendant's argument that the plaintiff is not aggrieved under the statute because the defendant followed the law in refusing to accept the untimely registration form. That argument is circular in the factual context of this case, namely, that the plaintiff's claim is that the untimely filing was the result of her receiving incorrect information about the write-in process that was promulgated by the defendant's office. Although § 9-323 may not be used to challenge the underlying election laws and merely considers whether the election official's ruling complied with those laws; see *Fay* v. *Merrill*, 336 Conn. 432, 449 n.19, 246 A.3d 970 (2020); see also *Wrinn* v. *Dunleavy*, 186 Conn. 125, 134 n.10, 440 A.2d 261 (1982); the gravamen of the plaintiff's complaint is that the defendant misapplied existing law by providing an erroneous quotation of the statute in the cover letter and, then, by refusing to accept the registration form in light of the confusion sown by that erroneous quotation. By way of illustration, in a challenge to expanded absentee balloting during the COVID-19 pandemic, Chief Justice Robinson recently observed that "the election contest statutes, including § 9-323, do not confer jurisdiction over . . . fundamental constitutional challenges to Executive

Order No. 7QQ, which the defendant—acting as an elections official—implemented via the application" but that "the court would . . . have had jurisdiction over the plaintiffs' claim that the application is not itself faithful to Executive Order No. 7QQ." *Fay* v. *Merrill*, supra, 450 n.19; cf. *Arciniega* v. *Feliciano*, 329 Conn. 293, 309–10, 184 A.3d 1202 (2018) (acceptance of allegedly defective candidate consent forms was not ruling of election official when statutory scheme did not require registrar to consider accuracy or validity of their content). The plaintiff's allegations in this case squarely concern the application of § 9-373a. Thus, guided by the strong presumption in favor of jurisdiction, and given that a colorable claim that the plaintiff's untimely filing of the registration form was the result of erroneous information communicated by the defendant's office, we conclude that the defendant's refusal to accept the untimely registration form rendered the plaintiff aggrieved by a ruling of an election official for purposes of establishing this court's jurisdiction under § 9-323.

II

We now turn to the merits of the plaintiff's claim. The core issue in this case is whether a court has equitable discretion to provide a prospective write-in candidate with relief from a mandatory statutory provision, when her noncompliance resulted from erroneous guidance given by the election official charged with the administration of the statutory scheme. The governing statutory provision in this case is § 9-373a, which provides in relevant part: "*The registration shall be filed with the* [*secretary*] not more than ninety days prior to the election at which the office is to be filled and not later than four o'clock p.m. on the fourteenth day preceding the commencement of the period of early voting at the election, *or the registration shall be void.* . . ." (Emphasis added.)

There is no dispute that the language of § 9-373a is mandatory in nature and plainly and unambiguously affords the defendant no discretion to accept an untimely filed registration form, given that it contains the hallmark of negative words that expressly invalidate untimely registrations. See, e.g., *Airey* v. *Feliciano*, 350 Conn. 162, 180, A.3d (2024); *State* v. *Banks*, 321 Conn. 821, 840, 146 A.3d 1 (2016); *Butts* v. *Bysiewicz*, supra, 298 Conn. 676–77. This raises the question of whether we can exercise our equitable powers to provide the plaintiff with relief from the operation of the mandatory statute voiding her untimely filed registration form.

This court's decision in *Butts* v. *Bysiewicz*, supra, 298 Conn. 665, is instructive. In *Butts*, a candidate for probate judge sought judicial relief after he filed his certificate of party endorsement by the Democratic Party with the defendant after the deadline set by General Statutes § 9-388, which contained mandatory language invalidating late filings. See id., 667–68, 678–79. This court held that it has no authority to direct the defendant to afford a candidate relief from a mandatory statutory requirement, despite any "harsh consequences" that may ensue. Id., 689; see id., 688 (concluding that statutory language made it "clear that the legislature has barred the defendant from accepting an untimely filed certificate of endorsement and . . . from giving effect to the endorsement"). This court further held that, despite "competent evidence" establishing that the candidate was indeed the Democratic Party's endorsed candidate; id., 682; "[b]ecause the legislature required strict compliance with the deadline of § 9-388, the court [could not] invoke its equitable authority to compel the defendant to act in direct contravention to this clear legislative mandate." Id., 688–89; see also id., 689 and n.23 (deeming "inapposite" those "election cases hold-

ing that substantial compliance may satisfy a mandatory requirement").

Footnote 7 of this court's decision in *Butts*, however, left open the possibility that certain conduct by an election official might permit the court to exercise its equitable powers to provide relief from a mandatory statute. See id., 676 n.7. This court observed that "[s]ome jurisdictions have concluded that, in *extraordinary circumstances*, courts can excuse a failure to comply with mandatory filing deadlines for declarations of candidacy due to (1) an action by the state, particularly election officials, causing the late filing, or (2) the impossibility of compliance." (Emphasis added.) Id. Holding that "[n]o such circumstance [was] implicated in [*Butts*]," this court "express[ed] no opinion as to whether courts would have authority to extend filing deadlines under such extraordinary circumstances." Id., 677 n.7.

We assume without deciding that Connecticut courts have the authority identified in footnote 7 of *Butts* to excuse a candidate's failure to comply with a mandatory filing deadline when that noncompliance was caused by the action of an election official. See id., 676 n.7. In the present case, the plaintiff argues that she used the erroneously included, outdated statutory language in the cover letter in determining the date by which she had to file her registration form, rather than the October 7, 2024 deadline clearly and prominently stated both in the cover letter and on the registration form. This is a reliance based argument that implicates the doctrine of equitable estoppel, which is grounded in "[s]trong public policies," and is intended "to show what equity and good conscience require, under the particular circumstances of the case, irrespective of what might otherwise be the legal rights of the parties. . . . No one is ever estopped from asserting what would otherwise be his right, unless to allow its assertion would enable him to do a wrong. . . .

"There are two essential elements to an estoppel: the party [against whom it is asserted] must do or say *something* [*that*] *is intended or calculated to induce another to believe in the existence of certain facts and to act* [*on*] *that belief*; and the other party, influenced thereby, *must actually change his position or do something to his injury* [that] he otherwise would not have done. Estoppel rests on the misleading conduct of one party to the prejudice of the other. In the absence of prejudice, estoppel does not exist." (Emphasis added; internal quotation marks omitted.) *Fischer* v. *Zollino*, 303 Conn. 661, 668, 35 A.3d 270 (2012). Whether an equitable estoppel exists is a question of fact; see, e.g., id.; and the "party claiming estoppel . . . has the burden of proof." Id., 667.

Moreover, "estoppel against a public agency is limited and may be invoked: (1) only with great caution; (2) only when the action in question has been induced by an agent having authority in such matters; and (3) only when special circumstances make it highly inequitable or oppressive not to estop the agency." (Internal quotation marks omitted.) *Fadner* v. *Commissioner of Revenue Services*, 281 Conn. 719, 726, 917 A.2d 540 (2007). "A party seeking to justify the application of the estoppel doctrine by establishing that a public agency has induced his actions carries a significant burden of proof." Id., 727; see id., 728 (trial court did not commit clear error in concluding that equitable estoppel did not bar commissioner of revenue services from assessing deficiencies against taxpayers who claimed to have relied on incorrect advice from taxpayer helpline when taxpayers could not establish when they had called helpline or to whom they had spoken).

In determining whether equitable estoppel allows us to remedy the plaintiff's noncompliance with a mandatory election statute, we find instructive the Superior Court's decision in *Nardello* v. *Merrill*, Superior Court,

judicial district of Waterbury, Docket No. CV-18-5022319-S (July 10, 2018) (66 Conn. L. Rptr. 711). In *Nardello*, a party endorsed candidate sought injunctive relief directing the defendant to place the candidate's name on the ballot for the Democratic primary for the sixteenth state senate district. Id., 712. The candidate timely filed her certificate of party endorsement pursuant to General Statutes § 9-400 (b) prior to the deadline but omitted the necessary district number; a representative of the Connecticut Democratic Party later completed the form with an erroneous district number. Id. When the candidate learned of the error, she contacted a senior staff member from the defendant's office, who advised her that she would " 'fix' " the issue. Id. The error was then corrected by a representative of the Democratic Party after the deadline, and the defendant rejected the corrected filing as untimely. Id., 713. Considering the "mandatory language" of § 9-400 (b), the court determined that the extraordinary circumstances contemplated in footnote 7 of *Butts* existed and that the candidate "ha[d] demonstrated the factual basis for a finding of equitable estoppel." Id., 713; see id., 716. The court distinguished *Butts*, in which the necessary filing was never made at all, and observed that, in *Nardello*, the filing was made on time initially, and the candidate acted with due diligence when she learned of the mistake by contacting a senior staff member from the defendant's office, who then advised her that she would " 'fix' " the error, but delayed in doing so out of her own inadvertence as to the filing deadline. Id., 716. The court found that, although "different interpretations could be made as to who ultimately should have borne responsibility for correcting the error on [the candidate's] certificate," she had "made appropriate efforts to resolve the error by notifying the defendant of the problem. [The candidate] relied on the response she received from the [defendant's] office that the mat-

ter would be corrected." Id. The court further found that the candidate's "change of position . . . was to her detriment" and that she had proven that she "exercised due diligence" because "she lacked any knowledge of the original omission, the initial correction made to the form and of any involvement by the Democratic Party." Id. Thus, the court concluded that the candidate "relied on not taking any further action to correct her certificate of endorsement by a representative of the [defendant] and that extraordinary circumstances [made] it highly inequitable and oppressive not to estop the [defendant]," and ordered the defendant to place the candidate on the primary ballot. (Internal quotation marks omitted.) Id.; see, e.g., *Ryshpan* v. *Cashman*, 132 Vt. 628, 629–30, 326 A.2d 169 (1974) (affording candidate equitable relief from untimely filing that was result of incorrect deadline on election calendar published by Vermont secretary of state); cf. *Camillo* v. *Thomas*, Superior Court, judicial district of Middlesex, Docket No. CV-24-6042022-S (August 28, 2024) (distinguishing *Nardello* and declining to order defendant to place candidate's name on ballot because of his "noticeable lack of action to correct the deficiency [in the certificate of endorsement form] once it was brought to his attention," and his lack of a "role" in preparing or filing his paperwork, or ensuring that it was filed correctly with defendant); *In re Guzzardi*, 627 Pa. 1, 8–10, 14, 99 A.3d 381 (2014) (equitable relief was not warranted when candidate's failure to file timely statement of financial interests with Pennsylvania ethics commission was result of candidate's inadvertence).

The present case is squarely distinguishable from *Nardello*, rendering it not an extraordinary circumstance under which the equities support providing the plaintiff with relief from the mandatory statutory deadline. First, this case does not concern the correction of

a timely, albeit erroneous, filing but, rather, concerns a failure to file timely at all. Second, the defendant clearly communicated a correct deadline of October 7, 2024, on the registration form and in the cover letter, with which twenty-nine other write-in candidates complied; the only write-in candidacy that was rejected as untimely was that of the plaintiff. Consistent with the plaintiff's own representations at the hearing before this court that she had simply failed to read that deadline, there is no evidence that the plaintiff exercised any due diligence by questioning the defendant or her staff about the potential inconsistency of the outdated statutory provision with the prominently stated October 7, 2024 deadline. This lack of due diligence is particularly striking because the defendant provides ample opportunity for candidates and voters to ask questions about ballot access and voting procedures, both through generally available material on her website and a staffed email address, phone line, and public front desk. In this case specifically, the record indicates that the defendant's staff members had been solicitous of and helpful to the plaintiff, as she had both written and oral communications with Dussault, one of the defendant's staff attorneys, about where she should register as a write-in candidate, and whether she could do so for multiple offices simultaneously. Thus, to the extent that the defendant did provide some erroneous guidance in this case through her quotation of the outdated statutory provision in the cover letter, she nevertheless clearly stated the correct deadline in multiple places, and the plaintiff's lack of due diligence as a prospective write-in candidate does not establish her entitlement to equitable relief from the mandatory deadline set by § 9-373a.

The plaintiff's request for an injunction directing the defendant to accept her registration as a write-in candidate is denied. Judgment is rendered for the defendant.

STATE OF CONNECTICUT *v.* MARCUS HURDLE (SC 20827)

McDonald, D'Auria, Mullins, Ecker, Alexander and Dannehy, Js.*

Syllabus

The defendant appealed, on the granting of certification, from the judgment of the Appellate Court, which had affirmed his conviction, following a guilty plea, of robbery in the first degree and conspiracy to commit robbery in the first degree. The defendant claimed, inter alia, that the Appellate Court had incorrectly upheld the trial court's conclusion that it lacked authority under the statute (§ 18-98d) governing presentence confinement credit to direct the commissioner of correction to apply such credit to the defendant's sentence. *Held*:

This court concluded that § 18-98d does not confer exclusive authority on the commissioner to calculate and apply presentence confinement credit and that a trial court has discretionary authority to include on a judgment mittimus an order directing the commissioner to apply presentence confinement credit, in accordance with § 18-98d (a) (1), to a sentence that the court has imposed.

This court reversed the judgment of the Appellate Court insofar as that court upheld the trial court's conclusion that it did not have discretion to direct the commissioner to apply certain presentence confinement credit to the defendant's sentence and ordered the Appellate Court to remand the case to the trial court so that it could exercise its discretion, in the first instance, with respect to the presentence confinement credit issue.

The Appellate Court correctly concluded that the defendant's plea agreement did not include an agreement that he would receive presentence confinement credit for the time that he was incarcerated and serving sentences in connection with two criminal cases unrelated to the present case, as the record contained no evidence that would support such a finding.

There was no merit to the defendant's claim that the plea agreement was void on the ground that there was no meeting of the minds on the issue of presentence confinement credit, because, although the record supported the conclusion that the defendant subjectively believed that he would receive

* This case originally was argued before a panel of this court consisting of Chief Justice Robinson and Justices McDonald, D'Auria, Mullins, Ecker, Alexander, and Dannehy. Thereafter, Chief Justice Robinson retired from this court and did not participate in the consideration of this case.

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

such credit under that agreement, that subjective belief was wholly unreasonable.

Argued April 25—officially released December 10, 2024

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of home invasion, robbery in the first degree, conspiracy to commit robbery in the first degree and criminal possession of a firearm, and, in the second part, with being a persistent dangerous felony offender and with committing an offense while on release, brought to the Superior Court in the judicial district of Ansonia-Milford, where the defendant was presented to the court, *Brown*, *J.*, on pleas of guilty to robbery in the first degree and conspiracy to commit robbery in the first degree; thereafter, the court, *Brown*, *J.*, denied the defendant's request for presentence confinement credit and the defendant's motion for reconsideration or to withdraw the pleas, and rendered judgment in accordance with the pleas, and the defendant appealed to the Appellate Court, *Alvord*, *Prescott* and *Moll*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed in part*; *further proceedings*.

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

Linda F. Rubertone, senior assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Howard S. Stein*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ALEXANDER, J. The principal issue in this certified appeal is whether a trial court has the authority under

General Statutes § 18-98d[1] to direct the commissioner of correction (commissioner) to apply presentence confinement credit, also known as jail credit, for specific dates to a defendant's sentence on the judgment mittimus.[2] Upon our grant of his petition for certification,[3] the defendant, Marcus Hurdle, appeals from the judgment of the Appellate Court affirming his conviction, rendered in accordance with a plea agreement, of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4) and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a). *State* v. *Hurdle*, 217 Conn. App. 453, 476, 288 A.3d 675 (2023). On appeal, the defendant claims that the Appellate Court incorrectly concluded that (1) under subsection (c) of § 18-98d, the trial court lacked authority to direct the commissioner to apply presentence confinement credit, and (2) there was no basis for allowing the defendant to withdraw his guilty

[1] We note that the legislature amended subdivision (1) of § 18-98d (a) in 2021 to divide it into subparagraphs (A) and (B), with the existing language of subsection (a) (1) contained in subparagraph (A), applicable to offenses "committed on or after July 1, 1981, and prior to October 1, 2021," and the new subparagraph (B) applicable to offenses "committed on or after October 1, 2021 . . . ." Public Acts 2021, No. 21-102, § 21. See footnote 19 of this opinion for further discussion of this statutory change. The 2021 amendment to § 18-98d does not affect the principal issue in this appeal, which turns on our interpretation of subsection (c) of that statute. In the interest of simplicity, all references in this opinion to § 18-98d are to the current revision of the statute.

[2] The mittimus is "a clerical document by virtue of which a person is transported to and rightly held in prison. . . . [A] mittimus after conviction in a criminal case is similar to an execution after judgment in a civil case; it is final process and carries into effect the judgment of the court." (Citations omitted; internal quotation marks omitted.) *Commissioner of Correction* v. *Gordon*, 228 Conn. 384, 392, 636 A.2d 799 (1994).

[3] We granted the defendant's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the trial court lacked authority to award the defendant presentence confinement credit at the time of sentencing?" And (2) "[d]id the Appellate Court correctly conclude that the plea agreement did not include presentence confinement credit?" *State* v. *Hurdle*, 346 Conn. 923, 295 A.3d 420 (2023).

pleas because the plea agreement did not include some of the presentence confinement credit that the defendant had sought from the trial court. We conclude that the trial court has the discretionary authority under § 18-98d to include on the mittimus an order directing the commissioner to award presentence confinement credit in accordance with subsection (a) (1) of that statute for specific dates when the defendant was confined because he was unable to obtain bail or because bail was denied. We further conclude that the Appellate Court correctly determined that the plea agreement did not include an agreement that the defendant would receive presentence confinement credit for the time he spent serving sentences in connection with different files, and, for that reason, the defendant was not entitled to withdraw his plea. Accordingly, we reverse in part the judgment of the Appellate Court.

The record reveals the following undisputed facts and procedural history. In January, 2016, the defendant was sentenced in the judicial district of Ansonia-Milford to a total effective sentence of five years of incarceration, execution suspended after nine months, and three years of probation, in two criminal cases unrelated to the present case (Ansonia-Milford cases). In July, 2018, the trial court, *McShane*, *J.*, in the Ansonia-Milford case accepted the defendant's admission that he had violated his probation under a *Garvin* agreement[4] and released him so that he could attend a substance abuse treatment program.

While awaiting sentencing for violation of probation in the Ansonia-Milford cases, the defendant participated

[4] "A *Garvin* agreement is a conditional plea agreement that has two possible binding outcomes, one that results from the defendant's compliance with the conditions of the plea agreement and one that is triggered by the defendant's violation of a condition of the agreement." (Internal quotation marks omitted.) *State* v. *Stevens*, 278 Conn. 1, 3 n.1, 895 A.2d 771 (2006); see *State* v. *Garvin*, 242 Conn. 296, 299–302, 699 A.2d 921 (1997).

in a robbery in West Haven, which formed the basis for the charges in the present case. When the police encountered the defendant and his three coconspirators several hours later, the defendant engaged the officers in a car chase in New Haven. Later that same day, New Haven police saw the defendant disposing of a firearm matching the description of the gun used in the West Haven robbery and arrested him. As a result of the events in New Haven, the defendant was charged in the judicial district of New Haven with interfering with a police officer and criminal possession of a pistol or revolver (New Haven case). He was arraigned in the New Haven case the next day, August 17, 2018, and was detained because he was unable to post bond.

While detained in connection with the New Haven case, the defendant was served with an arrest warrant in the present case. Because the robbery giving rise to the charges in the present case took place in West Haven, the state charged the defendant in the judicial district of Ansonia-Milford with multiple offenses, including home invasion and robbery in the first degree; the state also filed a part B information charging the defendant with being a persistent dangerous felony offender and with committing an offense while on release. The trial court, *Wilkerson Brillant, J.*, set a $300,000 bond at arraignment in the present case and raised the bond for the earlier violation of probation charges in the Ansonia-Milford cases, so that the defendant would receive "credit for any time that he [had been] incarcerated at [that] point."

On October 26, 2018, the trial court appointed a special public defender for the defendant and confirmed that bonds had been set in all of his cases. The defendant pleaded not guilty to the charges in the present case and elected a jury trial. On December 19, 2018, the defendant was released from the custody of the commissioner after posting bond.

On February 13, 2019, the defendant returned to court for sentencing on his violation of probation charges in the Ansonia-Milford cases. Judge McShane advised the defendant that he would *not* be earning presentence confinement credit toward any sentence in the present case or the New Haven case while he was incarcerated and serving a sentence on his violation of probation in the Ansonia-Milford cases. The defendant twice affirmed that he understood, and his sentencing was continued to February 20, 2019. On that date, the defendant arrived at court late and appeared to be intoxicated, prompting the court to raise his bond, to detain him, and to continue that matter to the following week. On February 26, 2019, the court terminated the defendant's probation in the Ansonia-Milford cases and sentenced him to concurrent terms of three and one-half years of incarceration. Thereafter, the state and the defendant attempted to negotiate a global resolution of the remaining charges but failed to reach an agreement.

On May 15, 2019, the defendant pleaded guilty under the *Alford* doctrine[5] to the charge of criminal possession of a pistol or revolver in the New Haven case. He was sentenced to ten years of incarceration, execution suspended after three and one-half years, followed by a three year conditional discharge. When the defendant asked whether he would receive credit in the New Haven case for his presentence confinement on those charges, the trial court, *Cradle, J.*, stated that he would receive credit "for the time that [he had] been confined on bond [in] this matter," specifically, from August 17 through December 19, 2018, and from February 20 through May 15, 2019—roughly seven months in total.[6]

[5] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[6] The defendant was serving the sentence for violation of probation in the Ansonia-Milford cases from February 26 through May 15, 2019, and, therefore, his confinement for that period of time was not the result of his inability to post bond in the New Haven case.

The court's order for specific jail credit was noted on the judgment mittimus.

In November, 2019, the defendant hired a private attorney, James R. Hardy II, to represent him in the present case. The proceedings in the present case were subsequently delayed by Hardy's multiple requests for continuances. On March 10, 2020, the trial court, *Brown, J.*,[7] marked over a hearing on the defendant's motion for bond reduction. Later that same day, Governor Ned Lamont declared a state of emergency throughout the state in response to the COVID-19 pandemic. On March 19, 2020, the governor ordered all noncritical court operations to be suspended. See Executive Order No. 7G (March 19, 2020).

On September 10, 2020, the trial court held a virtual hearing on the defendant's motion for bond reduction in the present case.[8] By that time, the defendant had hired Attorney Michael Brown to represent him in place of Hardy. The trial court granted the motion for bond reduction and then reminded the parties that, despite wanting to proceed to trial, "we can't do that right now," because of the ongoing suspension of noncritical court proceedings.

On October 29, 2020, the parties reached a plea agreement in the present case. Pursuant to that agreement, the defendant entered guilty pleas under the *Alford* doctrine to robbery in the first degree and conspiracy to commit robbery in the first degree. In exchange, the state agreed to enter a nolle prosequi on the remaining charges. The agreement was for a sentence of twelve years of incarceration, execution suspended after seven and one-half years, and five years of probation. The

[7] All subsequent references to the trial court in this opinion are to Judge Brown.

[8] The defendant was serving his sentence for violation of probation in the Ansonia-Milford cases and sought a reduction in the bond in the present case so that he could attend a veterans treatment program in prison.

plea deal included an agreement that the sentence in the present case would run concurrently with the sentences in the Ansonia-Milford and New Haven cases. The trial court accepted the pleas following a thorough canvass during which the defendant affirmed that he understood the terms of the agreement.

At the sentencing hearing on January 28, 2021, Brown raised the question of jail credit in the present case, stating: "[T]here was discussion of making the sentence run with the other sentences. And I contacted records at [the Department of Correction (department)], and they instructed me that you can order a jail credit going back to those dates. And I have those dates for the court, if so inclined. The arrest date of [August 17, 2018] through December 19, 2018, at which time [the defendant] bonded out. And then he was readmitted on February 20, 2019, and the jail credit can be ordered from then to here."

The prosecutor objected on the ground that presentence confinement credit had not been part of the plea agreement in the present case and that the court's practice had been to "always [defer] to the [commissioner] with regard to the calculation of jail credit." The prosecutor further argued that, if the defendant's time served were to become "dead time,"[9] namely, time that would not be credited toward his sentence for robbery in the present case—it was his own fault. The prosecutor stated: "It was a calculated decision by [the defendant] and each and every one of his previous attorneys to dispose of the violation of probation [charges in Ansonia-Milford], [and] to dispose of the gun charge in New Haven where he began serving dead time instead of

[9] "[D]ead time is [informal] parlance for presentence confinement time that cannot be credited because the inmate is a sentenced prisoner serving time [in connection with] another sentence." (Internal quotation marks omitted.) *Smith* v. *Commissioner of Correction*, 179 Conn. App. 160, 163 n.2, 178 A.3d 1079 (2018).

trying to resolve these things in a global fashion. He was warned by the court. He was warned by the state that these were all bad decisions."

The trial court then ruled: "I am going to impose [the] agreed on sentence. I am also going to allow the [commissioner] to impose whatever presentence credit [he] feels is appropriate. *You're obviously entitled to presentence credit. I'm going to let* [*the commissioner*] *make that determination.* . . . I'm not going to do that on the record." (Emphasis added.) Following additional discussions about the defendant's claimed understanding that jail credit was integral to his decision to accept the plea agreement, the trial court granted Brown's request for a continuance to allow him to consult with the defendant and to review the file in greater depth.

Thereafter, the defendant filed a motion requesting the court to direct the commissioner to apply specific presentence confinement dates for jail credit on the judgment mittimus or, in the alternative, that he be allowed to withdraw his guilty pleas on the ground that he did not understand that he was not receiving presentence confinement credit as part of his plea agreement. When the sentencing hearing resumed on February 18, 2021, the court denied the defendant's motion regarding presentence confinement credit, stating that the court had no discretion under § 18-98d to grant it. The court also denied the defendant's request to withdraw his pleas, stating that the court had no reason to believe that the defendant did not understand the terms of the plea agreement. The court then sentenced the defendant in accordance with the plea agreement, and his sentence in the present case commenced on February 18, 2021.

The defendant appealed from the judgment of conviction to the Appellate Court, claiming, among other things, that the trial court incorrectly determined that it lacked

the authority to award him presentence confinement credit at sentencing; *State* v. *Hurdle*, supra, 217 Conn. App. 461; and that the court improperly denied his motion to withdraw his guilty pleas because there was never a meeting of the minds regarding the terms of the plea agreement. Id., 469. The Appellate Court rejected those claims; id., 469, 471; and affirmed the trial court's judgment. Id., 476. This certified appeal followed. Additional facts will be set forth as necessary.

I

We first address the defendant's claim that the Appellate Court incorrectly determined that the commissioner has the exclusive authority to calculate and apply presentence confinement credit under § 18-98d (c). The defendant contends that the statute does not deprive the Superior Court of its inherent power as a court of general jurisdiction to set the parameters of a criminal sentence, which extends to the specific presentence confinement credit that the commissioner can apply to the sentence. See, e.g., *State* v. *Angel M.*, 337 Conn. 655, 668, 255 A.3d 801 (2020) ("[A] trial court possesses, within statutorily prescribed limits, broad discretion in sentencing matters. . . . In exercising its discretion, the trial court may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information [it] may consider, or the source from which it may come." (Citation omitted; internal quotation marks omitted.)); see also General Statutes § 53a-37;[10] General

[10] General Statutes § 53a-37 provides in relevant part: "When multiple sentences of imprisonment are imposed on a person at the same time, or when a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment, the sentence or sentences imposed by the court shall run either concurrently or consecutively with respect to each other and to the undischarged term or terms *in such manner as the court directs at the time of sentence*. The court shall state whether the respective maxima and minima shall run concurrently or consecutively with respect to each other, and shall state in conclusion the effective sentence imposed. . . ." (Emphasis added.)

Statutes § 53a-38 (b) (1).[11] Guided in part by case law establishing the statutory nature of presentence confinement credit, we agree and conclude that § 18-98d (c) does not deprive trial courts of the authority to direct the commissioner on a judgment mittimus to apply specific presentence confinement dates.

Whether § 18-98d (c) confers exclusive authority on the commissioner to calculate and apply a defendant's presentence confinement credit is a question of statutory interpretation subject to plenary review. See, e.g., *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 647, 224 A.3d 147 (2020).

In accordance with General Statutes § 1-2z, we begin our analysis with the applicable text of § 18-98d. Section 18-98d (a) (1) (A) provides in relevant part: "Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981, and prior to October 1, 2021, under a mittimus or because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed; provided (i) each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after such presentence confinement; and (ii) the provisions of this section shall only apply to a person for whom the existence of a mittimus, an inability to obtain bail or the denial of bail is the sole reason for such person's

[11] General Statutes § 53a-38 (b) provides in relevant part: "A definite sentence of imprisonment commences when the prisoner is received in the custody to which he was sentenced. Where a person is under more than one definite sentence, the sentences shall be calculated as follows: (1) If the sentences run concurrently, the terms merge in and are satisfied by discharge of the term which has the longest term to run . . . ."

presentence confinement . . . .” Subsection (c) of § 18-98d provides that the commissioner “shall be responsible for ensuring that each person to whom the provisions of this section apply receives the correct reduction in such person’s sentence; provided in no event shall credit be allowed under subsection (a) of this section in excess of the sentence actually imposed.”

Subsections (a) and (c) of § 18-98d are silent as to whether trial courts have any role in determining whether a particular period of presentence confinement credit should be applied to a sentence. “It is well settled, however, that silence does not necessarily equate to ambiguity.” (Internal quotation marks omitted.) *State* v. *Ramos*, 306 Conn. 125, 136, 49 A.3d 197 (2012). “Rather, [i]n determining whether legislative silence renders a statute ambiguous, we read the statute in context to determine whether the language is susceptible to more than one reasonable interpretation.” (Internal quotation marks omitted.) Id.

We conclude that the language of § 18-98d (c) providing that the commissioner “shall be *responsible* for *ensuring* that each person to whom the provisions of this section apply receives the *correct* reduction in such person’s sentence”; (emphasis added); contains an inherent tension, revealed by dictionary definitions contemporaneous with the enactment of the statute, that renders the statute ambiguous as to whether the commissioner has exclusive authority to calculate and apply presentence confinement credit. Specifically, the definition of the word “responsible” suggests that the commissioner’s authority in this area is, at the very least, primary. See Webster’s Ninth New Collegiate Dictionary (1987) p. 1005 (defining “responsible” in relevant part as “liable to be called to account as the primary cause, motive, or agent”); see also The American Heritage Dictionary of the English Language (New College Ed. 1978) p. 1108 (defining “responsible” in relevant part

as "[i]nvolving personal accountability or ability to act without guidance or superior authority," or "[b]eing the source or cause of something"). The definition of the operative verb "ensure" suggests, however, that the commissioner's role is, in fact, not exclusive. The verb "ensure" indicates that the legislature intended that the commissioner's role would be to *guarantee* that a defendant receives the presentence confinement credit to which he is entitled. See Webster's Ninth New Collegiate Dictionary, supra, p. 414 (defining "ensure" as "to make sure, certain, or safe: guarantee"). The related word "guarantee" strongly suggests that the commissioner's role and authority in the calculation and application of such credit is not necessarily exclusive, because service as a guarantor encompasses the "[assumption of] responsibility for the quality or execution of" that task by another party. The American Heritage Dictionary of the English Language, supra, p. 584. Further, the adjective "correct," in relation to the presentence credit awarded, suggests that the commissioner has a role in vetting credit initially awarded by a different party. See id., p. 299 (defining "correct" as "[f]ree from error or fault," or "[c]onforming to standards; proper"); see also Webster's Ninth New Collegiate Dictionary, supra, p. 293 (defining "correct" in relevant part as "conforming to an approved or conventional standard"). In this context, that other party reasonably could be understood to be the trial court, which would in turn be expected to provide accurate presentence confinement dates to the commissioner. Because this language reasonably may be understood to create uncertainty as to whether § 18-98d confers exclusive authority on the commissioner to determine the specific dates of presentence confinement for which the defendant should receive credit, we may consider extratextual sources, including the statute's legislative history. See General Statutes § 1-2z.

We first consider the legislative history of § 18-98d, beginning with its predecessor provisions, General Statutes §§ 18-97 and 18-98. See *James* v. *Commissioner of Correction*, 327 Conn. 24, 33–34, 170 A.3d 662 (2017) (concluding that §§ 18-97 and 18-98, "although not operative in [*James*], are still persuasive authority in determining the overall intent of granting presentence confinement credit"). In its 1967 report to the legislature, the Commission to Revise the Criminal Statutes recommended that, "[i]n imposing sentence of imprisonment, the court may provide that the term imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence." Report of the Commission to Revise the Criminal Statutes (1967) p. 14. Later that year, the legislature enacted No. 549, § 15, of the 1967 Public Acts, codified at General Statutes (Rev. to 1968) § 18-97, and No. 869 of the 1967 Public Acts, codified at General Statutes (Rev. to 1968) § 18-98, which governed the application of presentence confinement credit before the enactment of § 18-98d in 1980 and required the commissioner to grant such credit.[12] The

[12] General Statutes (Rev. to 1968) § 18-97 provides in relevant part: "Any person receiving a fine or prison or jail sentence shall receive credit towards any portion of such fine as is not remitted or any portion of such sentence as to which execution is not suspended for any days spent in custody under a mittimus as a result of any court proceeding for the offense or acts for which such fine or sentence is imposed. The clerk of the court shall enter such credit upon the order in the case of a fine, and upon the mittimus in the case of a sentence and it shall be the duty of the agency or person that held such person under such mittimus to inform the clerk of the court of the proper amount of such credit. . . ."

General Statutes (Rev. to 1968) § 18-98 provides: "Any person who has been denied bail or who has been unable to obtain bail and who is subsequently imprisoned is entitled to commutation of his sentence by the number of days which he spent in jail from the time he was denied or was unable to obtain bail to the time he was so imprisoned. The commissioner of correction shall credit such person with the number of days to which the deputy jailer of the jail where such person was confined while awaiting trial certifies such person was confined between the denial of bail to him or his inability to obtain bail and his imprisonment."

legislative history of § 18-98, which is the statutory progenitor of § 18-98d (c), indicates that the legislature authorized the commissioner to grant presentence confinement credit because trial courts were not consistently doing so at that time. Testifying in favor of the proposed legislation, Harold Hegstrom, the state jail administrator, stated: "There are a large number of inmates who are [not] released on bond and may wait for months before they come up to trial. . . . Now I understand that there are a number of [j]udges [who] do give consideration to the time that [a] man has spent in jail prior to sentencing, but it is usually the other way around, that no consideration is given to the time [he] is awaiting trial." Conn. Joint Standing Committee Hearings, Corrections, 1967 Sess., p. 55. Indeed, the floor debates on the bill ultimately enacted as § 18-98 indicate the remedial nature of the statutory progenitor of § 18-98d, which was intended to address inequities in sentencing arising from the effects of the bail bond system. See 12 S. Proc., Pt. 5, 1967 Sess., p. 2126, remarks of Senator George Gunther ("I rise in support of this bill. I was amazed in visiting our jails throughout this state, that we have cases of [holdovers] sitting in jail as long as a year, and then to find out that they could be brought into court, sentenced and have to serve an additional [five] or [ten], [fifteen] or [twenty] days. I think this is long overdue, it is another asset in our entire corrections program in the state of Connecticut."); 12 H.R. Proc., Pt. 7, 1967 Sess., p. 3096, remarks of Representative Norris L. O'Neill ("[O]ur bail bond laws have long discriminated against the poor. I think that this bill helps to make up for some of the inequities that have taken place for so long.").

When § 18-98d was enacted in 1980, §§ 18-97 and 18-98 were amended to apply only to persons who were confined for an offense committed prior to July 1, 1981. See Public Acts 1980, No. 80-442, §§ 5 and 6. All subsequent references to §§ 18-97 and 18-98 in this opinion are to the 1968 revisions of those statutes.

Subsequently, in 1980, the legislature enacted § 18-98d in connection with No. 80-442 of the 1980 Public Acts (P.A. 80-442), which provided for comprehensive sentencing reform, including the elimination of indeterminate sentencing in favor of definite sentencing and certain changes to good time credit. Section 2 of P.A. 80-442 was codified in part as § 18-98d and replaced §§ 18-97 and 18-98 with respect to any person who was confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981. Public Act 80-442 also added subsection (c) of § 18-98d, which provides in relevant part that the commissioner "shall be responsible for ensuring that each person to whom the provisions of this section apply receives the correct reduction in such person's sentence . . . ."

On the basis of the statutory text, read in light of this legislative history, we conclude that trial courts have discretionary authority to direct the commissioner to apply specific presentence confinement credit to the sentence that the court has imposed in accordance with § 18-98d (a) (1) (A). See, e.g., *Clark* v. *Waterford, Cohanzie Fire Dept.*, 346 Conn. 711, 728–29, 295 A.3d 889 (2023) (text remains primary consideration in construction of statute, even when it is ambiguous for purposes of § 1-2z). The legislative history of § 18-98, the progenitor of § 18-98d (c), demonstrates that the legislature was aware in 1967 that some courts had been granting credit for presentence confinement before that time, despite the absence of any specific statutory authority. Nothing in the legislative history or the language of that statute or of § 18-97 indicates that the legislature intended to deprive courts of that authority. To the contrary, the legislative history of § 18-98 indicates that the legislature was concerned that some trial courts were *not* exercising their authority to grant presentence confinement credit in cases in which credit

should have been granted. As a result, persons who were held in presentence confinement for lengthy periods—a disproportionate number of whom were poor and unable to post bond—were spending more time in confinement than intended by the legislature.

Our conclusion that trial courts have the inherent authority to determine presentence confinement credit is consistent with case law from other states. At least one other state supreme court has held that, "as long as any particular confinement credit does not lessen the penalty intended by the [l]egislature, or otherwise frustrate the [l]egislature's constitutional function of establishing criminal penalties . . . the judiciary possesses inherent discretionary authority to grant presentence confinement credit." *State* v. *Martinez*, 126 N.M. 39, 42–43, 966 P.2d 747 (1998); see also *Kronz* v. *State*, 462 So. 2d 450, 451 (Fla. 1985) (trial courts possess "inherent discretionary authority to award credit for time served in other jurisdictions while awaiting transfer to Florida"). In support of this conclusion, the New Mexico Supreme Court reasoned in *Martinez*: "Presentence confinement credit represents a court's recognition that a defendant, in fact, has satisfied a portion of the penalty mandated by the [l]egislature. See *State* v. *Trudeau*, 487 N.W.2d 11, 15 (N.D. 1992) ('[t]ime spent in custody that has been credited toward a sentence is effectively the same thing as time served pursuant to a sentence'). It is the duty of the judiciary, in implementing the directives of the [l]egislature, to exercise reason and ensure that the ends of justice are met." *State* v. *Martinez*, supra, 42.

That reasoning is persuasive. As we explained, trial courts in this state applied credit for presentence confinement to sentences prior to the enactment of §§ 18-97 and 18-98 in 1967, and they have continued to do so

up to the present time.[13] The legislature has never evinced any intent to deprive courts of such authority, and the phrasing of the statutory text strongly suggests that the commissioner's role is indeed one that is shared with the trial court. See, e.g., *William W. Backus Hospital* v. *Stonington*, 349 Conn. 713, 726, 321 A.3d 1117 (2024); *Clark* v. *Waterford, Cohanzie Fire Dept.*, supra, 346 Conn. 728–29. Because the language of § 18-98d, especially when read in light of its predecessor statutes and the legislative history, reflects an intention that trial courts will continue to exercise their inherent authority to issue orders directing that presentence confinement credit be applied to a particular sentence, we conclude that trial courts have such authority.

In support of its contention that trial courts do not have the inherent authority to apply credit for presentence confinement, the state points out that this court has indicated in a number of cases that "presentence credit is a creature of statute and that, as a general rule, such credit is not constitutionally required." (Internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 833, 860 A.2d 715 (2004); see *Hammond* v. *Commissioner of Correction*, 259 Conn. 855, 879, 792 A.2d 774 (2002); *Johnson* v. *Manson*, 196 Conn. 309, 321 n.12, 493 A.2d 846 (1985), cert. denied, 474 U.S. 1063, 106 S. Ct. 813, 88 L. Ed. 2d 787 (1986). On the basis of this language, the state argues that, in the absence of a statute affirmatively conferring authority on trial courts to order credit for presentence confinement, courts have no such authority. We disagree. Those cases are distinguishable because none

[13] As the Appellate Court noted, it has not been a universal position among the judges of the Superior Court that they lack the authority to place orders on judgment mittimuses directing the commissioner to apply specific presentence confinement credit to a defendant's sentence. See *State* v. *Hurdle*, supra, 217 Conn. App. 467–68. This division is evident in the procedural history of the present case, which indicates that Judge Cradle awarded such credit when she sentenced the defendant in the New Haven case.

addressed the specific question at issue in the present case, which is whether a trial court has the inherent authority to order the application of presentence confinement credit or, instead, has such authority *only* if conferred by statute. *Harris*, *Hammond*, and *Johnson* by contrast, addressed the different question of whether a construction of the statute that did not provide jail credit in a given situation violated a prisoner's *constitutional* rights to equal protection.

Instead, this court's description of presentence confinement credit as a creature of statute must be understood within the context of our cases holding that courts do not have exclusive control over sentencing matters generally. It is well settled that, "[w]hatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility . . . these are peculiarly questions of legislative policy. . . . Thus, although the rule of separation of governmental powers cannot always be rigidly applied . . . it must be remembered that the constitution assigns to the legislature the power to enact laws defining crimes and fixing the degree and method of punishment and to the judiciary the power to try offenses under these laws and [to] impose punishment within the limits and according to the methods . . . provided." (Internal quotation marks omitted.) *State* v. *Bischoff*, 337 Conn. 739, 764, 258 A.3d 14 (2021). Credit for presentence confinement in particular is a matter over which all three branches of government have a part. See *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 829, 950 A.2d 1220 (2008) (concluding that § 18-98d is not unconstitutional delegation of judicial sentencing power because it "properly designates to the executive branch the duty to manage a prisoner's sentence once it has been imposed by, for example, calculating applicable credit to reduce time spent in prison"). Thus, we disagree with the state insofar as it contends that, in the absence of a statute

affirmatively conferring authority on trial courts to order credit for presentence confinement, courts have no such authority. Rather, § 18-98d and its predecessors reflect legislative action implementing, supplementing, and limiting that nonexclusive authority.

We also disagree with the state's reliance on this court's decision in *Washington* v. *Commissioner of Correction*, supra, 287 Conn. 792, in support of its "inferential" argument that trial courts do not have the inherent authority to determine credit for presentence confinement pursuant to § 18-98d. In *Washington*, the trial court had sentenced the petitioner to a total effective term of seven years of incarceration in accordance with a plea agreement and declined to direct the commissioner to apply presentence confinement credit under § 18-98d, apparently on the basis of the court's view that it was up to the commissioner to determine the petitioner's entitlement to such credit. Id., 825–26. In a subsequent habeas challenge, this court rejected the petitioner's claim that the trial court had violated the separation of powers by "delegat[ing] a 'strictly judicial function' of sentencing to the executive branch when it deferred to the [commissioner] for the proper calculation and application of the petitioner's presentence confinement credit." Id., 827; see id., 827–29. In rejecting the delegation claim, this court disagreed with the petitioner's reliance "on a footnote in *Hammond* v. *Commissioner of Correction*, [supra, 259 Conn. 855], for the proposition that the [commissioner] must apply presentence confinement credit, 'as ordered by the trial court *even if the detainee has no constitutional or statutory entitlement to such credit.*' " (Emphasis added.) *Washington* v. *Commissioner of Correction*, supra, 829 n.19; see *Hammond* v. *Commissioner of Correction*, supra, 881 n.24. The court held in *Washington* that this observation in *Hammond* "merely indicates that when a petitioner is not statutorily entitled to receive a reduc-

tion in his sentence for presentence incarceration, the court may consider such incarceration, among all other discretionary factors, in determining the appropriate length of the sentence."[14] *Washington* v. *Commissioner of Correction*, supra, 830 n.19. Although both *Washington* and *Hammond* relate to the trial court's authority to order the commissioner to apply presentence confinement credit under § 18-98d, they do not squarely address the issue before this court in the present case, which concerns the distinct question of whether a trial court has the authority to direct the commissioner to award credit for specific dates of confinement under § 18-98d.[15]

Finally, the state argues that "[p]ublic policy and practical considerations do not favor a dual system of awarding presentence confinement credit." Specifically,

[14] It is not entirely clear whether, in *Washington*, this court intended to hold that a trial court has no authority to order presentence confinement credit that is not authorized by statute, or whether it intended to hold that a trial court has no authority to order presentence confinement credit *at all*. To the extent that *Washington* may be read to support the latter proposition, we disavow that interpretation.

[15] The defendant argues that, under this court's decision in *James* v. *Commissioner of Correction*, supra, 327 Conn. 24, the trial court's inherent authority to award presentence confinement credit is not limited by § 18-98d. The defendant posits that §§ 53a-37 and 53a-38, which govern when sentences commence, also influence the trial court's authority to award presentence credit. We disagree. *James* involved the scope of the commissioner's authority under § 18-98d and is entirely silent as to the trial court's inherent authority to award credit beyond that authorized by the statute.

To the extent that the trial court's authority to direct the commissioner to apply presentence credit is limited by § 18-98d, in sentencing a criminal defendant, the trial court has other options available in determining the time that the defendant should be incarcerated after sentencing. For example, it retains the discretion to adjust the overall period of incarceration imposed to address the time that does not qualify for credit under § 18-98d. See *Hammond* v. *Commissioner of Correction*, supra, 259 Conn. 881 n.24 (noting that, in determining sentence, even if defendant has no right to credit for presentence confinement under § 18-98d for time incarcerated in different state, it is within trial court's discretion to consider such presentence confinement *in its sentencing determination*).

the state argues that (1) the commissioner, rather than the trial court, is in the best position to access the information required to make an accurate calculation, and (2) public policy demands consistency and uniformity in the application of presentence confinement credit, and the amount of credit applied should not depend on the discretion of an individual sentencing judge. We disagree. With respect to the state's practicality argument, the defendant makes the unchallenged representation that the commissioner will comply with such court orders, as long as they are sufficiently specific.[16] See *Aviles* v. *Commissioner of Correction*, Docket No. TSR-CV-19-5000129-S, 2020 WL 4815872 (Conn. Super. July 23, 2020). In *Aviles*, the habeas court credited testimony by a records specialist for the department that the commissioner honored orders by trial courts to incorporate presentence confinement credit in a particular manner. Id., *2; see id. (records specialist testified that, "*absent a specific order from the court* noted on the mittimus at sentencing, [the commissioner] is constrained by the statutes governing the calculation and application of sentence credits" (emphasis added)). The records specialist further testified that trial courts, "based on information obtained from defense counsel, easily supplied through the [department's] records section and/or supplemented by computerized records to which counsel may have access, should specify to the [department] the exact date range for the application of such credit." Id. Accordingly, we conclude that trial courts have the ability to obtain accurate presentence confinement information for purposes of directing an award of credit in connection with determining an appropriate sentence.

[16] The state does not challenge the accuracy of this contention by the defendant or his reliance on the record in *Aviles* v. *Commissioner of Correction*, Docket No. TSR-CV-19-5000129-S, 2020 WL 4815872 (Conn. Super. July 23, 2020), for this assertion.

Turning to the state's concern about disparity in the award of presentence confinement credit, that concern is mitigated by the limits on the trial court's discretion to award such credit that are imposed by clauses (i) and (ii) of § 18-98d (a) (1) (A), which require the court to count "each day of presentence confinement . . . only once for the purpose of reducing all sentences imposed after such presentence confinement"; General Statutes § 18-98d (a) (1) (A) (i); and only when "the existence of a mittimus, an inability to obtain bail or the denial of bail is the sole reason for such person's presentence confinement . . . ."[17] General Statutes § 18-98d (a) (1) (A) (ii). We will not presume that trial courts will misconstrue those statutory provisions and direct the commissioner to apply less or more credit than that to which the defendant is statutorily entitled.

In summary, we conclude that the trial court has the discretionary authority to direct the commissioner to apply specific presentence confinement dates to a sentence.[18] Trial courts should not hesitate to exercise that authority, consistent with § 18-98d (a) (1) (A), in ensuring that the duration of incarceration reflects the intent of the court in fashioning a sentence.[19] Because the

[17] Clause (ii) of § 18-98d (a) (1) (A) provides an exception, not applicable in the present case, allowing presentence confinement credit for imprisonment served, or a fine paid, for a conviction later reversed on appeal.

[18] We emphasize that the trial court has only the discretionary authority to include on the judgment mittimus the specific dates of presentence confinement credit that the commissioner should apply. The commissioner has the ultimate and exclusive responsibility to apply that credit, and any additional presentence credit if applicable, as well as to calculate the defendant's release date.

[19] The calculation of presentence confinement credit becomes more complicated in cases like the present one, in which a defendant receives multiple concurrent sentences in files originating in numerous judicial districts. The defendant also seeks credit for a period (February 26, 2019, through February 18, 2021) during which it appears that he was not confined for inability to post bond or because bail was denied but, instead, was confined because he was serving sentences in other cases. Credit during this period would appear to be foreclosed by this court's construction of § 18-98d in *Harris*, which relied on this court's decision in *Payton* v. *Albert*, 209 Conn. 23, 547

Appellate Court improperly upheld the trial court's

A.2d 1 (1988), overruled in part on other grounds by *Rivera* v. *Commissioner of Correction*, 254 Conn. 214, 756 A.2d 1264 (2000). In *Harris*, this court held that, "[w]hen concurrent sentences are imposed on the same date, as in *Payton*, the available presentence confinement days have not yet been utilized," but that, "when concurrent sentences are imposed on different dates, the presentence confinement days accrued simultaneously on more than one docket are utilized fully on the date that they are applied to the first sentence. Hence, they cannot be counted a second time to accelerate the discharge date of any subsequent sentence without violating the language of § 18-98d (a) (1) (A)." *Harris* v. *Commissioner of Correction*, supra, 271 Conn. 823. The present case presents two potential additional issues arising from this application of § 18-98d in accordance with this court's construction of the statute in *Harris*.

First, the defendant summarily contends that, even though § 18-98d (a) (1) (A) expressly precludes awarding presentence confinement credit for time spent serving a sentence, denying credit for this period would violate his constitutional right to due process by unduly burdening his constitutional right to a jury trial. We decline to address this contention because it is inadequately briefed. See, e.g., *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 804–805, 256 A.3d 655 (2021).

Second, as we noted previously; see footnote 1 of this opinion; the legislature amended § 18-98d (a) (1) in 2021 to add a new subparagraph (B), which addresses the calculation of presentence confinement credit in the case of multiple concurrent sentences pending at the time that the sentence was imposed. See Public Acts 2021, No. 21-102, § 21 (P.A. 21-102). That provision provides in relevant part: "Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after October 1, 2021, under a mittimus or because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed; provided (i) each day of presentence confinement shall be counted equally in reduction of any concurrent sentence imposed for any offense pending at the time such sentence was imposed; [and] (ii) each day of presentence confinement shall be counted only once in reduction of any consecutive sentence so imposed . . . ." General Statutes § 18-98d (a) (1) (B).

The legislative history of that provision indicates that it was enacted in response to this court's decision in *Harris*. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 2021 Sess., p. 3070, remarks of Frank J. Riccio II, president of the Connecticut Criminal Defense Lawyers Association (explaining that result of *Harris* was that "[d]efendants with files in multiple court locations could inadvertently lose earned pretrial credits if they are sentenced on different dates" and that "[P.A. 21-102] would remedy that

determination that it had no discretion to direct the commissioner to apply specific presentence confinement dates, the case must be remanded to the trial court so that it may exercise that discretion in the first instance. See, e.g., *State* v. *Ayala*, 324 Conn. 571, 588–89, 153 A.3d 588 (2017) ("the failure to exercise discretion is an abuse in and of itself").

II

We next address the defendant's claims that the Appellate Court incorrectly determined that (1) the plea agreement did not include an agreement that the defendant would receive presentence confinement credit, and (2) the plea agreement is not void on the ground that there was no meeting of the minds on the issue of presentence confinement credit. We disagree with both claims.

"It is well settled that [p]rinciples of contract law and special due process concerns for fairness govern our interpretation of plea agreements." (Internal quotation marks omitted.) *State* v. *Kallberg*, 326 Conn. 1, 14–15, 160 A.3d 1034 (2017); see also *Santobello* v. *New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) ("the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances"). "[I]n the context of plea agreements, [t]he primary goal of contract interpretation is to effec-

problem"). The legislature's enactment of subparagraph (B) of § 18-98d (a) (1) strongly suggests that it did not agree with the result of this court's decision in *Harris* and intended to overrule it prospectively. See General Statutes § 18-98d (a) (1) (B) (provision applies only to persons who committed offense on or after October 1, 2021). Because the trial court declined to order any presentence confinement dates on the judgment mittimus in the present case, the continuing vitality of *Harris* and our other § 18-98d case law in the wake of the 2021 amendment to the statute is not before us. Accordingly, we leave to another day any questions concerning the proper calculation of presentence confinement in cases subject to its terms.

tuate the intent of the parties . . . . In ascertaining that intent, we employ an objective standard and look to what the parties reasonably understood to be the terms of the plea agreement on the basis of their words and conduct, and in light of the circumstances surrounding the making of the agreement and the purposes they sought to accomplish." (Citation omitted; internal quotation marks omitted.) *State* v. *Kallberg*, supra, 15; see also *United States* v. *Davis*, Docket No. 91-30430, 1994 WL 1712, *1 (9th Cir. January 4, 1994) (decision without published opinion, 15 F.3d 1091) ("the formation of a plea agreement is measured by objective manifestations of assent to specific terms").

Moreover, "[i]t is well settled that the threshold determination as to whether a plea agreement is ambiguous as to the parties' intent is a question of law subject to plenary review. . . . If the reviewing court deems the agreement ambiguous and extrinsic evidence has been offered to dispel that ambiguity, such as testimony regarding the facts surrounding the making of the agreement, then intent is a question of fact for the trial court, reversible only if clearly erroneous. . . . If, however, the agreement is ambiguous and no extrinsic evidence has been offered, resolution of the dispute as to the parties' intent necessarily hinges on what inferences can be drawn solely from the four corners of the agreement. Under such circumstances, the intention of the parties presents a question of law over which we exercise plenary review. . . . In the absence of extrinsic evidence, determining the intent of the parties does not require resolution of disputed facts or credibility assessments." (Citations omitted.) *State* v. *Kallberg*, supra, 326 Conn. 16–17.

In the present case, the sole evidence before the trial court, in determining the terms of the plea agreement, consisted of the representations of counsel and the canvass of the defendant. Applying plenary review to

the defendant's claim that the plea agreement included an agreement that the defendant would receive presentence confinement credit for the time that he spent serving the sentences in connection with the Ansonia-Milford and the New Haven cases, we agree with the Appellate Court that the record contains no evidence that would support such a finding. See *State* v. *Hurdle*, supra, 217 Conn. App. 470–71. To the contrary, the record shows that Brown represented to the trial court at the February 18, 2021 sentencing hearing that, although he told the defendant that he would seek presentence confinement credit, "[he] did not tell him there was an agreement for jail credit" and that "[t]here was not [such an agreement], and [he could not] represent that there was." In addition, the prosecutor represented to the court that, in his view, he had no authority to enter into an agreement for presentence confinement credit. We therefore conclude that the trial court correctly determined that the plea agreement did not include an agreement concerning the award of presentence confinement credit.

With respect to the defendant's alternative claim that the plea agreement is void because there was no meeting of the minds on the issue of presentence confinement credit, we conclude that, although the record might support the conclusion that the defendant *subjectively* believed that he would receive jail credit in the present case for the time that he had spent serving the sentences in connection with the Ansonia-Milford and New Haven cases, that subjective belief was wholly unreasonable, and the evidence supports a finding that the plea agreement with the state did not include any such credit. At the January 28, 2021 hearing, the prosecutor represented that Judge McShane had expressly warned the defendant at the February 13, 2019 hearing—at which the prosecutor was present—that, if he started serving his sentence for violating his probation

in the Ansonia-Milford cases, he would not receive credit for that time in the New Haven case or in the present case, and that the defendant confirmed twice that he understood that fact. Indeed, the prosecutor stated that, in his view, he had no authority to enter into such an agreement. In light of these representations, we conclude that Appellate Court correctly determined that the trial court's rejection of the defendant's claim that the plea agreement was void because there was no meeting of the minds was not clearly erroneous.

In support of his claim to the contrary, the defendant contends that Brown stated at the February 18, 2021 hearing that "the state represented in a pretrial negotiation that the seven and one-half year sentence would result in the [defendant's] serving four more years than he was currently serving," and the prosecutor did not dispute this claim. This contention rests on an inaccurate factual premise. Brown told the court at the February 18, 2021 hearing that he had found a note in his case file indicating that *he* "[believe[*d*]" that, under the state's plea offer, the seven and one-half year sentence would result in the defendant's serving only an additional four years in prison, but he acknowledged that his personal understanding of the offer may have been inaccurate. He also suggested that his discussion with the defendant regarding what he believed to have been the state's offer may have been the basis for the defendant's misunderstanding. As we indicated, Brown candidly acknowledged at the hearing that he had not made any such agreement with the state concerning credit for presentence confinement. We therefore reject this claim.

The judgment of the Appellate Court with respect to its conclusion regarding the trial court's authority to order the commissioner to apply presentence confinement credit to the defendant's sentence is reversed and the case is remanded to that court with direction to

reverse the trial court's judgment with respect to the presentence confinement credit issue and to remand the case to the trial court for further proceedings according to law; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ERIC L.*
(SC 20834)

McDonald, D'Auria, Mullins, Ecker, Alexander and Dannehy, Js.**

Syllabus

The defendant appealed from the judgment of the Appellate Court, which had affirmed the trial court's judgment revoking his probation. He claimed that the Appellate Court improperly upheld the trial court's conclusion that it lacked authority under the statute (§ 18-98d) governing presentence confinement credit to direct the commissioner of correction to apply such credit to his sentence. *Held*:

The issue of whether the trial court has authority to direct the commissioner to apply specific presentence confinement credit to a sentence was resolved in the companion case of *State* v. *Hurdle* (350 Conn. 770), in which this court held that trial courts do have authority to direct the commissioner to apply such credit to a sentence on a judgment mittimus.

Insofar as the Appellate Court improperly upheld the trial court's incorrect determination that it had no such authority, this court reversed the Appellate

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* In accordance with our policy of protecting the privacy interests of victims of family violence, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

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

** This case originally was argued before a panel of this court consisting of Chief Justice Robinson and Justices McDonald, D'Auria, Mullins, Ecker, Alexander, and Dannehy. Thereafter, Chief Justice Robinson retired from this court and did not participate in the consideration of this case.

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

Court's judgment in part, and the case was remanded so that the trial court could exercise its discretion to direct the commissioner to apply presentence confinement credit to the defendant's sentence.

Argued April 25—officially released December 10, 2024

Procedural History

Substitute information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Litchfield, geographical area number eighteen, and tried to the court, *Shaban*, *J.*; judgment revoking the defendant's probation; thereafter, the court denied the defendant's request for presentence confinement credit, and the defendant appealed to the Appellate Court, *Prescott*, *Moll* and *Cradle*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed in part*; *further proceedings*.

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

Laurie N. Feldman, assistant state's attorney, with whom, on the brief, was *David Shannon*, state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Eric L., appeals[1] from the judgment of the Appellate Court, which affirmed the trial court's judgment revoking his probation. The defendant claims that the Appellate Court incorrectly concluded that the trial court lacked authority under

[1] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the trial court lacked authority to award the defendant presentence confinement credit in view of that court's decision in *State* v. *Hurdle*, [217 Conn. App. 453, 288 A.3d 675] (2023)?" *State* v. *Eric L.*, 346 Conn. 927, 291 A.3d 1041 (2023).

General Statutes § 18-98d[2] to direct the commissioner of correction (commissioner) to apply specific presentence confinement credit to his sentence. We agree and, accordingly, reverse in part the judgment of the Appellate Court.

The following facts are relevant to our resolution of this appeal. On January 17, 2019, the defendant pleaded guilty to one count of violation of a protective order based on text messages that he had sent to his former girlfriend and the mother of his child. After accepting the defendant's plea, the trial court sentenced the defendant to five years of incarceration, execution suspended, followed by five years of probation. On May 2, 2020, the defendant was admitted to Danbury Hospital, suffering from auditory and visual hallucinations and suicidal ideation. While there, he disclosed to a social worker his plan to inflict serious bodily injury on his former girlfriend's boyfriend. Believing that the boyfriend was in danger, the social worker contacted the defendant's probation officer, who advised the social worker to call the police. On May 6, 2020, the defendant was arrested for threatening in the second degree on the basis of his statements to the social worker and

[2] General Statutes § 18-98d provides in relevant part: "(a) (1) (A) Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981, and prior to October 1, 2021, under a mittimus or because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed; provided (i) each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after such presentence confinement; and (ii) the provisions of this section shall only apply to a person for whom the existence of a mittimus, an inability to obtain bail or the denial of bail is the sole reason for such person's presentence confinement . . . ."

Although § 18-98d (a) (1) was amended by No. 21-102, § 21, of the 2021 Public Acts, those amendments have no bearing on this appeal. In the interest of simplicity, we refer to the current revision of the statute.

was placed in the custody of the commissioner. Due to that arrest, on May 14, 2020, the defendant was charged with violating the terms of his probation. Because of COVID-19 related restrictions and delays in court operations, the violation of probation arrest warrant was not served on the defendant until October 22, 2020, at which time the defendant was arraigned and bond was set. The defendant remained in custody until December 28, 2020, when he posted bond and was released.

On October 1, 2021, the trial court found the defendant in violation of his probation, revoked his probation, and sentenced him to 5 years of incarceration, execution suspended after 6 months, followed by 3 years and 250 days of probation. After the court imposed the sentence, defense counsel requested that the court state on the mittimus that the defendant should receive presentence confinement credit from May 6 to December 28, 2020, or, in the alternative, from the date the violation of probation arrest warrant was signed, May 14, 2020. Defense counsel explained that, although the arrest warrant was signed on May 14, 2020, because of the COVID-19 pandemic, it was not served until October 22, 2020. Defense counsel argued that, without a notation on the mittimus stating that the defendant was entitled to presentence confinement credit from May 6 to December 28, 2020, the commissioner would give him credit only from the date of his arraignment, October 22, 2020. The state did not dispute defense counsel's assertion that the defendant was entitled to approximately seven months of presentence confinement credit. The state argued, however, that only the commissioner has the authority to assign such credit.

The trial court agreed with the state, reasoning that "[the commissioner] typically discerns what [presentence confinement] credit is available to a particular individual," and, "[o]nce [the court] sentence[s] him,

the determination of credits is within the context and confines of [the Department of Correction (department)]." Accordingly, the court noted on the mittimus the following: "The [d]efendant is entitled to sentence credit of AS DEEMED APPROPRIATE BY [THE DEPARTMENT]." Defense counsel then asked the court to stay execution of the defendant's sentence so that the defendant could appeal the court's ruling that it lacked authority to order the commissioner to apply specific presentence confinement credit. She argued that, without such a stay, there was a serious risk that the defendant would end up serving far more time than the six months ordered by the court given that the defendant had already been incarcerated for seven months. Although the court refused to stay execution of the defendant's sentence, it agreed to set an appellate bond. After the defendant's sentencing, the state entered a nolle prosequi on the charge of threatening in the second degree. See *State* v. *Eric L.*, 218 Conn. App. 302, 307 n.6, 291 A.3d 621 (2023).

On appeal to the Appellate Court, the defendant claimed that the trial court had abused its discretion in declining to direct the commissioner to apply the requested presentence confinement credit to his sentence. Id., 321. The Appellate Court rejected this claim, citing its decision in *State* v. *Hurdle*, 217 Conn. App. 453, 288 A.3d 675 (2023), in which it determined that the trial court lacked authority to award such credit under § 18-98d. See *State* v. *Eric L.*, supra, 218 Conn. App. 323–24; see also *State* v. *Hurdle*, supra, 461, 469.

On appeal to this court following our grant of certification, the defendant claims that *State* v. *Hurdle*, supra, 217 Conn. App. 453, was wrongly decided and that the trial court has authority to order the commissioner to apply specific presentence confinement credit to his sentence. The state contends that *Hurdle* was correctly decided but argues that, even if we disagree, the defen-

dant is not entitled to presentence confinement credit starting on May 14, 2020, the date on which the arrest warrant for violation of probation was signed, because the warrant was not served on him until October 22, 2020. The state contends that, until such time as the defendant was arraigned on the violation of probation charge, he was not technically being held on that charge, only on the threatening charge, which was subsequently nolled.

The issue of whether the trial court has authority to order the commissioner to apply specific presentence confinement credit to a sentence was addressed in the companion case that we also decided today, *State* v. *Hurdle*, 350 Conn. 770, A.3d (2024), in which we concluded that our trial courts have the authority to direct the commissioner to apply specific presentence confinement credit to a sentence on a judgment mittimus. Id., 773, 785. Our examination of the issue in *Hurdle* addresses the arguments of the parties in the present case with respect to this issue.

We disagree with the state that the defendant is not entitled to presentence confinement credit starting on May 14, 2020, the date on which the arrest warrant for violation of probation was signed, because the warrant was not served on the defendant until October 22, 2020. The state cites no provision in § 18-98d (a) (1) (A) that would preclude the court from awarding credit starting on May 14, 2020. Moreover, the state's reliance on *Breen* v. *Warden*, 173 Conn. 312, 315–16, 377 A.2d 335 (1977), and *McCarthy* v. *Commissioner of Correction*, 217 Conn. 568, 583, 587 A.2d 116 (1991), is misplaced because, in both of those cases, the defendants sought presentence confinement credit for "dead time"—"prison parlance for presentence confinement time that cannot be credited because the inmate already is a sentenced prisoner serving time [in connection with] another sentence." *Griffin* v. *Commissioner of Correction*, 123

Conn. App. 840, 843 n.3, 3 A.3d 189, cert. denied, 299 Conn. 906, 10 A.3d 522 (2010). In the present case, it is undisputed that the defendant was not a sentenced prisoner serving time in connection with another sentence between May 14 and October 22, 2020. Had the defendant been promptly arraigned when the arrest warrant was signed on May 14, 2020, which presumably would have occurred but for pandemic related delays in court operations, there would be no question as to the defendant's entitlement to credit for time served from that date until his release on bond on December 28, 2020.

Because the trial court incorrectly determined that it had no discretion to direct the commissioner to apply specific presentence confinement credit on the judgment mittimus for the time that the defendant was incarcerated prior to his release on bond, the case must be remanded to that court so that it may exercise its discretion in accordance with this opinion and *State* v. *Hurdle*, supra, 350 Conn. 770.

The judgment of the Appellate Court with respect to its conclusion regarding the trial court's authority to order the commissioner to apply presentence confinement credit to the defendant's sentence is reversed and the case is remanded to that court with direction to remand the case to the trial court for further proceedings in accordance with this opinion; the judgment of the Appellate Court is affirmed in all other respects.

STATE OF CONNECTICUT *v.* KELLY NIXON
(SC 20848)

McDonald, D'Auria, Mullins, Ecker, Alexander and Dannehy, Js.*

Syllabus

The defendant appealed from the judgment of the trial court, which dismissed his motion to correct an illegal sentence for lack of subject matter

* This case originally was argued before a panel of this court consisting of Chief Justice Robinson and Justices McDonald, D'Auria, Mullins, Ecker,

jurisdiction. He claimed, inter alia, that the trial court had incorrectly concluded that it lacked authority under the statute (§ 18-98d) governing presentence confinement credit to direct the commissioner of correction to apply such credit to his sentence. *Held*:

The issue of whether the trial court has authority to direct the commissioner to apply presentence confinement credit to a sentence was resolved in the companion case of *State* v. *Hurdle* (350 Conn. 770), in which this court held that trial courts do have authority to direct the commissioner to apply such credit to a sentence on a judgment mittimus.

The trial court improperly dismissed the defendant's motion to correct an illegal sentence, as the court had jurisdiction over that motion under the applicable rule of practice (§ 43-22) because the motion raised a colorable claim that the defendant's plea agreement required that he receive a certain number of days of presentence confinement credit, and there was no indication in the record that, as part of the plea agreement, the defendant waived his right to the reduction in his sentence mandated by § 18-98d.

Accordingly, the trial court's judgment was reversed and the case was remanded so that the trial court could consider the merits of the defendant's motion to correct.

Argued April 25—officially released December 10, 2024

Procedural History

Information, in the first case, charging the defendant with the crimes of burglary in the third degree and larceny in the fourth degree, and substitute information, in the second case, charging the defendant with the crime of attempt to commit robbery in the first degree, brought to the Superior Court in the judicial district of New Britain, where the defendant was presented to the court, *Geathers*, *J.*, on pleas of guilty to burglary in the third degree and attempt to commit robbery in the first degree; judgments of guilty in accordance with the pleas; subsequently, the court, *Keegan*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed. *Reversed*; *further proceedings*.

Alexander, and Dannehy. Thereafter, Chief Justice Robinson retired from this court and did not participate in the consideration of this case.

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

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

Linda F. Rubertone, senior assistant state's attorney, with whom, on the brief, were *Christian M. Watson* and *Matthew C. Gedansky*, state's attorneys, and *Robert Mullins*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Kelly Nixon, appeals[1] from the judgment of the trial court dismissing his motion to correct an illegal sentence for lack of subject matter jurisdiction. On appeal, the defendant claims that the trial court incorrectly concluded that it lacked authority under General Statutes § 18-98d[2] to direct the commissioner of correction (commissioner) to apply a specific number of presentence confinement credits to his sentence. We agree and, accordingly, reverse the judgment of the trial court.

The record reveals the following relevant facts. The defendant was charged with multiple offenses in con-

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

[2] General Statutes § 18-98d provides in relevant part: "(a) (1) (A) Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981, and prior to October 1, 2021, under a mittimus or because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed; provided (i) each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after such presentence confinement; and (ii) the provisions of this section shall only apply to a person for whom the existence of a mittimus, an inability to obtain bail or the denial of bail is the sole reason for such person's presentence confinement . . . ."

Although § 18-98d (a) (1) was amended by No. 21-102, § 21, of the 2021 Public Acts, those amendments have no bearing on this appeal. In the interest of simplicity, we refer to the current revision of the statute.

nection with a string of robberies and burglaries that occurred in September and October, 2020, in the judicial districts of Tolland, Windham, Hartford, and New Britain. He was incarcerated immediately following his arrest on October 27, 2020.

On December 3, 2021, during pretrial proceedings in the judicial district of Tolland, State's Attorney Matthew C. Gedansky informed the court that he was working with the state's attorneys in the other judicial districts to achieve a global resolution of all charges. The defendant then reached an agreement with the state whereby he would plead guilty to certain charges in exchange for a total effective sentence of ten years of imprisonment, followed by five years of special parole. Pursuant to the terms of the plea agreement, the sentences were to run concurrently and to be stayed until April 1, 2022, so that they all would take effect on the same date.

On January 28, 2022, Gedansky informed the court that the global resolution would "be structured in a certain way to make sure that [the defendant's] pretrial credit doesn't get harmed in any way . . . ." Subsequently, the defendant entered guilty pleas in each of the judicial districts. On March 10, 2022, in the judicial district of New Britain, the defendant pleaded guilty to attempt to commit robbery in the first degree under docket number HHB-CR-21-0333647-T and burglary in the third degree under docket number H15N-CR-21-0332103-S, and received a total effective sentence of ten years of imprisonment, followed by five years of special parole. In accordance with the terms of the global plea agreement, the court issued a "no body" mittimus and stayed the sentence until April 1, 2022.

On March 11, 2022, in the judicial district of Windham, the defendant pleaded guilty to two counts of robbery in the second degree and received a total effective sentence of seven and one-half years of imprisonment,

followed by five years of special parole. During the sentencing hearing, the court sought confirmation that the sentences were to be stayed until April 1, 2022. Defense counsel responded in the affirmative, stating: "[The stay] will be lifted . . . on April 1, so that he's got, you know, all the credit for every one on the same date." The court responded, "[u]nderstood."

On March 31, 2022, in the judicial district of Hartford, the defendant pleaded guilty to robbery in the second degree and was sentenced to five years of imprisonment. At that time, defense counsel informed the court: "[T]he only thing I will indicate to the court is that [the defendant], and I had a long talk about his jail credit, which isn't an issue here. It was more of an issue in . . . New Britain. I didn't have a chance to let him know that I did . . . speak with his . . . New Britain attorney, Attorney Christopher Eddy, who will ask for credit on the mittimus tomorrow, for the dates that . . . [the defendant] and I talked about."

On April 1, 2022, in the judicial district of Tolland, the defendant pleaded guilty to robbery in the first degree and was sentenced to ten years of imprisonment, followed by five years of special parole. During the sentencing hearing, defense counsel asked the court to note on the mittimus that the defendant had been incarcerated since October 27, 2020. The court responded that it would make such a notation and then informed the defendant: "I want to let you know you may have credit for the time you've been held."

Also on April 1, 2022, Eddy appeared before the court in New Britain without the defendant and requested that the court note on the mittimus that the defendant was entitled to presentence confinement credit from August 26, 2021, to April 1, 2022. The court asked Eddy whether the defendant was free when the arrest warrant was signed in docket number HHB-CR-21-0333647-T.

Eddy responded: "No, he's . . . been incarcerated since October, 2020, and there was [an] ongoing investigation, and the warrant was signed [on] August 26, 2021, but he was not served until September 15, 2021, because of the [COVID-19] pandemic." The court declined to make the requested notation, stating that, because the defendant was incarcerated when the arrest warrant was signed, it would "just leave that up to [the commissioner]."

On January 18, 2023, the defendant filed a motion to correct an illegal sentence in the judicial district of New Britain, arguing that, although he had been promised a total effective sentence of ten years of imprisonment and 521 days of presentence confinement credit, the commissioner applied only 198 days of credit to his sentence in docket number HHB-CR-21-0333647-T and 302 days of credit to his sentence in docket number H15N-CR-21-0332103-S. As a result, he argued, he will have to serve a total effective sentence of nearly eleven years of imprisonment. The defendant argued that an "explicit inducement" to his entering into a plea agreement was that his total effective sentence would result in a sentence of ten years of imprisonment, followed by five years of special parole, calculated from the date of his initial arrest on October 27, 2020. He asked the court to order the commissioner to apply 521 days of presentence confinement credit to his sentences in docket numbers HHB-CR-21-0333647-T and H15N-CR-21-0332103-S. The defendant further argued that "[t]he state's failure to abide by the terms of the defendant's plea agreement constituted a material breach of [the] agreement pursuant to *Santobello* [v. *New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)]." The trial court dismissed the defendant's motion to correct for lack of subject matter jurisdiction, citing the Appellate Court's decision in *State* v. *Hurdle*, 217 Conn. App. 453, 288 A.3d 675 (2023), in which the court determined

that the trial court lacked authority under § 18-98d to award presentence confinement credit. See id., 461, 469.

On appeal, the defendant argues that *State* v. *Hurdle*, supra, 217 Conn. App. 453, was wrongly decided, and, therefore, the trial court improperly dismissed his motion to correct. The defendant further argues that, because his plea agreement with the state explicitly included 521 days of presentence confinement credit, that credit must be applied across all of his sentences or else he must be allowed to withdraw his plea. The state counters that *Hurdle* was correctly decided, and, as such, the trial court properly dismissed the defendant's motion for lack of subject matter jurisdiction. In the alternative, the state contends that the motion was properly dismissed because, "on its face, the motion did not actually challenge the manner in which the court imposed sentence, but, rather, it challenged the manner in which the [commissioner] had applied the defendant's presentence confinement credits, which is a matter for the habeas court." The state further contends that, even if the defendant's motion to correct can be construed as attacking the legality of the sentencing proceeding, "the factual basis [on] which [the defendant's] claim rests, namely, [Gedansky's] single remark at the January 28, 2022 pretrial hearing . . . does not suffice to show that it was plausible that the New Britain court imposed sentence contrary to the [plea] agreement by failing to order presentence confinement credits on the mittimus. . . .

"Other than [Gedansky's] isolated remark, the motion does not include any facts demonstrating a mutual understanding between the parties that the plea agreement included presentence confinement credit. The motion contains no statements, by the defendant or any of his four defense attorneys at any of the various court proceedings, in support of [the defendant's claim]."

The issue of whether the trial court has authority to order the commissioner to apply specific presentence confinement credit to a sentence was addressed in the companion case that we also decided today, *State* v. *Hurdle*, 350 Conn. 770, A.3d (2024), in which we concluded that trial courts have the authority to direct the commissioner to apply specific presentence confinement credit to a sentence on a judgment mittimus. Id., 773, 785. Our examination of the issue in *Hurdle* addresses the arguments of the parties in the present case with respect to this issue.

The state argues nonetheless that this court can affirm the trial court's judgment on an alternative ground. Specifically, the state argues that the trial court properly dismissed the defendant's motion to correct because the motion failed to allege a plausible claim that the New Britain court imposed a sentence that was contrary to the plea agreement when it failed to order 521 days of presentence confinement credit on the mittimus. We are not persuaded.

Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner." "Sentences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . ." (Internal quotation marks omitted.) *State* v. *Ward*, 341 Conn. 142, 150–51, 266 A.3d 807 (2021). This case involves the third category of illegal sentences.

"Because of the limited nature of the court's jurisdiction [to correct an illegal sentence], we . . . have explained that the trial court has jurisdiction over a motion to correct only if the defendant raises a colorable claim within the scope of Practice Book § 43-22 that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence." (Emphasis omitted; internal quotation marks omitted.) Id., 151–52. "A colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . . For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he might prevail. . . . The jurisdictional and merits inquiries are separate; whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 784, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

We conclude that the defendant's motion to correct raises a colorable claim that the plea agreement required the defendant to receive 521 days of presentence confinement credit. On January 28, 2022, Gedansky informed the trial court that the global resolution would "be structured in a certain way to make sure that [the defendant's] pretrial credit doesn't get harmed in any way . . . ." Because the defendant's sentences were to run concurrently under the plea agreement, the very harm of which Gedansky spoke would have come to pass if the 521 days were not applied to the New Britain sentences. Moreover, there was no reason for the parties to agree to stay the defendant's sentences until April 1, 2022, "so that [the defendant gets] . . . all the credit for every [sentence] on the same date," if the

credit was not going to make any difference with respect to the defendant's release date.[3]

Finally, we note that § 18-98d (a) (1) (A) provides in relevant part that "[a]ny person who is confined to a community correctional center or a correctional institution . . . under a mittimus or because such person is

[3] The parties' agreement to stay the sentences until April 1, 2022, can only be seen as an effort to avoid this court's holding in *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 860 A.2d 715 (2004). As discussed in the companion case of *Hurdle*, "the legislature amended § 18-98d (a) (1) in 2021 to add a new subparagraph (B), which addresses the calculation of presentence confinement credit in the case of multiple concurrent sentences pending at the time that the sentence was imposed. See Public Acts 2021, No. 21-102, § 21 (P.A. 21-102). That provision provides in relevant part: 'Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after October 1, 2021, under a mittimus or because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed; provided (i) each day of presentence confinement shall be counted equally in reduction of any concurrent sentence imposed for any offense pending at the time such sentence was imposed; [and] (ii) each day of presentence confinement shall be counted only once in reduction of any consecutive sentence so imposed . . . .' General Statutes § 18-98d (a) (1) (B).

"The legislative history of that provision indicates that it was enacted in response to this court's decision in *Harris*. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 2021 Sess., p. 3070, remarks of Frank J. Riccio II, president of the Connecticut Criminal Defense Lawyers Association (explaining that result of *Harris* was that '[d]efendants with files in multiple court locations could inadvertently lose earned pretrial credits if they are sentenced on different dates' and that '[P.A. 21-102] would remedy that problem'). The legislature's enactment of subparagraph (B) of § 18-98d (a) (1) strongly suggests that it did not agree with the result of this court's decision in *Harris* and intended to overrule it prospectively. See General Statutes § 18-98d (a) (1) (B) (provision applies only to persons who committed offense on or after October 1, 2021). Because the trial court declined to order any presentence confinement dates on the judgment mittimus in the present case, the continuing vitality of *Harris* and our other § 18-98d case law in the wake of the 2021 amendment to the statute is not before us. Accordingly, we leave to another day any questions concerning the proper calculation of presentence confinement in cases subject to its terms." *State* v. *Hurdle*, supra, 350 Conn. 793–94 n.19.

unable to obtain bail or is denied bail *shall*, if subsequently imprisoned, *earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed* . . . ." (Emphasis added.) There is no indication in the record that, as part of the plea agreement, the defendant waived his right to the reduction in sentence mandated by the statute. To the contrary, the record indicates that the plea agreement contemplated that the defendant would receive all of the credit to which he was entitled and that some presentence confinement credits were, in fact, applied to all of his sentences. In the absence of evidence that the defendant expressly waived his rights under § 18-98d (a) (1) (A), the presumption must be that the parties intended to follow the law. See, e.g., *State* v. *Obas*, 320 Conn. 426, 444, 446–48, 130 A.3d 252 (2016) (because "ambiguous language of a plea agreement must be construed against the state," court would not infer from defendant's assent to register as sex offender for ten years that he forfeited his statutory right to request exemption from registration); *State* v. *Rivers*, 283 Conn. 713, 725, 931 A.2d 185 (2007) ("[b]ecause the government ordinarily has certain awesome advantages in bargaining power, any ambiguities in the [plea] agreement must be resolved in favor of the defendant" (internal quotation marks omitted)).

Because the trial court incorrectly determined that it had no authority to direct the commissioner to apply presentence confinement credits to the defendant's sentences and, therefore, that it did not have jurisdiction over the defendant's motion to correct, the case must be remanded to that court so that it may consider the merits of the defendant's motion.

The judgment is reversed and the case is remanded for further proceedings according to law.

ORDERS

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DARNELL MOORE *v.* COMMISSIONER OF CORRECTION

The petitioner Darnell Moore's petition for certification to appeal from the Appellate Court, 227 Conn. App. 487 (AC 45842), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that the record supported the habeas court's rejection of the petitioner's claim that the state's cooperating witness had an agreement or understanding with the state, resulting in the habeas court's rejection of the petitioner's due process claim?

"2. Did the Appellate Court properly decline to consider additional transcripts from the cooperating wit-

ness' criminal case that were not introduced as exhibits at the petitioner's habeas trial?

"3. If the answer to the second question is 'no,' should this court consider or direct the habeas court to consider those additional transcripts, or would consideration of those transcripts have been material?"

Denis J. O'Malley III, assistant public defender, in support of the petition.

Danielle Koch, assistant state's attorney, in opposition.

Decided November 20, 2024

JASON M. DAY *v.* COMMISSIONER OF CORRECTION

The petitioner Jason M. Day's petition for certification to appeal from the Appellate Court, 218 Conn. App. 907 (AC 45013), is denied.

Jason M. Day, self-represented, in support of the petition.

Timothy F. Costello, supervisory assistant state's attorney, in opposition.

Decided November 26, 2024

BANK OF NEW YORK MELLON, SUCCESSOR TRUSTEE *v.* WADE H. HORSEY II ET AL.

The petition of the defendants Wade H. Horsey II and Jacquelyn Costa Horsey for certification to appeal from the Appellate Court, 227 Conn. App. 94 (AC 46167), is denied.

Thomas P. Willcutts, in support of the petition.

Benjamin T. Staskiewicz, in opposition.

Decided November 26, 2024

KEREN PRESCOTT *v.* YULIYA GILSHTEYN

The defendant's petition for certification to appeal from the Appellate Court, 227 Conn. App. 553 (AC 46350), is denied.

Yuliya Gilshteyn, self-represented, in support of the petition.

Kenneth J. Krayeske, in opposition.

Decided November 26, 2024

DANIEL MULVIHILL *v.* KARA SPINNATO

The defendant's petition for certification to appeal from the Appellate Court, 228 Conn. App. 781 (AC 45829), is denied.

Jack G. Steigelfest and *Thomas P. Cella*, in support of the petition.

Decided November 26, 2024

STATE OF CONNECTICUT *v.* PATRICIA DANIELS

The defendant's petition for certification to appeal from the Appellate Court, 228 Conn. App. 321 (AC 46053), is denied.

Laila M. G. Haswell, senior assistant public defender, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided November 26, 2024

NOEMI WALENCEWICZ *v.* JEALOUS MONK, LLC

The defendant's petition for certification to appeal from the Appellate Court, 228 Conn. App. 349 (AC 46362), is denied.

Daniel J. Krisch and *Julie A. Lavoie*, in support of the petition.

Caitlyn S. Malcynsky and *Lynne R. O'Keefe*, in opposition.

Decided November 26, 2024

RANDALL BROWN *v.* COMMISSIONER OF CORRECTION

The petitioner Randall Brown's petition for certification to appeal from the Appellate Court, 228 Conn. App. 309 (AC 46407), is denied.

ALEXANDER, J., did not participate in the consideration of or decision on this petition.

Samantha A. Conway, assigned counsel, in support of the petition.

Danielle Koch, assistant state's attorney, in opposition.

Decided November 26, 2024

ANDRES R. SOSA *v.* COMMISSIONER OF CORRECTION

The petitioner Andres R. Sosa's petition for certification to appeal from the Appellate Court, 228 Conn. App. 902 (AC 46705), is denied.

ALEXANDER, J., did not participate in the consideration of or decision on this petition.

James E. Mortimer, assigned counsel, in support of the petition.

Timothy F. Costello, supervisory assistant state's attorney, in opposition.

Decided November 26, 2024

FRANK CHARLES WHITE *v.* FCW LAW OFFICES ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 228 Conn. App. 1 (AC 46709), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that a plaintiff may not recover both punitive damages under the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., and treble damages under General Statutes § 52-571h because such recovery would violate the principle that a plaintiff is entitled to recover only once for losses sustained in connection with the same transaction, occurrence or event?"

Frank Charles White, self-represented, in support of the petition.

Decided November 26, 2024

STATE OF CONNECTICUT *v.* MAURICE B.

The defendant's petition for certification to appeal from the Appellate Court, 228 Conn. App. 720 (AC 46775), is denied.

Lisa J. Steele, assigned counsel, in support of the petition.

Timothy J. Sugrue, assistant state's attorney, in opposition.

Decided November 26, 2024

ANTHONY JOHNSON *v.* COMMISSIONER OF CORRECTION

The petitioner Anthony Johnson's petition for certification to appeal from the Appellate Court, 228 Conn. App. 701 (AC 46910), is denied.

ALEXANDER, J., did not participate in the consideration of or decision on this petition.

Matthew C. Eagan, assigned counsel, in support of the petition.

Timothy F. Costello, supervisory assistant state's attorney, in opposition.

Decided November 26, 2024

CITIGROUP MORTGAGE LOAN TRUST 2020-RP2 *v.* MARK CICHY ET AL.

The petition of the defendants Mark Cichy and Jody A. Horak for certification to appeal from the Appellate Court (AC 47564) is denied.

John A. Sodipo, in support of the petition.

Jessica L. Braus, in opposition.

Decided November 26, 2024

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

FRANTZ CATOR *v.* COMMISSIONER OF CORRECTION (AC 46542)

Clark, Westbrook and Prescott, Js.

Syllabus

The petitioner, who previously had been convicted of felony murder and other crimes in connection with a shooting incident, appealed following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. He claimed, inter alia, that the court had improperly rejected his contention that his criminal trial counsel and counsel in three prior habeas actions he filed had rendered ineffective assistance. *Held*:

The habeas court abused its discretion in denying the petitioner certification to appeal, the court having improperly dismissed the first count of his habeas petition because the due process claims it raised could have been resolved by a court in a different manner.

The habeas court properly dismissed on the ground of res judicata the third count of the petitioner's habeas petition, which alleged a claim of ineffective assistance on the part of his criminal trial counsel that had been rejected in a prior habeas petition that sought the same relief.

The petitioner was not entitled to a remand of his case to the habeas court for further proceedings; although the court incorrectly dismissed the first count of his habeas petition on the ground of res judicata, its concurrent rejection of that count's due process claims on their merits constituted an alternative basis for affirming the judgment as to that count.

This court discerned no clear error in the habeas court's finding that, during the petitioner's criminal trial, no in-chambers discussion occurred from which the petitioner had been excluded, and, accordingly, the petitioner failed to establish the factual predicate for his claim that he was unconstitutionally excluded from a critical stage of the proceedings.

The petitioner was not prejudiced by his first habeas counsel's failure to claim under *Brady* v. *Maryland* (373 U.S. 83) that the state had improperly failed to disclose to him a codefendant's written statement to the police that became known after the jury returned its verdict in the petitioner's criminal trial, as the statement was not material within the meaning of *Brady*.

The petitioner could not have been prejudiced, as he claimed, by his first habeas counsel's failure to plead and prove that the petitioner had been improperly excluded from an alleged in-chambers discussion during his

criminal trial, as the habeas court's finding that no such in-chambers conference occurred was not clearly erroneous.

The habeas court correctly concluded that, because the petitioner's claims against his first habeas counsel lacked merit, the petitioner failed to establish that counsel in his second and third habeas actions had rendered ineffective assistance by failing to plead and prove that counsel in his first habeas action was ineffective, and, accordingly, there was no reasonable probability that he would have prevailed in his second or third habeas actions.

Argued September 19—officially released December 10, 2024

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, *Newson, J.*; thereafter, the petitioner withdrew the petition in part; judgment denying the petition; subsequently, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

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

Linda F. Rubertone, senior assistant state's attorney, with whom, on the brief, was *Patrick B. James*, former deputy assistant state's attorney, for the appellee (respondent).

Opinion

CLARK, J. The petitioner, Frantz Cator, appeals from the judgment of the habeas court denying his third amended petition for a writ of habeas corpus (operative petition). The petitioner claims that the court abused its discretion by denying him certification to appeal from its judgment (1) dismissing the first and third counts of his operative petition, which alleged due process violations and ineffective assistance of trial counsel, respectively; (2) rejecting his claim that he was improperly excluded from a critical stage of the proceedings during his criminal trial; (3) concluding that he had failed to establish that his first habeas counsel

rendered ineffective assistance by failing to plead and prove a *Brady*[1] claim and that he had been excluded from a critical stage of his criminal trial; and (4) determining that he had failed to demonstrate that his second and third habeas counsel were ineffective for failing to plead and prove the aforementioned ineffectiveness claims against his first habeas counsel. Although we agree with the petitioner that the habeas court abused its discretion in denying him certification to appeal, we affirm the court's judgment on its merits.

The following facts and procedural history are relevant to this appeal. On October 21, 1997, following a jury trial, the petitioner was convicted of felony murder in violation of General Statutes § 53a-54c,[2] murder in violation of General Statutes § 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a (a), kidnapping in the second degree in violation of General Statutes § 53a-94 (a), conspiracy to commit kidnapping in the second degree in violation of §§ 53a-48 and 53a-94 (a), and his sentence was enhanced for the commission of a class A, B or C felony with a firearm in violation of General Statutes § 53-202k. On March 6, 1998, the court, *Ford*, *J.*, sentenced the petitioner to fifty-five years of incarceration, suspended after fifty years, followed by five years of probation. The state then moved to correct the petitioner's sentence on the ground that the imposition of probation was improper and that the proper calculation of the petitioner's total effective sentence was sixty-five years. The court granted the motion and, on October 8, 1999, corrected the petitioner's total effective sentence to fifty years of incarceration without any period

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

[2] General Statutes § 53a-54c was amended by No. 15-211, § 3, of the 2015 Public Acts, which made technical changes to the statute that are not relevant to this appeal. In the interest of simplicity, we refer to the current revision of § 53a-54c.

of probation. The petitioner appealed to our Supreme Court, which reversed the trial court's judgment in part and remanded the case to that court with direction to vacate the petitioner's conviction under § 53-202k, and to merge his conspiracy convictions and to impose a single sentence on those counts. See *State* v. *Cator*, 256 Conn. 785, 812–13, 781 A.2d 285 (2001). On May 13, 2003, pursuant to the court's remand order, the petitioner was resentenced to a total effective sentence of forty-five years of incarceration.

The jury reasonably could have found the following facts, as stated by our Supreme Court in the petitioner's direct appeal. "Desmond Hamilton, [the petitioner] and the victim, Nathaniel Morris, all knew each other and had participated in the sale of drugs together. On May 10, 1996, on Laurel Court, a dead-end street in Bridgeport, [the petitioner] and Hamilton had a discussion concerning both money that Hamilton owed [the petitioner] and a gun of [the petitioner's] that he had given to Hamilton approximately two weeks earlier. Also present during the conversation were the victim, and McWarren St. Julien. [The petitioner] also questioned the victim about the whereabouts of the gun. During the conversation, [the petitioner] became upset, began yelling and pulled out a Glock .40 handgun. Police officers subsequently came to the location of the conversation, but when they arrived [the petitioner] was no longer there. Later that night, Hamilton called [the petitioner] to attempt to explain that he did not know where the gun was located, and that he would never steal from [the petitioner]. [The petitioner] told Hamilton that he wanted him 'to get everything straight.'

"On the following day, May 11, 1996, Hamilton again called [the petitioner], who told Hamilton that he was going to meet Hamilton at Hamilton's mother's house, and that the two men would go together to find the victim to learn what had happened to the gun. Later

that evening, [the petitioner] picked up Hamilton and they proceeded to 244 Olive Street in Bridgeport, where Hamilton, the victim, Tamara Addison and Terrance Addison lived. At 244 Olive Street, [the petitioner], the victim, St. Julien, Hamilton, Hamilton's mother, Tamara Addison and Terrance Addison were on the front porch of the house. There [the petitioner] asked the victim about the whereabouts of his gun that had been the topic of the May 10 discussion. At or about the same time, Rodolphe St. Victor arrived at the house. [The petitioner] and St. Julien then left the porch as St. Victor forcibly pulled the victim off the porch. As [the petitioner] and St. Julien proceeded to enter a blue Oldsmobile parked in the driveway of the house, St. Victor grabbed the victim by the sleeve and said 'Come on. [The petitioner] wants to talk to you.' St. Victor then forced the victim into the Oldsmobile, which [the petitioner] then drove away. People at the house contacted the Bridgeport police out of concern for the victim's safety. The police came to the house and, after speaking with the people there, left in search of the blue Oldsmobile. Later that evening, [the petitioner], St. Julien and St. Victor returned to 244 Olive Street in the blue Oldsmobile. The police arrived shortly thereafter and arrested the three occupants of the vehicle and recovered a gun from it. [The petitioner], St. Julien and St. Victor then were taken to the Bridgeport police station. Thereafter, St. Victor and three Bridgeport police detectives left the Bridgeport police station and St. Victor directed the police to Suggetts Lane, Bridgeport, where the victim was found, conscious but unable to speak, with a gunshot wound to the back of his neck. The police summoned medical personnel, who took the victim to Bridgeport Hospital, where he died. Tests conducted on the gun recovered from the car revealed that the bullet that killed the victim had been fired from it. The murder weapon was a Mac-10 automatic pistol

modified with a shell catcher to retain spent bullet casings and a handle to prevent shaking when the gun was fired rapidly. This weapon belonged to [the petitioner], and he often carried it with him." Id., 789–91.

St. Victor and St. Julien were also prosecuted for their involvement in the victim's death. Following a jury trial, St. Victor was convicted of one count of conspiracy to commit kidnapping in the first degree in violation of §§ 53a-48 and 53a-92 (a) (2) (A), and acquitted on one count of kidnapping in the first degree in violation of § 53a-92 (a) (2) (A). The day after the petitioner's conviction, St. Julien pleaded guilty under the *Alford* doctrine[3] to conspiracy to commit kidnapping in the second degree in violation of §§ 53a-48 and 53a-94 (a). A fourth codefendant, Peter Johnson, was also arrested and prosecuted for the murder of the victim but was acquitted on all charges[4] after a jury trial on March 2, 2001.

The petitioner has previously, and without success, litigated three other petitions for a writ of habeas corpus to decision after trials on the merits.[5] See *Cator* v. *Warden*, Docket No. CV-01-0810396-S, 2004 WL 503831 (Conn. Super. February 25, 2004) (*Fuger*, *J.*), appeal

[3] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). "A defendant who pleads guilty under the *Alford* doctrine does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea." (Internal quotation marks omitted.) *State* v. *Webb*, 62 Conn. App. 805, 807 n.1, 772 A.2d 690 (2001).

[4] Johnson had been charged with murder in violation of § 53a-54a (a), kidnapping in the second degree in violation of § 53a-94 (a), felony murder in violation of § 53a-54c, capital felony in violation of General Statutes (Rev. to 1995) § 53a-54b (5) and conspiracy to commit murder in violation of §§ 53a-48 and 53a-54a.

[5] The petitioner also filed a petition for a writ of habeas corpus in 2010 but withdrew it prior to trial. See *Cator* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-10-4003845-S (March 21, 2013). In the interest of clarity, when discussing the petitioner's first, second, and third habeas proceedings and habeas counsel in this opinion, we refer only to those three prior habeas petitions that were decided after trials on the merits.

dismissed, 92 Conn. App. 241, 884 A.2d 447 (2005), cert. denied, 276 Conn. 936, 891 A.2d 1 (2006); *Cator* v. *Warden*, Docket No. CV-06-4001410-S, 2009 WL 765395 (Conn. Super. November 21, 2008)[6] (*Nazzaro*, *J.*), appeal dismissed, Connecticut Appellate Court, Docket No. 30804 (February 16, 2011); *Cator* v. *Warden*, Docket No. CV-14-4005876-S, 2016 WL 6603685 (Conn. Super. October 11, 2016) (*Sferrazza*, *J.*), appeal dismissed, 181 Conn. App. 167, 185 A.3d 601, cert. denied, 329 Conn. 902, 184 A.3d 1214 (2018). The petitioner commenced the underlying habeas action on June 12, 2017, and filed the operative eight count amended petition on September 28, 2021.

In his operative petition, the petitioner alleged: (1) his due process rights had been violated in his underlying criminal prosecution as a result of, inter alia, the prosecution's suppression of various pieces of exculpatory evidence; (2) he had been excluded from a critical stage of the prosecution; (3) his trial counsel, Kevin A. Randolph,[7] had rendered ineffective assistance; (4) he was actually innocent of the offenses of which he had been convicted; (5) his first habeas counsel, Robert J. McKay, had rendered ineffective assistance by failing to adequately plead, argue and prove the claims set forth in counts one through four; (6) his second habeas counsel, Thomas P. Mullaney III, had rendered ineffective assistance by failing to plead, argue and prove the claims set forth in counts one through five; (7) his third habeas counsel, Jason C. Goddard and Freesia Waldron, had rendered ineffective assistance by failing to plead, argue and prove the claims set forth in counts one through six and in count eight; and (8) his sentence violated his

[6] Judge Nazzaro rendered an oral decision denying the petitioner's habeas petition on November 21, 2008. A copy of the decision was transmitted to the Office of the Reporter of Judicial Decisions on February 19, 2009. In the Westlaw database for unreported Connecticut cases, Judge Nazzaro's decision is dated February 19, 2009.

[7] Randolph is currently a senior judge of the Superior Court.

rights to due process and to be free from cruel and unusual punishment.[8] He requested that the habeas court vacate the underlying criminal judgment and sentence and order "whatever other relief that law and justice require."

The habeas court, *Newson*, *J.*, held a trial on the petition on October 24 and December 19, 2022. The petitioner presented testimony from C. Robert Satti, Jr., the prosecuting attorney in his underlying criminal trial; Suzanne Zitser, who had represented the petitioner on direct appeal; Randolph; McKay; Mullaney; Goddard; and two expert witnesses, Attorneys Vishal K. Garg and Frank J. Riccio. The petitioner also submitted more than fifty exhibits into evidence. The respondent, the Commissioner of Correction, submitted no exhibits and called no witnesses.

On December 19, 2022, the court sua sponte ordered the parties to submit memoranda of law as to whether the court should dismiss one or both of counts one and four of the operative petition (which alleged due process violations and actual innocence, respectively) on the ground of res judicata pursuant to Practice Book § 23-29 (3).[9] The petitioner and the respondent filed supplemental briefs on February 3, 2023, in response to the court's order. On February 23, 2023, the court, sua sponte, further ordered that the parties were permitted to submit supplemental briefs as to why it should

[8] The numbering of this list corresponds to the numbering of the counts in the operative petition. The petitioner withdrew count eight on the record after the close of evidence.

[9] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . .

"(3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition . . .

"(5) any other legally sufficient ground for dismissal of the petition exists."

not dismiss count three (which alleged ineffective assistance of trial counsel) pursuant to § 23-29 (3) and (5). On March 24, 2023, the petitioner filed an objection to the court's notice of its possible dismissal of his petition in its entirety or of only count three; the respondent did not file any further supplemental briefing on the issue.

On March 29, 2023, the habeas court issued a memorandum of decision dismissing counts one, three, and four of the operative petition. It denied the petition with respect to the remaining counts. The petitioner subsequently filed a petition for certification to appeal to this court, which the habeas court denied on April 10, 2023. This appeal followed. Additional facts and procedural history will be set forth as necessary.

We begin with our well established standard for review of a denial of a petition for certification to appeal. "Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [a] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . .

"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 [claim] to determine whether

the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive [claim] for the purpose of ascertaining whether [that claim satisfies] one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Hilton* v. *Commissioner of Correction*, 225 Conn. App. 309, 332–33, 315 A.3d 1135 (2024).

As we explain in part I of this opinion, we agree with the petitioner that the habeas court improperly dismissed count one of the operative petition on the ground of res judicata. Accordingly, we necessarily conclude that a court could resolve the issues in a different manner and that the habeas court thus abused its discretion in denying certification to appeal. We therefore address the petitioner's claims on their merits. See, e.g., *Williams* v. *Commissioner of Correction*, 221 Conn. App. 294, 303, 301 A.3d 1136 (2023).

I

The petitioner first claims that the habeas court erroneously dismissed counts one and three of his operative petition and requests a remand for a trial on the merits of both counts.[10] We agree that the habeas court erroneously dismissed count one. We disagree, however, that the habeas court erroneously dismissed count three. We further conclude that a remand for a trial on the merits of count one is not necessary because an alternative ground exists for denying that count.

The following additional facts and procedural history are relevant to this claim. In count one of his operative

[10] The petitioner does not challenge the habeas court's dismissal of count four, which alleged actual innocence.

petition, the petitioner alleged that his right to due process under the state and federal constitutions had been violated in his underlying criminal prosecution. In particular, he claimed that the state improperly had withheld various pieces of material, exculpatory evidence, namely: "(i) that the petitioner's [codefendant] St. Julien, gave a written and recorded statement to the police that was favorable to the petitioner's defense;[11] (ii) that St. Julien testified in [*State* v. *Johnson*, Superior Court, Docket No. CR-97-0135375-T], in a manner that was favorable to the petitioner's defense; (iii) that William Kamper[12] and Terrance Addison testified in [*Johnson*] in a manner that was inconsistent with their testimony in [the petitioner's trial] and favorable to the petitioner's defense; and/or (iv) information about [Kamper], [Hamilton], Terrance Addison, and Tamara Addison that could have been used by the petitioner to impeach their testimony in [his own trial] on the basis of bias and/or motive to fabricate . . . ." (Footnotes added.) He also claimed that the state had procured his conviction "by presenting a theory of the case that was materially inconsistent" with the evidence it had used in the prosecution of Johnson.

In the petitioner's first habeas petition, which sought identical relief to that sought in his operative petition in the present case,[13] he presented a claim of prosecutorial

[11] We discuss the details of this statement in part III of this opinion.

[12] At the petitioner's criminal trial, the state called Kamper to testify as an eyewitness to the kidnapping.

[13] Specifically, in his first habeas petition, the petitioner requested the following relief: "[1] Order a writ of habeas corpus be issued to bring [the petitioner] before this court in order that justice may be done. [2] That the convictions and sentence described herein be ordered vacated and the matter be returned to the trial court dockets for further proceedings according to law. [3] Such other relief as law and justice require." The operative petition in the present case requested that the court "issue a writ of habeas corpus: (1) vacating the judgments in [the petitioner's underlying criminal case]; (2) directing the sentencing courts to vacate the judgment in [the petitioner's underlying criminal case] within ninety days or some other certain and reasonable period of time; and (3) ordering whatever other relief that law and justice require."

impropriety, predicated on an allegation that Satti had made unjustified statements and expressed personal opinions to the jury.[14] Following the close of evidence in his first habeas trial, the petitioner withdrew his prosecutorial impropriety claim on the record after consulting with his attorney. In its memorandum of decision, the first habeas court "[found] that [the prosecutorial impropriety claim was] withdrawn with prejudice." *Cator* v. *Warden*, supra, 2004 WL 503831, *1 n.1.

In the present action, the habeas court dismissed count one of the operative petition on the ground of res judicata. The court characterized count one as also alleging prosecutorial impropriety; determined that the factual predicates of the allegations in count one could have been discovered by due diligence prior to the conclusion of the first habeas trial; and concluded that, because the first habeas court had found that the petitioner's prosecutorial impropriety claim was withdrawn with prejudice, and both the first habeas petition and the operative petition sought the same relief, res judicata barred the petitioner from litigating a second "prosecutorial impropriety" claim in the present proceeding.

Despite its dismissal of count one, however, the habeas court also considered and rejected the petitioner's due process claims in count one on the merits. Specifically, the court addressed the claim regarding St. Julien's statement to the police in the context of the petitioner's claim of ineffective assistance of his first habeas counsel. The court concluded that the statement was not material to the petitioner's guilt or innocence and, thus, that the petitioner was not prejudiced by his first habeas counsel's failure to plead a claim under *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10

[14] Although the parties and the habeas court referred to this claim as one of "prosecutorial misconduct," it is more accurately characterized as a "prosecutorial impropriety" claim. See *State* v. *Fauci*, 282 Conn. 23, 26 n.2, 917 A.2d 978 (2007).

L. Ed. 2d 215 (1963), predicated on the statement's suppression. The court also concluded that St. Julien's testimony in Johnson's trial had not been "suppressed" because it was given in the course of a public proceeding. It further determined that the petitioner had failed to present sufficient evidence to substantiate his claims regarding Kamper, Hamilton, and Terrance and Tamara Addison—in significant part because the petitioner had not called any of these individuals to testify at his habeas trial. Finally, it concluded that the theories of prosecution used against the petitioner and Johnson were not materially inconsistent.[15]

In count three of his operative petition, the petitioner alleged that his criminal trial counsel, Randolph, had rendered ineffective assistance. Specifically, he claimed that Randolph had failed to raise and argue the claim in count two of the operative petition (exclusion from a critical stage of the proceedings); "failed to adequately present and argue the claim that Attorney [Joseph] Mirsky [the petitioner's first criminal trial counsel] had a conflict of interest when he represented both the petitioner and St. Julien during pretrial proceedings . . . failed to object to the trial court's instruction to the jury that it could find the petitioner guilty of murder based on a theory of coconspirator vicarious liability . . . failed to object to the trial court's jury instruction . . . and/or failed to ask the court to poll the jury regarding the theory under which it found the petitioner guilty of murder . . . failed to adequately cross-examine or otherwise impeach the testimony of [Terrance Addison, Tamara Addison, Kamper, and Hamilton] . . . failed to adequately investigate and/or call the following witnesses to testify [Tyler Bember, Patricia Bember,

[15] For reasons that are unclear, in its memorandum of decision the court addressed the remainder of the due process allegations pleaded in count one under the subheading "Count Two."

Effrain Johnson and St. Julien] . . . failed to adequately investigate the facts and circumstances of the petitioner's whereabouts, conduct, and interactions on May 11, 1996, prior to his arrival at 244 Olive Street . . . failed to adequately cross-examine and/or otherwise impeach the testimony of Edward McPhillips[16] . . . failed to object to the trial court's inaccurate and/or misleading jury instruction on the issue of specific intent . . . and . . . failed to move for a mistrial and/or disqualification based on the trial court's participation in discussions regarding a plea offer." (Footnote added.)

The habeas court also dismissed count three on the ground of res judicata. It explained that, in his first habeas petition, the petitioner had also presented an ineffective assistance of counsel claim against Randolph, though predicated on different factual allegations. The first habeas court denied that claim on the merits. See *Cator* v. *Warden*, supra, 2004 WL 503831, *7–8. The habeas court in the present case concluded that "all of the matters alleged in the current petition relate directly to information and witnesses that were known, or should have been known, through the exercise of due diligence . . . when the [first habeas] petition went to trial." It further concluded that, because the first habeas petition had also raised a claim of ineffective assistance of trial counsel and sought the same relief as the operative petition in the present case, count three was barred by res judicata.

Before examining the merits of the habeas court's dismissals of each count, we set forth the principles governing the application of res judicata in the habeas context. "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

[16] McPhillips was a firearms examiner with the state police forensics laboratory who testified for the state at the petitioner's criminal trial.

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. . . .

"[A] subsequent petition alleging the same ground as a previously denied petition will elude dismissal if it alleges grounds not actually litigated in the earlier petition and if it alleges new facts or proffers new evidence not reasonably available at the time of the earlier petition. . . . In this context, a ground has been defined as sufficient legal basis for granting the relief sought." (Citations omitted; internal quotation marks omitted.) *Sanchez* v. *Commissioner of Correction*, 203 Conn. App. 752, 762–63, 250 A.3d 731, cert. denied, 336 Conn. 946, 251 A.3d 77 (2021). 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. See, e.g., *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 435–36, 274 A.3d 85 (2022).

A

The petitioner argues that the habeas court improperly concluded that count one of the operative petition was barred by res judicata. The respondent does not challenge this argument in his brief, and, at oral argument before this court, counsel for the respondent conceded that the habeas court had incorrectly applied the doctrine of res judicata to count one. We agree with the petitioner.

Contrary to the habeas court's conclusion, count one of the operative petition does not present a claim of "prosecutorial impropriety," as that claim has been defined by our courts. To prevail on a claim of prosecutorial impropriety, a petitioner must show that there was improper conduct by the prosecutor and that such conduct deprived him of his due process right to a fair trial. See, e.g., *State* v. *Brown*, 345 Conn. 354, 384–85, 285 A.3d 367 (2022). In determining whether conduct by the prosecutor violated the petitioner's right to a fair trial, a court must conduct a multifactor analysis that considers the extent to which the improper conduct was invited by the defense; the severity of the improper conduct; the frequency of the improper conduct; the centrality of the improper conduct to the critical issues in the case; the strength of any curative measures adopted; and the strength of the state's case. See, e.g., *State* v. *Warholic*, 278 Conn. 354, 361, 897 A.2d 569 (2006).

In count one of the operative petition, the petitioner claimed that the prosecutor in the underlying criminal case violated the petitioner's due process rights by (1) suppressing material, exculpatory evidence, and (2) relying on inconsistent theories of guilt to convict the petitioner and a codefendant. Neither of these claims constitutes the same "ground" as prosecutorial impropriety because each claim requires a court to conduct

a distinct inquiry under a distinct legal standard. See, e.g., *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 66, 6 A.3d 213 (2010) (claims that require separate legal analyses are not identical for purposes of res judicata), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011); see also *Thorpe* v. *Commissioner of Correction*, 73 Conn. App. 773, 778, 809 A.2d 1126 (2002). To prevail on a claim that the prosecutor suppressed exculpatory evidence, a petitioner must show that the prosecutor suppressed evidence, that the evidence was favorable to the defense and that the evidence was material. See, e.g., *State* v. *Ouellette*, 295 Conn. 173, 185, 989 A.2d 1048 (2010). In determining whether a prosecutor violated a defendant's right to due process by relying on inconsistent theories of guilt across related cases, a court must examine the state's arguments in each case to determine whether inconsistencies between them—if any—are inherent to the state's theory or whether the varying material facts are irreconcilable. See *Council* v. *Commissioner of Correction*, 114 Conn. App. 99, 111–12, 968 A.2d 483, cert. denied, 292 Conn. 918, 973 A.2d 1275 (2009). Though, to be sure—at a high level of generality—these claims require a court to assess the conduct of the state in conducting a criminal prosecution, they are not thereby interchangeable with a prosecutorial impropriety claim, which has a specific meaning under Connecticut law. We therefore conclude that the habeas court erroneously dismissed count one of the petition on the basis of the doctrine of res judicata.[17]

B

The petitioner also argues that the habeas court's conclusion that count three was barred by res judicata was erroneous. We disagree.[18]

[17] Because we agree that the petitioner's claims in count one are not identical to the prosecutorial impropriety claim that he brought in his first habeas action, we do not address his alternative challenges to the habeas court's dismissal of count one.

[18] We note that, in the petitioner's third habeas action, he also presented a claim of ineffective assistance of trial counsel against Randolph, which

Although the petitioner acknowledges having previously litigated a claim of ineffective assistance against Randolph in his first habeas action, he argues that the ineffectiveness claim in count three of the operative petition should not have been dismissed on the ground of res judicata because the specific factual allegations that he raised in his operative petition were not pleaded, litigated, or decided on the merits in his first or any other habeas petition. This court, however, has "rejected this argument on numerous occasions." *Tatum* v. *Commissioner of Correction*, 211 Conn. App. 42, 50, 272 A.3d 218 (2022), rev'd in part on other grounds, 349 Conn. 733, 322 A.3d 299 (2024). Even if a subsequent petition sets forth different specific factual allegations to support a claim of ineffective assistance of trial counsel, the claim remains the same for res judicata purposes so long as the petitioner seeks the same relief and does not allege newly available facts or evidence not reasonably available at the time of the prior petition. See id., 51–53; see also, e.g., *Damato* v. *Commissioner of Correction*, 156 Conn. App. 165, 174, 113 A.3d 449 ("[a]lthough we recognize that the petitioner sets forth *different allegations* in support of his claim of ineffective assistance, the claim is still one of ineffective assistance of counsel involving [trial counsel]" (emphasis in original)), cert. denied, 317 Conn. 902, 114 A.3d 167 (2015). The petitioner does not dispute that his current habeas petition seeks the same relief as that sought in his first petition, nor does he challenge the habeas court's conclusion that his allegations "relate directly to information and witnesses that were known, or should have been known, through the exercise in due diligence . . . when the [first habeas] petition went to trial." As such, we agree with the habeas court that the petitioner's claim of ineffective assistance against Randolph is improperly successive.

Judge Sferrazza also dismissed on res judicata grounds under Practice Book § 23-29. See *Cator* v. *Warden*, supra, 2016 WL 6603685, *1.

The petitioner insists that it was nonetheless improper for the habeas court to dismiss his ineffectiveness claim against Randolph because, to prevail on his claims of ineffective assistance of habeas counsel (counts five through seven), he necessarily had to prove that Randolph, his trial counsel, was also ineffective. Although it is true that a petitioner seeking to prevail on a claim of ineffective assistance of habeas counsel must establish both that his appointed habeas counsel and trial counsel were ineffective; see, e.g., *Harris* v. *Commissioner of Correction*, 108 Conn. App. 201, 206, 947 A.2d 435, cert. denied, 288 Conn. 911, 953 A.2d 652 (2008); it does not follow that the res judicata dismissal of a freestanding count of ineffective assistance of trial counsel automatically precludes a petitioner from proceeding on, and prevailing on the merits of, a separate claim of ineffective assistance of habeas counsel.

This court's decision in *Kearney* v. *Commissioner of Correction*, 113 Conn. App. 223, 965 A.2d 608 (2009), is directly on point. In *Kearney*, the petitioner brought a second habeas petition in which he alleged ineffective assistance of his trial counsel and ineffective assistance of his first habeas counsel. Id., 226–27. In his first habeas petition, the petitioner had also pleaded ineffective assistance of trial counsel, though without all of the same underlying factual allegations as were contained in his second petition. Id., 230–31. The second habeas court dismissed the petitioner's claim of ineffective assistance of trial counsel as barred by res judicata, and this court upheld that dismissal on appeal for the same reason that we uphold the dismissal of count three in the present case. See id., 233. The second habeas court in *Kearney*, however, further concluded that, because the petitioner's claim of ineffective assistance of trial counsel was foreclosed, his claim of ineffective assistance of habeas counsel must necessarily be dismissed as well because the latter claim required

the petitioner to prove ineffective assistance of trial counsel. See id., 237–38. This court rejected that argument, holding that, under our Supreme Court's decision in *Lozada* v. *Warden*, 223 Conn. 834, 844, 613 A.2d 818 (1992)—which had held that "[t]he claim of ineffective assistance of habeas counsel, when added to the claim of ineffective assistance of trial counsel, results in a different issue"—a habeas petitioner "is entitled to make a claim that he or she was deprived of effective habeas counsel in a prior petition . . . [and] such a claim is not subject to dismissal on the ground that an earlier habeas petition that was based on the ineffectiveness of trial counsel had been unsuccessful." *Kearney* v. *Commissioner of Correction*, supra, 239. As such, the petitioner's argument—that count three should not have been dismissed because he was required to separately plead ineffective assistance of trial counsel in order to prevail on his claims of ineffective assistance of habeas counsel—is unavailing.

C

The petitioner argues that, because count one was improperly dismissed, he is entitled to a remand to the habeas court for further proceedings on the merits of that count. Though we agree, for the reasons set forth in part I A of this opinion, that the habeas court's reasoning in dismissing count one was erroneous, we disagree that a remand is appropriate because the court's judgment as to count one may be affirmed on an alternative basis.

"[If] the trial court reaches a correct decision but on [improper] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. . . . [W]e . . . may affirm the court's judgment on a dispositive alternative ground for which there is support in the trial court record." (Internal quotation marks omitted.) *Green Tree Servicing, LLC* v. *Clark*, 224 Conn.

App. 740, 748, 314 A.3d 1019, cert. denied, 349 Conn. 913, 315 A.3d 300 (2024); see also *Ross* v. *Commissioner of Correction*, 337 Conn. 718, 733, 256 A.3d 118 (2021) (concluding that Appellate Court improperly determined that ineffective assistance claim was barred by collateral estoppel but nonetheless affirming judgment on alternative ground that petitioner failed to demonstrate prejudice).

As we have explained, notwithstanding its dismissal of count one, the habeas court also rejected on the merits the various due process allegations pleaded in count one. Although a court's dismissal of a claim on jurisdictional grounds deprives it of jurisdiction to consider the merits of that claim, and any further discussion of those merits constitutes dicta; see, e.g., *State* v. *Despres*, 220 Conn. App. 612, 624 n.9, 300 A.3d 637 (2023); a conclusion that a claim is barred by res judicata does not implicate the court's jurisdiction. See, e.g., *M&T Bank* v. *Lewis*, 349 Conn. 9, 19 n.6, 312 A.3d 1040 (2024). As a result, the habeas court in this case was free to consider the merits of count one after it dismissed that count on res judicata grounds, and its conclusion with respect to the merits of count one constitutes an alternative holding. Cf. *Mulvihill* v. *Spinnato*, 228 Conn. App. 781, 788 n.12, A.3d , cert. denied, 350 Conn. 926, A.3d (2024); see *Rosenthal Law Firm, LLC* v. *Cohen*, 190 Conn. App. 284, 293, 210 A.3d 579 (2019) (distinguishing dicta from alternative holdings and explaining that when court "has focused on the legal issue presented by the case before it and made a deliberate decision to resolve the issue, that ruling becomes the law" (internal quotation marks omitted)).

On appeal, the only portion of the habeas court's ruling on the merits of count one that the petitioner contests is its conclusion that the state's failure to disclose to him St. Julien's statement to the police did not violate the petitioner's due process rights. Because he

has not contested or even referred in his brief to the court's conclusions with respect to any of the other specific due process allegations contained in count one, he has abandoned any challenge to those portions of its ruling. See *State* v. *Saucier*, 283 Conn. 207, 223, 926 A.2d 633 (2007) (unmentioned claim is, by definition, inadequately briefed and therefore abandoned); *Forestier* v. *Bridgeport*, 223 Conn. App. 298, 314, 308 A.3d 102 (2024) ("[w]e do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed" (internal quotation marks omitted)). And for the reasons set forth in part III A of this opinion, we agree with the habeas court that the failure to disclose St. Julien's statement to the police did not violate the petitioner's due process rights. Therefore, we affirm, on an alternative basis, the habeas court's denial of relief on count one and decline to remand the case for further proceedings on the merits of that count.[19]

[19] We may generally affirm a lower court's judgment on an alternative ground so long as the appellant is not prejudiced thereby. See *State* v. *Osuch*, 124 Conn. App. 572, 580, 5 A.3d 976, cert. denied, 299 Conn. 918, 10 A.3d 1052 (2010). Under the circumstances of this case, we conclude that the petitioner would not be prejudiced by our decision to affirm the habeas court's judgment on an alternative basis. Because the habeas court set forth two independent bases for its denial of relief on count one in its memorandum of decision—res judicata and its ruling on the merits of count one—the petitioner was on notice from the moment his petition was denied that the alternative basis on which we rely to sustain the habeas court's judgment existed. Indeed, in his petition for certification to appeal (though not in his principal appellate brief), the petitioner raised several challenges to other portions of the habeas court's ruling on the merits of count one. Moreover, in his brief, the respondent argued that, even if the habeas court's res judicata dismissal of count one was erroneous, the court's ruling on the merits of the petitioner's claim pertaining to St. Julien's statement provided an alternative basis on which to sustain its judgment. Accordingly, the petitioner had a full and fair opportunity to challenge the habeas court's ruling on the merits of count one as and to the extent he believed appropriate. Cf., e.g., *Devine* v. *Fusaro*, 205 Conn. App. 554, 584 n.23, 259 A.3d 655 (2021), appeal dismissed, 346 Conn. 29, 287 A.3d 598 (2023) (certification improvidently granted); *State* v. *Martin M.*, 143 Conn. App. 140, 151–53, 70 A.3d 135, cert. denied, 309 Conn. 919, 70 A.3d 41 (2013).

II

The petitioner next claims that the habeas court erred in rejecting his claim that, during his underlying criminal prosecution, he was improperly excluded from an in-chambers conference regarding a possible conflict of interest on the part of his counsel. He argues that his exclusion from the in-chambers conference violated his constitutional right to be present at a critical stage of the prosecution and that this violation constitutes structural error for which he need not demonstrate prejudice. We are not persuaded.

The following additional facts and procedural history are relevant to this claim. At the outset of his underlying criminal prosecution, the petitioner was represented by Mirsky.[20] Mirsky also represented St. Julien, one of the petitioner's codefendants. On July 2, 1996, the court, *Maiocco*, *J.*, held a joint hearing in probable cause for the petitioner and St. Julien. At the start of the hearing, Mirsky identified himself as counsel for the petitioner and St. Julien, and stated: "[A]t this time I find no conflict of interest." The court did not further inquire, during that hearing, as to the basis for Mirsky's conclusion that no conflict existed. On May 15, 1997, however, Mirsky moved to withdraw as the petitioner's counsel on the ground that "there may or could possibly arise a conflict of interest . . . ." The court, *Ronan*, *J.*, granted the motion on May 28, 1997, and appointed Randolph in Mirsky's stead.

On July 15, 1997, Randolph moved to dismiss the charges against the petitioner, arguing that the court had violated the petitioner's right to the effective assistance of counsel by failing to canvass him concerning a waiver of his right to conflict free representation at the July 2, 1996 probable cause hearing. The court,

[20] According to the information provided to the habeas court and uncontested by either party, Mirsky is deceased.

Ford, *J.*, heard argument on the motion to dismiss on October 9, 1997. During that hearing, Satti (the prosecuting attorney) stated: "The claim of the [petitioner] is that the court had an obligation to inquire, on the record, regarding a conflict. Our position is that that was made known to the court, in chambers, and the response of the defense counsel, on the record, foreclosed any further inquiry by the court, therefore, not necessitating an inquiry on the record because it was done in chambers." This statement forms the basis of the petitioner's allegation that he was excluded from an in-chambers conference concerning a possible conflict of interest.

During the habeas trial, the petitioner's counsel questioned Satti repeatedly about his October 9, 1997 statement and whether an in-chambers conference regarding a potential conflict had occurred. On direct examination, in response to counsel's question: "Did you have an in-chambers conversation . . . about the conflict that existed between [Mirsky] representing [the petitioner] and St. Julien at the same time?" Satti stated: "I have no memory of that." Satti then reviewed the transcript of October 9, 1997, but did not further testify during his direct examination as to this alleged in-chambers conference. The petitioner's counsel renewed her inquiry on redirect examination, leading to the following colloquy:

"[The Petitioner's Counsel]: Do you recall the in-chambers or judicial pretrial, however you want to call it, conversation that you had with [Mirsky] concerning [the petitioner] and [St. Julien]?

"[The Witness]: For both of them?

"[The Petitioner's Counsel]: Yes.

"[The Witness]: No. That—I have no—*that did not occur*.

"[The Petitioner's Counsel]: If there's a transcript that says where you say, on the record, that you had an in-chambers discussion about the conflict, would that refresh your recollection?

"[The Witness]: Is that the item you gave me earlier today?

"[The Petitioner's Counsel]: It might have been. I believe there were two separate days, but it might have been. . . .

"[The Witness]: And *I do recall saying that there was an in-chamber*[*s*]*—not that I participated in the in-chambers conference, but there was an in-chambers conference* between [Mirsky], and I forgot who the—Judge Maiocco, I believe it was, did the [probable cause hearing]. So, that was—where I saw on that document, I was referring to the fact that there was a motion to dismiss filed by [Randolph] . . . .

"[The Petitioner's Counsel]: . . . Do you recall what dates the supervised judicial pretrials occurred?

"[The Witness]: In the beginning of October.

"[The Petitioner's Counsel]: Was that the only one?

"[The Witness]: That was the only one that I noted in my file, *which leads me to believe that there* [*were*] *no other ones.*

"[The Petitioner's Counsel]: Do you have in your file any other notes concerning when judicial pretrials occurred?

"[The Witness]: In my notes, yes. And there were no other notes of any judicial pretrials with the other defendants, *not* [*the petitioner*], *clearly*. . . .

"[The Petitioner's Counsel]: Okay. Now, on [May 28], 1997, and I might have showed you this transcript, I don't recall . . . the court says to [the petitioner],

you're aware that [Mirsky] has to withdraw because he represents one of the codefendants, and it would be a conflict of interest. And at the prior hearing in probable cause, which occurred in July of 1996, Mirsky said that he did not believe that there was a conflict of interest.

"Now, the judicial pretrials that we've talked about, did one of those—or do you have any idea if a judicial pretrial or an in-chambers conversation happened around May of [1997]?

"[The Witness]: *I don't have any independent recollection of that.*

"[The Petitioner's Counsel]: Would you have any notes concerning that in your file?

"[The Witness]: *If they existed, I would. And there's none in the file. . . .*

[Satti briefly left the witness stand to procure his file from the petitioner's criminal prosecution.]

"[The Petitioner's Counsel]: . . . Can you look into your file and see if there were any notes concerning judicial pretrial or in-chamber[s] discussions in [the petitioner's] or St. Julien's case with [Mirsky] around—

"[The Witness]: Well, I didn't bring St. Julien's file with me. You asked me only to bring [the petitioner's], but I'll look in the [petitioner's] file. . . . So, I reviewed my notes, which are—*I write down everything I do.* First note is appointment of counsel and setting of a hearing in probable cause date, the probable cause date. *There is no other note regarding* [*Mirsky*]. The first note is conversations with [Randolph], and the presiding judge at that time was Judge John Ronan. . . .

"The Court: So, I mean, for the court's information, counsel, I get, at some point, lots of files get to the point where there's supervised judicial pretrial. This case is pending for a year, and you don't have any notes

about any general conversations you have with defense counsel about what's going on with the file, where it's moving? I mean, what goes on? I mean, I know for a fact files don't just meander along for a year without some discussions.

"[The Witness]: Correct. And on this file, it was unique in that it appeared that nobody wanted to resolve anything, and you're right, I didn't write that specific note down. But I have a memory of nobody wanted to resolve it. And it basically went from a point where there was inaction on the file for whatever the reason was, and then the only other action was [Randolph] getting in the file, which would have been [1997], which we then had the trial." (Emphasis added.)

In its memorandum of decision, the habeas court found that the in-chambers conference that the petitioner alleged had taken place never actually occurred. The court did not mention Satti's comments during the October 9, 1997 hearing,[21] it concluded that neither the transcript of the July 2, 1996 probable cause hearing nor

[21] Although "the trier [of fact] is bound to consider all the evidence which has been admitted, as far as admissible, for all the purposes for which it was offered and claimed . . . [w]e cannot assume that the court's conclusions were reached without due weight having been given to the evidence presented and the facts found." (Citations omitted; internal quotation marks omitted.) *Giamattei* v. *DiCerbo*, 135 Conn. 159, 162, 62 A.2d 519 (1948). Unless "[a] statement [by the court] . . . suggest[s] that the court did not consider [certain] testimony, we . . . are entitled to presume that the trial court acted properly and considered all the evidence." (Internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 229–30, 145 A.3d 362 (2016), cert. denied, 324 Conn. 905, 153 A.3d 653 (2017). We will thus not presume, from the habeas court's failure to mention Satti's comments during the October 9, 1997 hearing in its memorandum of decision, that it disregarded those comments in the course of ruling on the petitioner's claim. Given the centrality of those comments to the petitioner's case, however, we reiterate that "[a] court should strive to avoid leaving litigants with the impression that it has failed to discharge its duty or somehow acted unlawfully . . . [and should not] abrogate [its] duty to review the evidence admitted at trial or . . . give litigants the erroneous impression that [it has] done so." Id., 235.

the transcript of Mirsky's withdrawal and Randolph's appointment on May 28, 1997, supported the petitioner's allegations. It further determined that Satti had, during his habeas trial testimony, "offered no information that would support the petitioner's claim."

"It is well established that the burden of establishing grounds for relief in a habeas corpus proceeding rest[s] with the petitioner. . . . The petitioner, as the plaintiff in a habeas corpus proceeding, bears a heavy burden of proof." (Citation omitted; internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, 99 Conn. App. 506, 510, 914 A.2d 602, cert. denied, 282 Conn. 906, 920 A.2d 308 (2007). "As a general matter, the underlying historical facts found by the habeas court may not be disturbed unless they were clearly erroneous . . . ." (Internal quotation marks omitted.) *Donald G.* v. *Commissioner of Correction*, 224 Conn. App. 93, 112, 311 A.3d 187, cert. denied, 349 Conn. 902, 312 A.3d 585 (2024). "[A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Valentine* v. *Commissioner of Correction*, 219 Conn. App. 276, 288, 295 A.3d 973, cert. denied, 348 Conn. 913, 303 A.3d 602 (2023). "Our function is not to examine the record to see if the trier of fact could have reached a contrary conclusion." *Siano* v. *Warden*, 31 Conn. App. 94, 95, 623 A.2d 1035, cert. denied, 226 Conn. 910, 628 A.2d 984 (1993).

We discern no clear error in the habeas court's finding that no in-chambers discussion occurred. Indeed, at several points Satti's testimony during the habeas trial undercuts such a conclusion. In particular, Satti explained that, although he "write[s] down everything [he] do[es]," his file from the petitioner's case contained

no notes regarding Mirsky following his appointment as trial counsel, nor did it indicate that Satti participated in any in-chambers conversations concerning the petitioner in or about May, 1997, when Mirsky moved to withdraw from representation. Furthermore, Satti testified that, although he recalled making his comments on October 9, 1997, he did not recall any in-chambers conference having taken place; indeed, at one point he stated that such a conference "did not occur." When this testimony is considered alongside the transcript of October 9, 1997, the record is, at best, ambiguous as to whether the discussion from which the petitioner alleges he was excluded actually happened. Because the petitioner had the burden of proof, the habeas court was free, in light of the conflicting evidence in the record, to conclude that the petitioner had not established the factual predicate of his claim. Mindful of the limited scope of our review of the habeas court's factual findings, we are not—on this record—left with a "definite and firm conviction" that the habeas court erred in finding that no in-chambers discussion occurred. Accordingly, the petitioner's claim fails, and we therefore do not reach the question of whether the petitioner's alleged exclusion from such a discussion violated his constitutional rights.

III

The petitioner next claims that the habeas court erred when it concluded that his first habeas counsel, McKay, did not render ineffective assistance by failing (1) to raise a *Brady* claim pertaining to an undisclosed statement given by the petitioner's codefendant, St. Julien, to the Bridgeport Police Department, and (2) to raise the claim that the petitioner had been excluded from a critical stage of his underlying criminal proceeding, which we have discussed in part II of this opinion. We disagree.

The following additional facts and procedural history are relevant to this claim. In his underlying criminal proceeding, the petitioner was charged with, inter alia, kidnapping in the second degree in violation of § 53a-94 (a), conspiracy to commit kidnapping in the second degree in violation of §§ 53a-48 and 53a-94 (a), and felony murder in violation of § 53a-54c. At the time of the petitioner's trial in 1997, as is the case today, § 53a-94 (a) provided: "A person is guilty of kidnapping in the second degree when he abducts another person." At the petitioner's trial, the court instructed the jury that it could not find the petitioner guilty of kidnapping unless it "first [found] it established that there was . . . a restriction of [the victim's] movement, that it [had] been done intentionally . . . and it [had] the effect of interfering substantially with the victim's liberty." Kidnapping in the second degree was also the predicate felony for the felony murder charge. The state argued at trial that the victim had been kidnapped because he had been dragged off the porch of 244 Olive Street in Bridgeport and forced into a car that the petitioner was driving.

The petitioner was found guilty by the jury on October 21, 1997. The following day, St. Julien entered an *Alford* plea to conspiracy to commit kidnapping in the second degree. That same day—October 22, 1997—St. Julien also gave a recorded statement, in the presence of his counsel, to Detective Robert Martin of the Bridgeport Police Department in the office of the state's attorney in Bridgeport. A transcript of this statement was entered into evidence in the habeas trial.

In his statement, St. Julien stated in relevant part that, on May 11, 1996—the day of the incident at issue—he and the petitioner had traveled to 244 Olive Street to ask Hamilton, who resided at that address, for some money that he owed St. Julien. When St. Julien and the petitioner arrived at Hamilton's residence, the victim

was already there. After St. Julien and the petitioner arrived, St. Victor also arrived at the residence separately and also asked Hamilton for money that he owed him.[22] An argument ensued between St. Victor and Hamilton. While the argument between St. Victor and Hamilton was ongoing, the petitioner told St. Julien, "let's go," and the petitioner and St. Julien went to sit in the petitioner's car. The petitioner sat in the driver's seat and St. Julien sat in the front passenger seat. The petitioner started the car and began trying to fix its tape player. As he was doing so, St. Julien saw St. Victor and the victim walking toward the car. St. Victor and the victim got into the car and asked, "what was doing?" St. Julien stated that, at that time, he, the petitioner, St. Victor and the victim were "just chilling . . . ." When Martin asked St. Julien if the victim had "indicate[d] to you or anybody else that you heard that he didn't want to go in the car," St. Julien responded: "No. I just [saw] him and [St. Victor] coming [toward] the car." St. Julien likewise denied hearing "any discussion of, asking or telling [the victim] to come along" with him, the petitioner, and St. Victor.

St. Julien further stated that, after St. Victor and the victim got into the car, the four of them drove to Johnson's residence to pick him up and "[go] chilling" with him before St. Julien and the petitioner went to a movie. They picked up Johnson, who got into the backseat next to the victim. Johnson and the victim then got into an argument in which Johnson stated: "I need to know where my shit at . . . ." St. Julien did not know to what Johnson was referring. Johnson and the victim began hitting each other in the backseat, at which point the petitioner, who was driving, stated: "[Y]o, chill, you can't be doing that shit, you have to stop." Johnson

[22] In his statement, St. Julien referred to St. Victor and Hamilton as "Sammy" and "Bushwick," respectively. St. Victor was routinely referred to as "Sammy" throughout the petitioner's criminal proceedings.

then told the petitioner to drive him to an area near Bishop Avenue in Bridgeport. Johnson did not say why he wanted to go to that location, but St. Julien assumed that it was because Johnson "[sold] drugs in that side of town . . . ." Once they arrived, Johnson and the victim got out of the car, at which point they began arguing again. As the argument escalated, Johnson pulled out a gun. The petitioner got out of the car and said: "[W]hat [are] you doin[g] . . . chill, don't do that." Johnson then shot the victim twice.

St. Julien did not testify in the petitioner's criminal trial, nor did he testify in the habeas trial in this matter. At the habeas trial, Satti testified that, although St. Julien gave his statement to Martin in the state's attorney's office, he (Satti) was not present. The transcript of St. Julien's statement does not indicate that anyone was present apart from St. Julien, Mirsky (his attorney), and Martin. Satti further testified that the police would "routinely" use a room at the state's attorney's office to conduct interviews and that, in St. Julien's case, because he was incarcerated, the police decided to take his statement at the state's attorney's office because "they couldn't take it at the police station . . . ." Though he did not recall the precise procedure by which the police could arrange to use the room for an interview, Satti confirmed that the police would have had to arrange the interview with someone in the state's attorney's office ahead of time. Satti had no recollection of having been personally notified in advance that St. Julien intended to give a statement. He also testified that, prior to giving the statement to Martin, St. Julien had exercised his right to remain silent and that he (Satti) had had no discussions with either St. Julien or his counsel regarding a waiver of that right before St. Julien gave the statement. Satti admitted that, when he received a copy of St. Julien's statement, he did not provide it to the petitioner's counsel.

McKay, the petitioner's first habeas counsel, testified briefly in the habeas trial in the present case. He testified that he did not recall the claims he had raised in the first habeas petition; that he did not recall the names of the petitioner's codefendants; that he had a "vague recollection" of a statement from one of the petitioner's codefendants[23] but did not recall what it said; and that he had not been able to review any materials in preparation for his testimony, in part because he had previously turned over his file to another attorney after his representation of the petitioner concluded. After reviewing a portion of the transcript from the first habeas trial, McKay testified that his recollection had not been refreshed.

In her closing argument before the habeas court in the present case, the petitioner's counsel argued that St. Julien's statement was material and exculpatory within the meaning of *Brady* because it undercut the state's claim that the victim had been kidnapped and demonstrated that he had in fact gotten into the petitioner's car "o[f] [his] own accord." She also argued that McKay as well as the petitioner's second and third habeas counsel had rendered ineffective assistance by failing to conduct an adequate investigation into the statement's existence and to plead a *Brady* claim based on the statement's suppression.

The habeas court ruled against the petitioner on his claims of ineffective assistance of first habeas counsel. Relevant to this appeal, the court concluded that the petitioner could not establish deficient performance

[23] The record reflects that St. Victor also gave a statement to Martin. St. Victor gave his statement one day after the incident at issue, on May 12, 1996, and it is part of the petitioner's criminal file. The petitioner did not allege that McKay or any of the petitioner's prior habeas counsel had actual knowledge of St. Julien's October 22, 1997 statement; the petitioner represented to the habeas court that St. Julien's statement was not discovered until 2022.

because McKay had testified that he had no memory of the petitioner's case, meaning that the petitioner was unable to present "affirmative evidence sufficient to overcome the presumption of competent representation." The court further determined that, even if the petitioner could establish deficient performance, he could not establish prejudice from McKay's failure to plead and prove a *Brady* claim pertaining to St. Julien's statement because St. Julien's statement was not " 'material' " under *Brady*. In particular, the court concluded that St. Julien's statement was "fact-starved" and implausible, such that there was no reasonable probability that it would have changed the outcome of the petitioner's trial. The court also wrote, in a footnote, that, "[g]iven the determination by the court already in analyzing other claims that there is no credible proof that there was an in-chambers conversation about the petitioner's defense counsel having a conflict of interest . . . there is no need for the court to analyze those claims in the context of the petitioner's claim that . . . McKay was ineffective for failing to prove these claims against . . . Randolph."

"We begin with well settled legal principles, including our standard of review. To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . .

must be established for a habeas petitioner to prevail, a court may [deny] a petitioner's claim if he fails to meet either prong. . . .

"Our Supreme Court, in *Lozada* v. *Warden*, [supra, 223 Conn. 843], established that habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing . . . a second petition for a writ of habeas corpus . . . challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus . . . [that] had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal. . . . Our Supreme Court subsequently expanded *Lozada*'s holding to encompass third habeas petitions challenging the performance of second habeas counsel. . . . Nevertheless, the court in *Lozada* also emphasized that a petitioner asserting a habeas on a habeas faces the herculean task . . . of proving in accordance with [*Strickland*] both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . .

"Simply put, a petitioner cannot succeed . . . on a claim that his habeas counsel was ineffective by failing to raise a claim against trial counsel or prior habeas counsel in a prior habeas action unless the petitioner ultimately will be able to demonstrate that the claim against trial or prior habeas counsel would have had a reasonable probability of success if raised. . . .

"The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed [on appeal] unless they are clearly erroneous. . . . Thus, the [habeas] court's factual findings are entitled to great weight. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

Whether a petitioner received constitutionally inadequate representation is a mixed question of law and fact that requires plenary review." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, 220 Conn. App. 567, 583–86, 300 A.3d 607, cert. denied, 348 Conn. 911, 303 A.3d 10 (2023).

A

The petitioner argues that the habeas court improperly determined that McKay was not ineffective for failing to raise a *Brady* claim pertaining to St. Julien's statement. Because we agree with the habeas court's conclusion that St. Julien's statement was not material within the meaning of *Brady*, and hence that the petitioner was not prejudiced,[24] we reject the petitioner's claim.

[24] Although we decide the petitioner's claim under *Strickland*'s prejudice prong, we note that the habeas court's reasoning in concluding that the petitioner had failed to establish deficient performance runs contrary to precedent from our Supreme Court. The habeas court gave great weight to the fact that McKay was unable to recall any details of the petitioner's case and concluded that the petitioner had accordingly failed to present sufficient evidence of deficient performance. In particular, the habeas court stated: "[B]eing unable to elicit direct evidence on the information counsel possessed *at the time* of the representation and why he made certain decisions *at that time* raises a hurdle making it impossible for the petitioner to establish the deficient performance prong of the *Strickland* test." (Citations omitted; emphasis in original.) The court further stated that "McKay's lack of memory cannot be claimed as the equivalent of presenting affirmative evidence sufficient to overcome the presumption of competent representation." However, in *Jordan* v. *Commissioner of Correction*, 341 Conn. 279, 267 A.3d 120 (2021), which was decided prior to the petitioner's habeas trial in the present case, our Supreme Court expressly disapproved of such reasoning, holding that, when trial counsel is unavailable to testify at a habeas trial, "requiring [a] habeas petitioner . . . to [nonetheless] provide evidence of counsel's subjective state of mind would undoubtedly and impermissibly heighten the petitioner's burden under *Strickland*." (Emphasis omitted.) Id., 291. Our Supreme Court further held that, "[i]n that circumstance, as always, the court must contemplate the possible strategic reasons that might have supported the challenged action and then consider whether those reasons were *objectively* reasonable." (Emphasis added.) Id., 290. As the court in *Jordan* has made clear, it was improper for the habeas court

"In *Brady* . . . the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. To establish a *Brady* violation, the defendant must show that (1) the government suppressed evidence, (2) the suppressed evidence was favorable to the defendant, and (3) it was material [either to guilt or to punishment]. . . . [E]vidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (Citations omitted; internal quotation marks omitted.) *Morant* v. *Commissioner of Correction*, 117 Conn. App. 279, 284–85, 979 A.2d 507, cert. denied, 294 Conn. 906, 982 A.2d 1080 (2009). A trial court's determination as to materiality under *Brady* presents a mixed question of law and fact subject to plenary review, with the underlying historical facts subject to review for clear error. See, e.g., *State* v. *Ortiz*, 280 Conn. 686, 720, 911 A.2d 1055 (2006).

As a threshold matter, it is unclear whether a *Brady* claim pertaining to St. Julien's statement is cognizable, given that his statement did not come into existence until one day after the petitioner's trial had concluded. In *District Attorney's Office* v. *Osborne*, 557 U.S. 52, 68–69, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009), the United States Supreme Court held that *Brady*'s disclosure obligation does not continue "after [a] defendant [is] convicted and the case [is] closed," explaining that *Brady* is a "preconviction trial [right]" that a defendant

to rely on McKay's unavailability—that is, on his lack of memory; see *State* v. *Schiappa*, 248 Conn. 132, 140–41, 728 A.2d 466, cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999)—in concluding that the petitioner had failed to establish deficient performance, without considering whether there were any objectively reasonable strategic reasons for counsel's actions or inactions.

does not retain once he has been "proved guilty after a fair trial" and lost the presumption of innocence.

Some courts have held that, notwithstanding *Osborne*, a prosecutor's *Brady* obligations continue through to the conclusion of a defendant's direct appeal—a rule that would mean St. Julien's statement *was* subject to *Brady* disclosure because our Supreme Court did not decide the petitioner's direct appeal until 2001. See, e.g., *Fields* v. *Wharrie*, 672 F.3d 505, 514–15 (7th Cir. 2012); *Runningeagle* v. *Ryan*, 686 F.3d 758, 772 n.6 (9th Cir. 2012), cert. denied, 569 U.S. 1026, 133 S. Ct. 2766, 186 L. Ed. 2d 233 (2013). The United States Court of Appeals for the Second Circuit, by contrast, appears to have concluded that the prosecutor's *Brady* obligations terminate at the moment of conviction; see, e.g., *United States* v. *Santos*, 486 Fed. Appx. 133, 135 n.1 (2d Cir. 2012) (summary order); and at least one District Court within the Second Circuit has accordingly determined that, under *Osborne*, a prosecutor had no duty to disclose allegedly exculpatory statements by a codefendant that were made between a habeas petitioner's conviction and sentencing, like the statement at issue in this case. See *Dotsenko* v. *Joseph*, Docket No. 18-CV-1640 (WFK), 2019 WL 4917952, *4–5 (E.D.N.Y. October 4, 2019). Neither this court nor our Supreme Court appears to have addressed the implications of *Osborne*'s holding for *Brady* claims pertaining to evidence that comes into existence between the time of a petitioner's conviction but before sentencing and the conclusion of a direct appeal.

We need not decide this question today, however, because—even if we assume arguendo that the petitioner was entitled, under *Brady*, to material exculpatory information that only came into existence the day after his conviction—St. Julien's statement was not material. Although the petitioner argues that the statement "would have raised a reasonable doubt in the

minds of the jury as to the petitioner's guilt"; (internal quotation marks omitted); this argument, which focuses on the impact the statement would have had at the petitioner's criminal trial, defies logic. There is no reasonable probability that, had the statement been disclosed to the petitioner, the result of his trial would have been different because the earliest point at which the statement could conceivably have been disclosed—the day St. Julien gave it—was after the trial had concluded.

Nonetheless, had St. Julien's statement been promptly disclosed, the petitioner could have filed a motion for a new trial on the basis of newly discovered evidence pursuant to General Statutes § 52-270.[25] See *Reyes* v. *State*, 222 Conn. App. 510, 529, 306 A.3d 5 (2023), cert. denied, 348 Conn. 944, 307 A.3d 910 (2024). As such, for purposes of the materiality analysis, we consider whether there was a reasonable probability that St. Julien's statement, had it been presented in support of such a motion, would have resulted in a new trial for the petitioner.[26]

[25] General Statutes § 52-270 (a) provides in relevant part: "The Superior Court may grant a new trial of any action that may come before it, for . . . the discovery of new evidence . . . or for other reasonable cause, according to the usual rules in such cases. . . ."

Section 52-270 is not the only mechanism by which a defendant may move for a new trial. Under Practice Book § 42-53, formerly § 902, a defendant may also move for a new trial "if it is required in the interests of justice." However, the disclosure of St. Julien's statement would not have provided the petitioner a ground on which to seek a new trial under this latter provision because a motion under Practice Book § 42-53 may not be based on newly discovered evidence. See *State* v. *Legrande*, 60 Conn. App. 408, 419, 759 A.2d 1027 (2000), cert. denied, 255 Conn. 925, 767 A.2d 99 (2001).

[26] Because the petitioner does not argue on appeal that he could have used St. Julien's statement to secure a more favorable sentence, we do not consider the impact, if any, that St. Julien's statement might have had on the petitioner's punishment. Although the petitioner does not *explicitly* argue on appeal that he could have used St. Julien's statement as the predicate for a new trial motion, we think it is nonetheless appropriate to consider the statement's materiality for that purpose because the petitioner's brief focuses on the statement's materiality as to his guilt of the crimes charged.

For a petitioner to be entitled to a new trial on the basis of newly discovered evidence, he must establish (1) that the proffered evidence is newly discovered, such that it could not have been discovered earlier by the exercise of due diligence; (2) that it would be material in a new trial; (3) it is not merely cumulative; and (4) it is likely produce a new result in a different trial. See, e.g., *Asherman* v. *State*, 202 Conn. 429, 434, 521 A.2d 578 (1987). In *Shabazz* v. *State*, 259 Conn. 811, 827, 792 A.2d 797 (2002), our Supreme Court held that a trial court considering whether newly discovered evidence satisfies *Asherman*'s fourth prong must evaluate whether that evidence "passes a minimum credibility threshold." As the court made clear in *Shabazz*, this holding broke no new ground; rather, it was simply a crystallization of prior Connecticut case law, dating to the nineteenth century, on the granting of new trials. See id., 822–23 (collecting cases). In *Adams* v. *State*, 259 Conn. 831, 841, 792 A.2d 809 (2002), decided on the same day as *Shabazz*, the court further explained that, "absent extraordinary or extenuating circumstances, the court [considering a motion for a new trial] should make its credibility assessments . . . on the basis of the presentation of live testimony, rather than on the basis of a printed record." This holding, too, is consistent with long established principles for determining the credibility of evidence. See, e.g., *State* v. *Synakorn*, 239 Conn. 427, 436, 685 A.2d 1123 (1996) (trier of fact's "firsthand observation of [witnesses'] conduct, demeanor and attitude" renders it better judge of witness credibility than reviewing court, which is limited to "cold printed

Because a motion for a new trial based on newly discovered evidence also evaluates whether that evidence might have resulted in a not guilty verdict (albeit using a slightly less lenient standard of probability than that used for *Brady* claims), the petitioner's arguments as to materiality are adequate for us to evaluate whether St. Julien's statement would have resulted in a new trial. See *Jones* v. *State*, 328 Conn. 84, 102–103, 177 A.3d 534 (2018) (comparing standard for materiality under *Brady* with standard for ruling on motion for new trial).

record" (internal quotation marks omitted)); *State* v. *Henning*, 220 Conn. 417, 420, 599 A.2d 1065 (1991) (same); *Wieler* v. *Commissioner of Correction*, 47 Conn. App. 59, 61, 702 A.2d 1195 (same), cert. denied, 243 Conn. 957, 704 A.2d 806 (1997).

In light of the bedrock legal principles articulated in *Shabazz* and *Adams*, we do not believe that there is a reasonable probability that St. Julien's statement would have satisfied *Asherman*'s fourth prong, thereby entitling the petitioner to a new trial. St. Julien's statement is a written document—precisely the kind of "printed record" that our courts have long held to be an insufficient basis on which to make a credibility determination. It is, of course, theoretically *possible* that St. Julien may have supplemented his statement with live testimony had the petitioner filed and litigated a motion for a new trial, but St. Julien did not testify during the habeas trial and the habeas court made no findings as to whether St. Julien would have testified had the petitioner moved for a new trial, or whether his testimony would have been credible and consistent with his statement, and we may not and will not speculate on the subject. See, e.g., *Priest* v. *Edmonds*, 295 Conn. 132, 138, 989 A.2d 588 (2010) (role of reviewing court "is not to guess at possibilities . . . but to review claims based on a complete factual record developed by a trial court" (internal quotation marks omitted)). Presented with St. Julien's written statement, standing alone, we do not think that there is a reasonable probability that a court would have found that evidence sufficiently credible to grant the petitioner a new trial.[27]

We thus conclude that, even if the prosecutor had an obligation under *Brady* to disclose material exculpatory

[27] Indeed, although the habeas court at times purported to evaluate the statement's credibility without the benefit of live testimony from St. Julien, it also wrote that "it is not possible to assess the substance and impact of that statement without the ability to evaluate St. Julien's demeanor and credibility, and to see how he would hold up under cross-examination."

evidence that came into existence after the jury returned its verdict in the petitioner's criminal trial, the petitioner's claim predicated on St. Julien's statement would not have been viable because it was not material within the meaning of *Brady*. Therefore, McKay's failure to raise such a claim in the petitioner's first habeas case did not prejudice the petitioner.

B

The petitioner also claims that the habeas court improperly concluded that McKay did not render ineffective assistance by failing to plead and prove that the petitioner was excluded from a critical stage of his criminal prosecution—namely, the alleged in-chambers conference pertaining to Mirsky's conflict of interest. We disagree.

In light of our analysis in part II of this opinion, this claim merits only a brief discussion. When reviewing a claim of ineffective assistance of counsel, we are bound by the habeas court's factual findings unless they are clearly erroneous. See, e.g., *Crocker* v. *Commissioner of Correction*, supra, 220 Conn. App. 586. As we have discussed, the habeas court found that no in-chambers conference regarding a conflict of interest had occurred, and that factual finding is not clearly erroneous. Therefore, the petitioner cannot have been prejudiced by McKay's failure to plead and prove a claim predicated on the petitioner's exclusion from that alleged conference.

IV

The petitioner also claims that the habeas court erred when it concluded that his second habeas counsel, Mullaney, and his third habeas counsel, Goddard and Waldron, had not rendered ineffective assistance[28] by failing

[28] When our Supreme Court decided *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 570–71, 153 A.3d 1233 (2017), holding that a petitioner may bring a habeas petition predicated on ineffective assistance of *second* habeas counsel, it expressed no view as to the availability of a claim of

to plead and prove the ineffectiveness claims discussed in part III of this opinion against McKay. We disagree.

The habeas court concluded in relevant part that, because the petitioner had failed to prove his ineffectiveness claims against McKay, he could not establish that Mullaney, Goddard, or Waldron were ineffective for failing to raise those claims against McKay in the petitioner's second and third habeas petitions. For the reasons we set forth in part III of this opinion, we agree that the petitioner's ineffectiveness claims against McKay lack merit. Therefore, there is no reasonable probability that, had the petitioner's second or third habeas counsel raised those claims, the petitioner would have prevailed in those prior habeas proceedings.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JESSE LEE MILLER (AC 46598)

Cradle, Clark and Sheldon, Js.

Syllabus

Convicted of the crimes of attempt to commit assault in the first degree and assault in the second degree, the defendant appealed. He claimed, inter alia, that the trial court improperly denied his motion to suppress certain evidence, namely, the screwdriver used as a weapon in the assault. *Held*:

The trial court did not abuse its discretion in denying the defendant's motion to suppress the testimony of a police officer at the evidentiary hearing on the motion having been sufficient to establish a reasonable probability that

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ineffective assistance against third habeas counsel and beyond. See id., 570 n.19. Nevertheless, since *Kaddah*, this court has on at least one occasion ruled on the merits of a claim of ineffective assistance of a petitioner's third habeas counsel; see *Tatum* v. *Commissioner of Correction*, supra, 211 Conn. App. 75–76; and for the purposes of this appeal, we assume without deciding that the petitioner's claim of ineffective assistance against Goddard and Waldron is one for which habeas corpus relief is available.

the screwdriver the state intended to offer into evidence was the one found at the scene and that it had not been changed or altered, thereby authenticating it.

This court declined to review the defendant's unpreserved claim that the trial court improperly allowed the state's expert witness to opine on an ultimate issue reserved for the jury.

The trial court did not abuse its discretion in permitting the state's expert witness to opine on a hypothetical question that allegedly omitted a material fact, as the court reasonably could have concluded that the question provided a fair summary of the relevant evidence and that the answer would assist the jury.

The evidence was sufficient to support the jury's verdict as to the defendant's intent to cause serious physical injury as required to support his conviction of attempt to commit assault in the first degree.

The evidence was sufficient to establish that the screwdriver was a dangerous instrument as required to support the defendant's convictions of attempt to commit assault in the first degree and assault in the second degree.

Argued October 8—officially released December 10, 2024

Procedural History

Substitute information charging the defendant with the crimes of attempt to commit assault in the first degree and assault in the second degree, brought to the Superior Court in the judicial district of New Haven, geographical area twenty-three, where the court, *Alander*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Alander*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Chad L. Edgar, assigned counsel, for the appellant (defendant).

Alexander A. Kambanis, deputy assistant state's attorney, with whom, on the brief, were *John P. Doyle, Jr.*, state's attorney, and *Kathleen E. Morgan*, assistant state's attorney, for the appellee (state).

Opinion

CLARK, J. The defendant, Jesse Lee Miller, appeals from the judgment of conviction, rendered after a jury trial, of attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2)[1] and 53a-59 (a) (1),[2] and assault in the second degree in violation of General Statutes § 53a-60 (a) (2).[3] On appeal, the defendant claims that (1) the court improperly denied his motion to suppress, (2) the court erroneously admitted certain expert testimony, and (3) there was insufficient evidence to support his convictions. We affirm the judgment of the court.

The following procedural history and facts, as the jury reasonably could have found them, are relevant to this appeal. The victim, Rupert Beckford, had known the defendant since the latter was a child. On the afternoon of August 9, 2021, the victim traveled by car from the Island Spice restaurant in New Haven to Waterbury, accompanied by Kenyatta Folkes, Hope Woodson, and Folkes' brother. After dropping off Folkes' brother in Waterbury, Folkes, Woodson, and the victim returned to New Haven and parked the car across from Island Spice. Folkes had been driving, with Woodson in the front passenger seat, and the victim in the back seat

[1] General Statutes § 53a-49 provides in relevant part: "(a) A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. . . ."

[2] General Statutes § 53a-59 provides in relevant part: "(a) A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person by means of a deadly weapon or a dangerous instrument . . . ."

[3] General Statutes § 53a-60 provides in relevant part: "(a) A person is guilty of assault in the second degree when . . . (2) with intent to cause physical injury to another person, the actor causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm . . . ."

on the passenger side. Woodson exited the car first and walked toward Island Spice. As the victim was moving to exit the car, the defendant approached the car, pulled open the door, placed his foot inside the car between the victim's legs, and began to punch him and thrust a screwdriver toward his chest. The victim attempted to push the defendant away from him and to shield himself from the thrusted screwdriver. The attack was unprovoked. The victim had heart stents and was sixty-five years old at the time of the offense; at the time of trial, he was approximately five feet, four inches tall and weighed 190 pounds. The defendant was slightly more than six feet tall and weighed more than 200 pounds.

While the attack was occurring, a group of bystanders converged around the car. Folkes jumped out of the car, at which point the defendant moved away from the car and began walking toward the middle of the street. As he did so, the defendant said: "I got him, I got him, who else wants it, I got him." A bystander approached the defendant swinging a baseball bat, and Folkes picked up some stones and threw them at the defendant, knocking the screwdriver out of his hand. The defendant then walked down the street and away from the scene. Woodson called 911.

Officer Brandon Cain of the New Haven Police Department was dispatched to the scene at approximately 5:40 p.m. He located the defendant farther down the street and placed him in handcuffs. Cain had consistently patrolled the area in which the attack occurred since 2016 and had interacted with the defendant approximately once per week leading up to the date of the offense.

The victim sustained a one centimeter superficial laceration to the right side of his chest—over the area where his lungs and heart were located—as well as small superficial lacerations to his right forearm. He

was transported via ambulance to Yale-New Haven Hospital (hospital), where he was admitted to the emergency department at 6:28 p.m. and discharged thirty minutes later. He received Bacitracin and a Band-Aid for his injuries, which were not life-threatening.

The defendant was tried before a jury of six over two days on March 3 and 6, 2023. On March 6, 2023, the jury returned a verdict of guilty of both charges. On May 2, 2023, the court, *Alander*, *J.*, sentenced the defendant to a total effective sentence of eleven years of incarceration, suspended after six years (of which five were a mandatory minimum), followed by five years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court improperly denied his motion to suppress the screwdriver used in the assault of the victim. He argues that the screwdriver should not have been admitted as evidence because there was a break in the chain of custody, and the state thus failed to meet its burden of establishing the screwdriver's authenticity. We are not persuaded.

The following additional facts and procedural history are relevant to this claim. On March 2, 2023, the eve of trial, the defendant filed a motion to suppress the screwdriver, in which he averred that the evidence was "tainted" because "the chain of custody . . . was broken when [the screwdriver] was commingled with other articles, thus causing the [screwdriver] to be tampered with." The court held an evidentiary hearing on this motion on March 3, 2023, before the start of evidence in the defendant's trial. The state presented the testimony of one witness at the hearing, Sergeant Scott Shumway of the New Haven Police Department; the defendant did not call any witnesses.

Shumway testified that he was dispatched to the location of the incident on August 9, 2021. Other officers were already present at the scene when he arrived, and one of them identified a screwdriver lying on the pavement in a parking lot as the weapon that had been used in the incident. Shumway picked up the screwdriver and placed it loosely in the trunk of his police cruiser. He did not put the screwdriver in an evidence bag at the scene. The trunk contained large bags and other tools. Shumway did not recall that there were any other screwdrivers in the trunk. After placing the screwdriver in his trunk, Shumway drove directly from the scene to police headquarters, where he logged the screwdriver into evidence with the front desk sergeant. The screwdriver was placed in a box used to log knives and other sharp objects into evidence. The state showed this box, which contained a screwdriver, to Shumway on the stand, and asked him whether the screwdriver it contained was the same one he had recovered from the scene. Shumway testified, "[w]ith a high degree of certainty," that the screwdriver in the box was the same screwdriver that he had picked up from the parking lot at the scene of the incident and logged into evidence.

Following Shumway's testimony and brief argument by the parties, the court orally denied the defendant's motion to suppress. The court explained its ruling: "I think based—given [Shumway's] testimony that he's highly certain that that's the screwdriver that he . . . picked up from the parking lot, put it in his trunk, and then . . . took it—there doesn't seem to be a chain of custody issue here. I mean, he testified that he picked that screwdriver up from the parking lot, put it in his trunk, took it to the police station, had it logged into the . . . evidence room. He testified that he's highly certain that that is the screwdriver. There's . . . no evidence before me that it's—that either it's been altered or changed or exchanged or it's just the wrong

screwdriver. I think based on that testimony I'm [going to] allow the state to elicit that evidence."[4]

We begin with the relevant principles of law and standard of review. In order to be admissible, evidence must be authenticated; that is, the offering party must put forth evidence sufficient to support a finding that the proffered evidence is what its proponent claims it to be. Conn. Code Evid. § 9-1 (a). "To establish a foundation for admission, [a]n item offered as real evidence must be positively identified as the item in question. This can be done by establishing unique or distinguishable configurations, marks, or other characteristics, or by satisfactory proof of the item's chain of custody from the time of the incident to the time of trial." (Internal quotation marks omitted.) *State* v. *Dearborn*, 82 Conn. App. 734, 744–45, 846 A.2d 894, cert. denied, 270 Conn. 904, 853 A.2d 523 (2004). The chain of custody will generally be established by "testimony that traces the . . . custody of the item from the moment it was found to its appearance in the courtroom, with sufficient completeness to render it reasonably probable that the original item has neither been exchanged nor altered." (Internal quotation marks omitted.) *State* v. *Petitt*, 178 Conn. App. 443, 452, 175 A.3d 1274 (2017), cert. denied, 327 Conn. 1002, 176 A.3d 1195 (2018), quoting 2 C. McCormick, Evidence (7th Ed. 2013) § 213, pp. 13–14.

"[W]hen the chain of custody of evidence is at issue . . . [t]he state's burden . . . is met by a showing that there is a reasonable probability that the substance has not been changed in important respects. . . . The

[4] At trial, the state successfully offered the screwdriver into evidence as a full exhibit through the testimony of Shumway, who—consistent with his testimony at the hearing on the motion to suppress—identified it as the screwdriver he had seized at the scene. The state later showed the screwdriver to the victim, who testified that it was the same screwdriver with which the defendant had stabbed him.

court must consider the nature of the article, [and] the circumstances surrounding its preservation and custody . . . . As long as the state makes a sufficient preliminary showing regarding the chain of custody, a challenge to the chain of custody pertains to the weight of the evidence rather than to its admissibility." (Citation omitted; internal quotation marks omitted.) *Coccomo* v. *Commissioner of Correction*, 203 Conn. App. 704, 720, 252 A.3d 383, cert. denied, 336 Conn. 943, 249 A.3d 737 (2021). "There is no hard and fast rule that the state must exclude or disprove all possibility that the article has been tampered with"; *State* v. *Green*, 55 Conn. App. 706, 713, 740 A.2d 450 (1999), cert. denied, 252 Conn. 920, 744 A.2d 438, cert. denied, 529 U.S. 1136, 120 S. Ct. 2019, 146 L. Ed. 2d 966 (2000); and "[t]he prosecution is not required or compelled to prove each and every circumstance in the chain of custody beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Rosado*, 107 Conn. App. 517, 532, 945 A.2d 1028, cert. denied, 287 Conn. 919, 951 A.2d 571 (2008).

The court has broad discretion in determining the admissibility of evidence when presented with a chain of custody challenge, and its ruling may not be overturned on appellate review except for a clear abuse of its discretion. See *State* v. *Green*, supra, 55 Conn. App. 713. "In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Citation omitted; internal quotation marks omitted.) *State* v. *Boutilier*, 133 Conn. App. 493, 501–502,

36 A.3d 282, cert. denied, 304 Conn. 914, 40 A.3d 785 (2012).

Shumway's testimony was sufficient to establish a reasonable probability that the screwdriver was the one found at the scene. Shumway testified that he picked up the screwdriver at the scene, put it in the trunk of his police cruiser, and transported it directly to police headquarters, where he logged it into evidence. Although he testified that there were other items in the trunk, he did not recall there being any other screwdrivers with which the screwdriver used in the underlying assault could have been confused. Significantly, after being shown the screwdriver that the state intended to offer into evidence on the stand, he testified that he had a "high degree of certainty" that that screwdriver was the one he had recovered from the scene. His testimony was sufficient to establish a reasonable probability that the screwdriver the state intended to offer into evidence was the one found at the scene and that it had neither been changed nor altered, and thereby to authenticate it.[5] Accordingly, we conclude that the court did not abuse its discretion in denying the defendant's motion to suppress.[6]

[5] The defendant argues that, because Shumway was certain of the screwdriver's identity but unable to recall certain other details pertaining to his recovery of the screwdriver—such as the identity of the fellow officer who told him that the screwdriver at the scene had been used in the assault, the exact address of the incident, or the precise location in his trunk where he put the screwdriver—his testimony was "utterly lacking in credibility." However, "[i]t is axiomatic that this court does not assess the credibility of witnesses," and we decline the defendant's invitation to do so here. *State* v. *Castro*, 60 Conn. App. 78, 80, 758 A.2d 470, cert. denied, 255 Conn. 912, 763 A.2d 1038 (2000).

[6] Because we conclude that the admission of the screwdriver was not an abuse of the court's discretion, we do not reach the question of whether its admission was harmful. See, e.g., *State* v. *Maner*, 147 Conn. App. 761, 772, 83 A.3d 1182 ("[w]hen an improper evidentiary ruling is nonconstitutional in nature, it is the defendant's burden to demonstrate that such an error was harmful"), cert. denied, 311 Conn. 935, 88 A.3d 550 (2014).

II

The defendant next claims that the court erred by permitting the state's expert witness, Vivek Parwani, the medical director of the department of emergency medicine at the hospital where the victim was transported, to testify as to the injuries that could have been caused by thrusting a screwdriver into a person's chest. In particular, he contends that (1) Parwani's testimony constituted an impermissible opinion on an ultimate issue and (2) the hypothetical question to which Parwani responded omitted an essential material fact, namely, that the hypothetical assailant was intoxicated at the time of the incident. In response, the state argues that the defendant failed to preserve his claim regarding the admission of testimony on an ultimate issue at trial and that its hypothetical question to Parwani was not improper. We agree with the state.

The following additional facts and procedural history are relevant to this claim. At trial, the defendant did not contest that he had attacked the victim with a screwdriver but argued that he was intoxicated at the time of the incident and that his intoxication negated the intent necessary to prove him guilty of either charged offense. The state vigorously disputed this contention. Woodson and Folkes both testified that, on the day of the incident, the defendant had been drinking. Woodson also testified, however, that, after the attack, she did not observe the defendant stumbling over himself and was not sure whether he was slurring his words. Officer Cain testified that he knew the area of the incident to be the defendant's regular drinking spot and that he had observed the defendant drinking there during most of their prior interactions. He also testified, however, that, on the day of the incident, he did not observe the defendant showing any visible signs of intoxication, such as poor balance or slurred speech, and that the

defendant was able to listen to his commands and provide clear answers to his questions.

On the first day of evidence, the state called Parwani to testify as an expert witness. Parwani testified that, on the day of the incident, he was working as an emergency room physician and examined the victim on his arrival at the hospital. He further testified that the victim's injuries were consistent with having been stabbed and that the victim's statements to him and to other hospital personnel were consistent with his injuries. The following exchange ensued during Parwani's direct examination:

"[The Prosecutor]: Okay. Given the location of where [the victim] was stabbed, what other organs or body parts are in that area that could have been affected?

"[The Witness]: He—he was stabbed over the area where his lungs are located and his heart is located.

"[The Prosecutor]: So, showing you what's been marked as state's exhibit 5[7] as a full exhibit, given the size of that screwdriver, given the location of the injuries to [the victim], and given the body parts that are in that area that could have been affected, if that screwdriver went in further to [the victim's] body, what could—what could have been affected? What injuries could have occurred?

"[Defense Counsel]: I'm—I'm [going to] object, foundation. It's a hypothetical. And there's—there's no evidence to—to meet that hypothetical.

"The Court: Yeah. I still—well, let me just check something here for a minute.

"I'm [going to] allow—I'm [going to] allow the question. Overruled.

[7] State's exhibit 5 is a photograph depicting the screwdriver used in the attack, positioned next to a ruler.

"[The Witness]: Can you repeat the question?

"[The Prosecutor]: Yes. So, given—assuming the following facts are in evidence, given a screwdriver of that size, assume that, showing you what's been marked as state's exhibit 6,[8] full exhibit, assume the facts of a person over six foot, over 200 pounds thrusting the screwdriver into another person in the area of the right breast, what injuries could have followed from those actions?

"[The Witness]: Or if the screwdriver of that size was thrust, as you note, into the right breast, a patient's lungs as well as their heart [are] located there, one could puncture a lung; one could puncture one's heart. . . .

"[The Prosecutor]: Could that type of injury cause death or a serious impairment to the lung or the heart?

"[Defense Counsel]: I think I'm [going to] object, Your Honor. We've taken a real leap into—

"The Court: Well, let me excuse the jury for a moment. Ladies and gentlemen, I need to excuse you for one moment. I'll have you back in here shortly.

"(Whereupon the jury panel exited the courtroom.)

"The Court: So, under count one, the state's charge[d] criminal attempt to commit assault in the first degree—

"[Defense Counsel]: Assault in the first degree.

"The Court: —one of the things they have to prove—

"[Defense Counsel]: Is serious—

"The Court: —is that—well, is that the defendant specifically intended to cause serious physical injury to [the victim]. The reason I let his opinion in as to

[8] State's exhibit 6 is the evidence box containing the actual screwdriver used in the attack. The state may have meant to refer to exhibit 5, because Parwani had asked the state to repeat its prior question in which it had directed his attention to exhibit 5.

what—what could have—what—what the screwdriver, the injury that it could have caused, where he said it could have punctured a lung or heart; the other thing the state has to show is that the . . . that if, under the circumstances in which the dangerous instrument was used, it was capable of producing serious physical injury or death. So that's why I let that part in.

"Now, this question is—is specifically what? What are you asking the doctor?

"[The Prosecutor]: Is—could—could an injury to that area cause death or serious physical injury or serious impairment to—

"The Court: Why isn't that relevant to his intent?

"[Defense Counsel]: Why is it relevant?

"The Court: Why isn't it relevant to his intent?

"[Defense Counsel]: It's not the relevan[ce]. It's the foundation. His expert opinion for a hypothetical has to be based on the evidence or testimony that's given and it's not—there's no foundation and, basically, my objection is on the foundation set for that conclusion.

"The Court: Yeah. I—if that's the objection, it's overruled. So, we can have the jury come back, marshal.

"(Whereupon the jury panel entered the courtroom.) . . .

"[The Prosecutor]: Dr. Parwani, could that—could an injury to that area, could that have caused death or serious impairment to the heart or the lung?

"[The Witness]: So, just so I understand the question and correct me if this is not what you're asking, but if a—could a screwdriver to the chest cause serious injury, harm including death. If that—is that the question?

"[The Prosecutor]: Yes.

"[Defense Counsel]: Your Honor, I'm [going to]—that's—to where that particular spot was it may happen.

"The Court: That's my understanding is that's the question.

"[Defense Counsel]: He—he's testifying—

"[The Prosecutor]: To his right breast also.

"The Court: Yeah. That's my question. That's what my understanding is that's what the question is.

"[Defense Counsel]: As long as the doctor understands.

"[The Witness]: Yeah. That's a—a screwdriver to the right breast, could it cause serious injury, harm, or death, and it—it could." (Footnotes added.)

On cross-examination, the defendant did not ask Parwani to consider what, if any, effect an attacker's intoxication might have on the possible injuries that could result from being stabbed in the chest with a screwdriver.

A

The defendant first argues that, when the court permitted Parwani to testify that being stabbed with a screwdriver could place someone at risk of serious injury or death, it improperly allowed him to opine on an ultimate issue reserved for the jury. We decline to review the merits of this claim because the defendant failed to preserve it at trial.

"This court is not bound to consider claims of law not made at the trial. . . . Our rules of practice make it clear that when an objection to evidence is made, a succinct statement of the grounds forming the basis for the objection must be made in such form as counsel

desires it to be preserved and included in the record. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of his objection, any appeal will be limited to the ground asserted. . . . These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Citations omitted; internal quotation marks omitted.) *State* v. *Bush*, 249 Conn. 423, 427–28, 735 A.2d 778 (1999); see also Practice Book § 60-5.

It is clear, from our review of the record, that at no point did the defendant object to Parwani's testimony on the ground that it expressed an opinion as to an ultimate issue. Rather, he objected that the hypothetical posed to Parwani lacked a sufficient evidentiary foundation. These objections entail different legal inquiries. When a party objects on the ground that an expert is improperly testifying as to an ultimate issue, the court must assess whether the expert is being asked to invade the province of the jury by opining on a question inseparable from the essence of the matter to be decided by the fact finder. See, e.g., *State* v. *Beavers*, 290 Conn. 386, 414–15, 963 A.2d 956 (2009). By contrast, when a party objects on the ground that a hypothetical question posed to an expert lacks a sufficient foundation, the court must assess the extent to which the facts assumed in that question have a basis in the record. See, e.g., *Wallace* v. *Saint Francis Hospital & Medical Center*, 44 Conn. App. 257, 262, 688 A.2d 352 (1997). One objection, in other words, is meant to preserve the integrity

of the jury's fact-finding function; the other is designed to ensure the probative value of the expert's testimony. Raising the latter is not equivalent to raising the former. See, e.g., *State* v. *Jose G.*, 290 Conn. 331, 343–45, 963 A.2d 42 (2009) (declining to review evidentiary objection raised for first time on appeal when claim raised on appeal required inquiry distinct from that required by objections raised at trial).[9] As such, we decline to review the defendant's unpreserved claim.

B

The defendant also argues that the hypothetical question the state posed to Parwani—which asked him to opine on the extent of injuries that could result from a person more than six feet tall and weighing more than 200 pounds thrusting a screwdriver into another person's chest—was improper because it omitted the allegedly "material fact" that the hypothetical assailant was intoxicated at the time of the attack. He claims that the court thus erred in permitting Parwani to opine in response to that question. We disagree.

As a threshold matter, the defendant did not expressly raise this objection at trial. Though the state does not argue that the defendant failed to preserve this claim, a review of the record discloses that defense counsel objected to the state's hypothetical question only on the ground that it lacked a sufficient foundation in the evidence before the court. Specifically, defense

[9] In his reply brief, the defendant acknowledges that his trial counsel "stumble[d]" by "struggl[ing] and shift[ing] ground as to the nature of his objection," but argues that, nonetheless, the state was "clearly aware" that it was asking Parwani for his opinion on an ultimate issue and, thus, should have itself requested that the court make findings on whether the jury required an expert's assistance in deciding that issue. This argument lacks merit, because it is the responsibility of the appellant—not the appellee—to provide an adequate record for review. Practice Book § 61-10 (a); see also *State* v. *Feliciano*, 74 Conn. App. 391, 402, 812 A.2d 141 (2002), cert. denied, 262 Conn. 952, 817 A.2d 110 (2003).

counsel stated: "I'm [going to] object, foundation. It's a hypothetical. And there's—there's no evidence to—to meet that hypothetical"; and "[Parwani's] expert opinion for a hypothetical has to be based on the evidence or testimony that's given and it's not—there's no foundation . . . ." By contrast, a claim that a hypothetical question improperly omitted a material fact does not question the adequacy of the evidentiary basis on which the hypothetical rests but, rather, asks the court to consider whether the hypothetical has properly and fairly marshaled and presented that evidence. See *State* v. *David N.J.*, 301 Conn. 122, 133, 19 A.3d 646 (2011); see also Conn. Code Evid. § 7-4 (c). As such, the defendant's claim has not been properly preserved for review.

Even if the defendant had properly preserved his claim, however, we do not consider it to be meritorious. See, e.g., *Bodak* v. *Masotti*, 14 Conn. App. 347, 350, 540 A.2d 719 (1988) (determining that plaintiff's claim was not preserved but also rejecting it on its merits). "An expert may give an opinion in response to a hypothetical question provided that the hypothetical question (1) presents the facts in such a manner that they bear a true and fair relationship to each other and to the evidence in the case, (2) is not worded so as to mislead or confuse the jury, and (3) is not so lacking in the essential facts as to be without value in the decision of the case. A hypothetical question need not contain all of the facts in evidence." (Internal quotation marks omitted.) *State* v. *David N.J.*, supra, 301 Conn. 133. "The determination of the admissibility of a hypothetical question, at least except in extreme cases, is not to be made by the application of any rule of thumb. . . . Rather, it calls for the exercise of a sound discretion . . . ." (Citation omitted.) *Floyd* v. *Fruit Industries, Inc.*, 144 Conn. 659, 666, 136 A.2d 918 (1957).

The court did not abuse its discretion in permitting Parwani to testify in response to a hypothetical question

that omitted any mention of intoxication. Parwani's testimony addressed the question of whether a person of the same height and weight as the defendant could have caused another person serious physical injury by stabbing him in the chest with the screwdriver. This testimony was relevant to whether the screwdriver used in the assault constituted a "dangerous instrument" for purposes of the assault charges. See General Statutes § 53a-3 (7) (defining "dangerous instrument" as "any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury"). To be sure, Parwani's opinion that a hypothetical attacker, of similar build to the defendant, would be capable of causing serious physical injury to another person also was circumstantial evidence from which the jury could have drawn a conclusion as to the defendant's intent at the time of the crime. See, e.g., *State* v. *Ortiz*, 312 Conn. 551, 565, 93 A.3d 1128 (2014) (jury may, though is not required, to infer that defendant intended natural consequences of his voluntary conduct). It is unclear, however, how the fact of intoxication would have altered Parwani's conclusion because Parwani was not actually asked to opine, and did not opine, on the defendant's mental state—the subject matter to which the defendant argued that his alleged intoxication was relevant.[10] Moreover, to the extent that the defendant's alleged intoxication *was* material to Parwani's opinion that a person of the defendant's height and weight could cause serious physical injury

[10] Indeed, it would have been improper for Parwani to testify as to whether the defendant had the requisite intent to commit the crimes with which he was charged. See *State* v. *Delgado*, 178 Conn. 448, 449, 423 A.2d 106 (1979) ("intent is a question of fact for the determination of the trier of fact based upon the competent evidence presented, and a witness cannot testify as to the uncommunicated intent of another person where the trier of fact is as well qualified as the witness to form an opinion on the subject"); see also General Statutes § 54-86i.

to another person by stabbing him in the chest with the screwdriver, the defendant could have raised it on cross-examination if he so chose, but he did not. See E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 7.8.1, p. 467 ("[i]t is the function of cross-examination to bring out the probable effect of additional facts on a hypothetical question"), citing *Pischitto* v. *Waldron*, 147 Conn. 171, 177, 158 A.2d 168 (1960). Especially because a hypothetical question need not contain all the facts in evidence, the court reasonably could have concluded that the state's question provided a fair summary of the relevant evidence and that Parwani's answer would assist the jury in determining whether the defendant could have caused the victim serious physical injury by stabbing him in the chest with the screwdriver. Therefore, the defendant's claim fails.[11]

III

Finally, the defendant claims that there was insufficient evidence to support his convictions. Specifically, he argues that there was insufficient evidence that (1) he intended to cause the victim serious physical injury and (2) the screwdriver qualified as a "dangerous instrument." We disagree.

"It is well settled that a defendant who asserts an insufficiency of the evidence claim bears an arduous burden. . . . In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established

[11] As with the defendant's challenge to the denial of his motion to suppress, we do not address the question of whether the defendant was harmed by the admission of Parwani's testimony in response to the hypothetical because we conclude that its admission was not erroneous.

guilt beyond a reasonable doubt. . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"In evaluating evidence, the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence [that] it deems to be reasonable and logical. . . .

"Finally, on appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Citations omitted; internal quotation marks omitted.) *State* v. *VanDeusen*, 160 Conn. App. 815, 822–23, 126 A.3d 604, cert. denied, 320 Conn. 903, 127 A.3d 187 (2015).

A

The defendant first claims that there was insufficient evidence that he intended to cause the victim serious physical injury, as required to support his conviction

of attempt to commit assault in the first degree. We are not persuaded.

In order to convict a defendant of attempt to commit assault in the first degree, in violation of §§ 53a-49 (a) (2) and 53a-59 (a) (1), the state must prove that the defendant engaged in intentional conduct constituting a substantial step toward intentionally causing the victim serious physical injury by means of a dangerous instrument. See *State* v. *Andrews*, 114 Conn. App. 738, 744, 971 A.2d 63, cert. denied, 293 Conn. 901, 975 A.2d 1277 (2009). " 'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health, or serious loss or impairment of the function of any bodily organ . . . ." General Statutes § 53a-3 (4); see also *State* v. *Liam M.*, 176 Conn. App. 807, 814, 172 A.3d 243, cert. denied, 327 Conn. 978, 174 A.3d 196 (2017). [Section] 53a-3 (11) provides in relevant part that "[a] person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ."

"Intent may be, and usually is, inferred from [a] defendant's verbal or physical conduct [as well as] the surrounding circumstances. . . . Nonetheless [t]here is no distinction between circumstantial or direct evidence so far as probative force is concerned. . . . Moreover, [i]t is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . Intent is a question of fact, the determination of which should stand unless the conclusion drawn by the trier is an unreasonable one." (Internal quotation marks omitted.) *State* v. *Santiago*, 206 Conn. App. 390, 402, 260 A.3d 585, cert. denied, 339 Conn. 918, 262 A.3d 138 (2021).

"[T]he [jury is] not bound to accept as true the defendant's claim of lack of intent or his explanation of why he lacked intent." (Internal quotation marks omitted.) *State* v. *Delgado*, 247 Conn. 616, 623–24, 725 A.2d 306 (1999). "Intent may be gleaned from circumstantial evidence such as the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading up to and immediately following the incident. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Internal quotation marks omitted.) *State* v. *Salaman*, 97 Conn. App. 670, 677, 905 A.2d 739, cert. denied, 280 Conn. 942, 912 A.2d 478 (2006).

On the basis of the evidence presented, the jury could reasonably could have found that the defendant intended to cause the victim serious physical injury when he attacked him with a screwdriver. The victim testified that the defendant trapped him in the car, "came in at [him]" with the screwdriver, and "steadily tr[ied] to push the screwdriver in [him]" while also striking him in the face. He explained that, although his wounds were minor, he only avoided more serious injuries because he partially shielded himself against the defendant and because the defendant was unable, given his size, to fit his whole body into the car. The victim also heard bystanders "hollering that he's killing [the victim]." Folkes and the victim both testified that, after the defendant ceased his attack, he stated: "I got him." Parwani testified that the victim was stabbed over the area where his lungs and heart were located, which could have killed him or caused a serious injury such as a punctured organ.[12] Viewed cumulatively, this evidence—in particular the weapon used, the area in which

[12] The defendant argues that, because, in his view, Parwani's testimony on this point was erroneously admitted, "it should not enter the calculus when assessing whether the state produced sufficient evidence as to [the defendant's] intent." As discussed previously, we reject the defendant's claim that the trial court improperly admitted Parwani's testimony that the

the defendant attempted to stab the victim, his aggressive demeanor during the attack, and his statement afterward—provides a sufficient basis from which the jury reasonably could have inferred that the defendant acted with the conscious objective of causing the victim serious physical injury.

The defendant's arguments to the contrary are not convincing. He highlights the fact that, at certain points in his testimony, the victim characterized the defendant's screwdriver thrusts as " 'poking' and 'pushing,' rather than a more violent action like swinging or thrusting," and argues that this word choice suggests that the defendant only intended to cause the victim minor injury. The defendant, however, ignores the fact that, elsewhere in his testimony, the victim also described the defendant's actions as "stabbing." Likewise, the defendant claims that the evidence establishes that he "cease[d] his attack . . . of his own volition" before seriously injuring the victim and claims that, given his own size and the victim's vulnerable position, he "could have easily" caused the victim serious injury "if he was intent on" doing so. Folkes, however, testified that the defendant only stopped attacking the victim and backed away from the car once Folkes jumped out of the car and ran around toward the defendant and that the defendant did not walk away until Folkes knocked the screwdriver out of his hand and a bystander swung a baseball bat at him. The jury could reasonably have inferred from this testimony that the defendant was, in fact, intent on causing more serious injury to the victim

screwdriver was capable of causing serious physical injury. Even if we agreed with the defendant that Parwani's testimony was improperly admitted, however, we would still consider it when evaluating the defendant's sufficiency of the evidence claim. See, e.g., *State* v. *Morelli*, 293 Conn. 147, 153, 976 A.2d 678 (2009) ("even improperly admitted evidence may be considered in [evidentiary sufficiency] analysis, since [c]laims of evidentiary sufficiency in criminal cases are always addressed independently of claims of evidentiary error" (internal quotation marks omitted)).

than he ultimately inflicted and only ceased his attack because Folkes and others intervened.[13] Although the defendant asserts that the fact that he "walked" away after the attack and challenged bystanders to fight him indicates that he was "calm," "unafraid of confrontation," and could not have been "easily deterred by the likes of [Folkes]," the jury was not required to draw that inference, especially because there is no indication that the defendant attempted to resume his attack after Folkes and the bystander confronted him. Nor was the jury required to infer, as the defendant insists, that when he shouted, "I got him," he meant "that he was satisfied with a superficial laceration." "I got him" could just as reasonably be interpreted to indicate that the defendant had intended to hurt the victim badly and believed that he had succeeded in doing so.[14]

Ultimately, the defendant's arguments boil down to a request that we view the evidence in the light most favorable to him and draw inferences consistent only with his innocence, which we may not do on sufficiency review. The evidence was sufficient to support the jury's verdict as to the defendant's intent to cause serious physical injury.

B

The defendant also claims that the evidence was insufficient to establish that the screwdriver was a "dangerous instrument," as required to support his convictions of attempted assault in the first degree and assault in the second degree. We disagree.

[13] Recognizing that Folkes' testimony undercuts his argument, the defendant asks us to find that Folkes lacked credibility. We cannot and will not do so. See footnote 5 of this opinion.

[14] The defendant also argues that his choice of a screwdriver as a weapon, rather than "a knife or a gun or similarly dangerous weapon," indicates that he did not intend to cause serious physical injury. But given that there was sufficient evidence of the screwdriver's capacity to inflict serious physical injury; see part III B of this opinion; the jury reasonably could have determined that the defendant's choice of this weapon indicated an intent to cause such an injury to the victim.

"A dangerous instrument means any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury. . . . [A] dangerous instrument may be an ordinary object not designed to cause death or serious physical injury. . . . [E]ach case must be individually examined to determine whether, under the circumstances in which the object is used or threatened to be used, it has the potential for causing serious physical injury." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Barnett*, 53 Conn. App. 581, 590, 734 A.2d 991, cert. denied, 250 Conn. 919, 738 A.2d 659 (1999). "[I]t is not necessary, under . . . the definition of a dangerous instrument, that any physical injury actually have been inflicted. It [is] only necessary that the [instrument] have been under the circumstances in which it was used . . . capable of causing death or serious physical injury." (Internal quotation marks omitted.) *State* v. *Jones*, 173 Conn. 91, 95, 376 A.2d 1077 (1977).

The defendant argues that, because assessing whether an object qualifies as a dangerous instrument requires a case-by-case inquiry into the "circumstances in which the object is used or threatened to be used," it follows that the question of whether a screwdriver is a dangerous instrument "depends on whether the person using it in a given circumstance intended to cause serious physical injury or death to another." As such, he claims, if there is insufficient evidence of his intent to cause serious physical injury, there must therefore be insufficient evidence that the screwdriver was a dangerous instrument. We are not persuaded.

As an initial matter, we have already concluded in part III A of this opinion that there was sufficient evidence of the defendant's intent to cause serious physical

injury or death. Moreover, even had we not so concluded, this court rejected an identical argument to the one made here in *State* v. *Schultz*, 100 Conn. App. 709, 722–23, 921 A.2d 595, cert. denied, 282 Conn. 926, 926 A.2d 668 (2007). In *Schultz*, the defendant—who had been convicted of assault in the first degree in violation of § 53a-59 (a) (1) for smashing a cocktail glass into the victim's face—argued that the trial court had improperly denied his request for an instruction on a lesser included offense, because the evidence regarding whether the glass qualified as a "dangerous instrument" was sufficiently in dispute. Id., 719–22. In particular, the defendant argued that the glass' status was sufficiently disputed because he did not intend to inflict serious injury when he struck the victim with it. Id., 722. This court emphasized, however, that "[a]ny dispute concerning the defendant's intent to cause serious physical injury . . . is not relevant to our determination of whether it was sufficiently in dispute that the glass was a dangerous instrument . . . ." Id., 723. As such, our inquiry into whether there was sufficient evidence that the screwdriver constituted a dangerous instrument does not depend on whether there was sufficient evidence of the defendant's intent to cause serious physical injury or death.

On the basis of our review of the record in this case, we conclude that there was sufficient evidence in the record for the jury to find that the screwdriver used by the defendant constituted a dangerous instrument. Parwani testified that a screwdriver such as the one used in the assault could, when thrust into someone's chest, puncture a lung or the heart, possibly killing that person. Such an injury clearly meets the definition of "serious physical injury" under § 53a-3 (4), namely: "physical injury which creates a *substantial risk of death*, or which causes serious disfigurement, *serious impairment of health*, or serious *loss or impairment*

of the function of any bodily organ . . . ." (Emphasis added.) As such, even though the victim suffered only superficial injuries, the jury reasonably could have found that, under the circumstances in which the defendant used the screwdriver—thrusting it at the victim's chest—the screwdriver was capable of causing death or serious physical injury. Accordingly, the defendant's claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.

DASHAWN REVELS *v.* COMMISSIONER OF CORRECTION
(AC 46727)

Alvord, Cradle and Westbrook, Js.

Syllabus

The petitioner appealed, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claimed that the habeas court improperly concluded that his right to the effective assistance of counsel was not violated by his trial counsel. *Held*:

The habeas court properly determined that the petitioner failed to establish deficient performance by his trial counsel in conducting cross-examinations of certain witnesses, as his trial counsel's cross-examinations did not fall below an objective standard of reasonableness considering all of the circumstances.

The habeas court properly determined that the petitioner failed to establish that his trial counsel rendered deficient performance in deciding not to introduce certain cell phone records, as that decision reflected sound trial strategy.

The habeas court properly determined that the petitioner's trial counsel was not ineffective in failing to consult with or present an expert on coerced and false confessions, the petitioner having failed to establish that he was prejudiced as a result of his trial counsel's allegedly deficient performance.

The habeas court properly determined that trial counsel did not render deficient performance in failing to consult with or present the testimony of an expert on crime scene reconstruction.

Argued September 4—officially released December 10, 2024

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 denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Deren Manasevit, assigned counsel, for the appellant (petitioner).

Olivia M. Hally, deputy assistant state's attorney, with whom, on the brief, were *Paul J. Narducci*, state's attorney, and *Angela R. Macchiarulo*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. In this certified appeal, the petitioner, Dashawn Revels, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly concluded that his right to the effective assistance of counsel was not violated when his trial counsel (1) conducted inadequate cross-examinations, (2) failed to introduce into evidence the petitioner's cell phone records, and (3) failed to consult or present experts on false confessions and crime scene reconstruction. We affirm the judgment of the habeas court.

On the basis of the evidence presented at the petitioner's criminal trial, the jury reasonably could have found the following facts, as set forth by the Supreme Court in the petitioner's direct appeal. "On the night of March 31, 2009, sometime shortly before 11 p.m., the victim, Bryan Davila, was walking on Crystal Avenue, near the

Thames River Apartments, a three building complex in New London (apartment complex). A group of approximately eight to nine men [(the group)], including the [petitioner], were walking closely behind him. The victim crossed over from Crystal Avenue to State Pier Road. Most of the men in the group continued walking toward a nearby footbridge to a nearby housing project. Two men in the group, however, one of whom was the [petitioner], remained near the victim. The [petitioner] then ran toward the victim, who was on the sidewalk on State Pier Road in front of a building housing an electrical supply company. When the victim attempted to run, the [petitioner] fired numerous shots at the victim, who fell to the ground. The [petitioner] then fled the scene on foot.

"Immediately after he was shot, the victim called 911. He was unable to communicate with the dispatcher, so she triangulated his location to the closest cell phone tower. She then notified the New London Police Department of the call and the likely location of the victim. When police reported to the area, they found the victim lying face up on the sidewalk, breathing, but unable to communicate, with a nine millimeter semiautomatic pistol near his right hand and his cell phone on the ground nearby, with the call to the 911 dispatcher still connected. After securing the area, some officers remained to assist emergency medical services as they provided treatment to the victim, while others were sent to canvass the neighborhood. The victim was subsequently taken by ambulance to the hospital, where he was pronounced dead at 11:37 p.m. The autopsy later revealed that the victim bled to death from gunshot wounds, one in the abdomen, another in the left buttock, and a grazing wound near the left shoulder blade. Two .22 caliber bullets were recovered from the victim's body. Eight spent .22 caliber shell casings were discovered at the scene. A single, nine millimeter cartridge

case was removed from the chamber of the nine millimeter pistol.

"While canvassing the area of the apartment complex, Officer Justin Clachrie was approached by two women, Fidelia Carrillo and her younger sister. Because Carrillo spoke only Spanish, her younger sister translated for her. Carrillo explained to Clachrie that she had seen the shooting from her apartment windows on the fifth floor of 40-46 Crystal Avenue, a building in the apartment complex. Although the building was located approximately 265 feet away from where the victim's body was found, Carrillo had been able to see that the shooter was a black male with braided hair, wearing a green camouflage jacket, a red baseball cap, dark pants and dark tennis shoes. Shortly after Clachrie broadcast the description of the suspected shooter over the radio, he received news that other officers had located a suspect matching that description. He then asked Carrillo if she and her sister would accompany him to view the suspect, which Carrillo agreed to do.

"Clachrie drove Carrillo and her sister to Home Street in New London, where officers had apprehended the [petitioner]. When Clachrie pulled up at approximately 11:40 p.m., the [petitioner] was standing in the middle of the road, handcuffed and surrounded by uniformed police officers. Clachrie directed the spotlight on his cruiser toward the suspect, at which point Carrillo, with no prompting from Clachrie, exclaimed in Spanish, 'That's him!' The [petitioner] was wearing a camouflage jacket, a red cap, and dark pants.

"The police had apprehended and detained a second suspect, Eric Caple, in the same general vicinity as the [petitioner]. After she had identified the [petitioner], they brought Caple forward to show him to Carrillo. Although Carrillo identified Caple as being present at

the murder scene, she hesitated in making the identification and did not evince the same level of 'excitement' that she had displayed when identifying the [petitioner].

"The [petitioner] was taken to the New London Police Department, where his hands and clothes were tested for gunshot residue,[1] and he was interviewed twice by Detective Richard Curcuro. During the first interview, after he was advised of his rights, the [petitioner] denied being in the area of the shooting. When Curcuro interviewed the [petitioner] for a second time, however, the [petitioner] admitted to being present at the crime scene after being shown still photographs of him taken from video surveillance footage from cameras at one of the buildings in the apartment complex. The [petitioner] admitted that outside the apartment complex, his group had a confrontation with a Hispanic man. The Hispanic male then pulled out a gun and fired shots at the [petitioner's] group. Finally, the [petitioner] told Curcuro that he had fired back at the victim, and then had discarded the gun by throwing it down an embankment near the footbridge as he ran away.[2]

[1] "The results of the gunshot residue tests were inconclusive. They revealed the presence of lead and antimony particles on the victim's palms and the presence of lead on the [petitioner's] left palm and the back of his right hand. A single lead particle was discovered on the right cuff of the [petitioner's] sweatshirt, and no lead particles were discovered on his jacket. On the basis of these results, the state's forensic expert testified that he could not conclude whether either the [petitioner] or the victim had fired a gun on the night of the shooting." *State* v. *Revels*, 313 Conn. 762, 768 n.3, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

[2] "The interviews that Curcuro conducted of the [petitioner] were recorded, and the transcript of the recording indicates that rather than stating, as Curcuro testified, 'I shot back,' the [petitioner] stated that after the victim fired on the [petitioner's] group, '*we* start shooting back.' (Emphasis added.) The state claimed at trial that the recording from which the transcript was taken was garbled, and that the transcriber incorrectly heard the [petitioner] to say 'we' shot back, instead of 'I' shot back. The audio recording of the interviews was played to the jury during trial." *State* v. *Revels*, 313 Conn. 762, 768 n.4, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

"In a substitute information, the [petitioner] was charged with murder in violation of [General Statutes] § 53a-54a. Following his conviction, the [petitioner's] subsequent motions for a new trial and a judgment of acquittal were denied." (Footnotes in original.) *State* v. *Revels*, 313 Conn. 762, 766–69, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015). The Supreme Court affirmed the judgment of conviction on direct appeal. Id., 785.

On September 30, 2020, the petitioner filed a second amended petition for a writ of habeas corpus, claiming in relevant part that his trial counsel, Attorneys Bruce Sturman and Jennifer Baldwin, provided ineffective assistance during his criminal trial.[3] The petitioner alleged that Sturman had been ineffective because he "fail[ed] to consult with and present the testimony of experts on eyewitness identification, crime scene reconstruction and coerced confessions," failed to "adequately cross-examine two of the state's witnesses," and "failed to introduce certain evidence," including the petitioner's cell phone records.

The habeas court, *Bhatt*, *J.*, conducted a trial on October 19, 2022, and January 11 and May 26, 2023. The petitioner presented the testimony of several witnesses, including Detective Richard Curcuro, Attorney Brian Carlow, and experts Brian Cutler and Peter Valentin. The petitioner was unable to call Sturman as a witness during the habeas trial, but did present the testimony of Baldwin, who had acted as second chair during the petitioner's criminal trial.[4] The petitioner provided and the court admitted several exhibits, including Carrillo's

[3] Although the petitioner alleged claims of ineffective assistance of counsel with respect to both Sturman and Baldwin, the petitioner did not appeal the court's rejection of his claims with respect to Baldwin.

[4] Baldwin represented the petitioner at the arraignment. The case was then transferred to part A of the Superior Court in New London. She was not involved in the case again until jury selection.

statement to the police, transcripts from the underlying criminal proceeding, surveillance footage, the petitioner's cell phone records, a dashcam video, and a photo replicating what Carrillo could have observed from her apartment the night of the shooting.

On May 31, 2023, the court issued a memorandum of decision denying the petition. As to the petitioner's claim that counsel was deficient in failing to consult with and present certain expert testimony, the habeas court determined that (1) Sturman was not deficient in failing to hire a crime scene reconstruction expert and that the petitioner did not prove prejudice, (2) Sturman's failure to obtain an expert on coerced confessions did not prejudice the petitioner, and (3) Sturman was not deficient in failing to hire an eyewitness identification expert and that the petitioner did not prove prejudice. The habeas court also rejected the petitioner's claims that counsel did not adequately cross-examine Curcuro and Carrillo because the petitioner failed to prove that Sturman acted deficiently or prejudiced the petitioner in the cross-examination of both witnesses. Lastly, the court rejected the petitioner's claim regarding Sturman's failure to introduce records of the petitioner's cell phone usage the night of the shooting, concluding that Sturman did not render deficient performance and that the petitioner did not prove prejudice. The petitioner thereafter filed a petition for certification to appeal from the habeas court's denial of his writ of habeas corpus, which the habeas court granted. This appeal followed. Additional facts will be set forth as necessary.

We begin by setting forth the relevant standard of review and decisional law that guide our analysis of the petitioner's claims. "The standard of review and law governing ineffective assistance of counsel claims is well settled. The habeas court is afforded broad discretion in making its factual findings, and those findings

will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

"A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington*, [466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied. . . . Consequently, [i]t is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Internal quotation marks omitted.) *Raynor* v. *Commissioner of Correction*, 222 Conn. App. 584, 600–601, 306 A.3d 25 (2023), cert. denied, 348 Conn. 944, 307 A.3d 910 (2024).

"In order for a petitioner to prevail on a claim of ineffective assistance on the basis of deficient performance, he must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms. . . . In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. . . .

"[J]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance;

that is, the [*petitioner*] *must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.* . . . Indeed, our Supreme Court has recognized that [t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Emphasis in original; internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, 220 Conn. App. 285, 305–306, 298 A.3d 636, cert. denied, 348 Conn. 915, 303 A.3d 603 (2023).

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. . . . At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 832, 234 A.3d 78 (2020), aff'd, 341 Conn. 279, 267 A.3d 120 (2021).

I

We begin with the petitioner's claim that the habeas court improperly determined that Sturman was not ineffective in his cross-examination of two witnesses. Specifically, the petitioner asserts that Sturman's cross-examination of Carrillo, an eyewitness, and Curcuro, a detective who interviewed the petitioner, were deficient. We disagree.

The following legal principles pertaining to the deficient performance component of the *Strickland* test

are relevant to our resolution of these claims. "As this court has explained, [o]nce an attorney makes an informed, strategic decision regarding how to cross-examine a witness, that decision is virtually unchallengeable." (Internal quotation marks omitted.) *Mercer* v. *Commissioner of Correction*, 222 Conn. App. 713, 746, 306 A.3d 1073 (2023), cert. denied, 348 Conn. 953, 309 A.3d 303 (2024). "[A]n attorney's line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel's trial strategy. . . . The fact that counsel arguably could have inquired more deeply into certain areas, or failed to inquire at all into areas of claimed importance, falls short of establishing deficient performance." (Internal quotation marks omitted.) *Crenshaw* v. *Commissioner of Correction*, 215 Conn. App. 207, 228–29, 281 A.3d 546, cert. denied, 345 Conn. 966, 285 A.3d 389 (2022); see also *Ricardo R.* v. *Commissioner of Correction*, 185 Conn. App. 787, 802, 198 A.3d 630 (2018) ("[a]lthough the petitioner, with the benefit of hindsight, may now prefer that trial counsel had undermined [the witness'] testimony . . . he fails to sufficiently demonstrate how the line of questioning [trial counsel] actually pursued was not part of a sound trial strategy, or how it fell outside the range of competence displayed by lawyers with ordinary training and skill in the criminal law"), cert. denied, 330 Conn. 959, 199 A.3d 560 (2019).

A

First, the petitioner argues that Sturman's cross-examination of Carrillo was deficient because he failed to (1) highlight discrepancies between Carrillo's statement to the police and her testimony at the criminal trial and (2) elicit testimony that would demonstrate the fallibility and unreliability of her eyewitness identification of the petitioner. We disagree.

The following additional procedural history is relevant to the petitioner's claim. During a suppression

hearing, Carrillo was asked to make an identification of the shooter, and she identified the legal intern for the public defender's office who was sitting at counsel table. Subsequently, during the petitioner's criminal trial, she made an in-court identification of the petitioner as the shooter. On cross-examination, however, she acknowledged that she had misidentified the shooter during the suppression hearing. In addition, she conceded that she only saw the shooter's clothes on the night of the shooting. She agreed with Sturman that she switched to different windows as the incident unfolded, that the distance between her apartment windows and the spot on the pavement where the victim fell was a long distance, and that it was nighttime when she observed the shooting. Sturman emphasized these points during his closing argument. Sturman, however, did not question Carillo about discrepancies between her criminal trial direct testimony and her statement to the police.[5]

At the petitioner's habeas trial, Baldwin recounted that she and Sturman "talked about Miss Carrillo a lot." Specific points they wanted to elicit in Carrillo's cross-examination included: her distance from the incident, the lack of lighting at the time of the incident, and the impact that running between windows would have had on her ability to observe. It was their plan to further emphasize that Carrillo identified the clothing worn by the shooter and did not identify the shooter.

The petitioner's counsel presented an eyewitness identification expert during the habeas trial.[6] The

[5] Inconsistencies between her statement to the police and her testimony at trial included whether she saw the following: a gun during the shooting, a man biking circles around the shooter, and the shooter pull something from his waistband with both hands. She also gave inconsistent statements regarding the order in which she looked out her windows in her apartment. Her statement to the police was not introduced as an exhibit at the criminal trial.

[6] According to Baldwin, Sturman looked into the possibility of obtaining an expert on eyewitness identification. However, Baldwin did not know the full reasons why an expert was not hired.

habeas court found that an expert would have testified that there was an increased risk of misidentification because: the identification was cross-racial in nature; there existed several opportunities for change blindness;[7] and the darkness and the distance of the apartment from the incident would have affected her memory of the shooter's characteristics. The habeas court, in addressing the two claims of deficiency in cross-examining Carrillo about the inconsistent statements and reliability of her identification, found that the petitioner's assertions were "flatly belied by the evidence presented at the criminal trial." The habeas court focused on the fact that Sturman had extensively cross-examined Carrillo about her ability to view the incident from her apartment windows and her misidentification of an intern as the shooter during the suppression hearing.

We agree with the habeas court that Sturman's cross-examination of Carrillo did not fall below an objective standard of reasonableness considering all of the circumstances. Sturman was faced with challenging compelling testimony from the sole eyewitness, and his cross-examination was robust and made the jury aware of problems with the identification. He called attention to the fallibility of the eyewitness identification during the cross-examination by highlighting the cross-racial nature of the identification, the distance between Carrillo's apartment window and the scene, the difficulty Carrillo experienced when trying to pinpoint features of other individuals on the scene, and the misidentification that took place during the suppression hearing. This court will not, in hindsight, second-guess Sturman's trial strategy; the petitioner's argument that Sturman could

[7] The expert testified that "[c]hange blindness refers to a phenomenon where we miss subtle and sometimes large changes in the environment because of, basically, inattention, and it has been demonstrated to affect person recognition when there is a disruption in the continuity of the view."

have inquired further into certain areas during cross-examination falls short of establishing deficient performance.[8] *Crenshaw* v. *Commissioner of Correction*, supra, 215 Conn. App. 228–29. Accordingly, the habeas court properly determined that the petitioner failed to establish deficient performance.

B

The petitioner next asserts that Sturman rendered ineffective assistance by inadequately cross-examining Curcuro. The petitioner claims that Sturman's cross-examination should have given the jury a "reason to disbelieve the petitioner's inculpatory statements" by introducing details about Curcuro's interview of the petitioner. Specifically, he emphasizes that Sturman "did not question Curcuro on whether tactics such as: repeatedly insisting the petitioner was lying, insisting they had proof he was lying, suggesting there were probably extenuating circumstances that excused shooting the victim, and assuring him he would be better off if he confessed and showed remorse, were tactics that Curcuro had been trained to use to wear a suspect down." We are not persuaded.

The habeas court judge found that Sturman cross-examined Curcuro and elicited the following. On the

[8] The habeas corpus petitioner faces a "significant hurdle" in "seeking to prove a claim of ineffective assistance of trial counsel [if] trial counsel . . . is unavailable to provide evidence of counsel's strategic decisions regarding, inter alia, the pursuit of defenses for her client and calling witnesses in support of those defenses." *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 823. "[I]t is not necessary for a reviewing court to resolve what strategic decisions defense counsel *actually* made, but it is required to presume that the challenged actions were within the wide range of reasonable professional conduct if, under the circumstances, it *might have been* sound trial strategy." (Emphasis in original; internal quotation marks omitted.) Id., 862. The petitioner "has the burden to overcome that presumption of reasonable professional conduct" and trial counsel's unavailability "[does] not relieve the petitioner of the substantial burden of demonstrating that [trial counsel's] representation was less than constitutionally competent." Id.; see id., 862 (death of trial counsel did not relieve petitioner's burden).

night of the incident, Curcuro first interviewed the petitioner at 1 a.m. The petitioner denied involvement with or knowledge of the shooting, and the interview was terminated around 2 a.m. Another interview was initiated about three hours later, and the petitioner confirmed that he was present at the scene of the homicide after being shown still photographs of him taken from video surveillance footage from one of the apartment complex's cameras. The petitioner continued denying that he was the shooter. However, about thirty minutes into the second interview, he confessed to shooting the victim.

Curcuro also described the following about the interview process. He repeatedly told the petitioner he was there to help him. Furthermore, Curcuro knew that a confession from the petitioner would be helpful to the police. The petitioner was dressed solely in an undershirt, underwear, and a hospital gown because the police had taken his clothing.

In its memorandum of decision, the habeas court concluded that "Sturman examined the areas now complained of and [the petitioner] cannot prove that had Attorney Sturman better or further inquired into these areas, there is a reasonable likelihood that the outcome of the trial would have been different."

We agree with the habeas court that Sturman's performance did not fall below an objective standard of reasonableness and thus was not deficient. As found by the habeas court, Sturman elicited testimony about the circumstances surrounding the petitioner's interview. Through Sturman's cross-examination of Curcuro, the jury was put on notice about the uncomfortable circumstances under which the petitioner was interviewed, the false insistence that he was helping the petitioner, and other facts that could reasonably demonstrate that Curcuro's interview tactics were coercive. We will not

second-guess trial counsel's strategy; evidence of counsel's failure to inquire into certain areas of claimed importance in as much detail as the petitioner claims in hindsight was necessary falls short of establishing deficient performance. See *Crenshaw* v. *Commissioner of Correction*, supra, 215 Conn. App. 228–29; see also *Antonio A.* v. *Commissioner of Correction*, 148 Conn. App. 825, 832, 87 A.3d 600 (noting " 'attorney's line of questioning on examination of a witness clearly is tactical in nature' "), cert. denied, 312 Conn. 901, 91 A.3d 907 (2014).

Accordingly, the petitioner's claim that Sturman rendered ineffective assistance of counsel by inadequately cross-examining the two witnesses fails.

II

Next, the petitioner claims that the habeas court improperly determined that Sturman was not ineffective in his failure to introduce cell phone records from the night of the shooting. The petitioner asserts that the habeas court's reliance on Baldwin's testimony is misplaced. The petitioner further argues that introducing the cell phone records and establishing that the petitioner was on his cell phone during the shooting was a critical element of the theory that he was not the shooter because his right and dominant hand was in a cast. We are not persuaded.

The following additional procedural history is relevant to our resolution of this claim. During the criminal trial, the petitioner testified that he was on the phone with his girlfriend at the time of the incident. He stated that he was holding his phone with his left hand.

By way of background, Fung Kwok, a state forensic expert, was called by the state to testify as to the gunshot residue (GSR) testing he performed on the petitioner and the victim. His report was admitted as evidence at the criminal trial. One of his analyses detected

lead from residue on the petitioner's left palm, the back of his right hand, and the right cuff of his sweatshirt. He testified that presence of a GSR element, such as lead, can indicate that someone fired a gun, because the particles are typically expelled from the gun onto the shooter's hand or clothing. However, with time, the GSR particles can fall from or be brushed off of the hand or clothing. On the basis of the GSR results here, Kwok could not confirm if the petitioner, or the victim, had fired a gun.

At the habeas trial, Baldwin provided relevant testimony as to the petitioner's claim that the cell phone records should have been introduced at trial. She and Sturman had reviewed the cell phone records to confirm whether the petitioner was on the phone at the time of the shooting. To her recollection, however, Sturman's primary focus was third-party culpability. She believed that drawing attention to the petitioner's hands "might not have been the best defense" because the state's theory, in reliance on the GSR evidence, was that the petitioner used his right hand to shoot the victim.

In its memorandum of decision, the habeas court stated that the cell phone records, and thus the fact that the petitioner was on the phone at the time of the incident, do not preclude the possibility that the petitioner shot the victim. As a result, the habeas court "[could not] conclude that counsel performed deficiently by failing to introduce the [cell] phone records or that there is a reasonable likelihood of a different outcome."

The following legal standards on the deficient performance prong are relevant to our resolution of this claim. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the

conduct from counsel's perspective at the time. . . . Indeed, our Supreme Court has recognized that [t]here are countless ways to provide effective assistance . . . ." (Internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, supra, 220 Conn. App. 305–306. This assessment applies when defense counsel decides not to raise certain issues or evidence during trial. See *Ramey* v. *Commissioner of Correction*, 150 Conn. App. 205, 214, 90 A.3d 344 (finding defense counsel's decision not to raise issue of petitioner's level of intoxication to jury, in order to avoid calling attention to petitioner's intoxication, " 'falls into the category of trial strategy or judgment calls that we consistently have declined to second guess' "), cert. denied, 314 Conn. 902, 99 A.3d 1168 (2014); *Peruccio* v. *Commissioner of Correction*, 107 Conn. App. 66, 84, 943 A.2d 1148 (holding defense counsel's decision to not introduce photographs of victim was matter of trial strategy), cert. denied, 287 Conn. 920, 951 A.2d 569 (2008).

We conclude that Sturman did not render deficient performance in deciding not to introduce the cell phone records because that decision reflected sound trial strategy. Baldwin explained to the best of her recollection that, in choosing not to focus on the phone call between the petitioner and his girlfriend, Sturman avoided calling attention to the petitioner's hands and thus avoided the state's further probing of the concerning GSR evidence. "Simply put, trial counsel made a reasonable strategic decision that the risk associated with presenting [certain] evidence . . . was not justified." *Clinton S.* v. *Commissioner of Correction*, 174 Conn. App. 821, 832, 167 A.3d 389, cert. denied, 327 Conn. 927, 171 A.3d 59 (2017); see *Watson* v. *Commissioner of Correction*, 111 Conn. App. 160, 171, 172, 958 A.2d 782 (counsel's decision to not introduce investigative report because it would "invite difficult questions" fell "within the category of strategic decisions that our

courts consistently refuse to second-guess"), cert. denied, 290 Conn. 901, 962 A.2d 128 (2008). Accordingly, the habeas court did not improperly determine that the petitioner failed to establish that Sturman's decision not to introduce the cell phone records was unreasonable.

III

We finally turn to the petitioner's claim that the habeas court improperly determined that Sturman was not ineffective in failing to consult or present experts during the criminal trial. Specifically, the petitioner claims that the assistance of experts on false confessions and crime scene reconstruction was necessary to his defense. We address each claim in turn.

A

First, the petitioner argues that the habeas court improperly concluded that he had failed to establish that he was prejudiced as a result of Sturman's allegedly deficient performance in failing to consult or present the testimony of an expert on false confessions.[9] We are not persuaded.

The following additional facts and procedural history are relevant to our discussion. At the criminal trial, Curcuro testified that his first task upon assignment to the investigation was to interview the petitioner, in an interview room, the night of the shooting. During the first interview, Curcuro asked the petitioner multiple times whether he was in the area of the shooting. The petitioner denied being there and, after one hour of questioning, terminated the interview at around 2 a.m.

[9] Because we conclude that the habeas court properly determined that the petitioner failed to establish prejudice, we need not address *Strickland*'s performance prong. See *Davis* v. *Commissioner of Correction*, 198 Conn. App. 345, 367–68, 233 A.3d 1106, cert. denied, 335 Conn. 948, 238 A.3d 18 (2020).

Curcuro then swabbed the petitioner for GSR and DNA testing. Curcuro also was able to obtain screenshots of the apartment building's surveillance footage, which showed the petitioner to be present at the time of the incident. Curcuro then initiated a second interview with the petitioner around 5 a.m. and showed the petitioner still photographs of him taken from video surveillance footage. About ten minutes into the second interview, the petitioner admitted to his presence in the group at the time of the shooting. He continued to deny any involvement in the shooting. However, several minutes later, he explained to Curcuro that "I was just . . . going through the projects, and some guy said something to one of my peoples. I don't know. So we paid him no mind, crossed the bridge, went to [Crystal]. Next thing you know, we're coming back, and he's just walking around. He's right there now. He pulls out a gun and starts shooting. We start shooting back. And then he just . . . then he just dropped. He opened fire first."[10]

As summarized by the habeas court, Curcuro acknowledged the following when cross-examined by Sturman. "[I]t would have been helpful to [the police if the petitioner] had confessed to the murder and, [that] during the course of the interrogation, [he] was suggesting a defense of extenuating circumstances to [the petitioner]. . . . [He] repeatedly told [the petitioner] that he was there to help [the petitioner]." During the interviews, the petitioner was wearing an undershirt, underwear, and a hospital gown because the police had taken the petitioner's clothing as evidence.

The petitioner testified at length during the criminal trial. He testified that he did not shoot the victim. He also described the interview conducted by Curcuro. The petitioner stated that he initially lied about being

[10] It bears repeating the content of footnote 2 of this opinion.

present during the shooting because he was scared, and he later refused to provide the names of the shooters because he was afraid of retaliation. He explained that he gave a false confession because he believed Curcuro would only settle for a confession from him and did not want to hear that someone else shot the victim. During the criminal trial closing arguments, Sturman addressed the petitioner's confession. "Sturman repeatedly noted [the petitioner's] numerous denials and provided reasons why he may have ultimately confessed. He argued that due to the weakness of the eyewitness identification, the police needed a confession and so went aggressively after [the petitioner] in their interrogations."

At the habeas trial, Curcuro testified about his interviews of the petitioner. Baldwin also testified about her conversations with Sturman and decisions that were made to minimize damage caused by the petitioner's confession. The habeas court found that "Baldwin and Sturman questioned why [the petitioner] gave a statement and explored how that impacted their position that the perpetrator was someone else. . . . [Baldwin was] unaware if Attorney Sturman conducted any research on false confessions. They did not consider consulting with an expert, and [she] could not provide a reason why."

During the habeas trial, Brian Cutler testified as an expert on coerced compliance and forced confessions. When retained to consult on false confessions, "he typically evaluates the record including any recording of an interrogation, information about the suspect that indicates personal risk factors for false confessions and informs counsel about the relevant research and finally offer[s] opinions about the interrogation tactics used and analyzes the record for evidence of contamination of the confession."

Cutler provided his analysis of the petitioner's interview. He "noted that [the petitioner] was a young adult at the time of the interrogation, which occurred late at night or in the early morning. [The petitioner] mentioned that he was fatigued at various times; that he was cold and uncomfortable. [Cutler] also noted certain features present in [the petitioner's] interrogation that would fall under the categories of tactics that could lead to a false confession such as theme development or building toward an explanation of justification, offering to help the suspect, direct positive confrontation or false evidence ploys, suggesting that the interrogator knows that happened, expectation of reciprocity of honesty, and the notion that time is limited to come clean. He characterized it as a powerful interrogation in the number and type of tactics used. Some tactics were problematic in that the investigators repeatedly said they were there to help and that confessing was in his best interest. This is the type of interrogation that could convince an innocent person that confessing was the best option for damage control. He did not see any evidence of mental illness or disability but opined that [the petitioner] was young at the time and that combined with any fatigue or discomfort would affect his ability to self-regulate." However, Cutler acknowledged that he had no way of knowing whether a particular confession was true.

In its memorandum of decision, the habeas court stated the following: "Assuming that Attorney Sturman did not consult such an expert and a false confession expert would have been permitted to testify, [the petitioner] must still prove that the failure to do so prejudiced him. This he has not done." The court determined that the evidence presented did not "demonstrate that [the petitioner's] confession was, in fact, false and would either have been suppressed or the expert's testimony so compelling when applied to the facts of this

case that the jury would have completely disregarded his statement that he—or we—shot the victim." Furthermore, the court recognized the influence that Carrillo's testimony had on the jury, as she identified the petitioner as the shooter.

On appeal, the petitioner asserts that this is a "textbook example" of a coerced confession where the only reasonable and available defense strategy involves a consultation with and/or presentation of an expert. The petitioner argues that consulting an expert would have (1) made Sturman aware of the issues he needed to focus on relating to false confessions and (2) given the jury a basis to believe that the petitioner, as a result of Curcuro's interviewing methods, could have falsely confessed. The petitioner contends that Sturman did little to elicit testimony from Curcuro or to present other evidence that would have persuaded a jury that the petitioner made a false confession.

The following legal principles are applicable. "An evaluation of the prejudice prong involves a consideration of whether there is a reasonable probability that, absent the errors, the [fact finder] would have had a reasonable doubt respecting guilt. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . We do not conduct this inquiry in a vacuum, rather, we must consider the totality of the evidence before the judge or jury. . . . Further, we are required to undertake an objective review of the nature and strength of the state's case. . . . As our Supreme Court [has explained], [s]ome errors will have had pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . . [A] court making the prejudice inquiry must ask

if the [petitioner] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. . . .

"In other words, [i]n assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . The likelihood of a different result must be substantial, not just conceivable. . . . Notably, the petitioner must meet this burden not by use of speculation but by demonstrable realities." (Internal quotation marks omitted.) *Hilton* v. *Commissioner of Correction*, 225 Conn. App. 309, 327–28, 315 A.3d 1135 (2024).

We agree with the habeas court and conclude that Sturman's performance did not prejudice the petitioner. At best, an expert could have provided insight to Sturman and/or the jury regarding false confessions. Yet, Sturman's cross-examination of Curcuro and his closing argument to the jury reflected that he was aware of the issues with the confession and conveyed them to the jury. Furthermore, expert testimony would not change the fact that the jury had for its consideration other evidence, including Carrillo's on scene identification and the GSR evidence. As a result, the petitioner has failed to demonstrate that there exists a reasonable probability that, but for Sturman's failure to consult or present an expert on coerced and false confessions, the outcome of the proceeding would have been different. See *Jones* v. *Commissioner of Correction*, 212 Conn. App. 117, 128–36, 274 A.3d 237, cert. denied, 343 Conn. 933, 276 A.3d 975 (2022).

B

Second, the petitioner argues that Sturman was deficient for failing to present an expert on crime scene reconstruction. We disagree.

The following additional procedural history is relevant to the resolution of this claim. In preparation for the criminal trial, Sturman hired an investigator to take photographs but ultimately determined that those images would not be helpful to the jury. He also submitted a motion to have the jury view the scene of the crime, allowing the jury to see the distance from which Carrillo witnessed the shooting, but that motion was denied.

During the criminal trial, a state trooper testified that the scene of the shooting was 265.49 feet from Carrillo's window. The jury also saw photographs and videos of the crime scene. Sturman, through the cross-examination of another state trooper, elicited that an extensive number of lights were deployed to illuminate the crime scene while the photographs and videos were captured. During closing argument, Sturman focused on the unreliability of Carrillo's testimony, pointing out that the identification emphatically was made at night from the fifth floor of the apartment building at about 265 feet from the scene.

During the habeas trial, the petitioner's counsel questioned Baldwin. Although Baldwin was not aware of whether Sturman consulted with a crime scene expert, she testified that both she and Sturman discussed Carrillo's inability to see the incident due to distance and darkness. In addition, a crime scene reconstruction expert, Peter Valentin, testified on behalf of the petitioner. Valentin took "photographs from Carrillo's apartment to replicate what she would have been able to observe . . . he used the options on the camera to make the photographs mimic what could be seen with the naked eye. The photograph that best matched the naked eye view was admitted as an exhibit."

In its memorandum of decision, the habeas court found that Sturman was not deficient for failing to hire

a crime scene reconstruction expert. "The evidence establishes that he attempted to take photographs; the jury was presented with several photographs of the scene; the distance from the apartment to the scene was known to the jury and he made a motion for jury view which was denied. Clearly, the ability of Carrillo to see the incident from her apartment was challenged by the defense."

On appeal, the petitioner contends that a proper recreation provided by an expert, such as the one created by Valentin, would have provided the jury with an accurate view of how far Carillo was from the scene and how the low lighting would have made it difficult to see people and their clothing. In turn, the petitioner asserts that "[a]ny reasonably competent attorney would have hired an expert to capture that vantage point rather than rely on his own investigator, not equipped as an expert, to recreate the scene."

The following legal principles are relevant to our resolution of this claim. "[T]here is no per se rule that requires a trial attorney to seek out an expert witness. However, this court noted that in some cases, the failure to use any expert can result in a determination that a criminal defendant was denied the effective assistance of counsel." (Internal quotation marks omitted.) *Kellman* v. *Commissioner of Correction*, 178 Conn. App. 63, 77, 174 A.3d 206 (2017). "[F]ailing to retain or utilize an expert witness is not deficient when part of a legitimate and reasonable defense strategy. . . . Our appellate courts repeatedly have rejected a petitioner's claim that his trial counsel rendered deficient performance by failing to call an expert witness at trial on the ground that trial counsel's decision was supported by a legitimate strategic reason." (Internal quotation marks omitted.) *Vega* v. *Commissioner of Correction*, 224 Conn. App. 652, 665, 312 A.3d 1142, cert. granted, 349 Conn. 914, 315 A.3d 300 (2024).

We agree with the habeas court that Sturman did not render deficient performance by failing to consult with or hire a crime scene reconstruction expert. At the habeas trial, the crime scene reconstructionist presented a photograph mimicking the conditions under which Carrillo was seeing the shooting—and this would have been his primary, if not sole, contribution to the criminal trial. Although the accuracy of the crime scene reconstructionist's photograph surpassed that of the photographs presented to the jury during the criminal trial, the jury had ample evidence at its disposal to evaluate Carrillo's ability to see the incident from her apartment. Thus, the petitioner has not shown that Sturman performed deficiently by not consulting with or hiring a crime scene reconstruction expert. Accordingly, the petitioner's claim cannot prevail under *Strickland*.

The judgment is affirmed.

In this opinion the other judges concurred.

ERICA LAFFERTY ET AL. *v.* ALEX EMRIC JONES ET AL.
(AC 46131)

WILLIAM SHERLACH *v.* ALEX JONES ET AL.
(AC 46132)

WILLIAM SHERLACH ET AL. *v.* ALEX EMRIC JONES ET AL.
(AC 46133)

Moll, Clark and Eveleigh, Js.

Syllabus

The defendants, J and his company, F Co., appealed from the judgments of the trial court rendered following jury verdicts for the plaintiffs in three underlying consolidated actions that arose out of the 2012 mass shooting

at the Sandy Hook Elementary School in Newtown. The court had defaulted the defendants as a sanction for their repeated, wilful failure to fully and fairly comply with the plaintiffs' discovery requests and for violating a protective order. The cases then proceeded to a hearing in damages, after which the plaintiffs were awarded compensatory damages, attorney's fees and costs and, pursuant to the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., punitive damages. On appeal, the defendants claimed, inter alia, that the court incorrectly concluded that the plaintiffs' allegations were sufficient to support a legally viable CUTPA claim. *Held*:

The trial court properly exercised its discretion in defaulting the defendants as a sanction for their violations of its discovery orders and a protective order.

The trial court's default order was a sanction that was proportional to the defendants' wilful noncompliance and misconduct in repeatedly failing to produce critical documents that the plaintiffs needed to prosecute their case and in making highly confidential information about the plaintiffs available on the Internet.

The plaintiffs had no responsibility, as the defendants claimed, to prove the cause of the harm they suffered, as the effect of the trial court's default order was to conclusively establish the defendants' liability, thereby leaving the plaintiffs with only the burden of establishing their damages.

The defendants' inadequately briefed claim that the trial court improperly limited the scope of J's testimony was deemed abandoned.

The trial court did not abuse its discretion in denying the defendants' motion for remittitur, as the evidence was sufficient to support the jury's damages award, which did not shock the sense of justice in light of testimony by all of the plaintiffs about the mental anguish and emotional harm they suffered as a result of death threats and harassment conveyed to them through social media, by mail and in person that stemmed from the defendants' lies that the Sandy Hook massacre was a hoax.

The conduct forming the basis of the plaintiffs' CUTPA claim, namely, the defendants' dissemination of lies about the school shooting, did not constitute the conduct of any trade or commerce within the meaning of CUTPA, as the underlying motivation of the defendants' speech was to generate profit through the sale of products to their audience, and the plaintiffs did not allege that they were harmed by the defendants' advertising, marketing or sale of those products; accordingly, the judgments were reversed as to the plaintiffs' CUTPA claim.

Argued February 8—officially released December 10, 2024

Procedural History

Action, in the first case, to recover damages for, inter alia, invasion of privacy, and for other relief, brought to the Superior Court in the judicial district of Fairfield, and action, in the second case, to recover damages for, inter alia, invasion of privacy, and for other relief, brought to the Superior Court in the judicial district of Fairfield, and action, in the third case, to recover damages for, inter alia, invasion of privacy, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the cases were consolidated and transferred to the judicial district of Waterbury, Complex Litigation Docket; thereafter, in the first case, Jennifer Hensel, executrix of the estate of Jeremy Richman, was substituted as a plaintiff and withdrew her claims against the named defendant et al.; subsequently, in the first case, Richard Coan, trustee of the bankruptcy estate of Erica L. Garbatini, was substituted as a plaintiff; thereafter, the court, *Bellis*, *J.*, defaulted the named defendant et al. in each case for violations of certain discovery orders and a protective order; subsequently, the court denied the motions by the named defendant et al. in each case to set aside the defaults; thereafter, the issue of damages was tried to the jury before *Bellis*, *J.*; subsequently, in each case, the named plaintiff et al. filed an amended complaint; verdict in each case for the named plaintiff et al.; thereafter, in each case, the court denied the motions filed by the named defendant et al. to set aside the verdict and for remittitur, and rendered judgment in each case for the named plaintiff et al., from which the named defendant et al. in each case filed separate appeals with this court; subsequently, Erica L. Ash was substituted as a party plaintiff for Richard M. Coan, trustee of the bankruptcy estate of Erica L. Garbatini; thereafter, the appeals were consolidated. *Reversed in part*; *judgment directed in part.*

Norman A. Pattis, for the appellants in each case (named defendant et al.).

Alinor C. Sterling, with whom, on the brief, were *Christopher M. Mattei* and *Joshua D. Koskoff*, for the appellees in each case (named plaintiff et al.).

Opinion

MOLL, J. In these consolidated appeals, the defendants Alex Emric Jones and Free Speech Systems, LLC,[1] appeal from the judgments of the trial court rendered following jury verdicts returned in favor of the plaintiffs[2]

[1] Several additional defendants were named in the underlying consolidated actions, namely, Infowars, LLC, Infowars Health, LLC, Prison Planet TV, LLC, Wolfgang Halbig, Cory T. Sklanka, Genesis Communications Network, Inc., and Midas Resources, Inc. Jones and Free Speech Systems, LLC, however, were the only remaining defendants at the time of the judgments rendered following the jury verdicts returned in the underlying consolidated actions. We refer in this opinion to (1) Jones and Free Speech Systems, LLC, collectively, as the defendants, and (2) Jones, Free Speech Systems, LLC, Infowars, LLC, Infowars Health, LLC, and Prison Planet TV, LLC, collectively, as the Jones defendants.

[2] "There are three underlying actions. In the first action, the plaintiffs are Erica Lafferty, David Wheeler, Francine Wheeler, Jacqueline Barden, Mark Barden, Nicole Hockley, Ian Hockley, Jennifer Hensel, Jeremy Richman, Donna Soto, Carlee Soto-Parisi, Carlos Soto, Jillian Soto, and William Aldenberg. On November 29, 2018, the plaintiffs moved to consolidate the second and third cases . . . with their action pursuant to Practice Book § 9-5. William Sherlach is a plaintiff in the second and third cases and Robert Parker is a plaintiff in the third case. On December 17, 2018, the court granted the motion to consolidate the cases. Jeremy Richman died while this action was pending, and, on June 7, 2021, the court granted the plaintiffs' motion to substitute Jennifer Hensel, executrix of the estate of Jeremy Richman, as a plaintiff in his place; however, on June 8, 2021, Jennifer Hensel, in her capacity as executrix of the estate of Jeremy Richman, withdrew her claims against the defendants. On October 20, 2021, the court granted Erica Lafferty's motion to substitute Richard Coan, trustee of the bankruptcy estate of Erica L. Garbatini [also known as Erica Lafferty], in her place as a plaintiff in this case." (Citations omitted.) *Lafferty* v. *Jones*, 222 Conn. App. 855, 858 n.1, 307 A.3d 923 (2023). On December 14, 2023, the court granted a motion to substitute Erica L. Ash, also known as Erica Lafferty, as a plaintiff in place of Richard Coan, trustee of the bankruptcy estate of Erica L. Garbatini. All references in this opinion to the plaintiffs are to the remaining plaintiffs and do not include Jeremy Richman, Jennifer Hensel,

in the underlying consolidated tort actions[3] arising out of the 2012 mass shooting at Sandy Hook Elementary School in Newtown. On appeal, the defendants claim that the court improperly (1) defaulted them as a sanction for violating certain discovery orders and a protective order, (2) construed the effect of the default to relieve the plaintiffs of the burden to prove the extent of their damages, (3) restricted the scope of Jones' testimony at the hearing in damages, (4) denied their motion for a remittitur, and (5) concluded that the plaintiffs' claim asserting a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., was legally sufficient. For the reasons that follow, we disagree with the defendants' first, second, and fourth claims, and deem the defendants' third claim to be abandoned as inadequately briefed. We agree, however, with the defendants' fifth claim. Accordingly, we reverse in part the judgments of the trial court.

The following facts and procedural history, as set forth previously by this court or as were undisputed in the record, are relevant to our resolution of these appeals. "On December 14, 2012, Adam Lanza entered Sandy Hook Elementary School (Sandy Hook), and thereafter shot and killed twenty first-grade children and six adults, in addition to wounding two other victims who survived the attack. In the underlying consolidated actions, the plaintiffs, consisting of a first responder, who was not a victim of the Sandy Hook shooting but was depicted in the media following the

as executrix of the estate of Jeremy Richman, or Richard Coan, trustee of the bankruptcy estate of Erica L. Garbatini.

[3] The motions and pleadings filed in each of the underlying consolidated actions were largely identical, and the jury verdict returned in each action was the same. In the interest of simplicity, unless otherwise deemed necessary, we refer to the motions, pleadings, and other documents filed in the controlling action. See *Lafferty* v. *Jones*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. CV-18-6046436-S.

shooting, and the immediate family members of five of the children, one educator, the principal of Sandy Hook, and a school psychologist who were killed in the shooting, brought these separate actions . . . .

"In the complaints, the plaintiffs alleged that [Jones] hosts a nationally syndicated radio program and owns and operates multiple Internet websites that hold themselves out as news and journalism platforms. The plaintiffs further alleged that [Jones] began publishing content related to the Sandy Hook shooting on his radio and Internet platforms and circulated videos on his YouTube channel. Specifically, the plaintiffs alleged that, between December 19, 2012, and June 26, 2017, [Jones] used his Internet and radio platforms to spread the message that the Sandy Hook shooting was a staged event to the millions of his weekly listeners and subscribers. The complaints each consisted of five counts, including causes of action sounding in invasion of privacy by false light, defamation and defamation per se, intentional infliction of emotional distress, negligent infliction of emotional distress, and a violation of [CUTPA]." (Citation omitted.) *Lafferty* v. *Jones*, 222 Conn. App. 855, 859–60, 307 A.3d 923 (2023).

On November 15, 2021, the trial court, *Bellis*, *J.*, defaulted the defendants as a sanction for violating (1) certain discovery orders and (2) a protective order. Thereafter, the issue of damages was tried to a jury. In the midst of the hearing in damages, with the defendants' consent, the plaintiffs filed an amended complaint asserting four counts, each of which was accompanied by a claim of civil conspiracy: (1) invasion of privacy by false light; (2) defamation and defamation per se; (3) intentional infliction of emotional distress; and (4) a violation of CUTPA.[4] On October 12, 2022,

[4] In an accompanying request for leave to amend their complaint, the plaintiffs represented that the amended complaint (1) removed the negligent infliction of emotional distress count previously alleged, (2) removed former defendants, and (3) "simplifie[d] the pleadings by providing a single, uniform

the jury returned a verdict in favor of the plaintiffs, awarding them a total of $965,000,000 in compensatory damages. The jury further awarded the plaintiffs reasonable attorney's fees and costs, with the amounts to be determined by the court at a later date. On November 10, 2022, the court awarded the plaintiffs a total of (1) $321,650,000 in common-law punitive damages in the form of attorney's fees, (2) $1,489,555.94 in costs, and (3) $150,000,000 in statutory punitive damages pursuant to CUTPA. The defendants filed motions to set aside the verdict and for a remittitur, which the court denied on December 22, 2022. These consolidated appeals followed. Additional facts and procedural history will be set forth as necessary.

Before turning to the defendants' claims, we note that the plaintiffs argue that "[a]lmost all of [the defendants'] claims of error are so general or so inadequately briefed that they are waived." We iterate that we deem claims on appeal to be abandoned if they are inadequately briefed. See, e.g., *Lafferty* v. *Jones*, 336 Conn. 332, 375 n.30, 246 A.3d 429 (2020) ("We 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." (Internal quotation marks omitted.)), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021). As we explain throughout this opinion, we decline to review any

complaint for the hearing in damages of the [underlying] consolidated cases . . . ."

claims that the defendants have abandoned as a result of inadequate briefing.

I

The defendants first claim that the trial court improperly defaulted them as a sanction for violating certain discovery orders, as well as a discovery related protective order. We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. Shortly after the underlying consolidated actions had been commenced, the Jones defendants filed special motions to dismiss the actions pursuant to Connecticut's anti-SLAPP[5] statute. See General Statutes § 52-196a (b).[6] The plaintiffs moved for limited discovery vis-à-vis the special motions to dismiss; see General Statutes § 52-196a (d); which the court granted on December 17, 2018.

On January 10, 2019, the court overruled objections raised by the Jones defendants to the plaintiffs' requests for production seeking, inter alia, marketing data, sales analytics, and web analytics that the Jones defendants "own[ed] and/or control[led]." On May 7, 2019, in an objection addressing various discovery issues, the Jones defendants represented that they had "provided all of the analytics, business and marketing plans that they have." On May 29, 2019, the plaintiffs moved to compel compliance with the court's discovery orders, asserting in part that the Jones defendants had failed to produce responsive marketing and analytics information. The plaintiffs referred, in particular, to marketing

[5] "SLAPP is an acronym for 'strategic lawsuit against public participation' . . . ." *Lafferty* v. *Jones*, supra, 336 Conn. 337 n.4.

[6] Section 52-196a was amended by No. 19-64, § 17, of the 2019 Public Acts, which made changes to the statute that are not relevant to these appeals. Accordingly, we refer to the current revision of the statute.

data generated by Google Analytics[7] in the custody and control of the Jones defendants, and argued that a thirty-five page Google Analytics document provided by the Jones defendants was inadequate.

On June 10, 2019, the court issued an order stating that (1) testimony elicited during certain depositions confirmed that a "Google Analytics account is accessed and utilized by some employees of the [Jones] defendants," (2) the Google Analytics document that the Jones defendants had produced did not constitute full and fair compliance with the court's discovery orders, and (3) the plaintiffs were "entitled to the [Google Analytics] data pursuant to the court's discovery orders." The court further ordered that it would "consider appropriate sanctions for the [Jones] defendants' failure to fully and fairly comply should they not produce the data within one week." Subsequently, the Jones defendants represented that, on June 17, 2019, Google Analytics data purportedly had been emailed to the plaintiffs' counsel; however, the plaintiffs' counsel represented that the email was never received.

On June 17, 2019, the plaintiffs moved for the court to review a June 14, 2019 broadcast of Jones' radio program, during which Jones made threatening comments with respect to one of the plaintiffs' counsel. See *Lafferty* v. *Jones*, supra, 336 Conn. 342–46, 370. On June 18, 2019, after finding that (1) the Jones defendants were noncompliant with the court's discovery orders concerning, inter alia, the Google Analytics data, and (2) Jones had harassed, intimidated, and threatened one of the plaintiffs' counsel during the June 14, 2019

[7] In their principal appellate brief, the defendants represent that "Google Analytics is proprietary data made available to subscribers on a server maintained by Google. It is described thus on Google's webpage: 'Google Analytics is a web analytics service offered by Google that tracks and reports website traffic and also the mobile app traffic [and] events, currently inside a platform inside the Google Marketing Platform brand.' "

broadcast, the court sanctioned the Jones defendants by depriving them of the opportunity to pursue their special motions to dismiss. Id., 346–47, 374. At the outset of its decision, the court also stated: "[T]he discovery in this case has been marked with obfuscation and delay on the part of the [Jones] defendants, who, despite several court-ordered deadlines . . . [have] continue[d] . . . to object to having to, what they call affirmatively gather and produce documents which might help the plaintiffs make their case. Despite over approximately a dozen discovery status conferences and several court-ordered discovery deadlines, the Jones defendants have still not fully and fairly complied with their discovery obligations. . . . The [court has] entered discovery deadlines, extended discovery deadlines, and discovery deadlines have been disregarded by the Jones defendants, who continue to object to their discovery and [have] failed to produce that which is within their knowledge, possession, or power to obtain." Later, the court further stated: "At this point, I decline to default the . . . Jones defendants, but I will—I don't know how clearly I can say this. . . . As the discovery in this case progresses, if there is continued obfuscation and delay and tactics like I've seen up to this point, I will not hesitate after a hearing and an opportunity to be heard to default the . . . Jones defendants if they, from this point forward, continue with their behavior with respect to discovery." On July 10, 2020, following Chief Justice Richard A. Robinson's grant of the Jones defendants' petition for an expedited public interest appeal pursuant to General Statutes § 52-265a, our Supreme Court affirmed the trial court's sanction orders. *Lafferty* v. *Jones*, supra, 336 n.3, 385.

On November 12, 2020, the plaintiffs moved to again compel compliance with court-ordered discovery.[8] On

[8] The proceedings in the underlying consolidated actions were stayed pending our Supreme Court's resolution of the public interest appeal, and, on October 27, 2020, the trial court denied a request by the Jones defendants to stay discovery further.

May 5, 2021, the Jones defendants filed an objection, arguing in part that the plaintiffs' prior discovery requests had been rendered moot as a result of the court's June 18, 2019 sanction orders precluding the Jones defendants from pursuing their special motions to dismiss.[9] On May 14, 2021, the court issued an order stating that "the obligation of the [Jones] defendants to fully and fairly comply with the discovery requests at issue was not extinguished by the fact that the [Jones] defendants have been precluded from pursuing special motions to dismiss."

On June 1, 2021, the Jones defendants filed an emergency motion for a protective order requesting that the court (1) extend an upcoming discovery production deadline by forty-five days and (2) narrow the scope of discovery regarding, inter alia, the Google Analytics data, which, they represented, required them to review nearly 300,000 emails for privileged information. On June 2, 2021, the court issued an order stating: "The court previously entered numerous orders with respect to this discovery request and the Jones defendants' objections thereto. The court declines the Jones defendants' invitation to address, again, the scope of appropriate discovery. With respect to the timeframe for compliance, the outstanding discovery responses were due over two years ago. At no point in time following the decision [in *Lafferty* v. *Jones*, supra, 336 Conn. 332] did the Jones defendants seek clarification from the court as to their discovery obligations. According to emails produced by the plaintiffs . . . the Jones defendants, in February and March of 2020, while their case was pending before [our] Supreme Court and a court-ordered stay of discovery was in effect, asked the plaintiffs' counsel for a complete set of discovery requests to

[9] On November 18, 2020, the Jones defendants filed a notice that the underlying consolidated actions had been removed to the United States District Court for the District of Connecticut. The actions were remanded from the District Court on March 5, 2021.

date and continued to discuss the outstanding discovery that was owed by the Jones defendants. Nowhere in the email chain did counsel for the Jones defendants indicate that they were compiling their discovery only if they prevailed on their appeal. The plaintiffs filed a motion with the court seeking the overdue compliance on November 12, 2020, and the Jones defendants did not even file an objection until May 5, 2021. The court's ruling of May 14, 2021, confirmed that the outstanding discovery from the Jones defendants was overdue. At this point, the [Jones] defendants are not in compliance with their obligation to produce that discovery which is in their knowledge, possession, or power. To the extent that [the Jones defendants'] motion seeks, at this late date, a further extension of time to produce the already overdue supplemental compliance, it is granted as follows: complete, final supplemental compliance must be made by June 28, 2021, with compliance to begin immediately on a rolling basis. Failure to comply with this order may result in sanctions including but not limited to a default."

On June 28, 2021, the Jones defendants filed a notice of compliance indicating that (1) the defendants had provided "complete, final supplemental compliance," and (2) Infowars, LLC, Infowars Health, LLC, and Prison Planet TV, LLC, previously had satisfied their discovery obligations. With regard to the Google Analytics data, the Jones defendants represented that (1) only Free Speech Systems, LLC, used Google Analytics, (2) Free Speech Systems, LLC, did not possess, control, or have custody of Google Analytics data in a manner allowing the data to be exported,[10] and (3) the only reasonable method of sharing the Google Analytics data would

[10] The Jones defendants further represented that, to export the Google Analytics data, Free Speech Systems, LLC, would be required to purchase an upgraded membership account at a cost of $150,000.

be to permit the plaintiffs' counsel to access it via a " 'sandbox.' "[11]

On July 1, 2021, Free Speech Systems, LLC, Infowars Health, LLC, and Prison Planet TV, LLC, through one of their counsel, Attorney Norman A. Pattis of Pattis & Smith, LLC,[12] filed a motion for a commission to take an out-of-state deposition of Hillary Clinton (motion to depose Clinton).[13] These defendants asserted in relevant part that, (1) during one of the plaintiffs' depositions, (a) on the advice of counsel, the deponent refused to answer how the plaintiffs "all ended up represented by the same [law] firm" in the underlying consolidated actions and (b) claimed to be unaware of how her legal fees were being paid, (2) the lead plaintiff in the underlying consolidated actions was invited to speak at the Democratic National Convention in 2016, and thereafter was "praised" by Clinton, and (3) they "believe[d] that [the underlying consolidated actions were] filed six years after the shootings at Sandy Hook as part of a vendetta inspired, orchestrated and directed in whole or in part by . . . Clinton as part of a vendetta to silence . . . Jones after . . . Clinton lost the presidential race to Donald J. Trump."

On July 6, 2021, the plaintiffs filed a motion to sanction the Jones defendants for violating a protective

[11] The Jones defendants defined " '[s]andboxing' " as " 'a computer security term referring to when a program is set aside from other programs in a separate environment so that if errors or security issues occur, those issues will not spread to other areas on the computer. Programs are enabled in their own sequestered area, where they can be worked on without posing any threat to other programs.' "

[12] On July 1, 2021, all of the Jones defendants, except for Jones, were represented by both Attorney Jay Marshall Wolman and Pattis & Smith, LLC. At that time, Jones was represented by Wolman only.

[13] Jones did not join the motion to depose Clinton, and Infowars, LLC, was not listed as one of the movants. In subsequent filings, including an August 3, 2021 reply brief vis-à-vis the motion to depose Clinton, Infowars, LLC, was treated as an additional movant.

order entered on February 22, 2019, as amended on June 16, 2021 (protective order),[14] which originally had been proposed by the Jones defendants and which, inter alia, protected confidential information produced by the plaintiffs during discovery.[15] The plaintiffs maintained that the motion to depose Clinton, filed by the Jones defendants[16] in the middle of a deposition, (1) was frivolous and (2) improperly published information obtained from the deponent's testimony that was designated as "Highly Confidential-Attorneys Eyes Only" in violation of the protective order. On July 19, 2021, Free Speech Systems, LLC, Infowars, LLC, Infowars Health, LLC, and Prison Planet TV, LLC, filed an objection, and the plaintiffs filed a reply brief the next day.

On August 5, 2021, the court issued an order stating in relevant part: "In the midst of taking the first deposition of a plaintiff . . . Free Speech Systems, LLC, Infowars, LLC, Infowars Health, LLC, and Prison Planet TV, LLC (Infowars), filed a motion to depose . . . Clinton, using deposition testimony that had just been designated as '[Highly] Confidential-Attorneys Eyes Only,'

[14] The protective order was twice amended further in 2022.

[15] The protective order limited access to materials designated as "Confidential Information" or "Highly Confidential-Attorneys Eyes Only" to certain categories of persons. The protective order further provided in relevant part: "Depositions involving Confidential Information shall be treated, as follows:

"a. Portions of a deposition or depositions in their entirety may be designated Confidential Information or HIGHLY CONFIDENTIAL ATTORNEYS EYES ONLY by counsel for the deponent or the Designating Party [as defined in the protective order], with respect to documents or information that it has produced, by requesting such treatment on the record at the deposition or in writing no later than thirty (30) days after the date of the deposition.

"b. This Protective Order shall permit temporary designation of an entire transcript as Confidential Information or HIGHLY CONFIDENTIAL ATTORNEYS EYES ONLY where less than all of the testimony in that transcript would fall into those categories, subject to [a procedure detailed in the protective order]. . . . The designations shall remain effective until and unless an objection is made and finally resolved."

[16] The plaintiffs contended that the motion to depose Clinton should be treated as having been filed by all of the Jones defendants. See footnote 13 of this opinion.

and completely disregarding the court-ordered procedures. At no point prior to filing the Clinton motion did Infowars profess ignorance of the procedures they had proposed and which were court-ordered to be followed, nor have they since taken any steps to correct their improper filing. If Infowars was of the opinion that the plaintiffs' designation was unreasonable and not made in good faith, the solution was to follow the court-ordered procedure to challenge the designation, not to blatantly disregard it and make the confidential information available on the Internet by filing it in the court file. The court rejects Infowars' baseless argument that there was no good cause to issue the protective [order] . . . . Infowars . . . now takes the absurd position that the court-ordered protective order circumvents the good cause requirements of Practice Book § 13-5, did not need to be complied with, and should not be enforced by the court. This argument is frightening. Given the cavalier actions and wilful misconduct of Infowars in filing protected deposition information during the actual deposition, this court has grave concerns that their actions, in the future, will have a chilling effect on the testimony of witnesses who would be rightfully concerned that their confidential information, including their psychiatric and medical histories, would be made available to the public. The court will address sanctions at a future hearing."[17]

On July 6, 2021, the plaintiffs filed a motion to sanction the Jones defendants for failing to produce certain accounting documents. The plaintiffs asserted in relevant part that, (1) in connection with a noticed deposition of Melinda Flores, Free Speech System, LLC's accounting manager, Flores was directed to produce documents, including (a) Free Speech System, LLC's trial balances from 2012 to 2019, and (b) " '[a]ny and

[17] On August 4, 2021, the court denied the motion to depose Clinton. That ruling is not at issue in these consolidated appeals.

all subsidiary ledgers for each account listed in the [t]rial balances produced,' "[18] (2) the court ordered the requested records to be produced by the close of business on May 14, 2021,[19] (3) on May 14, 2021, the Jones defendants produced documents that they described to be trial balances "incorporating the [s]ubsidiary [l]edgers," (4) notwithstanding the Jones defendants' representation, they failed to produce any subsidiary ledgers, and (5) Flores testified during her deposition that (a) she assisted in assembling the documents produced on May 14, 2021, (b) Free Speech Systems, LLC, maintained subsidiary ledger information that was accessible, and (c) the documents produced did not contain subsidiary ledgers. (Emphasis omitted.) On July 27, 2021, the Jones defendants filed an objection, arguing in relevant part that Free Speech Systems, LLC, did not possess or maintain subsidiary ledgers. In support of their objection, the Jones defendants submitted a personal affidavit of Robert Roe (Roe affidavit), a certified public accountant and a certified forensic accountant, who averred

[18] Attached as an exhibit to the July 6, 2021 motion was an affidavit of Brian W. Merrill, a certified fraud examiner and a certified analytics professional, who averred in relevant part that "[a] trial balance is a standard accounting report listing a company's general ledger accounts. A debit or credit balance is presented for each general ledger account. The purpose of a trial balance is to prove that the value of all debit balances equals the value of all credit balances. Subsidiary ledgers ('[s]ubledgers') contain the transactional detail that support the trial balance details for all general ledger accounts in an accounting system. Subledgers allow for the interpretation and analysis of the financial activity that is recorded in the books and records that ultimately represent the financial statement of the organization."

On November 6, 2020, the Jones defendants objected to the production request seeking the trial balances and subsidiary ledgers on the grounds that the request was, inter alia, overbroad, irrelevant, and unduly burdensome. The court overruled the objection.

[19] On May 5, 2021, the Jones defendants filed an emergency motion for a protective order requesting in part that Flores' deposition, scheduled for May 7, 2021, be rescheduled for medical reasons. On May 6, 2021, the court ordered Flores' deposition to be rescheduled but further directed that "[t]he records requested in the request to produce are ordered to be produced by the close of business on [May 14, 2021]. Failure to comply with this order may result in sanctions."

that Free Speech Systems, LLC, did not maintain or utilize subsidiary ledgers. On August 3, 2021, the plaintiffs filed a reply brief.

On August 6, 2021, the court issued an order stating in relevant part: "The subsidiary ledger information . . . was easily accessible to Flores . . . . Despite the court orders, and although the information exists, is maintained by [Free Speech Systems, LLC], and could have been produced by Flores as was required by the court orders, the documents were not produced. The court rejects [Roe's] statement . . . that [Free Speech Systems, LLC] does not 'maintain or utilize' subsidiary ledgers as not credible in light of the circumstances. There is no excuse for the [Jones] defendants' disregard of not only their discovery obligations, but the . . . court orders. The court finds that the failure to comply with the production request has prejudiced the plaintiffs [in] their ability to both prosecute their claims and conduct further depositions in a meaningful manner." The court further ordered (1) Flores' deposition to resume, with Flores directed to produce the subsidiary ledger information, and (2) that sanctions would be addressed at a future hearing. During subsequent hearings before the court, the plaintiffs' counsel represented that, on August 24, 2021, the Jones defendants produced alleged subsidiary ledgers; however, the plaintiffs' counsel further represented that "it is not clear whether [the documents produced were], in fact, subsidiary ledgers . . . ."

On August 24, 2021, the plaintiffs filed a motion to sanction the Jones defendants for violating the court's discovery orders requiring them to produce, inter alia, the Google Analytics data. The plaintiffs refuted the Jones defendants' contention in their June 28, 2021 notice of compliance that Free Speech Systems, LLC, did not possess, control, or have custody of the Google Analytics data in a manner that could be exported,

asserting that such "representations were inaccurate and misleading." On September 14, 2021, the Jones defendants filed an objection, arguing, inter alia, that (1) on June 17, 2019, via email, they had produced the Google Analytics data requested by the plaintiffs, and (2) the "sandbox mechanism" previously suggested by them would allow the plaintiffs to access all of the "raw data." On September 23, 2021, the plaintiffs filed a reply brief, and on September 25, 2021, with leave of the court, the Jones defendants filed a surreply brief.

On September 30, 2021 the court issued an order stating in relevant part: "There is no dispute here that the Jones defendants failed to follow the rules [of practice] as they relate to discovery. . . . The purported June 17, 2019 email transmission of zip files . . . containing Google Analytics reports that the plaintiffs' counsel indicates was never received was not sent to [certain other defendants] nor did the purported transmission otherwise comply with the rules of practice. As such, it is not necessary for the court to resolve the issue of whether the purported transmission was actually sent, as it cannot be considered proper compliance under our rules. In short, after protracted objections and arguments by the Jones defendants over whether they had the ability to produce ANY Google Analytics data, to date they have still failed to comply. . . . In light of this continued failure to meet their discovery obligations in violation of the court's order, to the prejudice of the plaintiffs, the court will address the appropriate sanctions at the next status conference." Subsequently, by way of a notice of compliance dated October 8, 2021, the Jones defendants represented that they had provided supplemental responses to the plaintiffs' discovery requests.

On September 9, 2021, the plaintiffs moved to sanction the Jones defendants for producing "manufactured" documents in discovery. The plaintiffs contended that the trial balances that had been produced

were not the originals but, rather, constituted altered trial balances that Roe had manipulated prior to production. On October 7, 2021, the Jones defendants filed an objection. On October 18, 2021, the plaintiffs filed a reply brief, and on October 20, 2021, with leave of the court, the Jones defendants filed a surreply brief.

On November 15, 2021, after hearing argument from the parties over the course of three days between October 20 and November 15, 2021, the court issued an oral decision defaulting the Jones defendants as a sanction for violating (1) the protective order and (2) its discovery orders.[20] With regard to the protective order, the court found in relevant part that (1) the Jones defendants acknowledged that the motion to depose Clinton contained information obtained from a deposition that was designated as "Highly Confidential-Attorneys Eyes Only" pursuant to the protective order, (2) the Jones defendants argued that the protective order did not preclude them from publishing such confidential information so long as they did not identify the witness from whom the information was obtained, which position "did nothing but reinforce the court's August 5, 2021 order and findings that the [Jones defendants'] cavalier actions constituted wilful misconduct and violated the court's clear and unambiguous protective order,"[21] and (3) there was a "transparent attempt to cloud the issues" by counsel who had filed the motion to depose Clinton, Pattis, as well as one of the Jones defendants' former

[20] On October 7, 2021, the plaintiffs filed a memorandum of law in favor of the court defaulting the Jones defendants for their misconduct. On October 20, 2021, the Jones defendants filed a memorandum of law in opposition to a default order.

[21] The court further observed that the Jones defendants previously had asserted a different argument, namely, that the inclusion of the "Highly Confidential-Attorneys Eyes Only" information in the motion to depose Clinton was justified because the plaintiffs lacked a good faith basis to designate the deposition at issue as "Highly Confidential-Attorneys Eyes Only" pursuant to the protective order. The court rejected that argument.

counsel, Attorney Jay Marshall Wolman, stemming from inconsistent representations as to whether Infowars, LLC, was one of the movants of the motion to depose Clinton.[22]

With respect to the subsidiary ledgers, the court summarized its findings in its August 6, 2021 order regarding the subsidiary ledgers and commented that "it is still unclear as to what documents have been produced." The court then determined that sanctions were "appropriate in light of the [Jones] defendants' failure to fully and fairly comply with the plaintiffs' discovery request and the court's orders . . . ."

Regarding the trial balances, the court determined that the trial balances produced by the Jones defendants did not comply with its discovery orders. The court stated that (1) Flores testified at her deposition that she had generated the trial balances, which she believed had been produced to the plaintiffs, but (2) Roe later altered those trial balances before they had been provided to the plaintiffs. The court rejected an argument asserted by the Jones defendants that Flores had "provided flawed information to the [Jones] defendants that the [Jones] defendants, through Roe, had to correct." The court further stated: "The Jones defendants argue that Roe combined some accounts that were not used consistently and consolidated some general accounts because various transactions all involved the same account and those records created by [Roe] were the records that were produced. But these records that removed accounts and consolidated accounts altered

[22] As the court explained, (1) the motion to depose Clinton, filed by Pattis, listed Free Speech Systems, LLC, Infowars Health, LLC, and Prison Planet TV, LLC, as the movants, (2) in the July 19, 2021 objection to the plaintiffs' July 6, 2021 motion for sanctions, also filed by Pattis, Infowars, LLC, was treated as an additional movant, and (3) during argument, Wolman represented that Infowars, LLC, had no involvement in the motion to depose Clinton because its name was not listed in the motion.

the information in the reports that [Flores] had produced, and they contain trial balances that did not balance. These sanitized, inaccurate records created by Roe were simply not responsive to the plaintiffs' request or to the court's order."

The court next addressed the Google Analytics data requested by the plaintiffs, stating: "With respect to analytics, including Google Analytics . . . the [Jones] defendants on May 7, 2019, represented that they had provided all the analytics that they had. They stated with respect to Google Analytics that they had access to Google Analytics reports but did not regularly use them. . . . The [Jones] defendants also claim that, on June 17, 2019, they informally emailed zip files containing Google Analytics reports to the plaintiffs, but not [to] the codefendants, an email the plaintiffs state they did not receive and that the court found would not have been in compliance with our rules of practice. On June 28, 2021, the Jones defendants filed a notice of compliance stating that complete, final supplemental compliance was made by . . . [Jones] and Free Speech Systems, LLC, and that Infowars, LLC, Infowars Health, LLC, and Prison Planet [TV], LLC, quote: 'Had previously produced all documents required to be produced,' . . . representing that with respect to the Google Analytics documents, Free Speech Systems, LLC, could not export the dataset and that the only way they could comply was through the sandbox approach. Then on [October] 8, 2021,[23] the Jones defendants for the first time formally produced Excel spreadsheets limited to Google Analytics apparently for [Infowars.com] and not for any of the other websites such as Prison Planet TV

[23] The court referred to August 8, 2021, as the date of the production of the spreadsheets; however, (1) during argument preceding the court's sanctions order, the plaintiffs' counsel represented that the spreadsheets had been produced on October 8, 2021, and (2) the record reflects that the Jones defendants filed a notice of compliance dated October 8, 2021.

or Infowars Health." (Footnote added.) The court also found that (1) the Jones defendants had failed to produce analytics data for other platforms, such as Alexa and Criteo, and (2) the Jones defendants' production of certain social media analytics data "has . . . been insubstantial and . . . has fallen far short both procedurally and substantively . . . ."[24] As the court summarized, "[t]he court finds that the Jones defendants have withheld analytics and information that is critical to the plaintiffs' ability to conduct meaningful discovery and to prosecute their claims. This callous disregard of their obligations to fully and fairly comply with discovery and court orders on its own merits a default against the Jones defendants."

The court then stated: "Neither the court nor the parties can expect perfection when it comes to the discovery process. What is required, however, and what all parties are entitled to, is fundamental fairness that the other side produces that information which is within [its] knowledge, possession and power, and that the other side meet[s] its continuing duty to disclose additional or new material and amend prior compliance when it is incorrect.

"Here, the Jones defendants were not just careless. Their failure to produce critical documents, their disregard for the discovery process and procedure and for court orders is a pattern of obstructive conduct that interferes with the ability of the plaintiffs to conduct meaningful discovery and prevents the plaintiffs from properly prosecuting their claims.

[24] The defendants make a passing reference to these other analytics in their principal appellate brief. Insofar as the defendants attempt to raise a claim of error specifically as to these other analytics, they have not adequately briefed any such claim. See *Lafferty* v. *Jones*, supra, 336 Conn. 375 n.30. Thus, we do not set forth additional context vis-à-vis these other analytics.

"The court held off on scheduling this sanctions hearing in the hopes that many of these problems would be corrected and that the Jones defendants would ultimately comply with their discovery obligations and numerous court orders, and they have not.

"In addressing the sanctions that should enter here, the court is not punishing the [Jones] defendants. The court also recognizes that a sanction of default is one of last resort. This court previously sanctioned the [Jones] defendants not by entering a default, but by a lesser sanction, the preclusion of the [Jones] defendants' special motions to dismiss. At this point, entering other lesser sanctions such as monetary sanctions, the preclusion of evidence, or the establishment of facts is inadequate given the scope and extent of the discovery material that the [Jones] defendants have failed to produce.

"As pointed out by the plaintiffs, they are attempting to conduct discovery on what the [Jones] defendants publish and the [Jones] defendants' revenue. And the failure of the [Jones] defendants to produce the analytics impacts the ability of the plaintiffs to address what is published, and the [Jones] defendants' failure to produce the financial records such as subledgers and trial balances affects the ability of the plaintiffs to address the [Jones] defendants' revenue. The prejudice suffered by the plaintiffs, who had the right to conduct appropriate, meaningful discovery so they could prosecute their claims, again was caused by the Jones defendants' wilful noncompliance, that is, the Jones defendants' failure to produce critical material information that the plaintiff[s] needed to prove their claims.

"For these reasons, the court is entering a default against the [Jones] defendants . . . . The case will proceed as a hearing in damages as to the [Jones] defendants. The court notes [that] . . . Jones is [the] sole controlling authority of all the [Jones] defendants, and

that the [Jones] defendants filed motions and signed off on their discovery issues jointly. And all the [Jones] defendants have failed to fully and fairly comply with their discovery obligations."

On appeal, the defendants assert that (1) the court incorrectly (a) determined that they had violated the protective order in filing the motion to depose Clinton or, in the alternative, (b) attributed the violation of the protective order to them rather than to their counsel,[25] (2) the court incorrectly determined that their noncompliance with its discovery orders was wilful, and (3) the court's sanction order defaulting them was disproportionate.[26] These contentions are unavailing.

[25] As we explained in footnote 13 of this opinion, although Free Speech Systems, LLC, was one of the movants of the motion to depose Clinton, Jones did not join the motion. The defendants on appeal do not claim that Jones was sanctioned improperly vis-à-vis the protective order; on the contrary, both defendants—Jones and Free Speech Systems, LLC—claim error as to the court's ruling regarding the violation of the protective order and assert that the court attributed the violation to them rather than to their counsel. Accordingly, for purposes of our resolution of the defendants' claims in part I of this opinion and notwithstanding the convoluted background concerning the identity of the movants of the motion to depose Clinton, we do not differentiate between Jones and Free Speech Systems, LLC, with regard to the motion to depose Clinton and the court's rulings concerning the protective order.

[26] The defendants raise a number of additional claims, which we decline to review. First, in their reply brief, the defendants contend for the first time that, as a matter of law, "there should be an outer limit on a trial court's authority to enter a default in civil cases. Failure adequately or substantially to comply with discovery should never result in a default." We decline to consider this discrete legal issue raised for the first time in the defendants' reply brief. See *Anderson-Harris* v. *Harris*, 221 Conn. App. 222, 253 n.24, 301 A.3d 1090 (2023) ("[i]t [is] axiomatic that arguments cannot be raised for the first time in a reply brief"). Even if some semblance of this claim can be gleaned from the defendants' principal appellate brief, we conclude that the defendants have abandoned the claim as a result of their failure to brief it adequately in their main brief and notwithstanding their attempt to expound on it in their reply brief. See *Robb* v. *Connecticut Board of Veterinary Medicine*, 204 Conn. App. 595, 613 n.23, 254 A.3d 915 ("[T]he plaintiff cannot use his reply brief to resurrect a claim that he has abandoned by failing to adequately brief it in his principal appellate brief. See *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 378 n.6, 3 A.3d 892 (2010) (declining to consider claim when appellant raised 'vague assertion' of claim in principal

"A trial court's power to sanction a litigant or counsel stems from two different sources of authority, its inherent powers and the rules of practice. . . . [T]his inherent authority permits sanctions for dilatory, bad faith and harassing litigation conduct . . . ." (Citations omitted; internal quotation marks omitted.) *Lafferty* v. *Jones*, supra, 336 Conn. 373.

"Additionally, under Practice Book [Rev. to 2021] § 13-14,[27] a court may sanction a party for noncompliance with the court's discovery orders. Among the permissible sanctions is foreclosing judgment on the merits

appellate brief and later 'amplified her discussion of the issue considerably in her reply brief')."), cert. denied, 338 Conn. 911, 259 A.3d 654 (2021). Accordingly, insofar as the defendants claim that the default entered against them was a disproportionate sanction, we limit our analysis to the parameters of the claim adequately briefed by the defendants, namely, that the sanction constituted an abuse of the court's discretion on the basis of the record.

Second, in their principal appellate brief, the defendants claim that "[a] liability default is never appropriate in a case involving speech, given the importance the Connecticut constitution places on speech." The defendants cite article first, § 6, of the Connecticut constitution, which, as they concede, applies only to criminal prosecutions; see *Gray* v. *Mossman*, 91 Conn. 430, 442–43, 99 A. 1062 (1917); and which provides: "In all prosecutions or indictments for libels, the truth may be given in evidence, and the jury shall have the right to determine the law and the facts, under the direction of the court." Conn. Const., art. I, § 6. The defendants' principal appellate brief is bereft of any substantive legal analysis to support this claim, and, therefore, we deem it to be abandoned. See *Lafferty* v. *Jones*, supra, 336 Conn. 375 n.30.

Third, in their principal appellate brief, the defendants assert that the court, in its August 6, 2021 order addressing the subsidiary ledgers issue, improperly discredited the Roe affidavit without an evidentiary hearing. The defendants contend that "[t]he absence of a meaningful evidentiary record to support this finding as to . . . Roe, a finding that bore such fatal consequences for the defendants, constitutes an abuse of discretion . . . ." The defendants have abandoned this claim by failing to provide any substantive legal analysis to support it. See *Lafferty* v. *Jones*, supra, 336 Conn. 375 n.30.

Last, in their principal appellate brief, the defendants assert that "the trial court never set forth just what it thought Google Analytics was. As such, the order [regarding Google Analytics] was not so clear and unambiguous as to warrant a default if, in fact, the order was violated at all." We deem this claim to be inadequately briefed and, therefore, the defendants have abandoned it. See *Lafferty* v. *Jones*, supra, 336 Conn. 375 n.30.

[27] Practice Book (Rev. to 2021) § 13-14 provides in relevant part: "(a) If any party has failed to answer interrogatories or to answer them fairly, or

for a party, such as by rendering a default judgment against a defendant . . . .'' (Footnote added.) Id.

We consider three factors in determining whether ''a trial court properly exercises its discretion in imposing a sanction for a violation of a court order . . . .'' *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 328 Conn. 60, 71, 176 A.3d 1167 (2018); see also *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 17–18, 776 A.2d 1115 (2001). ''First, the order to be complied with must be reasonably clear. In this connection, however, we also state that even an order that does not meet this standard may form the basis of a sanction if the record establishes that, notwithstanding the lack of such clarity, the party sanctioned in fact understood the trial court's intended meaning. This requirement poses a legal question that we will review de novo. Second, the record must establish that the order was in fact violated. This requirement poses a question of fact that we will review using a clearly erroneous standard of review.[28] Third, the sanction imposed must be proportional to the violation. This requirement poses a

has intentionally answered them falsely or in a manner calculated to mislead, or has failed to respond to requests for production or for disclosure of the existence and contents of an insurance policy or the limits thereof, or has failed to submit to a physical or mental examination, or has failed to comply with a discovery order made pursuant to Section 13-13, or has failed to comply with the provisions of Section 13-15, or has failed to appear and testify at a deposition duly noticed pursuant to this chapter, or has failed otherwise substantially to comply with any other discovery order made pursuant to Sections 13-6 through 13-11, the judicial authority may, on motion, make such order as the ends of justice require.

''(b) Such orders may include the following:

''(1) The entry of a nonsuit or default against the party failing to comply . . . .''

[28] ''A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'' (Internal quotation marks omitted.) *Fernwood Realty, LLC* v. *AeroCision, LLC*, 166 Conn. App. 345, 356, 141 A.3d 965, cert. denied, 323 Conn. 912, 149 A.3d 981 (2016).

question of the discretion of the trial court that we will review for abuse of that discretion." (Footnote added; internal quotation marks omitted.) *Lafferty* v. *Jones*, supra, 336 Conn. 373–74.

A

The defendants contend that the court improperly (1) determined that they had violated the protective order in filing the motion to depose Clinton or, in the alternative, (2) attributed the violation of the protective order to them, as opposed to their counsel. We are not persuaded.

As to the court's determination that the filing of the motion to depose Clinton violated the protective order, the defendants maintain that, in the motion, they "represented that at a deposition a witness was instructed by counsel not to answer questions about choice of counsel or who was financing the litigation. The name and gender of the deponent were not mentioned; the deposition was characterized, not quoted. . . . The de minimis recitation of facts in the motion . . . did not violate a court order . . . ." (Citations omitted; footnote omitted.) As the court correctly determined, however, the clear and unambiguous language of the protective order limited access to depositions, or portions thereof, designated as "Highly Confidential-Attorneys Eyes Only." The defendants acknowledge that the motion to depose Clinton contained information drawn from the transcript of one of the plaintiffs' depositions, which, as the court found, was designated as "Highly Confidential-Attorneys Eyes Only" pursuant to the protective order. Thus, in filing the motion to depose Clinton and making the confidential information set forth therein available to the public, the defendants plainly violated the protective order.

Moreover, the defendants' position on appeal is further undermined by the fact that, during argument preceding the court's sanctions order, one of the defendants' former counsel, Wolman, conceded that the defendants' actions violated the protective order. The following colloquy occurred between the court and Wolman:

"[Wolman]: . . . We do take the [protective] order very seriously and have endeavored to abide it. There was during a deposition this motion [to depose Clinton] filed. And at the end of the day it comes down to simply one sentence. That the witness claims not to know how her legal fees were being paid. That's the only information that I can see in that motion that gives rise to the court's order. And you know, it was erroneously believed that that was not subject to the [protective] order. The witness herself was not identified. *And while it may be a technical violation*, and it was not realized to be so at the time—

"The Court: So, do you admit now that it was a violation, whether it's a technical violation or not?

"[Wolman]: *I would say it probably fits within the language of what is protected.* We had concerns as to whether or not it truly was protected. The court has weighed in." (Emphasis added.)

Accordingly, we reject the defendants' assertion that the court incorrectly determined that they violated the protective order in filing the motion to depose Clinton.

The defendants, in the alternative, contend that the court improperly ascribed the violation of the protective order to them rather than to their counsel. The defendants posit that, rather than referring counsel for disciplinary action, the court "attributed counsel's alleged failure to [the defendants], justifying a default on conduct over which the defendants themselves had no control, and about which, the record reflects, they knew

nothing." The defendants fail to cite any portion of the record supporting their assertion that they were unaware of counsel's actions. Without any such evidence, we cannot countenance the defendants' reasoning that they were absolved of any discipline stemming from counsel's conduct. See *MacCalla* v. *American Medical Response of Connecticut, Inc.*, 188 Conn. App. 228, 240, 204 A.3d 753 (2019) ("Although in some circumstances it may be unduly harsh to impute counsel's transgressions to his client, 'our adversarial system [also] requires that the client be responsible for acts of the attorney-agent whom [he] has freely chosen . . . .' *Thode* v. *Thode*, 190 Conn. 694, 698, 462 A.2d 4 (1983); see *Sousa* v. *Sousa*, 173 Conn. App. 755, 773 n.6, 164 A.3d 702 ('[a]n attorney is the client's agent and his knowledge is imputed to the client' . . .), cert. denied, 327 Conn. 906, 170 A.3d 2 (2017)."); see also *MacCalla* v. *American Medical Response of Connecticut, Inc.*, supra, 239–40 (concluding that court did not abuse its discretion in dismissing claims of certain plaintiffs on basis of counsel's actions); cf. *Herrick* v. *Monkey Farm Cafe, LLC*, 163 Conn. App. 45, 52–53, 134 A.3d 643 (2016) (reversing trial court's judgment of nonsuit rendered on basis of counsel's actions).

B

The defendants next claim that the court erred in finding that they wilfully violated its discovery orders. As to the discovery orders in general, the defendants maintain that "the failure to provide answers was not an example of wilful misconduct. Rather, it was the result of a shocking degree of disorganization. The plaintiffs persuaded the trial judge that the plaintiffs' expectations of how the defendants should operate their business and keep records was the standard the defendants must meet. The default prevented a jury from learning the truth about the defendants' corporate organization—it is a haphazard warren of people drawn

together by . . . Jones' charisma and generosity, but almost altogether devoid of institutional structure or normal corporate governance." We are unpersuaded.

Whether a party wilfully violates a court order "is a factual question committed to the sound discretion of the trial court." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, supra, 222 Conn. App. 867. The court's finding that the defendants' noncompliance with its discovery orders was wilful was supported by its subordinate findings that (1) the subsidiary ledgers requested by the plaintiffs were "easily accessible" and "available" to Flores, (2) Flores generated the trial balances sought by the plaintiffs, but those trial balances later were altered by Roe prior to production to the plaintiffs, and (3) the defendants withheld analytics materials and exhibited a "callous disregard of their obligations to fully and fairly comply with discovery . . . ." Rather than adequately contesting the factual underpinnings of these findings, the defendants propound the argument that their failure to comply with the court's discovery orders stemmed from their purported institutional disorganization. The defendants fail to cite to any portion of the record that supports this assertion. Moreover, the defendants' argument is belied by their own statement in their principal appellate brief that, notwithstanding their purported disorganized corporate structure, they "tendered tens of thousands of documents, sat for scores of depositions, provided answers to requests to admit, and otherwise made efforts to comply with discovery." Thus, the defendants' claim regarding the wilfulness of their noncompliance with the court's discovery orders in general is untenable.

The defendants also assert that the court incorrectly determined that they had wilfully violated its discovery orders specifically concerning the Google Analytics data. The defendants maintain that they (1) made "limited and sporadic use of Google Analytics data," (2)

"did not keep [any] reports, did not generally or systematically rely on them, and consulted Google Analytics only haphazardly," and (3) did not possess the Google Analytics data, but, rather, "access[ed] the information on Google servers," such that they did not wilfully fail to comply with the court's orders regarding the Google Analytics data. We reject this assertion. The frequency of the defendants' use and reliance on the Google Analytics data has no bearing on their obligation to abide by the court's discovery orders requiring them to provide the data to the plaintiffs. Further, whether the defendants were in possession of the Google Analytics data is immaterial because the plaintiffs' production request sought analytics that the defendants "own[ed] *and/or control*[*led*]." (Emphasis added.) See Practice Book § 13-9 (a)[29] ("[i]n any civil action, in any probate appeal, or in any administrative appeal where the judicial authority finds it reasonably probable that evidence outside the record will be required, any party may serve . . . upon any other party a request to afford the party submitting the request the opportunity to inspect, copy, photograph or otherwise reproduce designated documents or to inspect and copy, test or sample any tangible things *in the possession, custody or control* of the party upon whom the request is served" (emphasis added)). As the court found, the defendants (1) had access to the Google Analytics data and (2) produced some Google Analytics data to the plaintiffs, albeit not in full and fair compliance with the court's discovery orders. Accordingly, we conclude that the court properly found that the defendants wilfully violated the court's discovery orders as to the Google Analytics data.

C

The defendants next claim that the court's order defaulting them as a sanction for their violations of its

[29] An amendment to Practice Book § 13-9, effective January 1, 2022, made changes to the provision that are not relevant to these appeals. Accordingly, we refer to the current revision of this provision.

discovery orders and the protective order was disproportionate. The defendants maintain that, although they "resisted discovery by every lawful means possible in lengthy proceedings . . . [t]heir compliance was substantial," and they did not "[fail] to answer the complaint, [fail] to respond to discovery or otherwise [fail] to participate in the proceedings."[30] We conclude that the court did not abuse its discretion in defaulting the defendants.

As we set forth previously in this opinion, whether the court's sanction defaulting the defendants was proportional to their violations of the court's orders "poses a question of the discretion of the trial court that we will review for abuse of that discretion." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, supra, 336 Conn. 374. "As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did. . . . In reviewing a claim that the court has abused this discretion, great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness

[30] The defendants also argue that, as a less severe alternative to a default, the plaintiffs could have asserted a cause of action for intentional spoliation of evidence or the court could have provided a spoliation charge to the jury. See *Rizzuto* v. *Davidson Ladders, Inc.*, 280 Conn. 225, 243, 905 A.2d 1165 (2006) (recognizing independent cause of action for intentional spoliation of evidence, defined as " 'the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action' "). The plaintiffs counter that the law of spoliation is inapplicable because "there is no question that [the defendants] had—and simply withheld—financial and analytics compliance. Moreover, a spoliation charge would not have remedied the prejudice to the plaintiffs from [the defendants'] misrepresentations regarding the existence of discovery, prolonged delays in providing the compliance [they] did provide, and complete refusal to provide other compliance, or from [the defendants'] wilful violation of the protective order." We agree with the plaintiffs that the law of spoliation did not provide a reasonable alternative to the court's default order.

. . . . The determinative question for an appellate court is not whether it would have imposed a similar sanction but whether the trial court could reasonably conclude as it did given the facts presented. . . . Under an abuse of discretion standard, a court's decision must be legally sound and [the court] must [have] honest[ly] attempt[ed] . . . to do what is right and equitable under the circumstances of the law, without the dictates of whim or caprice." (Citation omitted; internal quotation marks omitted.) *Gianetti* v. *Neigher*, 214 Conn. App. 394, 437–38, 280 A.3d 555, cert. denied, 345 Conn. 963, 285 A.3d 390 (2022). With regard to discovery orders in particular, "[n]ever will the case on appeal look as it does to a [trial court] . . . faced with the need to impose reasonable bounds and order on discovery. . . . Trial court judges face great difficulties in controlling discovery procedures which all too often are abused by one side or the other and this court should support the trial judges' reasonable use of sanctions to control discovery." (Citation omitted; internal quotation marks omitted.) *Lafferty* v. *Jones*, supra, 374.

"[I]n assessing proportionality, a trial court must consider the totality of the circumstances, including, most importantly, the nature of the conduct itself. . . . [A] trial court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court. . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure. . . . Therefore, although dismissal of an action is not an abuse of discretion where a party shows deliberate, contumacious or unwarranted disregard for the court's authority . . . the court should be reluctant to employ the sanction of dismissal except as a last resort. . . . [T]he sanction of dismissal should be

imposed only as a last resort, and where it would be the only reasonable remedy available to vindicate the legitimate interests of the other party and the court. . . . Like a dismissal, a default judgment is also one of the more severe sanctions that a court may impose . . . .'' (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Gutierrez* v. *Mosor*, 206 Conn. App. 818, 827–28, 261 A.3d 850, cert. denied, 340 Conn. 913, 265 A.3d 926 (2021).

In determining whether the sanction of default was proportional to the defendants' violations of the court's orders, ''we are guided by the factors [our Supreme Court] . . . ha[s] employed when reviewing the reasonableness of a trial court's imposition of sanctions: (1) the cause of the [party's] failure to [comply with the orders], that is, whether it [was] due to inability rather than the [wilfulness], bad faith or fault of the [party] . . . (2) the degree of prejudice suffered by the opposing party . . . and (3) which of the available sanctions would, under the particular circumstances, be an appropriate response to the disobedient party's conduct.'' (Internal quotation marks omitted.) *Gianetti* v. *Neigher*, supra, 214 Conn. App. 439.

Remaining mindful, as the trial court recognized, that a default is a sanction of last resort, we conclude that the court's default order was a proportional sanction under the circumstances presented. As to the wilfulness factor, the court found that the defendants' failure to produce ''critical material information'' to the plaintiffs, as well as the defendants' ''cavalier actions'' in filing the motion to depose Clinton, constituted wilful noncompliance and misconduct. The court further found that ''the Jones defendants were not just careless. Their failure to produce critical documents, their disregard for the discovery process and procedure and for court

orders is a pattern of obstructive conduct . . . .'"[31] Thus, this factor militates in favor of the court's default order.

With regard to the prejudice factor, the court found that the purpose of the plaintiffs' discovery requests was to determine (1) what the defendants published and (2) the defendants' revenue, which purpose was thwarted by the defendants' failure to produce the analytics data, the subsidiary ledgers, and the trial balances requested by the plaintiffs. The court further found that the defendants' conduct "interfere[d] with the ability of the plaintiffs to conduct meaningful discovery and prevent[ed] the plaintiffs from properly prosecuting their claims." See *Krahel* v. *Czoch*, 186 Conn. App. 22, 35–36, 198 A.3d 103 (discussing importance of unproduced discovery and its effect as to plaintiff's case when examining prejudice), cert. denied, 330 Conn. 958, 198 A.3d 584 (2018); see also *Lafferty* v. *Jones*, supra, 336 Conn. 378 (citing *Krahel* in analyzing prejudice factor).

Additionally, with regard to the protective order, the court stated in its August 5, 2021 order addressing the filing of the motion to depose Clinton that (1) the defendants, in filing the motion to depose Clinton, made information designated as "Highly Confidential-Attorneys Eyes Only" under the protective order available on the Internet, (2) the defendants took no corrective action thereafter, and (3) it had "grave concerns" that there would be "a chilling effect on the testimony of witnesses who would be rightfully concerned that their confidential information, including their psychiatric and medical histories, would be made available to the public." The court iterated these concerns during argument preceding its sanction order, stating in relevant

[31] As we concluded in part I B of this opinion, we reject the defendants' claim that the court's finding that they wilfully violated the discovery orders was clearly erroneous.

part: "So, I do intend to impose sanctions [for the violation of the protective order]. . . . I think the [defendants'] behavior really is unconscionable. . . . And I am concerned about a chilling effect on the testimony of other witnesses." In light of these concerns, this factor weighs in favor of the court's default order.

Finally, the court determined that imposing a lesser sanction would be "inadequate . . . ." In 2019, following the defendants' noncompliance with discovery vis-à-vis the special motions to dismiss and Jones' comments during his June 14, 2019 radio broadcast, the court sanctioned the defendants by precluding them from pursuing the special motions to dismiss; however, the court cautioned that it would consider defaulting them in the future if "they, from th[at] point forward, continue[d] with their behavior with respect to discovery." Later, the court also warned the defendants that they risked being defaulted if they failed to comply with its June 2, 2021 order directing the production of complete, final supplemental compliance. See *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 74 ("[i]n instances in which our appellate courts have upheld the sanction of a nonsuit, a significant factor has been that the trial court put the plaintiff on notice that noncompliance would result in a nonsuit"). Nevertheless, as the court found, the defendants continued to engage in "a pattern of obstructive conduct" in "callous[ly]" disregarding their discovery obligations. This conduct was not isolated; rather, as the various orders entered by the court demonstrate, notwithstanding being given ample opportunities to comply, the defendants repeatedly failed to produce adequate, responsive materials. The court reasonably determined that a lesser sanction would not suffice under such circumstances. See *Gutierrez* v. *Mosor*, supra, 206 Conn. App. 829 ("[t]he appellate courts of this state consistently have upheld nonsuits, defaults or other sanctions imposed for discovery

violations where the noncomplying party has exhibited a pattern of violations or discovery abuse demonstrating a disregard for the court's authority").

Moreover, in the midst of the defendants' ongoing discovery noncompliance, the defendants filed the motion to depose Clinton, which contained information designated as "Highly Confidential-Attorneys Eyes Only" subject to the protective order. As the court determined, the defendants, in a "cavalier" fashion, violated the protective order, which they originally had proposed, by releasing the confidential information to the public, thereby creating a palpable risk of a "chilling effect" on the testimony of witnesses in the future. Against this backdrop, we cannot discern an abuse of discretion by the court in defaulting the defendants as a sanction. See *Gutierrez* v. *Mosor*, supra, 206 Conn. App. 827 ("dismissal of an action is not an abuse of discretion where a party shows deliberate, contumacious or unwarranted disregard for the court's authority" (emphasis omitted; internal quotation marks omitted)).

In sum, we conclude that the court properly exercised its discretion in defaulting the defendants as a sanction for their violations of its discovery orders and the protective order.

II

The defendants next claim that the trial court improperly construed the effect of the defendants' default to relieve the plaintiffs of the burden to establish the extent of their damages. This claim warrants little discussion.

Initially, we observe that the defendants assert that the court "never made a principled and intelligible ruling about causation in this case" but, rather, treated causation as having been established following the

defendants' default. The defendants do not brief any substantive claims as to any particular rulings of the court[32] but, rather, take issue with the court's rulings as a whole insofar as the court purportedly "eviscerated the concept of causation and relieved the plaintiffs of any responsibility to prove, or even to attempt to prove, a linkage to the various and diffuse harms they suffered and the conduct of the [defendants]."[33] We exercise

[32] The defendants refer to the court's jury charge, wherein the court instructed the jury in relevant part: "I hereby charge you that causation of the plaintiffs' damages is already established. . . . Causation of harm has been established by virtue of the court's prior rulings to the satisfaction of the law. That is, it has been established in this case that the defendants proximately caused harm to the plaintiffs by spreading lies about the plaintiffs to their audience and the public by urging their audience and the public to investigate and look into the plaintiffs and to stop the people supposedly behind the Sandy Hook hoax, resulting in members of the defendants' audience and the public cyberstalking, attacking, harassing, and threatening the plaintiffs, as you have heard in the evidence in this case. In sum, it has been established that the defendants caused harm to the plaintiffs in all the ways I just described. The defendants' statements and conduct caused reputational harm to the plaintiffs, invasion of privacy, and emotional distress. The extent of the harm is what you will be measuring in your verdict. The cause of the harm is not in question."

[33] In their principal appellate brief, the defendants make vague references to (1) "a series of bizarre evidentiary rulings" by the court that "eviscerated the requirement that [the] plaintiffs prove the extent of their damages," (2) the court's improper admission of evidence, (3) the court failing to determine which of the plaintiffs' allegations were "material," (4) the court instructing the jury that liability had been " 'established,' " and (5) the court denying a motion in limine filed by the defendants requesting that the transcript of its November 15, 2021 ruling defaulting the defendants be admissible at the hearing in damages. Insofar as the defendants attempt to raise claims of error with respect to these discrete issues, they have failed to brief such claims adequately and, therefore, we deem any such claims to be abandoned. See *Lafferty* v. *Jones*, supra, 336 Conn. 375 n.30.

Additionally, in their principal appellate brief, the defendants repeatedly state that the jury was unaware that liability was established against the defendants as the result of a disciplinary default. In their reply brief, the defendants assert for the first time that the court committed error in failing to notify the jury that the defendants were defaulted as a disciplinary sanction. We decline to review this claim, as it is (1) improperly raised for the first time in the defendants' reply brief or (2) inadequately briefed, even if cognizably raised in the defendants' principal appellate brief. See *Anderson-Harris* v. *Harris*, 221 Conn. App. 222, 253 n.24, 301 A.3d 1090 (2023); *Robb* v. *Connecticut Board of Veterinary Medicine*, 204 Conn. App. 595, 613 n.23,

plenary review over this claim, which presents a question of law. See *Williams* v. *Mansfield*, 215 Conn. App. 1, 10, 281 A.3d 1263 (2022) ("[w]hen . . . a court's decision is challenged on the basis of a question of law, our review is plenary").

It is axiomatic that "[a] default admits the material facts that constitute a cause of action . . . and entry of default, when appropriately made, conclusively determines the liability of a defendant. . . . If the allegations of the plaintiff's complaint are sufficient on their face to make out a valid claim for the relief requested, the plaintiff, on the entry of a default against the defendant, need not offer evidence to support those allegations. . . . Therefore, the only issue . . . following a default is the determination of damages. . . . A plaintiff ordinarily is entitled to at least nominal damages following an entry of default against a defendant in a legal action. . . .

"In an action at law, the rule is that the entry of a default operates as a confession by the defaulted defendant of the truth of the material facts alleged in the complaint which are essential to entitle the plaintiff to some of the relief prayed. It is not the equivalent of an admission of all of the facts pleaded. The limit of its effect is to preclude the defaulted defendant from making any further defense and to permit the entry of a judgment against him on the theory that he has admitted such of the facts alleged in the complaint as are essential to such a judgment. It does not follow that the plaintiff is entitled to a judgment for the full amount of the relief claimed. The plaintiff must still prove how much of the judgment prayed for in the complaint he is entitled to receive."[34] (Emphasis omitted; internal quotation marks

254 A.3d 915, cert. denied, 338 Conn. 911, 259 A.3d 654 (2021); see also footnote 26 of this opinion.

[34] We note that, "[a]fter a default, a defendant may still contest liability. Practice Book §§ 17-34, 17-35 and 17-37 delineate a defendant's right to contest liability in a hearing in damages after default. Unless the defendant provides the plaintiff written notice of any defenses, the defendant is fore-

omitted.) *Whitaker* v. *Taylor*, 99 Conn. App. 719, 725–26, 916 A.2d 834 (2007).

As these legal principles elucidate, after the court had defaulted the defendants, the plaintiffs were not required to demonstrate that the defendants' conduct caused their harm. Instead, following the defendants' default, the only burden carried by the plaintiffs was to prove the amount of their damages. See *Murray* v. *Taylor*, 65 Conn. App. 300, 335, 782 A.2d 702 (This court, in reversing the trial court's grant of the defaulted defendant's motion to set aside the verdict following the hearing in damages, explained that "[t]he [trial] court determined that there was no evidence from which the jury reasonably could have found that the plaintiff's damages were proximately caused by the conduct alleged and ruled against the plaintiff on that basis. Yet, in an action at law, as here, the liability of a defaulted defendant is established and the plaintiff's burden at a hearing in damages is limited to proving that the amount of damages claimed is derived from the injuries suffered and is properly supported by the evidence. . . . We, therefore, cannot agree with the court's conclusion that the plaintiff's claim must fail because he did not provide evidence that [the defaulted defendant's] negligent conduct proximately caused his injuries . . . ." (Citation omitted.)), cert. denied, 258

closed from contesting liability. . . . If written notice is furnished to the plaintiff, the defendant may offer evidence contradicting any allegation of the complaint and may challenge the right of the plaintiff to maintain the action or prove any matter of defense. . . . This approximates what the defendant would have been able to do if he had filed an answer and special defenses." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Schwartz* v. *Milazzo*, 84 Conn. App. 175, 178–79, 852 A.2d 847, cert. denied, 271 Conn. 942, 861 A.2d 515 (2004). On November 24, 2021, following the entry of the default against them, the defendants filed a notice of defenses, which was stricken by the court on December 24, 2021. The defendants on appeal do not challenge the propriety of the court's order striking the notice of defenses.

Conn. 928, 783 A.2d 1029 (2001).[35] Accordingly, the defendants' claim fails.

III

The defendants also claim that the trial court improperly restricted the scope of Jones' testimony at the hearing in damages. We conclude that the defendants have abandoned this claim by failing to brief it adequately.

The following additional procedural history is relevant. On September 6, 2022, the court granted motions in limine filed by the plaintiffs seeking to preclude evidence or argument at the hearing in damages concerning, inter alia, (1) the defendants' "maximum total amount of Sandy Hook coverage or percentage or proportion of Sandy Hook coverage" and (2) the court's ruling defaulting the defendants. Additionally, on September 13, 2022, the court granted a motion for sanctions filed by the plaintiffs on the basis of additional discovery misconduct by the defendants. The court sanctioned the defendants by prohibiting them from presenting evidence or argument "that they did not profit from their Sandy Hook coverage."

On September 22, 2022, during the hearing in damages, the plaintiffs called Jones as a witness. Outside of the jury's presence, the court canvassed Jones with regard to the various topics about which (1) counsel were prohibited from asking him and (2) he was precluded from testifying. Jones indicated that he understood which topics his testimony could not address. During the course of Jones' direct examination, the

[35] The defendants cite the following language in *Murray* to support their claim: " '[E]ven in a hearing in damages . . . a plaintiff must still prove that the damages claimed were caused by the conduct alleged.' " *Murray* v. *Taylor*, supra, 65 Conn. App. 333. The source of that language, however, is the trial court decision that this court reversed on appeal. See id., 332–35, 340. The defendants' reliance on that language, therefore, is untenable.

court and counsel engaged in multiple sidebars, and the jury was excused several times, in order to address whether certain questions asked by the plaintiffs' counsel and testimony by Jones were proper in light of the court's orders. The next day, the defendants' counsel informed the court that, for "strategic" reasons, the defendants were forfeiting the right to cross-examine Jones, intending instead to call him as a witness during their case-in-chief. On October 5, 2022, outside of the jury's presence, the defendants' counsel notified the court that Jones had decided not to testify during the defendants' case-in-chief, explaining that Jones was "boycotting [the] proceedings because he [felt] that [he was] on the horns of a trilemma. If he testifie[d] in accord with the court's orders [restricting his testimony], [he would] be committing perjury; if he violate[d] the court orders, [it would be] criminal contempt; if he [took] the fifth [amendment to the United States constitution], he [would get an] adverse inference."

The defendants claim on appeal that the court committed error in restricting the scope of Jones' testimony. The majority of the defendants' briefing of this claim focuses on reciting and commenting on the relevant procedural history, iterating the "trilemma" that Jones purportedly faced, and detailing how Jones would have testified but for the court's orders limiting his testimony. The defendants, however, provide no substantive legal analysis examining the propriety of the court's orders imposing limits on Jones' testimony, such as the court's September 13, 2022 order sanctioning the defendants for additional discovery violations. Accordingly, we conclude that the defendants have abandoned this claim as a result of their failure to adequately brief it. See *Lafferty* v. *Jones*, supra, 336 Conn. 375 n.30.

IV

The defendants next claim that the trial court improperly denied their motion for a remittitur. We disagree.

The following additional procedural history is relevant to our resolution of this claim. The evidentiary portion of the hearing in damages transpired over the course of several weeks, commencing on September 13, 2022, and concluding on October 5, 2022. The following witnesses testified during the plaintiffs' case-in-chief: (1) the plaintiffs; (2) Alissa Parker, a spouse of one of the plaintiffs; (3) Brittany Paz, a Connecticut attorney who served as a corporate representative of Free Speech Systems, LLC; (4) Clinton Watts, an expert in the field of "identifying analytics and analysis around social media, the Internet, and how it influences people's behavior"; and (5) Jones. The court admitted in full numerous exhibits offered by the plaintiffs, including video clips of Jones' broadcasts. The defendants rested without calling any witnesses or offering any exhibits, except for one exhibit that was marked for identification only.

In its verdict, the jury awarded the plaintiffs a total of $965,000,000 in compensatory damages, which was split into two categories for each plaintiff: (1) "defamation/slander" damages, past and future; and (2) emotional distress damages, past and future. The jury did not divide the $965,000,000 amount evenly among the plaintiffs; rather, other than two plaintiffs who were each awarded $57,600,000, each plaintiff was awarded a distinct amount of compensatory damages.

In moving for a remittitur, the defendants asserted that the jury's verdict was "exorbitant, shock[ed] the sense of justice and was influenced by partiality and prejudice." The defendants argued that (1) the plaintiffs failed to submit evidence to aid the jury in calculating compensatory damages, such as medical evidence or expert testimony on the extent of their emotional distress, such that the jury's verdict was predicated on speculation and was motivated by prejudice and passion, (2) the jury, in essence, awarded the plaintiffs

punitive damages rather than compensatory damages, and (3) the defendants' right to due process was violated as a result of the plaintiffs' failure to submit evidence estimating their damages. The plaintiffs filed a memorandum of law in opposition to the motion for a remittitur, refuting the defendants' arguments.

In denying the defendants' motion for a remittitur, the court stated: "The defendants take the position, in a conclusory manner unsupported by any evidence or case law, that the verdict was 'exorbitant' and the result of 'passion and prejudice.' They argue—again, unsupported by any law—that due process requires that the plaintiffs are responsible for establishing what they think would make them whole—that is, that the plaintiffs should have been required to offer evidence as to the amount they sought in compensatory damages. As the plaintiffs point out, the defendants cite no transcript, exhibits, or case law to even begin to carry their burden of showing manifest injustice.[36] Here, the overwhelming evidence of the plaintiffs' injuries and damages, in conjunction with the court's instructions on the law, which the jury is presumed to have followed, clearly support[s] the [verdict] rendered by the jury. The size of the [verdict], while substantial, does not so shock the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption, but instead falls within the necessarily uncertain limits of just damages to be determined by the jury. This jury discharged its obligations conscientiously, dutifully, and according to the court's instructions on the law to be applied. This jury was a careful jury whose behavior was beyond reproach; [its] attention to the evidence and instructions from the

[36] In footnotes, the court (1) observed that, in contrast to the defendants' "conclusory motion," the plaintiffs "in their objection painstakingly and accurately highlight[ed] the evidence submitted" and (2) iterated that it was not obligated to consider inadequately briefed claims.

court is evident from the specific questions [it] asked regarding both the charge and the evidence.[37] In reviewing the evidence in a light most favorable to sustaining the [verdict], the court finds that the evidence of the devastating harm caused to the plaintiffs through the defendants' continued use of their business platform[s] to spread lies to a massive audience clearly supports the [verdict], and that the [verdict was] within the limits of a fair and just award of damages." (Footnotes added; footnotes omitted.)

Before addressing the defendants' claim, we set forth the following applicable legal principles and standard of review. General Statutes § 52-216a provides in relevant part: "If the court at the conclusion of the trial concludes that the verdict is excessive as a matter of law, it shall order a remittitur and, upon failure of the party so ordered to remit the amount ordered by the court, it shall set aside the verdict and order a new trial. . . ."

"[I]n determining whether to order remittitur, the trial court is required to review the evidence in the light most favorable to sustaining the verdict. . . . Upon completing that review, the court should not interfere with the jury's determination except when the verdict is plainly excessive or exorbitant. . . . The ultimate test [that] must be applied to the verdict by the trial court is whether the jury's award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake or corruption. . . . The court's broad power to order a remittitur should be exercised only when it is manifest that the jury [has awarded damages that] are contrary to law, not supported by proof, or contrary to the court's

[37] The jury submitted several notes during its deliberations.

explicit and unchallenged instructions. . . . Accordingly, we consistently have held that a court should exercise its authority to order a remittitur rarely—only in the most exceptional of circumstances . . . and [when] the court can articulate very clear, definite and satisfactory reasons . . . for such interference." (Citation omitted; internal quotation marks omitted.) *Ashmore* v. *Hartford Hospital*, 331 Conn. 777, 782–83, 208 A.3d 256 (2019). The inquiry into whether a damages award shocks the sense of justice "is not intended to detect the kind of shock that arises from a moral outrage but, instead, refers to the distress that may be felt when the requirement of reasonableness has been abandoned in a setting in which reason is a necessary element of any legitimate outcome. If the verdict cannot be explained rationally, then the trial court may presume that it is tainted by improper considerations." *Maldonado* v. *Flannery*, 343 Conn. 150, 166–67, 272 A.3d 1089 (2022).

"[O]ur review of the trial court's decision [to grant or deny remittitur] requires careful balancing. . . . [T]he decision whether to reduce a jury verdict because it is excessive as a matter of law . . . rests solely within the discretion of the trial court. . . . [T]he same general principles apply to a trial court's decision to order a remittitur. [Consequently], the proper standard of review . . . is that of an abuse of discretion. . . . [T]he ruling of the trial court . . . is entitled to great weight and every reasonable presumption should be given in favor of its correctness. . . . The chief rationale that has been articulated in support of this deferential standard of review is that the trial court, having observed the trial and evaluated the testimony firsthand, is better positioned than a reviewing court to assess both the aptness of the award and whether the jury may have been motivated by improper sympathy,

partiality, or prejudice."[38] (Citations omitted; internal quotation marks omitted.) *Ashmore* v. *Hartford Hospital*, supra, 331 Conn. 783.

"[A]lthough the trial court has a broad legal discretion in this area, it is not without its limits. . . . Litigants have a constitutional right to have factual issues resolved by the jury. . . . This right embraces the determination of damages when there is room for a reasonable difference of opinion among fair-minded persons as to the amount that should be awarded. . . . Furthermore, [t]he size of the verdict alone does not determine whether it is excessive. . . . Thus, [i]n ruling on the motion for remittitur, the trial court [is] obliged to view the evidence in the light most favorable to the plaintiff in determining whether the verdict returned [is] reasonably supported thereby. . . . A conclusion that the jury exercised merely poor judgment is an insufficient basis for ordering a remittitur. . . . A generous award of noneconomic damages should be sustained if it does not shock the sense of justice. . . . The fact that the jury returns a verdict in excess of what the trial judge would have awarded does not alone establish that the verdict was excessive. . . . [T]he court should not act as the seventh juror with absolute veto power. Whether the court would have reached a different [result] is not in itself decisive. . . . The court's proper function is to determine whether the evidence, reviewed in a light most favorable to the prevailing party, reasonably supports the jury's verdict. . . . In determining whether the court abused its discretion, therefore, we must examine the evidential basis of the verdict itself . . . . [T]he court's action cannot

[38] The defendants assert that we should exercise plenary review over their claim because the jury's verdict "shocks the sense of justice" in violation of their due process rights. The defendants provide no legal authority in support of this assertion. We, instead, apply the well settled standard of review and examine the court's decision for an abuse of discretion.

be reviewed in a vacuum. The evidential underpinnings of the verdict itself must be examined." (Internal quotation marks omitted.) *Gois* v. *Asaro*, 150 Conn. App. 442, 457–58, 91 A.3d 513 (2014).

Moreover, "[p]roper compensation for noneconomic damages cannot be computed by a mathematical formula, and there is no precise rule for the assessment of damages. . . . The plaintiff need not prove damages with mathematical exactitude; rather, the plaintiff must provide sufficient evidence for the trier to make a fair and reasonable estimate." (Internal quotation marks omitted.) Id., 457; see also *Commission on Human Rights & Opportunities* v. *Cantillon*, 347 Conn. 58, 68–69, 295 A.3d 919 (2023) ("Noneconomic damages, such as emotional distress, pain and suffering, are, at best, rather indefinite and speculative in nature. . . . For more than fifty years, this court has rejected the idea that any specific yardstick can be applied to cabin the discretion of the trier of fact when calculating a fair and appropriate award of noneconomic damages." (Citation omitted; internal quotation marks omitted.)).

The defendants assert that a remittitur of the jury's verdict was necessary because the plaintiffs failed to submit sufficient evidence to establish their damages, such as medical evidence or expert testimony concerning their emotional distress, leaving the jury without a means to determine damages other than relying on passion, prejudice, and speculation. The defendants maintain that, rather than prove their damages, the plaintiffs "focus[ed] . . . on arousing sympathy, directing anger, and anchoring a large number before the jury[39] with the hope that [the] jurors would do what

[39] The defendants reference the plaintiffs' closing argument, during which the plaintiffs' counsel, in addressing damages for defamation and slander, proposed that the jury consider (1) picking a number representing a reasonable amount to award to one individual, assuming that a lie about that individual had been told to one person, and (2) multiplying that number first by 550 million, which, according to testimony elicited from Watts, represented the minimum audience that the defendants' lies about Sandy

they did in this case—award a fortune." (Footnote added.) We disagree.[40]

Our review of the record reveals that there was sufficient evidence to support the $965,000,000 in compensatory damages awarded by the jury. All of the plaintiffs

Hook reached between 2012 and 2018, and then by fifteen, or the number of plaintiffs in the underlying consolidated actions.

[40] The defendants raise two additional assertions that we discuss briefly. First, the defendants contend that, to comport with due process, the plaintiffs were required to present evidence that estimated their damages so as to provide "some notice as to the magnitude of [the] harm" suffered. As before the trial court, the defendants have failed to provide any substantive legal analysis to support this claim, and, therefore, we deem it to be abandoned. See *Lafferty* v. *Jones*, supra, 336 Conn. 375 n.30. Moreover, we iterate our Supreme Court's recent statement that "[n]oneconomic damages, such as emotional distress, pain and suffering, are, at best, rather indefinite and speculative in nature. . . . For more than fifty years, [our Supreme Court] has rejected the idea that any specific yardstick can be applied to cabin the discretion of the trier of fact when calculating a fair and appropriate award of noneconomic damages." (Citation omitted; internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Cantillon*, supra, 347 Conn. 68–69. We also observe that, under Connecticut law, in civil actions seeking the recovery of damages resulting from personal injury, counsel is entitled, but not required, to present argument on the amount of past and future noneconomic damages. See General Statutes § 52-216b (a) ("[i]n any civil action to recover damages resulting from personal injury or wrongful death, counsel for any party to the action shall be entitled to specifically articulate to the trier of fact during closing arguments, in lump sums or by mathematical formulae, the amount of past and future economic and noneconomic damages claimed to be recoverable"); see also Practice Book § 16-19 ("In any action seeking damages for injury to the person, the amount demanded in the complaint shall not be disclosed to the jury. In the event that the jury shall return a verdict which exceeds the amount demanded, the judicial authority shall reduce the award to, and render judgment in, the amount demanded. Counsel for any party to the action may articulate to the jury during closing argument a lump sum or mathematical formula as to damages claimed to be recoverable.").

Second, the defendants assert that the jury awarded the plaintiffs punitive, rather than compensatory, damages. The record does not support this assertion. Our review of the court's jury charge reflects that the court instructed the jury that its task was to determine compensatory damages, and the court expressly instructed the jury that, "[u]nder the rule [of] compensatory damages, the purpose of an award of damages is not to punish or penalize the defendants for their wrongdoing but to compensate the plaintiffs for the resulting harms and losses." Moreover, the court separately instructed the jury that (1) the plaintiffs were seeking punitive damages in the form

testified that, in the aftermath of the Sandy Hook massacre, they endured traumatic threats and harassment, conveyed, inter alia, through social media, by mail, or in person, stemming from the lies, as propagated by the defendants, that the Sandy Hook massacre was a hoax. Examples of such threats and harassment included death threats, claims that the plaintiffs were actors, and accusations that the deceased victims of the Sandy Hook massacre were not real or were still alive. Additionally, all of the plaintiffs testified to the mental anguish and emotional harm that they suffered as a result of the harrowing threats and harassment they experienced.[41] The extent of the plaintiffs' damages was established further by the testimony of Watts, the plaintiffs' social media expert, who testified that, on the basis of data that he reviewed from three social media platforms, namely, YouTube, Facebook, and Twitter, the defendants' lies about the Sandy Hook massacre reached a minimum audience of 550 million people between 2012 and 2018.

In sum, we agree with the court that the evidence supported the jury's verdict and, although substantial,

of attorney's fees and costs, and (2) the jury was to determine whether punitive damages were to be awarded, with the court to determine the amount thereof if awarded. In a section of the verdict form titled "Compensatory Damages," the jury awarded the plaintiffs a total of $965,000,000 in damages, comprising past and future "defamation/slander" and emotional distress damages. In a separate section of the verdict form, the jury determined that the plaintiffs were entitled to attorney's fees and costs. The defendants do not challenge the propriety of the jury instructions, and, "in the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that the jury followed them." *Audibert* v. *Halle*, 198 Conn. App. 472, 482, 233 A.3d 1237 (2020). Thus, we reject the defendants' contention that the $965,000,000 awarded by the jury to the plaintiffs constituted punitive, rather than compensatory, damages.

[41] Insofar as the defendants argue that the plaintiffs were required to produce medical or expert testimony to corroborate their testimony concerning their emotional distress, the defendants provide no legal support for this assertion. Cf. *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 707 n.25, 41 A.3d 1013 (2012) (rejecting defendant's argument that plaintiff's testimony regarding emotional distress was insufficient without corroboration by medical or expert testimony).

the verdict did not "so [shock] the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake or corruption." (Internal quotation marks omitted.) *Ashmore* v. *Hartford Hospital*, supra, 331 Conn. 782. Accordingly, we conclude that the court did not abuse its discretion in denying the defendants' motion for a remittitur.

V

The defendants' final claim is that the trial court improperly concluded that the plaintiffs asserted a legally viable CUTPA claim. For the reasons that follow, we agree.

We begin with a brief overview of CUTPA. "CUTPA is, on its face, a remedial statute that broadly prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . . To give effect to its provisions, [General Statutes] § 42-110g (a)[42] of [CUTPA] establishes a private cause of action, available to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [General Statutes §] 42-110b . . . ." (Footnote added; internal quotation marks omitted.) *Cenatiempo* v. *Bank of America, N.A.*, 333 Conn. 769, 788, 219 A.3d 767 (2019). Section 42-110b (a), in turn, provides: "No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Section 42-110a (4) defines " '[t]rade' and 'commerce' " as "the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the

[42] General Statutes § 42-110g (a) provides in relevant part: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. . . ."

distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state."[43]

The following additional procedural history is relevant to our resolution of this claim. To support their CUTPA claim in their original complaint, in addition to incorporating the allegations of the other claims that they asserted, the plaintiffs alleged, inter alia, that (1) the defendants "unethically, oppressively, immorally, and unscrupulously developed, propagated, and disseminated outrageous and malicious lies about the plaintiffs and their family members, and they did so for profit,"[44] (2) the defendants engaged in a "campaign of lies, abuse, and harassment, [which constituted] a deceptive practice and offended public policy," (3) the defendants' "reprehensible conduct caused substantial injury to the plaintiffs and other consumers that [was] not outweighed by any countervailing benefits to anyone, and that the plaintiffs themselves could not have

[43] CUTPA "refers to 'trade or commerce' in the substantive provision, § 42-110b (a), but contains a definition of ' "trade" ' and ' "commerce" ' in the definitions provision, § 42-110a (4). The definition seems to equate the disjunctive with the conjunctive relationship of the two terms and interpret the two terms as having a single meaning or a combined inclusive meaning." R. Langer et al., 12 Connecticut Practice Series: Connecticut Unfair Trade Practices, Business Torts and Antitrust (2024–2025 Ed.) § 3.1, p. 117 n.2.

[44] The plaintiffs further alleged, for instance, that, "[o]nce he has their attention and trust, Jones exploits his audience by selling them products in line with the paranoid worldview he promotes. In [Jones'] [I]nternet based and broadcast radio shows, the . . . defendants hawk 'open currency' precious metals, prepackaged food and dietary supplements, 'male enhancement' elixirs and radiation-defeating iodine tablets, gas masks and body armor, and various customized AR-15 'lower receivers' (the extruded metal frame that encloses the breach, ammunition feed and firing mechanism of the rifle). . . . [T]he . . . defendants concoct elaborate and false paranoia-tinged conspiracy theories because it moves product and they make money. Jones and his subordinates say what they say not because they are eager to educate or even to entertain their audience. Rather, they deliberately stoke social anxiety and political discord in their listeners, because distrust in government and cultural tribalism motivate[s] those listeners to buy their products." (Footnote omitted.)

reasonably avoided," (4) the defendants' "conduct was a foreseeable cause of and a substantial factor causing the plaintiffs' injury," and (5) the defendants "broadcast their outrageous, cruel, and malicious lies about the plaintiffs with knowledge that the statements were false and with reckless disregard as to whether or not they were true."[45]

On October 9, 2020, the Jones defendants filed a motion to strike, asserting in relevant part that the plaintiffs' CUTPA claim was insufficiently pleaded. On April 29, 2021, the plaintiffs filed an objection, and, on June 4, 2021, the Jones defendants filed a reply brief. On November 18, 2021, the court denied the motion to strike. With respect to the plaintiffs' CUTPA claim, the court determined that "[a]n allegation of defamatory conduct on the part of a defendant is sufficiently wrongful to formulate the underlying basis of a CUTPA cause of action. . . . As the court is not striking the plaintiffs' defamation claim, the plaintiffs' [original] complaint sets forth allegations of violations of public policy or otherwise immoral, unethical, oppressive or unscrupulous conduct such that the plaintiffs allege a legally sufficient CUTPA cause of action." (Citations omitted.) The court further determined that the plaintiffs had standing to maintain their CUTPA claim, stating that "the plaintiffs allege that the [Jones] defendants 'broadcast . . . outrageous, cruel and malicious lies about the plaintiffs' and that '[t]hese acts of the [Jones] defendants resulted in damage to the plaintiffs.' Therefore, the plaintiffs have set forth a colorable claim of direct injury such that they have standing to maintain their CUTPA cause of action."

On October 5, 2022, after the plaintiffs had rested their case-in-chief at the hearing in damages, the defendants' counsel orally moved for a directed verdict and/

[45] The allegations in support of the plaintiffs' CUTPA claim were substantively identical in the plaintiffs' respective original complaints, as well as in their September, 2022 amended complaint.

or to dismiss the plaintiffs' CUTPA claim.[46] The defendants' counsel argued in relevant part that the plaintiffs were asserting a "novel application" of CUTPA because "there is no representation whatsoever that the plaintiffs were harmed in any respect by . . . Jones' commercial activities with respect to the sale of dietary supplements. . . . There is no evidence that anyone was harmed by his commercial activity. . . . [N]othing in [his] speech, or the consequences of that speech, addresses what CUTPA is intended to address . . . and that is whether consumers were harmed by . . . the commercial activity [affecting] trade or commerce. . . . [W]hat we have here is a novel attempt to use CUTPA to silence unpopular speech. . . . So, we think that CUTPA is being used for inappropriate grounds and that the plaintiffs lack standing to bring the action because they cannot establish that they were harmed by . . . Jones' commercial activity. . . . [T]here is no case . . . that supports what the plaintiffs intend to do in this case, and that is [to] use . . . a statute that is designed to protect consumers against unscrupulous trade and commercial practices to attack speech. . . . [N]othing in our law supports an application of CUTPA on the fact[s] as pled and proven in this case." In response, the plaintiffs' counsel argued in relevant part: "With regard to the idea that the CUTPA claim is only about statements, it's not. What it describes is a commercial course of conduct that is built on targeting and victimizing these families by lying about them. So, certainly lies are in the mix, but what the court heard was not just the occasional lie, it's the use of lies to sell products to fuel a business. . . . There is a business plan to hurt these families and to sell things by hurting them. And that has to be . . . remediable under CUTPA . . . ." In rebuttal, the defendants' counsel

[46] On October 6, 2022, the defendants filed a written version of their oral motion.

argued that there was no precedent providing that CUTPA applies when (1) "a person engages in extreme comments and relies on the sale of products to produce that platform" and (2) there is no evidence of harm stemming from the products sold. The court rejected the defendants' claims without additional comment.

Subsequently, in their motion to set aside the jury's verdict, the defendants, in essence, reasserted their prior contention that the plaintiffs' CUTPA claim was legally insufficient. In denying that motion, the court determined in relevant part that "CUTPA serves to deter predatory commercial conduct such as [the conduct alleged by the plaintiffs]. This court, in ruling on the defendants' motion to strike, already determined that '[a]n allegation of defamatory conduct on the part of a defendant is sufficiently wrongful conduct to formulate the basis of a CUTPA cause of action.' The [verdict] rendered by [the] jury [is] not against the law or the evidence."[47]

We construe the crux of the defendants' claim on appeal to be that the conduct at issue alleged by the plaintiffs and admitted by operation of the defendants' default, namely, the defendants' dissemination of lies about the Sandy Hook massacre, was insufficient to support a viable CUTPA claim because their actions were not performed "in the conduct of any trade or commerce." General Statutes § 42-110b (a). The defendants posit that no CUTPA claim arises here when (1) they did not lie about or unscrupulously advertise the products that they sold and (2) their actions led to *indirect* commercial gains through product sales. In short, the defendants contend that they engaged in noncommercial speech outside of the scope of CUTPA. The

[47] The defendants raised additional claims directed to the plaintiffs' CUTPA claim, including that the plaintiffs failed to plead the ascertainable loss element of a CUTPA claim. The court rejected these claims, and the defendants do not pursue these issues on appeal.

plaintiffs respond that, "[w]hen using lies about [the] plaintiffs to sell supplements, [the defendants were] engaged in 'unfair' and 'deceptive' acts and practices 'in the conduct of' [their] 'trade or commerce.' " We conclude that, as a matter of law, the acts in which the defendants engaged were not "in the conduct of any trade or commerce" as required pursuant to CUTPA. See General Statutes § 42-110b (a).

"The interpretation of pleadings is an issue of law. . . . We conduct a plenary review of the pleadings to determine whether they are sufficient to establish a cause of action upon default." (Citation omitted; internal quotation marks omitted.) *Gaynor* v. *Hi-Tech Homes*, 149 Conn. App. 267, 276, 89 A.3d 373 (2014). Moreover, "[w]hether a defendant is subject to CUTPA is a question of law that is subject to plenary review." *NRT New England, LLC* v. *Longo*, 207 Conn. App. 588, 610–11, 263 A.3d 870, cert. denied, 340 Conn. 906, 263 A.3d 821 (2021).

Before turning to the merits of the defendants' claim, we note that the default entered against the defendants does not limit our review of this claim. "An appellate court . . . may examine the allegations of a complaint to ascertain whether they are sufficient on their face to establish a valid claim for the relief requested. . . . Although the failure of a party to deny the material allegations of a pleading operates so as to impliedly admit the allegations, a default does not automatically trigger judgment for, or the relief requested by, the pleader. The pleader is entitled to an entry of judgment or a grant of relief as a function of the nonresponsive party's default and the attendant implied admission only when the allegations in the well pleaded filing are sufficient on their face to make out a claim for judgment or relief. . . . While an admission carries with it all reasonable implications of fact and legal conclusions . . . the admission cannot traverse beyond the bounds

of the underlying pleading and admit allegations not made by the pleader; the pleading is, unless leave is granted to modify, the ceiling." (Internal quotation marks omitted.) *Gaynor* v. *Hi-Tech Homes*, supra, 149 Conn. App. 274–75. "As such, while a default admits the material allegations of the underlying pleading, the question as to whether the default requires judgment in favor of the pleader is to be determined by reference to the sufficiency of the pleading itself." *Commissioner of Social Services* v. *Smith*, 265 Conn. 723, 737, 830 A.2d 228 (2003). "Put another way, in both equitable and legal actions, the plaintiff must establish his right to relief to the court's satisfaction, even though some issues may have been laid at rest by the default." (Internal quotation marks omitted.) *Moran* v. *Morneau*, 140 Conn. App. 219, 226, 57 A.3d 872 (2013); see also id., 225 ("[a] default may settle many issues, but it does not operate to insulate a mistaken legal proposition from judicial review").

For CUTPA to apply, there must be an unfair or deceptive act or practice committed "in the conduct of any trade or commerce." General Statutes § 42-110b (a); see also *Cenatiempo* v. *Bank of America, N.A.*, supra, 333 Conn. 789 ("[t]o successfully state a claim for a CUTPA violation, the plaintiffs must allege that the defendant's acts occurred in the conduct of trade or commerce"); *Pellet* v. *Keller Williams Realty Corp.*, 177 Conn. App. 42, 62, 172 A.3d 283 (2017) ("[t]he essential elements to pleading a cause of action under CUTPA are: (1) the defendant committed an unfair or deceptive act or practice; (2) *the act complained of was performed in the conduct of trade or commerce*; and (3) the prohibited act was the proximate cause of harm to the plaintiff" (emphasis added)). CUTPA defines " '[t]rade' and 'commerce' " as "the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or

intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state." General Statutes § 42-110a (4).

"Despite th[e] broad language [of § 42-110a (4)], the definition of trade and commerce is not unlimited and has been used to restrict the application of CUTPA." *Stearns & Wheeler, LLC* v. *Kowalsky Bros., Inc.*, 289 Conn. 1, 11 n.13, 955 A.2d 538 (2008); see also R. Langer et al., 12 Connecticut Practice Series: Connecticut Unfair Trade Practices, Business Torts and Antitrust (2024–2025 Ed.) § 3.1, p. 117 ("[b]ecause CUTPA applies only to acts 'in the conduct of any trade or commerce,' there is a significant limitation on the reach of [CUTPA]" (footnote omitted)); see, e.g., *Sempey* v. *Stamford Hospital*, 194 Conn. App. 505, 518, 221 A.3d 839 (2019) (trial court properly struck CUTPA count predicated on allegations that former employer made false statements to State of Connecticut Unemployment Commission regarding former employee's reliability and integrity because, inter alia, employee failed to allege that employer committed any acts in " 'conduct of any trade or commerce' ").

Exercising our plenary review, we conclude that the facts alleged by the plaintiffs and admitted by the defendants are legally insufficient to satisfy the "trade or commerce" prong of CUTPA. As we have explained, the conduct forming the basis of the plaintiffs' CUTPA claim was the defendants' propagation of lies that the Sandy Hook massacre was a hoax. Applying the statutory definition of " '[t]rade' and 'commerce' " set forth in § 42-110a (4) (i.e., "the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state"), we cannot conclude that the defendants violated CUTPA

in disseminating their lies about the Sandy Hook massacre. That the defendants' speech was motivated by a desire to generate profit through sales of products that the defendants marketed is not adequate to satisfy the "trade or commerce" prong of CUTPA. Indeed, nothing in the defendants' speech, in and of itself, concerning the Sandy Hook massacre made any mention of their products.

In their respective appellate briefs, the plaintiffs and the defendants address our Supreme Court's decision in *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 202 A.3d 262, cert. denied sub nom. *Remington Arms Co., LLC* v. *Soto*, U.S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019). In *Soto*, several plaintiffs, acting as the administrators of the estates of nine of the victims of the Sandy Hook massacre; id., 65, 66 n.2; commenced an action against several defendants who were alleged to have manufactured, distributed, and sold (to Lanza's mother) the weapon used by Lanza at Sandy Hook—a Bushmaster XM15-E2S semiautomatic rifle. Id., 65–66. The plaintiffs asserted a number of legal theories seeking to hold the defendants liable in part for the Sandy Hook massacre, most of which our Supreme Court determined to be precluded by Connecticut law and/or the Protection of Lawful Commerce in Arms Act (PLCAA), Pub. L. No. 109-92, 119 Stat. 2095 (2005), codified at 15 U.S.C. §§ 7901 through 7903 (2012). Id., 65.

Our Supreme Court concluded, however, that the plaintiffs "offered one narrow legal theory" that was recognized pursuant to Connecticut law and not precluded by PLCAA. Id. Specifically, the plaintiffs alleged that "the defendants violated CUTPA[48] by advertising

[48] The plaintiffs in *Soto* brought their claims pursuant to Connecticut's wrongful death statute, General Statutes § 52-555, predicated in part on alleged CUTPA violations. *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 67.

and marketing the XM15-E2S in an unethical, oppressive, immoral, and unscrupulous manner that promoted illegal offensive use of the rifle" and "that such promotional tactics were causally related to some or all of the injuries that were inflicted during the Sandy Hook massacre." (Footnote added.) Id., 86–87. The trial court struck this CUTPA claim, along with a distinct claim by the plaintiffs alleging that the sale of the XM15-E2S to the civilian market, ipso facto, constituted an unfair trade practice, on the ground that the plaintiffs lacked standing stemming from their status as "third-party victims who did not have a direct consumer, commercial, or competitor relationship . . . with the defendants." Id., 88. Our Supreme Court determined that the trial court erred in striking the plaintiffs' CUTPA claims, reasoning: "Because the principal evils associated with unscrupulous and illegal advertising are not ones that necessarily arise from or infect the relationship between an advertiser and its customers, competitors, or business associates, we hold that a party directly injured by conduct resulting from such advertising can bring an action pursuant to CUTPA even in the absence of a business relationship with the defendant." Id. Our Supreme Court further clarified that it did not "need [to] decide today whether there are other contexts or situations in which parties who do not share a consumer, commercial, or competitor relationship with an alleged wrongdoer may be barred, for prudential or policy reasons, from bringing a CUTPA action. What is clear is that none of the rationales that underlie the standing doctrine, either generally or in the specific context of unfair trade practice litigation, supports the denial of standing to the plaintiffs in this case." Id., 96. Thus, the court held that the plaintiffs had standing with respect to their "narrow legal theory" under CUTPA because they alleged direct injuries from conduct resulting from wrongful advertising. Id., 65, 99–100.

The allegations underlying the CUTPA claim deemed viable in *Soto* are, however, materially distinguishable from the allegations in the underlying consolidated actions and do not lend the plaintiffs support with respect to their allegation that the defendants acted "in the conduct of any trade or commerce" for purposes of CUTPA. As in *Soto*, the plaintiffs in this case did not allege that they were consumers, competitors, or otherwise in a business or commercial relationship with the defendants. Unlike the plaintiffs in *Soto*, however, the plaintiffs in this case did not allege that they were "directly injured by conduct resulting from" the defendants' advertising or sale of the defendants' products, such that they could "bring an action pursuant to CUTPA even in the absence of a business relationship with the defendant[s]." *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 88. Thus, notwithstanding *Soto*'s elimination of the commercial relationship test, the plaintiffs did not allege direct injury from the defendants' *advertising* or *sale* of the defendants' products and, thus, did not fall within the expansion of CUTPA liability established in *Soto*. Rather, they alleged injuries from the defendants' *false speech* about the Sandy Hook massacre—speech that itself was silent with regard to the defendants' products. Stated differently, the plaintiffs did not allege direct injury from commercial speech relating to the advertising, marketing, or sale of goods, as in *Soto*. To extend CUTPA's reach to provide a remedy (in addition to the torts of invasion of privacy by false light, defamation, defamation per se, and intentional infliction of emotional distress) for content of speech unrelated to the advertising, marketing, or sale of products is simply a bridge too far.

In sum, we conclude that the plaintiffs failed to assert a legally viable CUTPA claim. As a result, the judgments rendered with respect to the plaintiffs' CUTPA claim

must be reversed and the attendant award entered pursuant to CUTPA, namely, the $150,000,000 in punitive damages awarded by the court, must be vacated.

The judgments are reversed only as to the plaintiffs' CUTPA claim and the cases are remanded with direction to vacate the court's award of $150,000,000 in punitive damages pursuant to CUTPA; the judgments are affirmed in all other respects.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 229

MILVIA DIBRINO *v.* NICOLAS WOCL ET AL.
(AC 46571)

Alvord, Clark and Pellegrino, Js.

Argued November 19—officially released December 10, 2024

Plaintiff's appeal from the Superior Court in the judicial district of Waterbury, *Massicotte*, *J.*

Per Curiam. The judgment is affirmed.

GEORGE BERKA *v.* MANFRED REHM ET AL.
(AC 46981)

Alvord, Suarez and Seeley, Js.

Argued November 20—officially released December 10, 2024

Plaintiff's appeal from the Superior Court in the judicial district of Middlesex, *Shah*, *J.*

Per Curiam. The judgment is affirmed.

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NOTICES

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in November 2024. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Acevedo-Hernandez, William Enrique of Kew Gardens, NY
Amir-Aslani, Azadeh of New York, NY
Bailie, Jonathan James of Clearwater, FL
Baldwin, William Huyck of Mystic, CT
Belz Dos Reis, Durcio of Boston, MA
Buchholz, Dylan Rock of Fort Montgomery, NY
Burns, Cameron of Norwalk, CT
Byrne, Shayna of West Simsbury, CT
Calabretta, Christa of Hartford, CT
Castor, John Lawrence of Boston, MA
Couture, Alyssa of Astoria, NY
Dayya, David Alexander of Norwalk, CT
Falt, Jillian of Hillsdale, NJ
Hill, Vanessa Alexandra of Stamford, CT
Jean, Stevenson of Bronx, NY
Karathanasis, Kristina of Rye, NY
Lalor, Fintan Stephen of Jersey City, NJ
LaRosa, Kayla Marie of Boston, MA
Leder, Rebecca Ashley of Freeport, NY
Li, Xuening of Weehawken, NJ
Maggi, Sage of Boston, MA
Marshak, Benjamin William of Stamford, CT
Papandrea, Robert of Boston, MA
Plaisir, Jo-Anna Alexandra of Brighton, MA
Rattigan, Liam Michael of New Fairfield, CT
Roman, Sarah Jane of New York, NY
Rowe, John Tobias of Simsbury, CT
Rutstein, Rachel Madeline of New York, NY
Wickham, Keilly of Warwick, RI
Zancewicz, Matthew of Boston, MA
Zangari, Hannah R. of Warwick, RI

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in November 2024. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Arnold, Harrison William of Essex, CT
Barrett, Kensley Robert of Cranston, RI
Barth, Justine Katherine Woods of West Roxbury, MA
Bleichmar, Javier of New York, NY
Briggs, Rachel Genna of New Haven, CT
Cohen, Joseph of Pleasantville, NY
Dorazio, Pamela of Salem, MA
Evans, Christopher of Southport, CT
Geroulo, Thomas of Malvern, PA
Giannetti, Ashley Jessica of Seven Fields, PA
Hecht, David Lawrence of Livingston, NJ
Korth, Sebastian of Ludlow, MA
McDonough, Katie Manzi of Longmeadow, MA
McElligott, William Joseph of Bridgeport, CT
Singer, Olivia Ruth of New York, NY
Zakatov, Oleg Sergeyevich of New Rochelle, NY
Zuckerman, Steven Andrew of Rye Brook, NY

Notice of Reprimand of Attorney

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimand ordered by the reviewing committee of the Statewide Grievance Committee:

Reviewing Committee Reprimand

September 20, 2024: Patrick M. Mullins - 404290
Robert A. Serafinowicz - 423695

September 27, 2024: James A. Saraceni - 414220

Copies of the full text of the decision of the Statewide Grievance Committee are available through the Committee's offices at 999 Asylum Avenue, Fifth Floor, Hartford, Connecticut 06105. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Christopher L. Slack
Statewide Bar Counsel