OREMA TAFT *v.* COMMISSIONER OF CORRECTION (AC 46251)

Elgo, Moll and Seeley, Js.

Syllabus

The respondent, the Commissioner of Correction, appealed, on the granting of certification, from the habeas court's judgment granting the petitioner's second amended petition for a writ of habeas corpus. The respondent claimed that the habeas court improperly determined that the petitioner demonstrated that he was prejudiced by the alleged ineffective assistance of his first habeas counsel, M, for failing to present certain transcripts from the criminal trial of the petitioner's codefendant, Z, at the petitioner's first habeas trial. *Held*:

The habeas court improperly granted the petitioner's second amended petition, that court having improperly determined that the petitioner established that he was prejudiced by M's allegedly deficient performance, as the petitioner did not present the testimony of the witnesses who had testified at the criminal trials of the petitioner and Z at the second habeas trial and did not offer any evidence concerning how those witnesses would have testified had they been cross-examined about a reward that had been offered prior to the petitioner's criminal trial and about the recantation of certain testimony by one of those witnesses, and, therefore, the second habeas court improperly speculated about the prejudicial nature of their possible testimony and improperly assessed their credibility.

Argued April 16—officially released December 17, 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, *Henry*, *J.*; judgment granting the petition; thereafter, the court granted the respondent's petition for certification to appeal, and the respondent appealed to this court. *Reversed*; *judgment directed.*

Linda F. Rubertone, senior assistant state's attorney, with whom, on the brief, were *Joseph A. Corradino*, state's attorney, and *Susan Campbell*, assistant state's attorney, for the appellant (respondent).

Nicole Britt, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellee (petitioner).

Opinion

SEELEY, J. The respondent, the Commissioner of Correction, appeals following the granting of his petition for certification to appeal from the judgment of the habeas court granting the second amended petition for a writ of habeas corpus filed by the petitioner, Orema Taft, in which the petitioner alleged, inter alia, that his habeas counsel in a prior habeas action rendered ineffective assistance. On appeal, the respondent claims that the habeas court improperly granted the petitioner's second amended habeas petition because the petitioner failed to demonstrate that he was prejudiced by the alleged ineffective assistance of his first habeas counsel. We agree with the respondent and reverse the judgment of the court.

The following facts and procedural history, as set forth by our Supreme Court in the petitioner's direct appeal from his conviction or as undisputed in the record, are relevant to our resolution of the petitioner's appeal. "On September 28, 2001, shortly before 3 a.m., the victim, Zoltan Kiss, was shot and killed in his car in the area of 1185 Pembroke Street in Bridgeport. Just prior to the shooting, the victim parked his car across

from 1185 Pembroke Street, exited the vehicle, approached some individuals on the street to seek change for a $100 bill and, thereafter, approached a gate leading to an alley next to 1185 Pembroke Street (gate). Shortly thereafter, a group of people, including the [petitioner], exited from behind the gate and followed the victim as he returned to his car. When the victim reached his car, at least one of the pursuers, Miguel Zapata,[1] began firing a handgun at the victim. Additionally, before the gunfire, one witness heard someone in the group say, 'Let's get this mother fucker.'

"During the autopsy, the medical examiner determined that Kiss' death was caused by multiple gunshot wounds, and that, of the twenty-five bullet wounds in Kiss' body, seventeen were entry wounds. The examiner from the state police forensic laboratory firearms unit analyzed a total of eighteen shell casings recovered from the ground in the area of the victim's car; nine were nine millimeter casings and nine were .40 caliber casings. He determined that all of the nine millimeter casings were fired from one gun, and all of the .40 caliber casings were fired from another single gun." (Footnote in original.) *State* v. *Taft*, 306 Conn. 749, 751–52, 51 A.3d 988 (2012).

Following an investigation, the petitioner and Zapata were both arrested and charged with the victim's murder. Specifically, "the state charged the [petitioner] with murder with a firearm in violation of General Statutes §§ 53a-54a (a) and 53-202k, conspiracy to commit murder with a firearm in violation of §§ 53a-48, 53a-54a

[1] "For his role in the victim's death, a jury, in a separate trial that preceded the [petitioner's] trial, convicted Zapata of conspiracy to commit murder with a firearm in violation of General Statutes §§ 53a-48, 53a-54a (a) and 53-202k, murder with a firearm in violation of §§ 53a-54a (a) and 53-202k, and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). See *State* v. *Zapata*, 119 Conn. App. 660, 663, 989 A.2d 626, cert. denied, 296 Conn. 906, 992 A.2d 1136 (2010)." *State* v. *Taft*, 306 Conn. 749, 752 n.5, 51 A.3d 988 (2012).

(a) and 53-202k, criminal possession of a firearm in violation of General Statutes § 53a-217 (a), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a)." *State* v. *Taft*, supra, 306 Conn. 752; see also footnote 1 of this opinion. Zapata's trial occurred prior to the petitioner's trial, and the prosecutor for both trials was C. Robert Satti, Jr. Zapata was represented by Attorney Frank O'Reilly during his criminal trial, and the petitioner's criminal trial counsel was Attorney Erroll Skyers.

At the petitioner's criminal trial, the state presented the testimony of five witnesses[2] and of the police officers who had investigated the victim's murder.[3] "[T]wo witnesses, A and B, testified that they had seen the [petitioner] in the area behind the gate with a number of other individuals.[4] A and B also testified that they had seen guns behind the gate where the [petitioner] and his companions were located. Both A and B recounted that they had seen the victim park his car across the street from the gate and approach the gate. A testified that she had seen the victim interact with someone behind the gate and then begin to return to his car. Shortly thereafter, A saw the group behind the gate chase after the victim, and A further recounted

[2] Because the criminal court sealed the names of the witnesses, we refer to them by initial in this opinion. See *State* v. *Taft*, supra, 306 Conn. 753 n.7; *Taft* v. *Commissioner of Correction*, 159 Conn. App. 537, 540 n.2, 124 A.3d 1, cert. denied, 320 Conn. 910, 128 A.3d 954 (2015).

[3] Those officers testified that, "shortly after police arrived at the scene of the shooting, they discovered a jacket containing a driver's license for an individual who they knew had associated with [Luisa] Bermudez. On the basis of that discovery, the police began attempting to locate Bermudez to discuss her potential involvement in the shooting. Their investigation led the police to an attic room of a building a few blocks from where the shooting took place, where they discovered Bermudez with the [petitioner], Zapata and A." *State* v. *Taft*, supra, 306 Conn. 754–55.

[4] "A testified that she had seen the [petitioner] with Zapata and Luisa Bermudez, while B testified that she had seen the [petitioner] with Zapata, Bermudez and Michael Cooney." *State* v. *Taft*, supra, 306 Conn. 754 n.8.

that she had seen both Zapata and the [petitioner] carrying guns as they pursued the victim to his car. B also testified that she had heard someone say, 'Let's get this mother fucker' before gunfire erupted. Both A and B then testified that they had heard shouting and gunfire, and had seen the muzzle flashes as the guns were fired at the victim.[5]

"The state then presented the testimony of another witness, C,[6] who, at the time of the shooting lived in a third floor apartment of a nearby building. C stated that, at approximately 2 or 3 a.m., on September 28, 2001, she had heard gunfire coming from the street located in front of her apartment. When she went to investigate the noise, C saw four people—the [petitioner], Zapata, Luisa Bermudez and A—standing in front of the door of a car on the street. C further recounted that she had seen the muzzle flashes as the guns were fired at the victim, and she had heard the

[5] During the petitioner's criminal trial, A was questioned regarding a written statement she had provided to the Bridgeport police in July, 2002, in which she did not inform the police what she had seen on the night of the shooting and, instead, indicated that she, the petitioner, Zapata, and Bermudez were at 639 Barnum Avenue when the shooting occurred. She also was questioned about a second written statement she had provided to the police in December, 2005, which was substantially different from the first one but which was consistent with her trial testimony that, on the night of the shooting, Zapata and the petitioner, with guns in their hands, walked past where she was sitting and started shooting at the victim. When asked why she had changed her story, A responded: "Because I couldn't take this no more. I couldn't take it. The police was harassing me. They was harassing my children, my mother, my father. They was raiding my house. They was raiding my sisters' houses. I was being dragged to jail. I couldn't take it no more." A testified further that, as a result of having witnessed the shooting, she had trouble sleeping because she kept dreaming about the shooting and reliving it, including hearing the victim's screams as he was being shot. A acknowledged that she was in court testifying because she had "no choice," as she had been brought to court to testify pursuant to a capias warrant.

[6] C testified at the petitioner's probable cause hearing but was unavailable to testify at the petitioner's criminal trial due to medical issues. Her prior sworn testimony from the probable cause hearing was read into the record at the petitioner's criminal trial.

victim screaming. She also stated that, from her perspective, she could only see Zapata holding a gun and that, after the shooting stopped, the group ran from the scene. . . .

"[T]he state [also] presented testimony from several individuals who had had contact with the [petitioner] while the charges in the present case were pending. First, D testified that he was incarcerated in the same prison as the [petitioner], and that the [petitioner] had told him that he and Zapata had shot a 'dude' in a Honda seven times with a .45 caliber gun. D then recounted that the [petitioner] had told him that he and Zapata had chased after the victim because they wanted to take the victim's jewelry. Then, the state presented the testimony of [Germaine O'Grinc],[7] who testified that, during one of his court appearances in connection with a felony charge, he was in the 'bullpen lockup' of the courthouse with the [petitioner] and Zapata. [O'Grinc] recounted that Zapata had told him that he was in court because he and the [petitioner] had shot a person in his car. [O'Grinc] further testified that the [petitioner] had confirmed or 'vouched for' Zapata's statements and had nodded in agreement while Zapata was talking to [O'Grinc]." (Footnotes added; footnote in original; footnote omitted.) *State* v. *Taft*, supra, 306 Conn. 753–55.

During Skyers' cross-examination of O'Grinc at the petitioner's criminal trial, O'Grinc acknowledged that he wanted to get some type of benefit for having provided his statement to the police. O'Grinc further stated that he was facing a term of imprisonment of forty-five years for charges against him at that time and that he hoped to get some type of benefit for testifying at the petitioner's criminal trial, although nothing had been

[7] O'Grinc's name, which was sealed at the time of the petitioner's direct appeal, is no longer sealed. See *Taft* v. *Commissioner of Correction*, 159 Conn. App. 537, 542 n.3, 124 A.3d 1, cert. denied, 320 Conn. 910, 128 A.3d 954 (2015).

promised to him. On redirect examination, the prosecutor asked O'Grinc whether he was aware that, if he lied under oath, it could affect any benefit he hoped to receive with respect to the charges pending against him, to which he responded in the affirmative. On recross-examination, he clarified that he was saying that he would not lie under oath.

Following a jury trial, the petitioner was found guilty of murder and conspiracy to commit murder. The trial court rendered a judgment of conviction in accordance with the jury's verdict and sentenced the petitioner "to forty-five years [of] imprisonment on the murder count and twenty years [of] imprisonment on the conspiracy count to run concurrently with each other and consecutively to a sentence that the [petitioner] already was serving on an unrelated conviction." *State* v. *Taft*, supra, 306 Conn. 752–53. The petitioner filed a direct appeal from the judgment of conviction to our Supreme Court, which affirmed the judgment of the trial court. See id., 751 and n.3.

The petitioner thereafter brought his first habeas action, during which he was represented by Attorney Bruce McIntyre. In a second amended habeas petition that was filed on December 10, 2012, the petitioner alleged, inter alia, that his trial counsel, Skyers, provided ineffective assistance by failing (1) to conduct an adequate investigation of the state's offer of a reward for the victim's murder, the testimony of A, B, and C at Zapata's criminal trial concerning the reward, and O'Grinc's testimony at Zapata's trial, at which O'Grinc recanted a statement previously made to the police that inculpated the petitioner, and (2) to cross-examine A, B, and C regarding the reward and O'Grinc regarding his recantation. See *Taft* v. *Commissioner of Correction*, 159 Conn. App. 537, 543, 545, 556, 124 A.3d 1, cert. denied, 320 Conn. 910, 128 A.3d 954 (2015). Following a habeas trial, the habeas court rendered judgment

denying the second amended habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. Id., 543.

In the petitioner's appeal in the first habeas action, this court set forth the following additional facts. "Prior to the petitioner's arrest, due to the stalled nature of the investigation of the victim's murder, the governor signed an offer of a $50,000 reward for information leading to the 'arrest and conviction' of the guilty parties. A, B, and C knew about the reward and each received a portion of the reward money after the petitioner's conviction. All three witnesses testified at Zapata's trial, which occurred prior to the petitioner's trial, and O'Reilly cross-examined all three witnesses about the reward. O'Reilly also cross-examined O'Grinc about a statement inculpating the petitioner and Zapata, which O'Grinc had previously made to the police. On cross-examination, at Zapata's trial, O'Grinc recanted his prior statement inculpating the petitioner. *State* v. *Zapata*, 119 Conn. App. 660, 667–68, 989 A.2d 626, cert. denied, 296 Conn. 906, 992 A.2d 1136 (2010).

"In preparation for the petitioner's trial, Skyers did not attend Zapata's trial. Instead, Skyers spoke to O'Reilly about what had occurred at Zapata's trial and discussed with him who the important witnesses were. Relying on O'Reilly's representations, Skyers did not order all of the transcripts from Zapata's trial, including any portion of O'Grinc's testimony. Skyers did request and read the trial transcripts of the testimony of A, B, and C. At the petitioner's criminal trial, Skyers did not cross-examine any of the witnesses about the reward and did not confront O'Grinc about his recantation. O'Grinc testified against the petitioner in accordance with his prior statement inculpating the petitioner by stating that while in lockup with the petitioner and Zapata, Zapata admitted to his and the petitioner's involvement in the murder, and the petitioner nodded in agreement.

"The habeas court found that Skyers 'was aware of and investigated the reward. He spoke with [O'Reilly] and reviewed relevant portions of the codefendant's criminal trial transcripts. After these efforts, [Skyers] made an informed tactical decision to not pursue a line of questioning that had already proved to be unfruitful in [Zapata's] trial.' The habeas court, however, did not make a specific finding regarding precisely when Skyers became aware of the reward.[8]" (Footnote in original.) *Taft* v. *Commissioner of Correction*, supra, 159 Conn. App. 545–46.

On appeal in the first habeas action, this court determined that "the petitioner's claim regarding Skyers' deficient performance as it relates to his allegedly inadequate investigation of the petitioner's case [was] debatable amongst jurists of reason"; id., 553; as "Skyers' sole reliance on the representations and opinions of O'Reilly regarding what evidence from Zapata's trial would be important for the defense of the petitioner raise[d] a meritorious claim of deficient performance." Id., 548. Nonetheless, this court concluded that the first habeas court "properly found that the petitioner failed to demonstrate any prejudice by any lack of proper investigation, and, thus, it did not abuse its discretion by denying the petition for certification to appeal as to th[at] claim." Id., 553. In reaching that conclusion, this court explained that "[t]he petitioner offered no evidence at the habeas trial as to what Skyers would have discovered if he had read the entire transcript of Zapata's trial. The petitioner did not provide the habeas court with those trial transcripts. Furthermore, *the petitioner also did not offer evidence regarding how O'Grinc or*

[8] "At the habeas trial, Skyers could not recollect if he knew about the reward at the probable cause hearing. The habeas court made no specific finding regarding whether Skyers knew, at the time of the petitioner's criminal trial, that O'Grinc had recanted his statement to the police." *Taft* v. *Commissioner of Correction*, supra, 159 Conn. App. 546 n.4.

A, B and C would have testified if they had been cross-examined about the recantation or reward, respectively." (Emphasis added.) Id., 554. This court further stated that, "even if the petitioner had offered the witnesses' testimony or the Zapata transcripts as evidence, he did not establish how this evidence would tend to demonstrate that Skyers would have changed his defense strategy and chosen to cross-examine the witnesses about the reward and recantation. Indeed, the habeas court found that, if the witnesses had been cross-examined about the reward, Satti would have been able to rehabilitate them on redirect examination with evidence damaging to the petitioner: 'Further buttressing [Skyers'] tactical decision was the very reasonable concern of opening the door to additional [and harmful rehabilitation] questioning,' namely, that A, B, and C would have testified to having other motives for testifying at the criminal trial other than the reward—C was motivated to testify by almost being killed in the past for being thought as a snitch in the present case; B was motivated to testify by fear as Zapata had tried to murder her in the courtroom during Zapata's trial; and A was motivated to testify by being arrested and forced to testify pursuant to a capias warrant. As for O'Grinc, Satti would have shown that the petitioner, Zapata, and O'Grinc had a prior history, including alleged participation in the same drug operation and a familial relationship between Zapata and O'Grinc. The habeas court found Satti['s] and Skyers' testimony at the habeas trial credible as to the rehabilitation evidence being more harmful than the cross-examinations being beneficial.

"[This court thus] agree[d] with the habeas court's conclusion that the petitioner failed to establish that he was prejudiced by Skyers' deficient performance, as he did not [offer] any evidence of how the result of his trial would have been different if Skyers had reviewed the Zapata trial transcript[s] in [their] entirety and had

cross-examined the witnesses about the reward and recantation. . . . The petitioner . . . failed to prove how any additional information, if it did exist, about the reward or recantation would have altered Skyers' defense strategy or impeachment strategy. The petitioner [also] provided no testimony from the witnesses as to what they would have said on cross-examination about the reward or the recantation. In sum, the petitioner . . . offered no evidence proving that a different cross-examination of O'Grinc or A, B, and C would have altered the jury's verdict." (Citation omitted.) Id., 555–56.

This court also concluded that the habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to the petitioner's claim in the first habeas appeal that Skyers performed deficiently by failing to adequately cross-examine the witnesses at the petitioner's criminal trial regarding either the reward or the recantation. Id., 556. In doing so, this court stated that, because "the habeas court made no findings as to [whether] Skyers knew about the recantation when O'Grinc testified at the petitioner's trial, and the petitioner did not seek an articulation from the habeas court, we assume for the purposes of this claim that Skyers knew about the recantation at the time that O'Grinc testified at the petitioner's trial. Assuming that Skyers knew of the recantation, Skyers offered a strategic, plausible reason for not utilizing that line of impeachment. On the basis of Skyers' testimony and other evidence, the habeas court found that it was a strategic decision not to cross-examine O'Grinc about the recantation; had Skyers cross-examined O'Grinc about the recantation, Satti would have been able to introduce harmful rehabilitation evidence, negating the benefit of the cross-examination. Thus, we must defer, as the habeas court did, to Skyers' informed, strategic decision.

"We similarly must defer to Skyers' strategic decision not to cross-examine A, B, and C about the state's offer of a reward. The habeas court made no findings of fact as to when Skyers became aware of the reward, and the record is ambiguous. In light of this ambiguity, we assume for the purposes of this claim that Skyers knew of the reward at the petitioner's probable cause hearing, when he first could have cross-examined C about the reward. The habeas court found that the testimony of Satti and Skyers was credible that the rehabilitation evidence was more harmful than the potential benefit of the cross-examinations. Thus, Skyers made an informed, strategic decision not to cross-examine the witnesses about the reward." Id., 557–58.

Following this court's dismissal of the petitioner's appeal in the first habeas action, the petitioner commenced a second habeas action, which is the subject of this appeal. In his operative second amended habeas petition in the second habeas action, the petitioner initially asserted three counts: count one, alleging ineffective assistance of Skyers at his criminal trial; count two, alleging ineffective assistance of McIntyre at his first habeas trial; and count three, alleging prosecutorial impropriety on the basis of a violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). At the commencement of the second habeas trial, the court dismissed count one on the ground of res judicata and because it was successive of the claim of ineffective assistance of trial counsel in the first habeas action. The petitioner withdrew count three and any claims relating to *Brady*, which included a claim raised in paragraph 30 (d) of count two. The case, thus, proceeded to trial on count two only as it pertained to the claim of ineffective assistance of McIntyre, which alleged that McIntyre was ineffective for failing to pursue an ineffective assistance of counsel claim against Skyers for Skyers' failure (1) to utilize trial transcripts

from Zapata's trial in order to cross-examine witnesses concerning inconsistencies in statements made by witnesses and the reward offered in the case, and (2) to make an adequate investigation of the Zapata trial transcripts in order to fully construct a defense at the petitioner's criminal trial and/or probable cause hearing. The focus of the petitioner's ineffective assistance of counsel claim against McIntyre in count two concerns McIntyre's failure to utilize the trial transcripts from Zapata's criminal trial in the petitioner's first habeas trial.

At the second habeas trial, which took place on June 15, 2022, the petitioner's counsel entered into evidence the transcripts of the petitioner's criminal trial, Zapata's criminal trial, and the petitioner's first habeas trial. The respondent did not enter any exhibits into evidence, and only one witness—McIntyre—testified. Following the trial, the court issued a memorandum of decision granting the petitioner's second amended habeas petition. The court concluded that the petitioner satisfied his burden of proving that McIntyre's performance at the first habeas trial was deficient and that the petitioner was prejudiced by McIntyre's deficient performance. Specifically, the court concluded that McIntyre was deficient for not presenting the Zapata transcripts into evidence at the first habeas trial and that Skyers performed deficiently by conducting an incomplete and flawed investigation and failing to cross-examine A, B, and C about their knowledge of the reward.

The court also concluded that the petitioner was prejudiced by those deficiencies because "critical impeachment evidence was not presented." The court explained that, "[h]ad McIntyre introduced the Zapata trial transcripts, the first habeas court would have had evidence of the eyewitnesses' testimony that was available for Skyers to adequately represent the petitioner at trial—specifically, to prepare for effective cross-examination

of the eyewitnesses. Had McIntyre introduced Zapata's trial transcripts, he would have demonstrated to the [first habeas] court that if Skyers had obtained and familiarized himself with O'Grinc's testimony, Skyers too would have gleaned from the transcripts that O'Grinc was an admitted liar and was not a credible witness. Furthermore, McIntyre would have shown the first habeas court that Skyers would have had knowledge of the fact that O'Grinc's testimony at Zapata's trial did not inculpate [the petitioner]. Additionally, McIntyre would have demonstrated to the first habeas court that had Skyers familiarized himself with the transcripts he would have been prepared to effectively cross-examine O'Grinc about his recantation when he testified at [the petitioner's] criminal trial."[9] The second habeas court concluded: "But for McIntyre's failure to introduce the transcripts from Zapata's trial into evidence, there is a reasonable probability that the outcome of the first habeas proceeding would have been different because [the petitioner] would have demonstrated both deficient performance by Skyers and that he was prejudiced thereby. The evidence presented to this court undermines confidence in the outcome of [the petitioner's] criminal trial."

[9] On the issue of O'Grinc's recantation, the second habeas court concluded: "If Skyers had obtained and reviewed Zapata's trial transcripts, he would have known that O'Grinc admitted under oath that he lied to the police in his prior statement. . . . Skyers would have been aware that O'Grinc testified that he lied and made up the statement because he wanted to get a benefit—help with the pending charges against him, [and] so he told the detectives what he thought they wanted to hear. . . . Skyers' failure to obtain and familiarize himself with the transcripts deprived the [the petitioner's] jury of important impeachment evidence that O'Grinc recanted his prior statement when he testified under oath at Zapata's trial only a few months earlier. . . . Had Skyers obtained and familiarized himself with the transcripts of O'Grinc's recantation, Skyers would have been able to use O'Grinc's own testimony to demonstrate bias and show that O'Grinc was only testifying, including falsely, at [the petitioner's] trial for his own benefit. Skyers acknowledged on cross-examination that if he had brought out O'Grinc's recantation, the state would have rehabilitated O'Grinc using the prior statement. Even if the state was able to use the prior statement on

After the second habeas court rendered judgment granting the second amended habeas petition, the respondent, on the granting of certification, appealed to this court. Additional facts and procedural history will be set forth as necessary.

Before we address the respondent's claim on appeal, we set forth our standard of review of a habeas court's judgment on ineffective assistance of counsel claims, which is well settled. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong of the *Strickland* test, 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. . . . [A]

redirect, credibility damage would have already been done by Skyers' cross-examination about the recantation."

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. . . .

"With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . .

"It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier. . . . [T]he petitioner's failure to prove either [the performance prong or the prejudice prong] is fatal to a habeas petition. . . . [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Citations omitted; internal quotation marks omitted.) *Soto* v. *Commissioner of Correction*, 215 Conn. App. 113, 119–21, 281 A.3d 1189 (2022).

"The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834,

613 A.2d 818 (1992). . . . *Harris* v. *Commissioner of Correction*, 191 Conn. App. 238, 246, 214 A.3d 422, cert. denied, 333 Conn. 919, 217 A.3d 1 (2019). To prevail on a claim of ineffective assistance of habeas counsel that is predicated on the ineffective assistance of trial counsel, a petitioner must demonstrate that both trial and habeas counsel were ineffective. . . . [When] applied to a claim of ineffective assistance of prior habeas counsel, the *Strickland* [v. *Washington*, supra, 466 U.S. 687] standard requires the petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that this ineffectiveness prejudiced the petitioner's prior habeas proceeding. . . . [T]he petitioner will have to prove that one or both of the prior habeas counsel, in presenting his claims, was ineffective and that effective representation by habeas counsel establishes a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . . A petitioner who claims ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must satisfy *Strickland* twice; that is, he must show that his appointed habeas counsel and his trial counsel were ineffective. . . . *Britton* v. *Commissioner of Correction*, 185 Conn. App. 388, 420, 197 A.3d 895 (2018), cert. denied, 337 Conn. 901, 252 A.3d 362 (2021). We have characterized this burden as presenting a herculean task . . . ." (Internal quotation marks omitted.) *White* v. *Commissioner of Correction*, 209 Conn. App. 144, 152–53, 267 A.3d 289 (2021), cert. denied, 341 Conn. 904, 268 A.3d 78 (2022).

In the present case, the respondent challenges only the habeas court's finding that the petitioner established that he was prejudiced by McIntyre's allegedly deficient performance. We, therefore, do not address the performance prong of *Strickland* and focus our analysis on the issue of prejudice, which is dispositive of this

appeal. See *James P.* v. *Commissioner of Correction*, 224 Conn. App. 636, 645, 312 A.3d 1132, cert. denied, 349 Conn. 911, 314 A.3d 603 (2024).

On appeal, the respondent claims that the habeas court improperly determined that the petitioner satisfied his heavy burden of demonstrating prejudice. Specifically, the respondent argues that, "[e]ven if McIntyre's decision to forgo submitting the Zapata transcripts into evidence fell below prevailing professional norms, it is not reasonably probable that the outcome of the petitioner's first habeas trial would have been different . . . ." This is so, according to the respondent, because the petitioner never presented testimony at the second habeas trial from A, B, C, and O'Grinc concerning what they would have said if cross-examined by Skyers at the petitioner's criminal trial about the reward or the recantation and, without such testimony, the second habeas court's finding of prejudice was based on speculation. The respondent argues further that the second habeas court, without ever seeing A, B, C, or O'Grinc, improperly assessed the witnesses' credibility and assumed that a jury would not have believed those witnesses if they had testified at the petitioner's criminal trial consistent with their testimony at Zapata's trial. We agree.

Because our resolution of the claim on appeal requires us to review the Zapata transcripts, we first set forth the following additional facts regarding the testimony of A, B, C, and O'Grinc at Zapata's criminal trial. During Zapata's criminal trial, A, B, and C each were questioned on cross-examination about the reward that was offered concerning the victim's murder. When A was asked if she was aware that there was a reward in the case, she responded, "[t]hat has nothing to do with me." She further testified that she was not previously aware of the reward and had just become aware of it while she was testifying. She was asked

multiple times if she ever heard of the reward previously, each time responding in the negative. B similarly testified that she did not know that there was a reward offered in the case. That prompted Zapata's attorney to ask: "So, what did you come in here for, out of the kindness of your heart?" B replied: "No, I didn't come here from the kindness of my heart; it's that somebody [saw me at the scene of the shooting] before it happened . . . . Other than that, I wouldn't be here." C testified that she did not find out about the reward until "later on" and that she was "not really interested about the money . . . ." When asked repeatedly if she was trying or expecting to get a portion of the reward, she responded "no" each time. On redirect examination, C testified that she did not have any knowledge of the reward prior to contacting the police regarding the shooting.

O'Grinc testified that he had known the petitioner and Zapata for a number of years and that he was currently incarcerated. When asked about a conversation he had had while in a courthouse lockup with Zapata and the petitioner, O'Grinc mentioned that Zapata indicated that he was in jail on a murder charge for a shooting that took place on Pembroke Street and that Zapata thought that he had his murder case "beat . . . ." When asked further whether Zapata had made any statements to him about the details underlying the murder charge, O'Grinc replied, "[n]ot specifically." That prompted the prosecutor to question O'Grinc about a prior written, sworn statement he had made to the police indicating otherwise. O'Grinc testified that his statement to the police was not true and that he had made it up. The court subsequently allowed a redacted version of the statement into evidence as a full exhibit, and it was read to the jury. The redacted statement provides in relevant part that Zapata told O'Grinc that he killed the victim, that Zapata had the case beat

because of lack of evidence, that Zapata said he and the petitioner "went around the car and shot the guy" at least fifteen times, that Zapata said that he and the petitioner "shot the guy" on Pembroke Street, and that the petitioner "was standing right there when [Zapata] was saying how he shot the guy." With respect to the redactions, the court precluded the jury in the Zapata trial from hearing anything about how the petitioner responded in response to Zapata's statements while in the courthouse lockup.

With this background in mind, we turn to the sole issue raised in the petition for certification to appeal, namely, whether the second habeas court properly determined that the petitioner established that he was prejudiced by McIntyre's alleged ineffective assistance for failing to present the Zapata transcripts at the first habeas trial. In other words, the question before this court is whether the second habeas court properly determined that there was a reasonable probability that, if McIntyre had submitted the Zapata transcripts into evidence at the petitioner's first habeas trial, the outcome of the first habeas trial would have been different. See, e.g., *White* v. *Commissioner of Correction*, supra, 209 Conn. App. 152, 164; *Edward M.* v. *Commissioner of Correction*, 186 Conn. App. 754, 767, 201 A.3d 492 (2018).

On the basis of our plenary review of the record before the second habeas court, we conclude that the court improperly determined that the petitioner met his heavy burden of establishing that he was prejudiced by the allegedly deficient performance of McIntyre. The primary basis for our conclusion stems from the fact that the petitioner did not present A, B, C,[10] or O'Grinc

[10] As we stated previously in this opinion, C did not testify in person at the petitioner's criminal trial; rather, her testimony from the petitioner's probable cause hearing was read to the jury. The second amended habeas petition alleges ineffective assistance by McIntyre for his failure to pursue an ineffective assistance of counsel claim against Skyers for Skyers' failure

as witnesses at his second habeas trial, and he did not offer any evidence concerning how those witnesses would have testified had they been cross-examined about the reward and the recantation at the petitioner's criminal trial or his probable cause hearing. "It is axiomatic that a habeas petitioner who claims prejudice based on counsel's alleged failure to present helpful evidence from a particular witness, must call that witness to testify before the habeas court or otherwise prove what the witness would or could have stated had he been questioned at trial, as the petitioner claims he should have been." (Internal quotation marks omitted.) *Jones* v. *Commissioner of Correction*, 212 Conn. App. 117, 131–32, 274 A.3d 237, cert. denied, 343 Conn. 933, 276 A.3d 975 (2022); see also *Andrews* v. *Commissioner of Correction*, 45 Conn. App. 242, 247–48, 695 A.2d 20 (habeas court correctly determined that petitioner presented insufficient proof of prejudice when petitioner did not call witnesses to testify at habeas trial and, thus, did not establish that their testimony at criminal trial would have been favorable to him), cert. denied, 242 Conn. 910, 697 A.2d 364 (1997).

For example, in *Thomas* v. *Commissioner of Correction*, 141 Conn. App. 465, 466–67, 472, 62 A.3d 534, cert. denied, 308 Conn. 939, 66 A.3d 881 (2013), the petitioner alleged that his trial counsel was ineffective in failing to call a certain witness to testify at the petitioner's criminal trial. The petitioner, however, did not present testimony from that witness at his habeas trial. Id., 472. The habeas court therefore determined that the petitioner failed to show that he was prejudiced by his counsel's failure to call the witness to testify at the

to utilize the Zapata transcripts to cross-examine witnesses during the petitioner's criminal trial and/or the probable cause hearing. Thus, although Skyers could not have cross-examined C at the petitioner's criminal trial concerning the reward, the operative habeas petition appears to allege that Skyers should have done so with respect to C at the probable cause hearing. For that reason, we include C in our analysis of the issue of prejudice.

criminal trial, and this court affirmed that decision on appeal. Id. In doing so, we stated: "[T]he failure of defense counsel to call a potential witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." (Internal quotation marks omitted.) Id. Because the petitioner in *Thomas* did not call the witness to testify at the habeas trial, this court concluded that "it [was] thus not possible to find that [the witness'] testimony at the criminal trial would have aided the petitioner. More fundamentally, without [the witness'] testimony at the habeas trial, it [was] not discernible whether he would have testified in accordance with his initial, exculpatory statement to the police or if he would have admitted that he had fabricated that statement as he did on the eve of trial. Without his testimony, the habeas court could not evaluate him as a witness, nor could it assess the likely impact of his testimony." Id.

Likewise, in the present case, without the testimony of A, B, and C at the second habeas trial, it is not possible to discern whether A, B, or C would have testified in accordance with their testimony at Zapata's trial, in which each one denied having knowledge of the reward prior to speaking with the police, or if any one of them would have testified to the contrary. There is also no way of knowing how O'Grinc would have responded to questions about his recantation.[11] Furthermore, the Zapata transcripts do not contain information about the financial circumstances of A, B, or C, and they do not contain testimony supporting an inference that A, B, or C testified against the petitioner at his criminal trial or probable cause hearing in order to

[11] We are mindful "that courts universally view recantation evidence with a healthy dose of skepticism." *Gould* v. *Commissioner of Correction*, 301 Conn. 544, 568, 22 A.3d 1196 (2011).

receive a portion of the reward money.[12] Consequently, without their testimony at the second habeas trial, it was not possible for the habeas court to evaluate the strength of any testimony they would have offered had they been cross-examined about the reward or recantation, and the court could not assess the likely impact of their testimony or whether the testimony of any of these witnesses at the criminal trial would have aided the petitioner. See, e.g., id., 472–73.

Nevertheless, the second habeas court did, in effect, assess the impact of any testimony the witnesses might have offered on cross-examination when it concluded that the petitioner was prejudiced by "the inability to effectively cross-examine [the] four witnesses and [show] either their motivations for testifying or undermining credibility," as the presumption underlying that conclusion is that the credibility of the witnesses would have been impeached, and a pecuniary motive for their testimony would have been established, by cross-examination regarding the reward and recantation. In essence, the court found that a cross-examination of these witnesses would have been beneficial to the petitioner, despite not knowing what the witnesses would have testified to if they had been questioned about the reward and recantation. For example, the second habeas court "gave weight to [the petitioner's] argument that, '[e]ven if [the eyewitnesses] all denied coming forward for the reward money, by introducing that information, Skyers would have highlighted to the jury that each of the witnesses had a *compelling motive* for testifying.' " (Emphasis added.) It also concluded

[12] In fact, despite the existence of the reward, A did not want to testify and had to be brought to court pursuant to a capias warrant, which undermines any argument that she was there for pecuniary gain. Therefore, the second habeas court's finding that the jury in the petitioner's criminal trial could have inferred, from a cross-examination of A about the reward, that she had a financial motive to testify favorably for the state is not supported by the record and is clearly erroneous.

that the petitioner was prejudiced because "*critical* impeachment evidence was not presented." (Emphasis added.) The compelling or critical nature of any such impeachment evidence, however, had not been established.[13] The petitioner's case in the second habeas trial thus suffers from the same fundamental problem that existed at his first habeas trial—no live testimony from A, B, C, or O'Grinc "as to what they would have said on cross-examination about the reward or recantation"—without which this court in the prior appeal agreed with the first habeas court's conclusion that the petitioner had not established prejudice. *Taft* v. *Commissioner of Correction*, supra, 159 Conn. App. 554; see also *Jones* v. *Commissioner of Correction*, supra, 212 Conn. App. 131–32; *Thomas* v. *Commissioner of Correction*, supra, 141 Conn. App. 472; *Andrews* v. *Commissioner of Correction*, supra, 45 Conn. App. 247–48.

We, thus, conclude that the second habeas court improperly speculated about the prejudicial nature of any testimony that might have been elicited from the witnesses on cross-examination concerning the reward and recantation. As this court has stated previously, a petitioner cannot meet his burden of demonstrating fundamental unfairness or prejudice by speculation; it must be proved by "demonstrable realities." (Internal quotation marks omitted.) *Grant* v. *Commissioner of Correction*, 121 Conn. App. 295, 303–304, 995 A.2d 641, cert. denied, 297 Conn. 920, 996 A.2d 1192 (2010); see also *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 40, 188 A.3d 1 (2018) ("[t]he likelihood of a different

[13] On appeal, the petitioner argues that the mere existence of a reward in a case warrants a presumption that the reward is the motivating factor for the witness' testimony, regardless of whether the witness even knew about the reward. The petitioner's argument, however, is not substantiated by evidence in the record, including the Zapata transcripts, and the petitioner has not cited any case law to support this claim.

result must be substantial, not just conceivable" (internal quotation marks omitted)), cert. denied, 586 U.S. 1068, 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019).

Additionally, the second habeas court, in making those presumptions about the witnesses' credibility, improperly assessed the credibility of witnesses who never testified at the second habeas trial. "It is generally inappropriate for the trier of fact to assess the witness' credibility without having watched the witness testify under oath." *Santos* v. *Commissioner of Correction*, 186 Conn. App. 107, 116, 198 A.3d 698, cert. denied, 330 Conn. 955, 197 A.3d 393 (2018); see also *Tang* v. *Bou-Fakhreddine*, 75 Conn. App. 334, 352, 815 A.2d 1276 (2003) ("Credibility must be assessed . . . by observing firsthand the witness' conduct, demeanor and attitude. . . . As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record." (Internal quotation marks omitted.)).

Because A, B, C, and O'Grinc were not called as witnesses at the second habeas trial, the second habeas court impermissibly speculated as to their possible testimony and improperly assessed their credibility. Accordingly, without live testimony from A, B, C, or O'Grinc at the second habeas trial, we conclude that the second habeas court improperly determined that the petitioner met his burden of showing the existence of a reasonable probability that the decision reached by the first habeas court would have been different if McIntyre had introduced the Zapata transcripts at the first habeas trial.

We also do not agree with the second habeas court that the Zapata transcripts, alone, are sufficient to undermine confidence in the outcome of the petitioner's

criminal trial. The second habeas court's finding of prejudice is predicated, in part, on its determination that "[t]he Zapata transcripts [were] rife with negative information about both [B] and [A]. . . . Skyers could have combined such negative information with the likely financial gain from the reward money to highlight their motive for testifying for the state, and to cast doubt on their credibility." Specifically, the second habeas court stated: "[H]ad Skyers familiarized himself with Zapata's trial transcripts, he would have had knowledge that B testified to smoking angel dust and marijuana during the time of August to September, 2001." The court also stated: "Additionally, [B's] testimony at Zapata's trial conflicted with her statement to Detective [Heitor] Texeira. [B] confirmed on cross-examination that she did not tell Detective Texeira that she saw [the petitioner] at the crime scene." With respect to O'Grinc, the second habeas court found that, if Skyers had obtained and reviewed the Zapata transcripts, he would have been aware of O'Grinc's recantation and would have known that O'Grinc was an admitted liar, that he lied in his statement to the police to get a benefit regarding criminal charges pending against him, that he testified at the petitioner's criminal trial to benefit himself, and that O'Grinc's testimony at Zapata's trial did not inculpate the petitioner.

The transcripts from the petitioner's criminal trial, however, show that Skyers did utilize negative information similar to that which was in the Zapata transcripts during his cross-examinations of A and B, with the exception of the reward. For example, at the petitioner's criminal trial, B was questioned about the drugs that she was using at the time of the shooting and testified that, on the night of the shooting, she bought marijuana that was "laced," which she called "purple haze," because there was no "angel dust" available to buy.

Skyers also cross-examined B regarding her prior inconsistent statement to Detective Texeira, in which she never mentioned that the petitioner was at the scene of the shooting that night. Similarly, Skyers did cross-examine A regarding her prior drug dealing and felony convictions, as well as her prior inconsistent statement to the police and the fact that she was "being forced to testify under the fear of being held in contempt . . . ." See footnote 5 of this opinion. With respect to O'Grinc, Skyers did elicit, through cross-examination of O'Grinc at the petitioner's criminal trial, that O'Grinc wanted to get some kind of benefit from talking with the police about the shooting death of the victim and that O'Grinc spoke with the police for self-serving reasons, namely, to take care of himself. Although, when Skyers asked O'Grinc if he would lie under oath, O'Grinc replied that he would not, the jury had to assess that answer in light of the fact that O'Grinc was a convicted felon and a jailhouse informant.[14]

Finally, we note that the first habeas court credited testimony from Satti and Skyers at the first habeas trial

[14] We note that, even if Skyers had been able to impeach O'Grinc through questioning about his recantation and the fact that O'Grinc testified at Zapata's trial that he lied in his sworn statement to the police, such that the jury would not have found O'Grinc's testimony credible or believable, the state also presented testimony from D, another jailhouse informant, whose testimony was similar to that of O'Grinc. Specifically, D "testified that he was incarcerated in the same prison as the [petitioner], and that the [petitioner] had told him that he and Zapata had shot a 'dude' in a Honda seven times with a .45 caliber gun. D then recounted that the [petitioner] had told him that he and Zapata had chased after the victim because they wanted to take the victim's jewelry." *State* v. *Taft*, supra, 306 Conn. 755. Thus, the record contains testimony from another jailhouse informant to the same effect as that of O'Grinc, that is, that the petitioner acknowledged his involvement in the shooting. The existence of similar testimony in the record from another jailhouse informant diminishes the likelihood that a cross-examination of O'Grinc about his recantation would have had a substantial effect on the result of the criminal trial. See *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 40; *Edward M.* v. *Commissioner of Correction*, supra, 186 Conn. App. 767.

that, if the witnesses had been cross-examined about the reward and the recantation, "Satti would have been able to rehabilitate them on redirect examination with evidence damaging to the petitioner";[15] *Taft* v. *Commissioner of Correction*, supra, 159 Conn. App. 555; and that the rehabilitation evidence would have been more harmful than any benefit received from cross-examinations about the reward and the recantation. See *Barlow* v. *Commissioner of Correction*, 343 Conn. 347, 357, 273 A.3d 680 (2022) ("[b]ecause it is the [habeas] court's function to weigh the evidence and determine credibility, [a reviewing court gives] great deference to its findings" (internal quotation marks omitted)); *Bowens* v. *Commissioner of Correction*, 333 Conn. 502, 523, 217 A.3d 609 (2019) ("habeas court is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony"). The second habeas court, however, did not defer to the first habeas court's assessment of the credibility of the witnesses who testified at the first habeas trial, which factored into the first habeas court's decision to deny the petitioner's claim that Skyers performed deficiently in failing to adequately cross-examine witnesses at the petitioner's criminal trial. When

[15] For example, Satti testified at the first habeas trial that he would have tried to introduce into evidence the prior consistent statement made by O'Grinc to the police, which would have provided confirmation of O'Grinc's testimony at the petitioner's criminal trial that the petitioner was present when Zapata made the comments about how the two of them killed the victim. If O'Grinc had been cross-examined about his recantation, there also was a reasonable concern of opening the door to harmful rehabilitation questioning by Satti, who "would have shown that the petitioner, Zapata, and O'Grinc had a prior history, including alleged participation in the same drug operation and a familial relationship between Zapata and O'Grinc." *Taft* v. *Commissioner of Correction*, supra, 159 Conn. App. 555. Additionally, "A, B, and C would have testified to having other motives for testifying at the criminal trial other than the reward—C was motivated to testify by almost being killed in the past for being thought as a snitch in the present case; B was motivated to testify by fear as Zapata had tried to murder her in the courtroom during Zapata's trial; and A was motivated to testify by being arrested and forced to testify pursuant to a capias warrant." Id.

we take into consideration the first habeas court's finding that Skyers had made an informed, strategic decision not to cross-examine O'Grinc about the recantation and A, B, and C about the reward, we are hard-pressed to find a reasonable probability that the first habeas court would have made a different decision if it had been able to review the Zapata transcripts.

As we stated previously in this opinion, in cases involving a habeas on a habeas, a petitioner must demonstrate ineffective assistance by both prior habeas counsel and trial counsel. See *Hilton* v. *Commissioner of Correction*, 225 Conn. App. 309, 328, 315 A.3d 1135 (2024). Thus, the petitioner's claim that his prior habeas counsel provided ineffective assistance must fail "if the claim of ineffective assistance of his trial counsel . . . is without merit." Id., 329. "Simply put, a petitioner cannot succeed . . . on a claim that his habeas counsel was ineffective by failing to raise a claim against trial counsel . . . unless the petitioner ultimately will be able to demonstrate that the claim against trial . . . counsel would have had a reasonable probability of success if raised." (Internal quotation marks omitted.) Id., 328. In the present case, the first habeas court rejected the petitioner's claim that Skyers performed deficiently by failing to cross-examine the witnesses about the reward and recantation and, instead, found, on the basis of its credibility assessment of Skyers' testimony, that Skyers had made a reasonable, strategic decision not to do so, and this court in the first habeas appeal similarly deferred to Skyers' "informed tactical decisions" that those lines of impeachment would not have been fruitful. *Taft* v. *Commissioner of Correction*, supra, 159 Conn. App. 556, 558. In light of the foregoing, we conclude that the petitioner has not established that there is a reasonable probability that the outcome of his first habeas trial would have been different because he cannot show that the first habeas court, which found

that Skyers had made a reasonable, strategic decision not to cross-examine A, B, C, and O'Grinc about the reward and recantation, would have changed its determination that Skyers did not perform deficiently in that respect had it viewed the Zapata transcripts.[16]

Accordingly, we disagree with the second habeas court's conclusion that the petitioner satisfied his burden of establishing that he was prejudiced by McIntyre's failure to introduce the Zapata transcripts into evidence at the first habeas trial. The evidence presented by the petitioner at the second habeas trial does not demonstrate the existence of a reasonable probability that the outcome of the first habeas trial would have been different had McIntyre done so. The second habeas court, therefore, improperly granted the petitioner's second amended petition for a writ of habeas corpus.

The judgment is reversed and the case is remanded with direction to deny the petitioner's second amended petition for a writ of habeas corpus.

In this opinion the other judges concurred.

TERRY D. JOHNSON *v.* COMMISSIONER OF CORRECTION (AC 45797)

Elgo, Clark and Lavine, Js.

Syllabus

The petitioner appealed, on the granting of certification, from the habeas court's denial of his petition for a writ of habeas corpus. The petitioner

[16] Although we recognize that the respondent challenges only the second habeas court's finding of prejudice, our analysis of the issue on appeal necessarily must include an examination of whether the petitioner's claim of ineffective assistance of Skyers had a reasonable probability of success. See *Hilton* v. *Commissioner of Correction*, supra, 225 Conn. App. 328; see also *Kaddah* v. *Commissioner of Correction*, 211 Conn. App. 823, 837, 274 A.3d 115, cert. denied, 343 Conn. 928, 281 A.3d 1188 (2022); *Haywood* v. *Commissioner of Correction*, 194 Conn. App. 757, 766, 222 A.3d 545 (2019), cert. denied, 335 Conn. 914, 229 A.3d 729 (2020).

claimed, inter alia, that the court improperly concluded that his criminal trial counsel were not ineffective by advising him to plead guilty to various charges arising out of the shooting death of a state trooper, including capital felony murder. *Held*:

The habeas court properly concluded that the petitioner failed to sustain his burden with respect to both demonstrating deficient performance by his trial counsel and establishing prejudice as a result of his trial counsel's advice to plead guilty in an attempt to present a mitigating factor to prevent the imposition of the death penalty and, thus, that his counsel did not provide ineffective assistance.

The habeas court properly concluded that the petitioner failed to establish that his trial counsel provided deficient performance with respect to their failure to raise a diminished capacity defense prior to his guilty plea, and, therefore, that claim alleging ineffective assistance of counsel failed.

The habeas court properly concluded that the petitioner failed to establish prejudice with respect to his claim that his trial counsel were ineffective in not raising the issue of his competency to elect a three judge panel for the guilt phase of his criminal trial, and, thus, that claim of ineffective assistance of counsel failed.

The habeas court properly concluded that the petitioner failed to establish prejudice with respect to his claim that his trial counsel were ineffective in failing to object to his guilty plea on the ground of competency and, accordingly, that claim of ineffective assistance of counsel failed.

The habeas court properly concluded that the petitioner's trial counsel did not provide ineffective assistance by incorrectly advising him that the trial court would not accept his guilty plea after the issue of his competency had been raised at the same proceeding, as the factual predicate for that claim did not exist, and the petitioner failed to sustain his burden of demonstrating prejudice by establishing that he would not have pleaded guilty had he been advised as he claimed he should have been.

Argued January 9—officially released December 17, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *M. Murphy*, *J.*, rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed*.

Nicole Britt, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Lena A. Arnold and *Brandi A. Roberts*, certified legal interns, with whom was *Ronald G. Weller*, senior assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Terry D. Johnson, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, he claims that the court improperly concluded that his criminal trial counsel were not ineffective in (1) advising him to plead guilty, (2) failing to raise a diminished capacity defense, (3) failing to raise the issue of his competency at two different proceedings, and (4) advising him that the court would not accept his guilty plea after the issue of his competency had been raised at that same proceeding. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to this appeal. On December 10, 1992, the petitioner pleaded guilty to murder and felony murder in violation of General Statutes (Rev. to 1991) §§ 53a-54a and 53a-54c, capital felony murder of a member of the division of state police, while the officer was acting within the scope of his or her duties, in violation of General Statutes (Rev. to 1991) §§ 53a-54b (1), 53a-54a (a) and (c) and 53a-54c, and burglary in the first degree in violation of General Statutes (Rev. to 1991) § 53a-101 (a) (1) and (2). These charges arose from the shooting death of Connecticut State Trooper Russell Bagshaw during the commission of a burglary of a sporting goods store.

At the time of his guilty plea, the petitioner admitted the following facts before a three judge panel,[1] *Corrigan*, *Spada* and *Potter*, *Js.*: "During the early morning

[1] General Statutes (Rev. to 1981) § 54-82 (b) provides: "If the accused is charged with a crime punishable by death or imprisonment for life and

hours of June 5, 1991, the [petitioner] and his brother, Duane Johnson, broke into the Land and Sea Sports Center (Land and Sea) in North Windham. The [petitioner] entered the building through a small window and removed several weapons and boxes of ammunition from the Land and Sea by passing them through the window to Duane. The [petitioner] loaded a semiautomatic nine millimeter pistol and passed that weapon through the window to Duane as well. During the course of the break-in, Bagshaw, who was on routine patrol in the vicinity, drove his cruiser into the parking lot of the Land and Sea. Duane saw Bagshaw's cruiser approaching and warned the [petitioner]. The [petitioner] exited the Land and Sea through the window by which he had entered. The [petitioner], armed with the semiautomatic nine millimeter pistol, then proceeded to wait near the building. As Bagshaw's cruiser approached the Land and Sea, the [petitioner] began shooting at the cruiser. One of the bullets fired by the [petitioner] hit Bagshaw, fatally wounding him. The [petitioner] and Duane then fled the scene." *State* v. *Johnson*, 253 Conn. 1, 6, 751 A.2d 298 (2000).

Following his arrest, Attorneys Patrick Culligan and Ramon Canning were appointed to represent the petitioner. On October 22, 1992, the petitioner appeared at a hearing before Judge Corrigan regarding his motion to change his election of a jury trial to a three judge panel. When canvassed by Judge Corrigan, the petitioner initially denied consuming any alcohol or drugs within the past twenty-four hours. The petitioner then stated that, approximately twelve hours before the hearing, he had taken "sleeping pills, body tranquilizers"

elects to be tried by the court, the court shall be composed of three judges consisting of the judge presiding at the session and two other judges to be designated by the chief justice. Such judges, or a majority of them, shall have power to decide all questions of law and fact arising upon the trial and render judgment accordingly."

but commented that he felt "pretty good." He indicated that he had no difficulty hearing the court, and, in response to the court's inquiry as to whether he understood the proceeding, the petitioner responded: "Yes, pretty much to—as much as it makes sense." At the conclusion of the court's canvass, Judge Corrigan stated that, "[i]n view of the motion and remarks of the [petitioner] concerning the motion, his knowledge and *apparent competency* and capacity to understand the questioning . . . the court grants the [petitioner's] motion [for a three judge panel]." (Emphasis added.)

The three judge panel subsequently held a hearing on December 10, 1992. At the outset, the petitioner's counsel moved for a competency hearing pursuant to General Statutes (Rev. to 1991) § 54-56d. The basis for this motion was a December 9, 1992 letter sent to Culligan from David M. Mantell, a clinical psychologist who had examined the petitioner. In that letter, Mantell raised a concern regarding the petitioner's competency.[2] Judge Corrigan responded that he had found the petitioner competent on October 22, 1992, and that Mantell's letter did not change that determination. Judge Corrigan further stated that the burden of proof for this issue rested with the petitioner. Counsel offered to have Mantell appear in court and testify, to which Judge Corrigan responded: "Well, if he's going to testify

[2] The December 9, 1992 letter from Mantell stated: "I have examined [the petitioner] since November 25 exploring child and family development issues for the purpose of mitigation in the event of his conviction.

"During my first examination of [the petitioner] on 11/25/92 but particularly during those this morning and this afternoon, I have found symptomatic evidence of psychotic thought process *which*, *if validated*, *may severely impact on* [the petitioner's] *present legal competence*.

"After reviewing my results with you and Attorney Canning today I learned that this information is new and not previously known. It was not part of the background data or findings given to me before or since I began my study.

"The conclusion expressed above was promptly relayed telephonically to you and to Attorney Canning from the Hartford Correctional Center this afternoon." (Emphasis added.)

by virtue of what's in the letter it would not be sufficient." Judge Corrigan then denied the petitioner's motion for a competency examination.

The petitioner then directly addressed the three judge panel (trial court), stating: "In order to save the family additional suffering I hereby plead guilty and accept responsibility for the crimes I have committed." Specifically, the petitioner pleaded guilty to murder and felony murder, capital felony murder, and burglary as alleged in counts one, two, and three of the amended information dated December 9, 1992. The prosecutor then presented a detailed recitation of the facts underlying the criminal charges. After a recess, the trial court conducted a thorough and comprehensive canvass of the petitioner with respect to his guilty plea.[3] It found that the petitioner's plea was "made knowingly, intelligently, and voluntarily, with full understanding of the crimes charged—their possible penalties—and the consequences of such a plea—and after adequate advice and assistance of counsel. The [trial] court finds there exists a factual basis to support acceptance of these pleas, and the pleas of guilty are accepted and may be recorded and a finding of guilt is made."

"After the [petitioner's] guilty plea, a separate sentencing hearing was conducted pursuant to General Statutes (Rev. to 1991) § 53a-46a . . . . At the conclusion of the sentencing phase of the trial, the jury found an aggravating factor and no mitigating factor. In accordance with the jury's findings, the trial court rendered a judgment of guilty of capital felony and imposed the

[3] During a colloquy with the trial court, the petitioner stated that he was at the Land and Sea Sports Center in the early morning hours of June 5, 1991, where he committed a burglary, and he recognized the arrival of a police cruiser and a police officer. He further stated: "I shot at a police cruiser and caused the death of a police officer." He also admitted that it was his intention to shoot at the cruiser and cause the death of the officer inside.

death penalty on the [petitioner]."[4] (Footnote omitted.) *State* v. *Johnson*, supra, 253 Conn. 6–8.

The petitioner appealed to our Supreme Court, and he raised twenty-eight issues. Id., 9. The court reversed the judgment imposing the death penalty on the basis of insufficient evidence of an aggravating factor and remanded the case with direction to impose a life sentence without the possibility of release. Id. As a result of this conclusion, the court considered only four of the petitioner's remaining claims. Id., 9–10. Specifically, the petitioner argued that the trial court improperly had denied his motions for a competency examination, made on December 10, 1992, and on March 3, 4 and 9, 1993, in violation of his state and federal constitutional rights. Id., 11–19. Our Supreme Court concluded that, although the trial court had applied an improper evidentiary standard to the petitioner's requests for a competency evaluation, this error did not deprive him of his rights to due process. Id., 12–13. He also claimed that the trial court improperly (1) accepted his guilty pleas because they were not knowing, intelligent, or voluntary, and there was not substantial compliance with our rules of practice; id., 31–32; (2) denied his motion to withdraw his guilty plea without holding an evidentiary hearing or appointing new counsel; id., 47; and (3) deprived him of a fair determination of probable cause. Id., 78. Our Supreme Court rejected all of the petitioner's arguments with respect to these claims.

[4] Our Supreme Court explained that, "[u]nder [the then existing] capital offense sentencing scheme, a capital defendant may not be sentenced to death unless the state establishes the existence of an aggravating factor beyond a reasonable doubt, and the defendant fails to establish a mitigating factor by a preponderance of the evidence. . . . In the present case, the jury rejected the aggravating factor of 'especially depraved,' but did find as an aggravating factor that the [petitioner] had committed the offense of capital felony in an 'especially cruel and heinous manner.' . . . The jury's verdict also indicated that it had found no mitigating factor." (Citations omitted.) *State* v. *Johnson*, supra, 253 Conn. 56.

The petitioner subsequently commenced the present habeas action. In an amended petition dated June 18, 2020, the petitioner alleged ineffective assistance of counsel. Specifically, the petitioner claimed that Canning and Culligan were ineffective in failing (1) to advise him not to plead guilty, (2) to reasonably investigate, plead, and/or raise diminished capacity as a defense at the guilt phase, and (3) to preserve the issue of competency based on the petitioner's statements at the October 22 and December 10, 1992 canvasses. Additionally, the petitioner claimed that Canning provided ineffective assistance of counsel by advising him that the trial court would stop the proceedings and not accept his guilty plea after the issue of competency had been raised at the December 10, 1992 proceeding.

The habeas court held a one day trial on November 10, 2021. The petitioner submitted a number of documents that were admitted into evidence, namely, transcripts, psychological evaluations and reports, and a copy of the criminal case file. The petitioner, Canning, and Attorney Walter Bansley III testified. The parties submitted posttrial briefs.

On July 25, 2022, the court issued a memorandum of decision denying the petition for a writ of habeas corpus. At the outset, the court explained that it addressed the allegations of deficient performance made against only Canning as if they were made against both Canning and Culligan and that, to the extent that any claim mentioned in the amended petition was not addressed in the posttrial briefs, it was deemed abandoned. After setting forth the relevant legal principles, the court then considered the petitioner's claim that "counsel failed to advise him that he should not plead guilty when he would not be spared the death penalty and would be accepting no less than life without the possibility of parole. Stated somewhat differently and as briefed by the petitioner, the petitioner faults counsel for [failing

to advise him not to] plead guilty because there was no practical benefit gained from pleading guilty. Subsumed within this claim is the prospect that the petitioner would have accomplished a better outcome in the guilt phase by going to trial instead of pleading guilty." The court concluded that it was a reasonable and sound strategy to recommend that the petitioner plead guilty because it could be considered a mitigating factor pursuant to General Statutes (Rev. to 1991) § 53a-46a (d) during the sentencing phase of the trial. Thus, the court determined that counsel were not deficient in their performance. Additionally, the court concluded that the petitioner had failed to demonstrate prejudice "because he has not shown that the outcome of the guilt phase would have been any different or better. The petitioner has not substantiated any defenses that, had they been raised, would have resulted in any convictions or less punishment than what resulted of the guilty pleas. The court also does not credit the petitioner's testimony, which was inconsistent and highly selective, that he would not have pleaded guilty." Finally, the habeas court pointed out that the reversal of the death penalty and imposition of life imprisonment without the possibility of release as a result of his appeal to our Supreme Court further supported the absence of prejudice.

The court then considered the petitioner's claim that counsel were ineffective in failing to investigate, plead, and/or raise a diminished capacity defense. It determined that the petitioner had failed to present any evidence to substantiate the claim that a viable diminished capacity defense existed that would have resulted in a conviction for a lesser included offense or an acquittal. Accordingly, the court concluded that he failed to establish that his counsel's performance was deficient or that he was prejudiced as a result.

Next, the court addressed the petitioner's claim that counsel were ineffective in failing to object to the canvass conducted by Judge Corrigan at the October 22,

1992 proceeding in which the petitioner requested to be tried before a three judge panel at the guilt phase. The petitioner claimed that, on the basis of his responses during that canvass, counsel should have objected and raised the issue of lack of competency. The court disagreed that the petitioner's responses during this canvass supported the contention that he was not competent and concluded: "The petitioner has not shown that counsel were deficient for failing to object to the October 22 canvass, which only has a tangential connection to the actual guilty pleas, nor that he was prejudiced."

The court then turned to the petitioner's claim that his counsel were ineffective in failing to object or raise a claim that he was incompetent to plead guilty after Judge Corrigan denied his motion for a competency evaluation with respect to the issue of his competency to stand trial at the outset of the December 10, 1992 proceeding. In rejecting this claim, the court stated: "Counsel represented a client in a capital case with egregious facts and no viable mental health defense. None of the experts who evaluated the petitioner were able to conclude that he was not competent. Attorney Canning acknowledged that the [December 10, 1992] last-minute request for a competency evaluation was intended to delay the proceedings.[5] Consequently, the court concludes that the petitioner has failed to present any evidence that counsel were ineffective for failing to object to the December 10, 1992 canvass." (Footnote added.)

Finally, the court addressed the petitioner's claim that his counsel were ineffective in advising him that the court would refuse to accept his guilty plea after the issue of his competence had been raised at the same proceeding. He also claimed that he had not wanted to

[5] This is an unusually frank and troubling admission.

plead guilty. The court determined that "[t]he credible evidence belies the petitioner's contentions." It further explained that the petitioner had failed to demonstrate deficient performance or prejudice with respect to this claim.

In conclusion, the court stated: "The evidence in the habeas case, submitted nearly thirty years after the underlying criminal proceedings, shows that the defense quickly retained a defense expert who extensively and thoroughly evaluated the petitioner in preparation for potential defenses and mitigating evidence. The credible evidence supports the conclusion that the petitioner was competent, did not have a viable defense to assert in the guilt phase, that the state had overwhelming evidence against the petitioner, and that guilty verdicts on all charged counts were all but assured. The defense strategy of the petitioner pleading guilty and then proceeding to the penalty phase, which now could encompass the mitigant that the petitioner had taken full responsibility for his crimes and not made the victim's family go through both phases of the trial, was reasonable and sound. A trial in the guilt phase would have removed an important mitigant from the scale that the petitioner was attempting to tilt in his favor.

"The court concludes that the petitioner has not proven that counsel failed to object to any of the court canvasses and were deficient in their performance when he pleaded guilty. Additionally, the petitioner has failed to prove that he was prejudiced because he has not shown that the outcome of the guilt phase would have been any different or better. The petitioner has not substantiated any defenses that, had they been raised, would have resulted in any convictions or less punishment than what resulted . . . .

"Lastly, the Supreme Court's decision to vacate the sentence of death, which resulted in a sentence of life

without the possibility of release, further supports the conclusion that the petitioner was not prejudiced by pleading guilty. Had the state agreed not to seek the death penalty in exchange for the petitioner's guilty plea, then his convictions and sentences would be precisely what he has today. Therefore, the court concludes that counsel were not ineffective as to the petitioner's guilty plea." The court denied the petition for a writ of habeas corpus, and subsequently granted his petition for certification to appeal. This appeal followed.

Before addressing the petitioner's specific appellate claims, we set forth the relevant legal principles and our standard of review. The sixth amendment to the United States constitution guarantees a criminal defendant the right to the effective assistance of counsel for his defense. See, e.g., *Coltherst* v. *Commissioner of Correction*, 208 Conn. App. 470, 477, 264 A.3d 1080 (2021), cert. denied, 340 Conn. 920, 267 A.3d 857 (2022). "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, the petitioner must establish that his counsel made errors so serious that [counsel] was not functioning as the counsel guaranteed the [petitioner] by the [s]ixth [a]mendment. . . . The petitioner must thus show that counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

. . . Furthermore, the right to counsel is not the right to perfect counsel. . . .

"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. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition. . . .

"On appeal, [a]lthough the underlying historical facts found by the habeas court may not be disturbed unless they [are] clearly erroneous, whether those facts constituted a violation of the petitioner's rights [to the effective assistance of counsel] under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of [the] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Citations omitted; internal quotation marks omitted.) *Soyini* v. *Commissioner of Correction*, 222 Conn. App. 428, 441–42, 305 A.3d 662 (2023), cert. denied, 348 Conn. 940, 307 A.3d 274 (2024). Guided by these principles, we turn to the specific claims raised by the petitioner in this appeal.

I

The petitioner first claims that the court improperly concluded that counsel were not ineffective by advising him to plead guilty. Specifically, he argues that counsel were ineffective by advising him to plead guilty without receiving any benefit or consideration for doing so and he suffered prejudice as a result thereof. We conclude that the petitioner failed to establish prejudice with respect to this claim.

The following additional facts are necessary for the resolution of this issue. At the habeas trial, the petitioner testified that he pleaded guilty on the advice of Canning and Culligan. He further stated that he would not have pleaded guilty if his counsel had informed him that (1) he could be sentenced to life imprisonment as a result of pleading guilty, (2) the court could accept his guilty plea even though a competency evaluation had been requested, and (3) even if he was found incompetent, that would not permanently stop the proceedings.

Bansley testified as a legal expert on behalf of the petitioner and stated that he had represented several individuals facing capital murder charges. He then stated that criminal defendants generally plead guilty to receive some form of consideration. He acknowledged that, in a capital case where the evidence against a defendant is overwhelming, the best result may be to plead guilty in exchange for a life sentence. Bansley also indicated that he would not recommend that a defendant plead guilty unless he or she received some form of consideration for doing so. He further described the approach of "frontloading" the mitigation evidence as having an opportunity to present it twice, first during the guilt phase and second during the penalty phase. Bansley explained that this strategy afforded counsel the opportunity to present the facts of the case to a jury over an extended period time, which would "humanize" the petitioner, particularly with the use of psychological evidence, to show "all the difficulties he had growing up" such as the petitioner's long-standing mental illness, being abandoned by his mother several times, and the physical abuse he suffered from this father. Bansley expressly opined that, in general, an attorney should not advise his or her client to plead guilty if there is no benefit and, in particular, should

not advise a defendant to plead guilty when the death penalty remained a potential sentence.

Canning testified that he was employed as a public defender for thirty-nine years and he had worked on two or three capital cases before being appointed, along with Culligan, to represent the petitioner. He stated that the petitioner pleaded guilty based on the advice he received from counsel. Canning could not recall why the petitioner was advised to plead guilty, and he "could not imagine what the strategy was . . . ." Later, he noted that, given the fact that the state was continuing to pursue the death penalty, there was no risk of going to trial at the guilt phase and he could not identify a benefit to pleading guilty.

During cross-examination, Canning acknowledged that, because the state would not reduce the charges or agree not to pursue the death penalty, he needed "to mitigate the damage for [his] client . . . ." He admitted that a guilty plea may be used to elicit "sympathy" for use during the penalty phase. Finally, Canning acknowledged that Culligan worked in the capital felony unit of the public defender's office and worked on these types of cases "consistently."

In his posttrial brief submitted to the habeas court, the petitioner argued that his counsel were ineffective in failing to advise him not to plead guilty because he did not receive anything in exchange for such a plea, as he still faced the possibility of the death penalty. He iterated that the better approach was to go to trial "because it would allow the defense to frontload the mitigation evidence and put some distance between when you're selecting your jury and starting the case to when you get to the penalty phase." (Internal quotation marks omitted.) The respondent, the Commissioner of Correction, countered, inter alia, that the petitioner's

criminal counsel "reasonably focused on the penalty phase of the trial."

In its memorandum of decision, the court noted that the state adamantly insisted on pursuing the death penalty, and, given the strength of its case and the weakness of the petitioner's defenses, the guilt phase was "a poor testbed for any defense theories." Rather, the petitioner's counsel focused on the penalty phase. It further determined that the record indicated that the petitioner and his counsel used the guilty plea as a mitigating factor. The court explained that the strategy of pleading guilty, and then using the fact that the petitioner took responsibility for his actions and did not force the victim's family to go through both phases of the criminal trial, was reasonable and sound. Had the jury found that the petitioner's decision to plead guilty constituted a mitigating factor, the court could not have imposed a sentence of death. General Statutes (Rev. to 1991) § 53a-46a (g). The court also disagreed with Bansley regarding the benefit of presenting psychological evidence twice to the fact finder. Specifically, the court stated: "Two bites at the apple, in this court's assessment, would not have benefited the petitioner given the totality of the circumstances of this case. Furthermore, a trial in the guilt phase would have removed an important mitigant from the aggravant versus mitigant scale that the petitioner was attempting to tilt in his favor." Accordingly, the court determined that the petitioner had failed to demonstrate deficient performance.

Additionally, the habeas court concluded that the petitioner failed to establish prejudice as a result of his counsel's advice to plead guilty. The habeas court expressly discredited the petitioner's testimony, which it described as inconsistent and highly selective, that he would not have pleaded guilty. Further, it stated that the petitioner failed to demonstrate that the outcome of the guilt phase would have been any different, as he

did not substantiate any defenses that, had they been raised, would have resulted in a better result for him following the opinion of our Supreme Court.

On appeal, the petitioner reasserts his claim that counsel improperly failed to advise him against pleading guilty when the state continued to pursue the death penalty. He further contends that, because there was evidence that he was not remorseful following the shooting of the victim, and the victim's family had to "suffer through" the penalty phase of the trial, pleading guilty in this case did not amount to a mitigating factor.[6] Finally, the petitioner argues that he was prejudiced because, by pleading guilty, he "gave up his only opportunity to present a defense that could have led to a conviction of a lesser offense" on the basis of a diminished capacity defense. We are not persuaded by the petitioner's arguments.

The prejudice prong of the *Strickland* test has been modified in cases where the petitioner claims improper advice from counsel with respect to the decision to plead guilty. In such cases, the petitioner satisfies his burden with respect to prejudice by reasonably demonstrating that, but for the conduct of counsel, he would not have pleaded guilty. See *Williams* v. *Commissioner of Correction*, 223 Conn. App. 745, 753, 310 A.3d 381, cert. denied, 349 Conn. 901, 312 A.3d 586 (2024); see generally *Hill* v. *Lockhart*, 474 U.S. 52, 58–59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). "However, a petitioner must make more than a bare allegation that he would have pleaded differently to demonstrate prejudice . . . because such a statement suffers from obvious credibility problems and must be evaluated in light of the circumstances the defendant would have faced at the time

[6] The fact that the state presented evidence during the penalty phase that the petitioner was neither remorseful nor accepting of responsibility for his actions did not render counsel's strategy deficient. See footnote 7 of this opinion.

of his decision." (Internal quotation marks omitted.) *Williams* v. *Commissioner of Correction*, supra, 753; see also *Love* v. *Commissioner of Correction*, 223 Conn. App. 658, 667, 308 A.3d 1040, cert. denied, 348 Conn. 958, 310 A.3d 960 (2024).

"In evaluating the credibility of such an assertion [that the petitioner would not have pleaded guilty], the strength of the state's case is often the best evidence of whether a defendant in fact would have changed his plea and insisted on going to trial, in light of newly discovered evidence or a defense strategy that was not previously contemplated. . . . Likewise, the credibility of the petitioner's after the fact insistence that he would have gone to trial should be assessed in light of the likely risks that pursuing that course would have entailed." (Internal quotation marks omitted.) *Colon* v. *Commissioner of Correction*, 179 Conn. App. 30, 36–37, 177 A.3d 1162 (2017), cert. denied, 328 Conn. 907, 178 A.3d 390 (2018).

The habeas court discredited the petitioner's testimony and concluded that he failed to present any other evidence that he would not have pleaded guilty but for the improper advice provided by counsel.[7] Specifically,

[7] To prevail on a claim of ineffective assistance of counsel, the petitioner must prevail on both prongs of the *Strickland-Hill* test, and a court may decide against a petitioner on either prong, whichever is easier. See *Williams* v. *Commissioner of Correction*, supra, 223 Conn. App. 752–53. In the present case, the habeas court concluded that the petitioner's counsel were not deficient in their strategy to plead guilty and focus on the penalty phase due to the strength of the state's case and the comparative weakness of the petitioner's defenses and that the petitioner was not prejudiced. Contrary to the petitioner's assertion that there was "no conceivable benefit to pleading guilty," counsel sought to use the guilty plea as a mitigation factor. General Statutes (Rev. to 1991) § 53a-46a (c) placed the burden of establishing a mitigating factor on the petitioner, *while subsections (f) and (g) provided that if a mitigating factor existed, then the court shall not impose the sentence of death.*

The habeas court referred to Canning's closing argument during the penalty phase, in which he attempted to persuade the three judge panel that the petitioner's guilty plea constituted a "responsible act" and thus a mitigating factor. As noted in the respondent's appellate brief, courts have acknowl-

it stated: "The court also does not credit the petitioner's testimony, which was inconsistent and highly selective, that he would not have pleaded guilty. For example, the petitioner could not recall his guilty plea and mental

edged the reasonableness of such a strategy. See, e.g., *Post* v. *Bradshaw*, 621 F.3d 406, 417–18 (6th Cir. 2010) (advice to plead no contest was not deficient performance when state's case was so strong that conviction was essentially assured and sentencing court would not hear adverse testimony and petitioner gained mitigating factor), cert. denied, 563 U.S. 1009, 131 S. Ct. 2902, 179 L. Ed. 2d 1249 (2011); *Hodges* v. *Bell*, 548 F. Supp. 2d 485, 518 (M.D. Tenn. 2008) (petitioner's trial counsel, who were experienced in capital cases and clearly aware of state's overwhelming evidence and hampered by petitioner's public statements and interviews admitting to several murders, made reasonable strategic decision to recommend guilty plea to demonstrate remorse and limit proof that state could introduce), aff'd sub nom. *Hodges* v. *Colson*, 727 F.3d 517 (6th Cir. 2013), cert. denied sub nom. *Hodges* v. *Carpenter*, 575 U.S. 915, 135 S. Ct. 1545, 191 L. Ed. 2d 642 (2015); *Brant* v. *State*, 197 So. 3d 1051, 1065 (Fla. 2016) (counsel's expertise and experience in trying capital murder cases rendered them qualified to advise defendant that guilty plea would limit jury's exposure to damaging nature of his confession and it might help avoid ire of jury if he attempted to contest guilt, and therefore advice to plead guilty was reasonable); *Simonsen* v. *Premo*, 267 Or. App. 649, 661–67, 341 P.3d 817 (2014) (acknowledging guilt can constitute tenable capital defense strategy, especially where evidence is overwhelming and crime heinous, and may be tactically advantageous choice within *Strickland*), cert. denied, 357 Or. 324, 354 P.3d 696 (2015).

The United States Supreme Court has stated that "[c]ounsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared. Unable to negotiate a guilty plea in exchange for a life sentence, defense counsel must strive at the guilt phase to avoid a counterproductive course. . . . In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in a useless charade. . . . *To summarize, in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *Florida* v. *Nixon*, 543 U.S. 175, 191–92, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004).

In the present case, the petitioner's counsel made the informed strategic decision to plead guilty in the face of overwhelming evidence and to focus on establishing a mitigating factor to avoid the death penalty. We conclude that this approach did not constitute constitutionally deficient performance and, therefore, this claim of ineffective assistance of counsel must fail. The petitioner, therefore, has not sustained his burden with respect to either prong of the *Strickland-Hill* test on this claim.

health treatment around the time of his plea but could completely recall other aspects of his pretrial process." It is not the function of this court to second-guess the credibility determination of the habeas court with respect to this critical finding regarding the petitioner's decision to plead guilty. See *Smith* v. *Commissioner of Correction*, 215 Conn. App. 167, 187–89, 282 A.3d 1036, cert. denied, 345 Conn. 921, 284 A.3d 983 (2022). We iterate that the petitioner must reasonably demonstrate that, but for the conduct of counsel, he would not have pleaded guilty. See *James P.* v. *Commissioner of Correction*, 224 Conn. App. 636, 645–46, 312 A.3d 1132 (to establish prejudice, petitioner need only establish it is reasonably probable that, but for counsel's deficient performance, he or she would not have accepted plea offer and insisted on going to trial), cert. denied, 349 Conn. 911, 314 A.3d 603 (2024). Additionally, beyond the petitioner's testimony that he would not have pleaded guilty, which the habeas court rejected, the petitioner did not present any evidence relative to the prejudice prong of the *Strickland-Hill* test. Further, the state had a strong case against the petitioner. In the absence of any other evidence to support the claim that the petitioner would not have pleaded guilty, we conclude that, under these facts and circumstances, he failed to demonstrate prejudice. See *Williams* v. *Commissioner of Correction*, supra, 223 Conn. App. 756.

II

The petitioner next claims that the court improperly concluded that his counsel were ineffective in failing to raise a diminished capacity defense. Specifically, he argues that counsel were deficient in failing to investigate adequately this defense, which would have negated the intent requirement in a capital murder case, prior to his guilty plea or to pursue such a defense during the guilt phase. The respondent counters, inter alia, that the petitioner failed to demonstrate that counsel did

not investigate adequately a diminished capacity defense, and, therefore, their performance was not deficient. We agree.

The following additional facts are necessary for the resolution of this claim. On June 9, 1991, days after the shooting, the petitioner's counsel hired Kenneth Selig, a psychiatrist, to conduct an "extensive examination" to assist the defense. Selig concluded that the petitioner was competent but had suffered from serious psychological illnesses for most of his life. Additionally, Mantell, in his December 9, 1992 letter, stated that he had examined the petitioner "for the purpose of mitigation in the event of his conviction" and found evidence that, if validated, might have called into question the petitioner's competence. The petitioner pleaded guilty the next day, after Judge Corrigan denied his motion for a competency evaluation.

Following his guilty plea, the petitioner was examined by various psychologists and other mental health providers. Mantell authored a psychological report dated April 17, 1993, in which he concluded: "From 1985 through 1992/93, [the petitioner] has experienced a significant loss of cognitive capacity. His profile is also consistent with the insidious onset of a major, mental disorder. Because of his significant history of head trauma, however, subtle brain damage cannot be ruled out. . . . *While his major loss of mental capacity to think, to make judgments, and to control his impulses, has not rendered him incompetent, this loss has, in my professional opinion, significantly impaired his ability to conform his conduct to the requirements of law*." (Emphasis added.)

In his amended petition for a writ of habeas corpus, the petitioner alleged that his counsel was ineffective in failing to reasonably investigate, plead, and/or raise a diminished capacity defense on the basis of Mantell's

evaluations, which had occurred after he pleaded guilty. The petitioner argued that there was evidence that he had suffered severe abuse and neglect, had a family history of mental illness and antisocial behavior, had sustained head injuries, and had experienced a significant loss of cognitive capacity that impacted his ability to conform his conduct to the requirements of law.

During the habeas trial, Canning acknowledged that Mantell worked with the petitioner prior to his guilty plea. Further, during cross-examination, Canning stated that he instructed medical professionals to evaluate his clients for various types of mental states, including diminished capacity.[8] Canning further acknowledged that the medical professionals were not able to provide an opinion that such a defense was available in the present case.

[8] Specifically, the following colloquy occurred:

"[The Respondent's Counsel]: And fair to say that when you do that in death penalty cases or any case, your instructions to the medical professional are pretty much, evaluate this guy for [extreme emotional disturbance], diminished capacity, insanity; give me something I can work with. Correct?

"Canning: Yes.

"[The Respondent's Counsel]: Okay. And that would have been the same especially in this case. Wouldn't it have been?

"Canning: Yes.

"[The Respondent's Counsel]: And at some point after those evaluations, you notified the court that you had no intent to file a mental status defense on behalf of your client. Right?

"Canning: I don't recall that, but I would certainly say that we did not file it.

"[The Respondent's Counsel]: That you did not file for a mental disease or defect alibi or— excuse me—defense. Correct?

"Canning: Correct.

"[The Respondent's Counsel]: And that would have been that because, in part, your doctors were not able to provide you with such a defense, were they?

"Canning: That's true.

"[The Respondent's Counsel]: So, at that point, your only option is to take what your doctors have given you concerning the mental state of your client and attempt to use it at the penalty phase?

"Canning: Well, that's one possibility."

In rejecting the petitioner's claim regarding diminished capacity, the court summarized the timeline of events in the present matter. Specifically, it noted that the underlying offenses were committed on June 5, 1991, and that counsel hired Selig on June 9, 1991. Selig conducted an "extensive examination" of the petitioner to assist in his defense. The petitioner pleaded guilty on December 10, 1992, one day after Mantell had written a letter expressing a concern regarding the petitioner's competency. The court further observed that Bansley, the petitioner's expert, had acknowledged that the professionals who evaluated the petitioner had indicated that any impairment from which he suffered was not sufficient to the degree necessary to be a defense to the crime of murder.

The court concluded that the petitioner had "not presented any evidence in the habeas trial that substantiates he had a viable diminished capacity defense that would have resulted in a conviction for a lesser included offense or an acquittal. *To the contrary . . . the defense left no proverbial stone unturned.* Unfortunately, the petitioner was competent and did not have a supportable defense. The court concludes that the petitioner has proven neither that counsel were ineffective for failing to investigate, plead, and/or raise a diminished capacity defense, nor that he was prejudiced." (Emphasis added.)

On appeal, the petitioner asserts that, contrary to the conclusions of the court, he presented evidence demonstrating that he had a viable diminished capacity defense. "Specifically, the evidence shows that the petitioner suffered severe abuse and neglect, family history of mental illness and antisocial behavior, had several head injuries, and had a significant loss of cognitive capacity that had significantly impaired his ability to

conform his conduct to the requirements of law." (Internal quotation marks omitted.) The petitioner acknowledges that his counsel had utilized mental health experts prior to his guilty plea but claims much of the evidence regarding a diminished capacity defense was not developed and analyzed until after his guilty plea. "As a result, the petitioner was deprived of the information he needed to properly pursue a diminished capacity defense during the guilt phase."

"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. . . . 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 omitted; internal quotation marks omitted.) *Morales* v. *Commission of Correction*, 220 Conn. App. 285, 305–306, 298 A.3d 636, cert. denied, 348 Conn. 915, 303 A.3d 603 (2023); see also *Williams* v. *Commissioner of Correction*, supra, 223 Conn. App. 760–61.

Next, we set forth the legal principles underlying this claim. " '[T]he specific intent to kill is an essential element of the crime of murder.' " *State* v. *Bharrat*, 129 Conn. App. 1, 7, 20 A.3d 9, cert. denied, 302 Conn. 905, 23 A.3d 1243 (2011); see also *Bharrat* v. *Commissioner of Correction*, 167 Conn. App. 158, 168, 143 A.3d 1106, cert. denied, 323 Conn. 924, 149 A.3d 982 (2016). The defense of diminished capacity pertains to this element. See, e.g., *State* v. *Pagano*, 23 Conn. App. 447, 449, 581 A.2d 1058, cert. denied, 217 Conn. 802, 583 A.2d 132 (1990). Stated differently, "[t]he doctrine of diminished capacity means that if the defendant, because of a limited or impaired mental capacity, did not have the specific intent to commit the acts which comprise the crime

[charged] because of a limited or impaired mental capacity, then the element of intent would not have been proven in this case." (Internal quotation marks omitted.) *State* v. *J.M.F.*, 170 Conn. App. 120, 183, 154 A.3d 1, cert. denied, 325 Conn. 912, 159 A.3d 230 (2017). Thus, "[e]vidence [regarding a defendant's mental capacity] is admitted not for the purpose of exempting a defendant from criminal responsibility, but as bearing upon the question of whether he possessed, at the time he committed the act, the necessary specific intent, the proof of which was required to obtain a conviction." (Internal quotation marks omitted.) *State* v. *Bharrat*, supra, 7.

In the present case, counsel used the services of Selig to evaluate the petitioner four days after the shooting of Bagshaw. Additionally, other medical professionals, including Mantell, evaluated the petitioner prior to his guilty plea.[9] Canning requested that the evaluations include among other things, whether the petitioner had a viable diminished capacity defense. We agree with

[9] We note that the list of exhibits from the habeas trial indicates that the reports of various medical providers are for identification only. At the start of the habeas trial, the petitioner's counsel indicated that she was not sure if the reports she had were, in fact, the same as those entered into evidence during the guilt phase of the petitioner's criminal trial. The habeas court agreed to leave the hearing open for a period of time to allow the petitioner's counsel to locate and confirm that these reports were admitted into evidence at the criminal trial.

On January 27, 2022, the habeas court issued the following order: "The petitioner lodged additional documents under seal on a flash drive pursuant to court order. The documents are from the petitioner's underlying criminal trial and replace certain of the petitioner's exhibits that were marked for identification at the habeas trial on [November 10, 2021]. The exhibits marked for identification in the habeas trial remain marked for identification only. The lodged documents are marked full exhibits in the habeas trial [including the sealed reports of Anne Phillips and Peter Zeman]. The exhibits listed herein are sealed pursuant to the protective order, attached hereto, issued by *Newson*, *J.*, on [December 23, 2021]. Until further order of the court, the exhibits listed in this order shall remain sealed and are available only to the parties, their counsel and the court."

the habeas court, therefore, that the petitioner failed to substantiate his claim of deficient performance on the basis of failure to raise or investigate a diminished capacity defense prior to his guilty plea. Simply put, the petitioner presented no evidence in the habeas trial to support his claim. Rather, as the habeas court observed, "the defense left no proverbial stone unturned." Specifically, counsel employed the services of medical professionals to evaluate the mental status of the petitioner, including whether he had a diminished capacity at the time the crimes were committed. Following these evaluations, there was little evidence to support a diminished capacity defense. Furthermore, as we previously concluded in this opinion, counsel then made the strategic choice to plead guilty in an attempt to present a mitigating factor to prevent the imposition of the death penalty.[10] See, e.g., *Bharrat* v. *Commissioner of Correction*, supra, 167 Conn. App. 167–68. For these reasons, we conclude that the habeas court properly concluded that the petitioner failed to establish that his counsel provided deficient performance with respect to this issue, and, therefore, this claim alleging ineffective assistance of counsel must fail.

III

The petitioner next claims that the court improperly concluded that his counsel did not provide ineffective assistance by failing to raise the issue of his competency at the October 22, 1992 hearing, at which he elected a three judge panel for the guilt phase of his criminal trial, and at the December 10, 1992 hearing, at which he pleaded guilty.[11] Specifically, he argues that, as to

[10] We note that, during the penalty phase, the jury rejected the petitioner's claim of diminished capacity as a mitigating factor. See General Statutes (Rev. to 1991) § 53a-46a (g).

[11] We recognize that an individual's competence may fluctuate over a period of time. See, e.g., *In re Kaleb H.*, 306 Conn. 22, 34 n.11, 48 A.3d 631 (2012).

the former, his responses to the court's questions during the canvass indicated that his competency was in doubt, and therefore his counsel should have raised this issue at that time. As to the latter, the petitioner contends that his counsel should have raised the issue of his competency to plead guilty in addition to the claim that he was incompetent to stand trial. We are not persuaded by the petitioner's arguments and conclude that he has failed to demonstrate prejudice with respect to this claim.

At the outset, we set forth the applicable legal principles regarding the prejudice prong of the *Strickland* standard. "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. . . . 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).

Next, we identify the relevant legal principles regarding the competency of a criminal defendant. As our Supreme Court observed in the petitioner's direct appeal, "[w]e begin with the undisputed principle that the guilty plea and subsequent conviction of an accused person who is not legally competent to stand trial violates the due process of law guaranteed by the state and federal constitutions. . . . Connecticut jealously guards this right. Therefore, [t]his constitutional mandate is codified in [General Statutes (Rev. to 1991)] § 54-56d (a), which provides that [a] defendant shall not be tried, convicted or sentenced while he is not competent. . . .

"[A] defendant is not competent if he is unable to understand the proceedings against him or to assist in his own defense. General Statutes (Rev. to 1991) § 54-56d (a). . . . [T]he test for competency must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him. . . . Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial. . . .

"Although [General Statutes (Rev. to 1991)] § 54-56d (b) presumes the competency of defendants, when a reasonable doubt concerning the defendant's competency is raised, the trial court must order a competency examination. . . . Thus, [a]s a matter of due process, the trial court is required to conduct an independent inquiry into the defendant's competence whenever he makes specific factual allegations that, if true, would

constitute substantial evidence of mental impairment. . . . Substantial evidence is a term of art. Evidence encompasses all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court. Evidence is substantial if it raises a reasonable doubt about the defendant's competency . . . . The trial court should carefully weigh the need for a hearing in each case, but this is not to say that a hearing should be available on demand. The decision whether to grant a hearing requires the exercise of sound judicial discretion." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Johnson*, supra, 253 Conn. 20–22; see also *Moye* v. *Commissioner of Correction*, 166 Conn. App. 707, 720, 142 A.3d 424 (2016).

We emphasize, however, that incompetence is not defined by the presence of mental illness alone. See *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 451–52, 936 A.2d 611 (2007). A defendant may have a mental illness and still be able to understand the charges against him and assist in his defense. Id.; see also *State* v. *Burgos*, 170 Conn. App. 501, 521, 155 A.3d 246, cert. denied, 325 Conn. 907, 156 A.3d 538 (2017).

As previously noted, Judge Corrigan held a hearing on October 22, 1992, to consider the petitioner's motion to change his election from a jury trial to a three judge panel. During this proceeding, the petitioner stated that he had taken prescription drugs such as sleeping pills and body tranquilizers within the prior twelve hours; nevertheless, he informed Judge Corrigan that he felt "pretty good." Judge Corrigan inquired whether the petitioner's counsel had informed him that the court or the state could object to the type of fact finder with respect to the penalty phase, and he responded: "I don't think so but I'm pretty much sure the state's going to do pretty much whatever they want to do. They've done

it from the start, they'll do it today, and—I'm just along for the ride." The petitioner further acknowledged that he was aware that there was no "automatic right to a trial, on the penalty phase, to . . . a three judge panel . . . ." At the conclusion of the cavass, Judge Corrigan stated: "In view of the motion and remarks of the [petitioner] concerning the motion, his knowledge and apparent competence and capacity to understand the questioning of the court—and the lack of objection by the state—and a failure to show any delay in the course of a trial, the court grants the motion . . . ."

At the start of the December 10, 1992 hearing, counsel moved for an evaluation pursuant to General Statutes (Rev. to 1991) § 54-56d to determine whether the petitioner was competent to stand trial. The principal basis for this request was Mantell's December 9, 1992 letter. The trial court responded that the petitioner previously had been determined to be competent at the October 22, 1992 hearing, and Mantell's letter did not change that determination. The motion for such an evaluation, therefore, was denied. The petitioner then informed the trial court of his intention to plead guilty. After the state's detailed summary of the facts and an extensive plea canvass, the trial court found the petitioner's plea was made knowingly, intelligently, and voluntarily with a full understanding of the crimes charged, their possible penalties, and the consequences of his plea after adequate advice and assistance of counsel.

In his direct appeal, the petitioner claimed that the trial court improperly denied his motions for a competency examination, including the one made on December 10, 1992.[12] *State* v. *Johnson*, supra, 253 Conn. 11. Our Supreme Court concluded that, although the trial

[12] Our Supreme Court also considered the petitioner's arguments regarding the competency issue raised on March 3, 4 and 9, 1993. *State* v. *Johnson*, supra, 253 Conn. 29–31.

court had applied an incorrect evidentiary standard to the requests for a competency hearing, this error did not deprive the petitioner of his due process rights. Id., 12–13. Specifically, it explained that "the trial court improperly required the [petitioner] to provide clear and convincing evidence of incompetency in his motion for a competency evaluation. Additionally, because the evidence proffered by the [petitioner] raised a reasonable doubt as to the [petitioner's] competency, a competency examination was justified in this case." Id., 23–24.

Our Supreme Court then considered whether the denial of a competency examination deprived the petitioner of his right to due process because he was incompetent to stand trial. Id., 25. It determined that the denial of a competency hearing amounted to harmless error. Id. At the outset of this analysis, the court noted that the degree of competency required to stand trial is the same as the degree of competency required to plead guilty. Id., 26. "In the present case, the canvass of the [petitioner] amply supports the trial court's finding that the [petitioner] was competent to plead guilty. . . . Throughout the canvass the [petitioner] demonstrated his clear understanding of the charges against him and the implications of his guilty plea. The [petitioner] provided appropriate and coherent responses to the court's questions and indicated that he had consulted with defense counsel regarding various aspects of his guilty plea. Furthermore, the [petitioner] paused repeatedly during the lengthy canvass to consult with counsel before answering specific questions. Thus, the record of the canvass establishes that the [petitioner] comprehended the proceedings and was able to consult with and assist counsel in the presentation of his case. Accordingly, the [petitioner] was competent to plead guilty. . . . Thus, the trial court's extensive canvass of the [petitioner], prior to accepting his guilty plea,

necessarily included a determination that the [petitioner] was competent. . . . Because the same competency standard applied to both determinations and because the canvass occurred immediately after defense counsel raised the issue of competency, implicit in the trial court's conclusion that the [petitioner] was competent to plead guilty is its finding that the [petitioner] was also competent to stand trial." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 27–29.

A

In the present case, the petitioner claims that his counsel were ineffective in not raising the issue of his competency to plead guilty at the October 22, 1992 proceeding. In rejecting this claim, the court concluded that it "does not agree that the October 22 transcript supports the contention that the petitioner was not competent. The petitioner clearly told the court that he felt 'pretty good.' . . . The petitioner has not shown that counsel were deficient for failing to object to the October 22 canvass, which only has a tangential connection to the actual guilty pleas, nor that he was prejudiced. The claim of ineffective assistance of counsel must fail."

On appeal, the petitioner asserts that his responses during the October 22, 1992 canvass demonstrated that "this competency was at best questionable . . . ." As a result, he contends, counsel should have raised the competency issue at this proceeding. The petitioner further argues that, "[a]t the very least, calling into question the petitioner's competency during the October 22, 1992 canvass would have made it more difficult for the trial court to rely on it during [his] later plea. In other words, if the petitioner's competency was in doubt during the October 22, 1992 canvass, the trial court cannot then rely on that canvass as proof and

evidence that [he] was competent during his December 10, 1992 plea canvass." The respondent counters that the petitioner's counsel had no evidence to support this claim at the October 22, 1992 proceeding. With respect to the prejudice prong, the respondent claims, inter alia, that, even if counsel had raised the competency issue at the October 22, 1992 hearing, the court likely would not have ordered an examination and, if it had, the petitioner would not have been found incompetent. We agree with the respondent that the petitioner failed to demonstrate prejudice and, therefore, this claim of ineffective assistance of counsel must fail.

During the October 22, 1992 proceeding, the petitioner, in response to a question from the court as to whether he recently had taken any medication, alcohol or drugs, stated that he had taken "sleeping pills, body tranquilizers . . . things to help me sleep" within the past twelve hours. The petitioner then asserted that he "felt pretty good," did not have any problems hearing the court, and was able to understand the court's questions. After a further colloquy regarding the election of a three judge panel for the guilt phase of his criminal trial, Judge Corrigan concluded: "In view of the motion and remarks of the [petitioner] concerning the motion, his knowledge and *apparent competency and a capacity to understanding the questions* . . . the court grants the motion . . . ." (Emphasis added.)

"Connecticut appellate courts have repeatedly held that a trial court may not be required to order a competency examination when the defendant's canvass supports a finding of competency." *State* v. *Silva*, 65 Conn. App. 234, 249, 783 A.2d 7, cert. denied, 258 Conn. 929, 783 A.2d 1031 (2001); see also *State* v. *DesLaurier*, 230 Conn. 572, 590, 646 A.2d 108 (1994). Indeed, this court specifically has recognized that "[t]he trial judge is in

a particularly advantageous position to observe a defendant's conduct during a trial and has a unique opportunity to assess a defendant's competency. A trial court's opinion, therefore, of the competency of a defendant is highly significant." (Internal quotation marks omitted.) *State* v. *Ducharme*, 134 Conn. App. 595, 602, 39 A.3d 1183, cert. denied, 305 Conn. 905, 44 A.3d 181 (2012).

Furthermore, had defense counsel requested a competency examination, the petitioner would have been required to present substantial evidence that raised a reasonable doubt about his competency, rather than mere allegations of incompetency. See *State* v. *Kendall*, 123 Conn. App. 625, 650–51, 2 A.3d 990, cert. denied, 299 Conn. 902, 10 A.3d 521 (2010). He failed to present any such evidence to the habeas court that would have supported his contention that he likely would have been found incompetent at the October 22, 1992 hearing. We emphasize that the petitioner bears the burden of demonstrating prejudice not with mere speculation but rather with " 'demonstrable realties.' " *Hilton* v. *Commissioner of Correction*, supra, 225 Conn. App. 328. For these reasons, we conclude that this claim of ineffective assistance counsel with respect to the October 22, 1992 hearing must fail.

B

Next, we consider the petitioner's claim that his counsel were ineffective in failing to object to his pleading guilty at the December 10, 1992 proceeding on the basis of lack of competency. He acknowledges that, at this hearing, his counsel claimed that he was incompetent to stand trial but asserts that they also should have raised the issue of, and challenged, his competency to plead guilty. The respondent counters, inter alia, that, because our Supreme Court determined that the petitioner's rights to due process were not violated by the

determination of the criminal court that he was competent to stand trial, and that the same measure of competency applied to the evaluation of his guilty plea, which was made at the same time, the petitioner cannot establish prejudice. We agree.

At the outset of the December 10, 1992 proceeding, the petitioner's counsel moved for a competency evaluation pursuant to General Statutes (Rev. to 1991) § 54-56d. The basis of this motion was Mantell's December 9, 1992 letter. As noted, Judge Corrigan remarked that he had found the petitioner to be competent at the October 22, 1992 proceeding and that Mantell's letter did not alter that conclusion. Judge Corrigan ultimately denied counsel's motion for a competency examination.

On appeal, our Supreme Court explained that the standard of competency to stand trial was the same degree of competency required to plead guilty. *State* v. *Johnson*, supra, 253 Conn. 26. It further determined that the December 10, 1992 canvass supported the court's finding that the petitioner was competent to plead guilty. Id., 27. Furthermore, "[b]ecause the same competency standard applied to both determinations and because the canvass occurred immediately after defense counsel raised the issue of competency, implicit in the trial court's conclusion that the [petitioner] was competent to plead guilty is its finding that the [petitioner] was also competent to stand trial." Id., 29.

Our Supreme Court previously determined that the petitioner was competent at the time of his December 10, 1992 guilty plea. The petitioner has not presented any additional evidence regarding his competency, or lack thereof, on December 10, 1992. As a result, he has failed to sustain his burden of establishing prejudice by demonstrable realities. Accordingly, this claim of ineffective assistance of counsel fails.

IV

The petitioner finally claims that the court improperly concluded that counsel did not provide ineffective assistance when they incorrectly advised him that the court would not accept his guilty plea after the issue of his competency had been raised at the same proceeding.[13] Specifically, he argues that, as a result of this advice, his plea was not knowingly, intelligently and voluntarily made. The respondent contends, inter alia, that the factual predicate for this claim, that counsel informed the petitioner that the court could not accept his plea after requesting a competency evaluation, did not exist and that he failed to demonstrate prejudice because, despite any such purportedly improper advice, the "petitioner made the personal decision to plead guilty to spare the victim's family any added grief and to use such a plea as a mitigating factor at sentencing."[14] We agree with the respondent that the petitioner has failed to establish the factual predicate for this claim, and therefore it fails.

During the habeas trial, the petitioner testified that he "was advised that if [he pleaded] guilty that there would be no way that the court would accept a guilty plea from a person whose competency has been raised [previously]." The petitioner also stated that he pleaded guilty on the advice of counsel, but they did not inform him that, as a result, he could be sentenced to life imprisonment or that he was waiving his right to appeal any issues arising during the guilt phase. Finally, the petitioner claimed that, had counsel explained that the court could accept the plea even though a competency

[13] To the extent that the petitioner also argues that his counsel's purportedly improper advice caused him to plead guilty to a capital offense without receiving any benefit, we have considered and rejected this contention in part I of this opinion.

[14] We note that, despite this claim, as discussed previously, the petitioner was thoroughly canvassed by the trial court before his guilty plea was accepted.

evaluation had been requested, he would not have pleaded guilty.

Canning testified that he could not remember why he advised the petitioner to plead guilty and thought that he would have been ready to proceed to a trial if necessary. He could not recall whether he advised the petitioner that the court would not accept his guilty plea because a request for a competency evaluation had been made at the same proceeding, although there was a "good possibility that that actually happened."

After considering the evidence, the court rejected the petitioner's testimony that he did not want to plead guilty. It concluded that there was no evidence to support the petitioner's contention that he was not competent. Furthermore, the court specifically discredited the petitioner's testimony that counsel had told him that the court would not accept his guilty plea after the competency issue was raised. The court further noted that Canning's testimony regarding this issue was "highly speculative at best and not based on clear recollections of events that transpired about thirty years ago." The habeas court also noted that Canning had testified that he had discussed entering a guilty plea with the petitioner. Finally, it concluded: "There being no credible evidence that counsel was ineffective for advising the petitioner that the court would not accept his guilty plea, this final basis must also be denied. The petitioner has neither shown the required deficient performance nor how he was prejudiced."

This court must defer to the habeas court's weighing of the facts and determinations of credibility. See *LaSalle* v. *Commissioner of Correction*, 227 Conn. App. 520, 528, 321 A.3d 499 (2024); *Angel C.* v. *Commissioner of Correction*, 226 Conn. App. 837, 848, 319 A.3d 168, cert. denied, 350 Conn. 908, 323 A.3d 1091 (2024). Here, the habeas court disbelieved the petitioner's testimony

that his counsel had told him that the trial court would not accept his guilty plea after there was a request for a competency evaluation. The factual predicate for his claim, therefore, does not exist. Furthermore, as we have noted previously in this opinion, the petitioner failed to sustain his burden of demonstrating prejudice by establishing that he would not have pleaded guilty had he been advised as he claims he should have been. For these reasons, we conclude that this claim is without merit.

The judgment is affirmed.

In this opinion the other judges concurred.

CIVIC MIND, LLC *v.* CITY OF HARTFORD ET AL.
(AC 46508)

Moll, Westbrook and DiPentima, Js.

Syllabus

The plaintiff appealed from the trial court's judgment dismissing its action against nineteen defendants concerning the defendant city's allegedly fraudulent solicitation of bids for the redevelopment of a stadium. The plaintiff claimed, inter alia, that the court improperly determined that it lacked standing to pursue its claims. *Held*:

The trial court properly dismissed the plaintiff's claims seeking injunctive and declaratory relief for lack of standing because the court correctly determined that the request for proposals issued by the defendant city in connection with the redevelopment project was not governed by the competitive bidding requirements of the applicable statute (§ 4b-91) or the applicable provision of the Hartford Municipal Code (§ 2-548).

The trial court properly dismissed the plaintiff's claims seeking monetary damages against the defendants other than the city because the root issue of those claims was that the plaintiff had participated in the request for proposals and was not awarded a contract, and the rejection of its proposal did not establish standing for the plaintiff to seek judicial intervention.

Argued May 28—officially released December 17, 2024

Procedural History

Action to recover damages for, inter alia, fraud, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the Complex Litigation Docket, where the court, *Farley, J.*, granted the defendants' motions to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Patrick Tomasiewicz, with whom, on the brief, was *Gregory A. Jones*, for the appellant (plaintiff).

David R. Roth, for the appellees (defendant city of Hartford et al.).

Cathleen A. Giannetta, with whom, on the brief, were *Molly M. Wilcox* and *Michelle Arbitrio*, for the appellees (defendant Capital Region Development Authority et al.).

Richard F. Wareing, with whom, on the brief, was *Anthony J. Natale*, for the appellees (defendant Hartford Sports Group, LLC, et al.).

Donna L. Cook, with whom, on the brief, was *Alessandro J. Angelori*, for the appellee (defendant Michael Freimuth).

Opinion

MOLL, J. In this action concerning the redevelopment of Dillon Stadium (stadium)[1] in Hartford, the plaintiff, Civic Mind, LLC, appeals from the judgment of the trial court dismissing its complaint against the nineteen defendants, including the city of Hartford (city) and

[1] The record reflects that Dillon Stadium is currently named Trinity Health Stadium; however, the parties primarily refer to the stadium by its former name.

the Capital Region Development Authority (CRDA).[2] On appeal, the plaintiff claims that the court improperly granted motions to dismiss filed by the defendants on the ground that the plaintiff lacked standing to pursue its claims against the defendants. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as alleged in the plaintiff's complaint or as established by uncontested evidence submitted in connection with the defendants' motions to dismiss, and procedural history are relevant to our resolution of this appeal. In 2012, the city began efforts to revitalize the stadium, which was built in 1935 and had fallen into a state of disrepair. In 2013, after soliciting bids, the city selected the plaintiff as its " 'preferred vendor' . . . ." In December, 2013, the plaintiff created a plan to develop and to manage the stadium, which included bringing United Soccer League (USL) and W-League soccer franchises to the city. In February, 2014, the city terminated the plaintiff from the stadium project because, as the plaintiff alleged, the plaintiff's founder and principal, Thomas Clynch, "refused to accept bribes" and to "cooperate" with a "criminal scheme" orchestrated by the city. In May, 2014, the city chose Premier Sports Management Group (PSMG) "to continue the work of [the plaintiff]"; however, PSMG's principals later were convicted of money laundering and fraud for illegal activities in connection with the stadium project.

In November, 2014, Clynch retained Hinckley, Allen & Snyder, LLP (Hinckley Allen), as legal counsel, and, shortly thereafter, the plaintiff filed an action against, inter alia, the city and PSMG (2014 action). See *Civic*

[2] The defendants are the city, CRDA, Luke Bronin, Sean Fitzpatrick, Glendowlyn Thames, Julio Concepcion, Andy Bessette, Suzanne Hopgood, Anthony Lazzaro, Kimberly Hart, David Jorgensen, Michael Matteo, Marcia Leclerc, Hartford Sports Group, LLC, Bruce Mandell, Joseph Calafiore, Scott Schooley, Data-Mail, Inc., and Michael Freimuth.

Mind, LLC v. *Hartford*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. CV-14-6055838-S. Shortly after the commencement of the 2014 action, Luke Bronin became a partner at Hinckley Allen and announced his candidacy for the mayorship of the city. In July, 2015, Bronin invited Clynch to his home to discuss (1) the 2014 action, (2) an ongoing investigation by the Federal Bureau of Investigation into the city's alleged solicitation and fraud, (3) the city officials who were involved in the scheme, and (4) Clynch's plans for the stadium, including securing professional soccer franchises. Thereafter, concerned with the firm's potential conflicts of interest, Clynch terminated Hinckley Allen as legal counsel. In January, 2016, Bronin began his tenure as the city's mayor.[3]

On February 7, 2017, a shared plan was unanimously adopted by the city, CRDA, Hartford Sports Group, LLC (HSG), and Bruce Mandell, one of HSG's owners, "to publicly finance [the stadium] to HSG's specifications." This shared plan was developed using the plaintiff's "work [product], know-how, and professional soccer plans . . . ." In March, 2017, ICON Venue Group, a stadium design firm retained by HSG, performed a site visit at the stadium in partnership with the city and CRDA. On April 14, 2017, ICON Venue Group produced a report containing a comprehensive analysis to develop the stadium in accordance with USL specifications with a budget of $10.7 million (ICON report). The ICON report included internal city documents, vendor quotes, and a photo of individuals at the stadium, including Mandell and city representatives.

[3] The 2014 action was resolved in late 2017, after (1) the trial court, *Moukawsher, J.*, rendered summary judgment in favor of the city and (2) the plaintiff withdrew the remainder of its claims. See *Civic Mind, LLC* v. *Hartford*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. CV-14-6055838-S (November 8, 2017) (65 Conn. L. Rptr. 470, 471).

On August 9, 2017, Michael Freimuth, CRDA's executive director, offered the Bronin administration CRDA's help "to develop a plan to repair/upgrade and [reuse the stadium]." On August 22, 2017, Bronin accepted CRDA's offer.

On September 15, 2017, on behalf of the city, CRDA issued a request for proposals (RFP), the stated purpose of which was to "[seek] proposals from individuals, firms and/or organizations authorized to do business in the [s]tate of Connecticut who are interested in using, redeveloping and operating [the stadium] and potentially securing a professional sports team for that facility." The ICON report was not made available to the public in connection with the RFP.

The RFP expressly delineated five project goals: (1) "[s]ecur[ing] greater uses of [the stadium] with a strong preference for a professional sports team"; (2) "[p]rovid[ing] for the upgrade and repair of the [s]tadium," accompanied by a nonexhaustive list of renovations required to the existing facilities; (3) "[e]stablish[ing] an operational management program for the [s]tadium"; (4) "[c]ompliment[ing] and assist[ing] Colt Park renewal and recreational programs operating within [Colt] Park"; and (5) "[s]pur[ring] other community redevelopment and renewal within the [United States] National Park area." (Emphasis omitted.) The RFP also established five selection criteria: (1) "[p]roposed use of [the stadium]"; (2) "[r]espondent's experience, technical competence and financial plan"; (3) "[r]espondent's capacity to perform work"; (4) "[p]rivate capital/public capital program"; and (5) "[e]fficacy of revenue return and economic impact to the [c]ity . . . ."

In addition, the RFP set forth several submission requirements, which instructed respondents to provide, inter alia, (1) a description of proposed use(s) for the

stadium, along with any attendant business and marketing plans, (2) a budget and a description of necessary capital improvements, along with the sources of funding for such improvements, and (3) a plan to manage and to operate the stadium, along with proposed operating proforma reflecting annual revenues and expenses. The RFP also set forth various general conditions, including: "7. Issuance of [the] RFP does not obligate CRDA or the [c]ity . . . to undertake any action. [The] RFP does not commit CRDA or the [c]ity . . . to award a contract. CRDA reserves the right to use submissions as a basis for negotiation with one or more respondents and/or with parties other than those responding to [the] RFP and/or terms other than those set forth herein. CRDA reserves the right to waive compliance with and/or change any terms of [the] RFP."

On September 14, 2017, Kimberly Hart, a CRDA board member and CRDA's venue director, emailed Clynch to notify him of the forthcoming RFP. By the October 13, 2017 deadline specified in the RFP, CRDA received RFP submissions from the plaintiff, HSG, and a third respondent. HSG's submission proposed an investment of approximately $10 million in public funds to reconstruct the stadium, with CRDA tasked with the development thereof and the city tasked with the management thereof, and a stated goal of securing a USL franchise. The plaintiff's submission proposed an investment of $1.5 million in private funding to upgrade the stadium and partnerships with (1) a Boston based stadium design firm, (2) the Connecticut Interscholastic Athletic Conference and Connecticut Association of Schools in order "to establish 'an annual calendar of competitive and inspiring high school sporting events,' " and (3) "Oakwood Soccer, a local, established, premier soccer club." On November 1, 2017, CRDA held a public forum in connection with the RFP, which included presentations from the respondents regarding their proposals.

On December 1, 2017, Freimuth mailed Bronin a letter accompanied by a memorandum outlining CRDA's recommendations regarding the stadium. Following its review of the three RFP submissions, and notwithstanding certain concerns, "particularly the scope of capital improvements and [the] level of public funding required," CRDA recommended that the city pursue an agreement with HSG to redevelop the stadium, as it "believe[d] the proposal offered by [HSG] represent[ed] the strongest plan moving forward." In contrast, CRDA determined that the plaintiff's RFP submission was, "in essence, a planning proposal that would utilize the expertise of a nationally known sports facility planner, but it [was] otherwise [nonresponsive] to the RFP . . . ." On December 14, 2017, the city accepted CRDA's recommendation, whereupon the city, CRDA, and HSG entered into negotiations.

In February, 2018, while negotiations among the city, CRDA, and HSG were ongoing, CRDA secured $10 million in funding for the stadium project from the State Bond Commission (commission), which funding was contingent on a signed agreement with a professional soccer team. Around that time, HSG was awarded a USL franchise, which was named the Hartford Athletic and was operated by Hartford Athletic, LLC, an entity owned by HSG. The city, CRDA, and HSG proceeded to draft a term sheet, pursuant to which "the [city] would enter into a [l]icense [a]greement with [CRDA] to oversee stadium operations. CRDA [would], in turn, enter into a [s]tadium [u]se [a]greement with [HSG] to operate a USL team at the stadium pursuant to terms agreed to between the [c]ity and HSG as described [in the term sheet]." On March 26, 2018, Bronin presented the city's Court of Common Council (council)[4] with a resolution to authorize the city to enter into a license

[4] Pursuant to the city's charter, "[t]he legislative power and authority of the City shall be vested in the Council. . . ." Hartford Charter, c. IV, § 1.

agreement with CRDA in accordance with the term sheet, as well as "other necessary agreements for the operation and use of [the stadium] in accordance with the [t]erm [s]heet," which resolution the council approved on April 9, 2018.

On June 8, 2018, the city and CRDA executed a license agreement (2018 license agreement). Pursuant to the 2018 license agreement, the city granted CRDA and its agents "a license and right of access to the [stadium] for the purpose of constructing and operating the New Dillon Stadium[5] and activities related thereto." (Footnote added.) The 2018 license agreement further provided, inter alia, that CRDA's agents "shall have the right and license to use New Dillon Stadium for the presentation of professional soccer and lacrosse as well as various community events and uses as provided in [a] [s]tadium [u]se [a]greement to be entered into by and among the [city, CRDA, and Hartford Athletic, LLC] . . . . [CRDA] shall construct the New Dillon Stadium in accordance with the final plans and specifications ensuring the [New Dillon] Stadium and field are built to [USL] and 'FIFA 2 Star' standards . . . ."

In July, 2018, notwithstanding the lack of an agreement with a professional soccer team in place, CRDA began spending some of the $10 million in funds awarded to it by the commission on the reconstruction of the stadium, with CRDA expending $4,039,356 between July, 2018, and February 24, 2019. During this period, HSG and its owners, Mandell, Joseph Calafiore, and Scott Schooley, contributed approximately $2.3 million toward the redevelopment of the stadium.[6]

[5] The 2018 license agreement, in defining " 'New Dillon Stadium,' " provided that "[the stadium] is a former football stadium, and [the city] desires to construct substantial upgrades and convert [the stadium] into a soccer stadium that will host, among other things, professional soccer games, entertainment and community events . . . ."

[6] Additionally, at some point, the Hartford Foundation for Public Giving, a nonparty to the present action, contributed approximately $1.5 million toward the redevelopment efforts.

On November 7, 2018, Mandell filed a self-reported complaint with the State Elections Enforcement Commission (SEEC) to report political contributions made by himself and by members of his family in the late summer and early fall of 2018. The complaint represented that Mandell, along with Calafiore and Schooley, had entered into an agreement with the city "to bring a professional soccer team to play at a municipal stadium" and that the city, CRDA, and HSG had entered into a stadium use agreement.[7]

On February 13, 2019, Bronin presented the council with a resolution to authorize the city to amend (1) the 2018 license agreement between the city and CRDA, and (2) "terms in a [s]tadium [u]se [a]greement . . . for the operation and use of [the stadium] by . . . Hartford Athletic, LLC . . . ." Bronin represented to the council that, "[i]n April 2018, [the council] authorized the [c]ity to enter into [the 2018] [l]icense [a]greement with CRDA to oversee the [s]tadium's renovations and approved terms which would form the basis of a tri-party [stadium] [u]se [a]greement . . . between the [c]ity, CRDA and [HSG, referred to therein as Hartford Athletic, LLC] for the operation and use of the [s]tadium. [The term sheet], which outlined the roles and responsibilities of the parties under the respective agreements was provided to [the council] at that time." Bronin further represented to the council that the city "wishe[d] to modify the form of agreements going forward with respect to [the stadium] to clarify the [c]ity's relationship between the parties as separate and distinct from each other. . . . [The city's] intent has always been that CRDA will lead the reconstruction efforts at [the stadium] and provide management services to the [c]ity, and that the utilization of the facilities at [the stadium] would

[7] In accordance with a voluntary settlement agreement adopted in 2019, Mandell was required to pay a civil penalty of $45,000 to the SEEC for making improper political contributions.

constitute an agreement between the [c]ity and [Hartford Athletic, LLC]. To that end, the [c]ity proposes to clarify CRDA's [s]tadium operations management functions in an agreement separate and apart from the [stadium] [u]se [a]greement. In the [m]anagement [a]greement, CRDA would continue its oversight of the [s]tadium renovations and retain the [s]tadium operations management and fiduciary role that was outlined in the . . . [t]erm [s]heet. In turn, the [s]tadium [u]se [a]greement would be clarified to recognize that this understanding is and should be between [Hartford Athletic, LLC] and the [city], as the [o]wner of the [s]tadium." On February 13, 2019, the council approved this resolution.

On February 25, 2019, the city and Hartford Athletic, LLC, executed a stadium use agreement (2019 stadium use agreement), which "set forth the detailed terms and conditions pursuant to which (i) [Hartford Athletic, LLC] will use the [s]tadium in accordance with the terms [thereof] and will play Club Home Games (as defined [therein]) at the [s]tadium, (ii) [Hartford Athletic, LLC] and the [Hartford Athletic] may host other Club Additional Events (as defined [therein]) at the [s]tadium, and (iii) the [city], and to the extent provided under [a separate agreement between the city and CRDA], [CRDA] will provide the [s]tadium and Stadium Premises [as defined therein] and its appurtenances for such games and other events in accordance with the terms and conditions set forth [therein]." The same day, the city and CRDA executed a stadium renovation and operation agreement (2019 stadium renovation and operation agreement), which "set forth the detailed terms and conditions pursuant to which [CRDA] shall renovate and operate the [s]tadium . . . ."[8]

[8] The 2019 stadium renovation and operation agreement later was amended on February 1, 2022, "[t]o reflect the completion of the Renovations [as defined therein] and certain changes to CRDA's role with regard to the operation of the [s]tadium."

According to CRDA and the city, the redevelopment of the stadium was completed in July, 2019.[9] The Hartford Athletic began playing its home games at the stadium on July 13, 2019.

On August 9, 2019, the State Contracting Standards Board (board) "form[ed] a working group to examine the procurement processes for the renovation of [the stadium]," which action was prompted by (1) a report by the State Auditors of Public Accounts, issued in 2019 (2019 SAPA report), regarding the expenditure of public funds on the stadium project, which report found that CRDA improperly had spent approximately $4 million of the funds awarded to it by the commission without satisfying the attendant requirement that an executed agreement with a professional soccer team be in place, (2) two contests filed with the board by Clynch on behalf of the plaintiff in 2018 regarding the RFP and the "award" to HSG, and (3) a discussion during a meeting of the board on December 14, 2018, regarding certain newspaper reports and the SEEC's investigation into Mandell's improper political contributions in 2018.

In 2020, the board issued its final report on the stadium (2020 final report). The board labeled the RFP and the "convoluted procurement process" as a "charade," questioning why the city pursued the RFP and the procurement process rather than, from the outset, licensing the use of the stadium to HSG and authorizing CRDA to renovate and to redevelop the stadium and its surrounding area, which, as the board found, "[i]n the end . . . is what actually occurred . . . ." The board found that on April 2, 2018, CRDA issued a construction management RFP to develop the stadium, with a nonparty named "Newfield Construction" being awarded the contract on June 1, 2018. The board also concluded that

[9] In a personal affidavit filed in support of the HSG defendants' motion to dismiss, Mandell averred that the renovation of the stadium was completed in 2018.

the RFP was deficient in a number of ways, including that it failed to disclose the estimated costs to all of the respondents, and provided recommendations to CRDA to ensure that future procurements provided all bidders or proposers with a "level playing field." In addition, the board concluded that, "[f]ollowing the RFP and recommendation of HSG by CRDA to the [c]ity, the [c]ity effectively abandoned the RFP by substantially changing the construct of the . . . RFP" without providing notification that it had abandoned the RFP process.

On January 31, 2022, the plaintiff commenced the present action. The first three counts of the plaintiff's fifty-six count complaint were directed to the city. In count one, the plaintiff asserted that the city violated the competitive bidding requirements of General Statutes § 4b-91[10] et seq. and/or § 2-546 et seq. of the Hartford Municipal Code (code). The plaintiff alleged that, notwithstanding the city's representations "to the public and all bidders that it would follow the RFP process under the Connecticut General Statutes and/or the [code] and proceed in a fair and equitable manner," the city conspired with "other persons to award the contract to remodel [the stadium] to an underqualified and improper bidder that was not in the city's best interests." More specifically, the plaintiff alleged that the city conspired with (1) Mandell and his partners to have them submit a bid to remodel the stadium using

[10] Section 4b-91 was amended after September 15, 2017, when the RFP was issued, by No. 21-104, §§ 4 and 5, of the 2021 Public Acts, No. 21-198, § 3, of the 2021 Public Acts, No. 22-39, § 5, of the 2022 Public Acts, and No. 23-204, §§ 435 and 436, of the 2023 Public Acts. One of these public acts amended the portions of the statute cited here—subdivisions (2) and (4) of § 4b-91 (a)—as No. 23-204, § 435, of the 2023 Public Acts increased the estimated cost of the contracts governed by the provisions from $500,000 to $1 million; however, none of these amendments affects our analysis. Accordingly, in the interest of simplicity, we refer to the current revision of the statute.

information that was unavailable to other bidders, thereby demonstrating favoritism, and (2) CRDA and its board members to encourage the plaintiff to participate in the RFP process despite having no intention to consider the plaintiff's bid, which, by law, should have been selected as the winning bid. The plaintiff further alleged that the city's "misrepresentations were intended to encourage other parties to submit bids for the purpose of validating its sham RFP process."

Count two of the complaint sounded in breach of contract. The plaintiff alleged that (1) the city invited the plaintiff to submit a bid in reliance on the city's representations that "it would follow the RFP process under the Connecticut General Statutes and/or the [code] and proceed in a fair and equitable manner," (2) the plaintiff submitted a bid in reliance upon the city's representations, thereby entering into a contract with the city pursuant to which (a) the plaintiff and the city would "follow the bidding requirements" and (b) the city "would proceed in a fair and equitable manner in effectuating the bidding statutes and/or ordinances," and (3) the city breached this contract by engaging in fraud and showing favoritism toward HSG and its owners. In the alternative, in count three, the plaintiff asserted a claim of promissory estoppel, alleging that it relied on the city's misrepresentations that the city "would follow the RFP process under the Connecticut General Statutes and/or the [code] and proceed in a fair and equitable manner" in submitting its bid.

In count four of the complaint, the plaintiff asserted a claim of fraud against CRDA. The plaintiff alleged that, notwithstanding CRDA's representation "to the public and all bidders that it would follow the RFP process under the Connecticut General Statutes and proceed in a fair and equitable manner," CRDA conspired with the city, HSG, and others to award the contract to remodel and to develop the stadium to HSG

and its owners notwithstanding the merits of the plaintiff's bid, which, by law, should have been the successful bid, thereby demonstrating fraud and favoritism. Additionally, the plaintiff alleged that "CRDA's misrepresentations were intended to encourage other parties to submit bids for the purpose of validating its sham RFP process."

The remaining fifty-two counts of the plaintiff's complaint asserted claims of (1) conspiracy to commit fraud, (2) tortious interference with a business expectancy, (3) conspiracy to commit tortious interference with a business expectancy, and (4) violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., with each count directed to one of CRDA, HSG, Data-Mail, Inc., or the various individual defendants. See footnote 2 of this opinion. In support of these counts, the plaintiff alleged that the RFP was a "sham . . . process" intended to conceal the defendants' collective scheme to ensure that HSG was awarded a contract to redevelop the stadium.

In addition, in support of each count of its complaint, the plaintiff alleged that the defendants' misconduct caused it harm in the form of (1) costs and fees it incurred in developing its RFP submission and (2) lost profits that would have resulted "from its successful bid that rightfully belonged to it." As relief, the plaintiff sought (1) money damages against all of the defendants, except for the city, (2) injunctive relief (a) prohibiting any additional development of the stadium, (b) voiding the agreement between the city and HSG, and (c) ordering a new procurement, conducted under the proper procedures, to develop the stadium, and (3) any additional relief deemed just and proper by the court.

On May 23, 2022, motions to dismiss the plaintiff's complaint, accompanied by memoranda of law and exhibits, were filed by, respectively, (1) the city, Bronin, Sean Fitzpatrick, Glendowlyn Thames, and Julio Con-

cepcion (collectively, city defendants),[11] (2) CRDA, Hart, Andy Bessette, Suzanne Hopgood, Anthony Lazzaro, David Jorgensen, Michael Matteo, and Marcia Leclerc (collectively, CRDA defendants),[12] (3) HSG, Mandell, Calafiore, Schooley, and Data-Mail, Inc. (collectively, HSG defendants),[13] and (4) Freimuth.[14] The defendants collectively claimed that the trial court lacked subject matter jurisdiction over the present action on the ground that the plaintiff did not have standing to raise claims concerning the award of a contract pursuant to the RFP because it had no legal or equitable right in any such contract. Insofar as the plaintiff sought money damages in connection with its remaining claims, the defendants further collectively asserted that the plaintiff lacked standing to claim such damages.[15] On July 7, 2022, the plaintiff filed memoranda of law in opposition to the defendants' respective

[11] The plaintiff alleged that (1) Bronin was the city's mayor and, prior to the beginning of his tenure as the city's mayor, a partner at Hinckley Allen, (2) Fitzpatrick was a CRDA board member and the city's director of development services, (3) Thames was a CRDA board member and the president of the council, and (4) Concepcion was a state representative and a former council majority leader.

[12] The plaintiff alleged that (1) Hart was a CRDA board member and CRDA's venue director, (2) Bessette was a CRDA board member and CRDA's venue committee chair, (3) Hopgood was a CRDA board member and CRDA's board chair, (4) Lazzaro was a CRDA board member and CRDA's deputy director and general counsel, (5) Jorgensen and Matteo were CRDA board members and served on CRDA's venue committee, and (6) Leclerc was a CRDA board member and the chairwoman of CRDA's venue committee.

[13] The plaintiff alleged that (1) Mandell was the president of Data-Mail, Inc., and a co-owner of HSG, (2) Calafiore and Schooley were partnered with Mandell and were co-owners of HSG, and (3) Data-Mail, Inc., was "indistinguishable from . . . HSG in terms of operation, personnel, and funds such that the independence of the two corporations had never begun and adhering to the fiction of separate identities would only defeat justice and equity."

[14] The plaintiff alleged that Freimuth was a CRDA board member and CRDA's executive director. Freimuth did not join the motion to dismiss filed by the CRDA defendants but, instead, filed a separate motion to dismiss. On May 24, 2022, Freimuth filed a corrected memorandum of law accompanying his motion to dismiss.

[15] Additionally, (1) the defendants collectively claimed that the plaintiff's claims were moot and (2) the individual CRDA defendants and Freimuth

motions to dismiss, along with appended exhibits, and, on July 29, 2022, reply briefs were filed by, respectively, the city defendants, the CRDA defendants, the HSG defendants, and Freimuth.

On August 31, 2022, the court, *Farley, J.*, heard argument on the motions to dismiss. On December 7, 2022, the court ordered the parties to file simultaneous supplemental briefs to address further the applicability of the code to the RFP, which supplemental briefs were filed on January 6, 2023.

On May 4, 2023, the court issued a memorandum of decision granting the defendants' respective motions to dismiss on the ground that the plaintiff lacked standing. The court first concluded that, insofar as the plaintiff was seeking declaratory and injunctive relief, the plaintiff lacked standing because, as the defendants argued, its claims "rest[ed] upon the core allegation that it participated in a government procurement process and was not awarded a contract." Quoting *Ardmare Construction Co.* v. *Freedman*, 191 Conn. 497, 502, 467 A.2d 674 (1983), the court determined that "[a]n unsuccessful bidder 'has no legal or equitable right in the contract . . . [and] no right to judicial intervention.' " The court then rejected an argument raised by the plaintiff that its allegations of fraud and favoritism in the RFP process afforded it standing, concluding that (1) there is a limited exception to the rules of standing that enables an unsuccessful bidder in a government procurement process *that is subject to competitive bidding laws* to present claims regarding the award of a public contract "where fraud, corruption or acts undermining the objective and integrity of the bidding process existed"; (internal quotation marks omitted); but (2) the RFP was not subject to the competitive bidding requirements of

claimed that they were entitled to statutory immunity pursuant to General Statutes § 1-125.

either § 4b-91 or § 2-548 of the code, and the plaintiff cited no authority to support the proposition that an unsuccessful bidder in a government procurement process that is *not* governed by competitive bidding laws may challenge the award of a government contract by alleging fraud or favoritism. The court further concluded that the plaintiff lacked standing to pursue its remaining claims for money damages against the CRDA defendants, Freimuth, the HSG defendants, and the individual city defendants.[16] This appeal followed.[17] Additional facts and procedural history will be set forth as necessary.

On appeal, the plaintiff asserts that the court improperly concluded that it lacked standing to bring its claims against the defendants.[18] The plaintiff maintains that, contrary to the court's determinations, (1) the RFP was

[16] In a footnote, citing *Blesso Fire Systems, Inc.* v. *Eastern Connecticut State University*, 245 Conn. 252, 713 A.2d 1283 (1998), the court further concluded that, "[e]ven if the RFP [were] subject to competitive bidding requirements, the plaintiff's claims for equitable relief are moot because the [RFP] process was abandoned and no contract for the redevelopment and operation of [the stadium] was awarded to an RFP participant." The court briefly iterated this conclusion at the end of its decision. The court declined to reach any other alternative grounds for dismissal that the defendants had raised in their respective motions to dismiss.

[17] On May 24, 2023, pursuant to General Statutes § 52-265a, the plaintiff filed an application for certification to appeal with our Supreme Court, which application was denied on May 31, 2023.

[18] The plaintiff also claims that the court improperly concluded that its claims were moot on the basis of its determinations that the RFP had been "abandoned and no contract for the redevelopment and operation of [the stadium] was awarded to an RFP participant." See footnote 16 of this opinion. Additionally, two alternative grounds for affirmance have been raised on appeal, namely, that (1) the plaintiff's claims were moot because the stadium has been fully developed and (2) the individual CRDA defendants and Freimuth are entitled to statutory immunity pursuant to General Statutes § 1-125. The plaintiff argues that these alternative grounds for affirmance are without merit. Our conclusion that the court properly dismissed the plaintiff's complaint for lack of standing is dispositive of this appeal, and, therefore, we need not address either the court's mootness analysis or the alternative grounds for affirmance.

subject to the competitive bidding requirements of (a) § 4b-91 and (b) § 2-548 of the code, such that it had standing to assert its claims seeking injunctive and declaratory relief on the basis of its allegations that the RFP process was marred by fraud and favoritism, and (2) it had standing to assert its other claims against the defendants, other than the city, seeking money damages.[19] We disagree.

Before addressing the merits of the plaintiff's claims, we set forth the governing standard of review. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . .

"Our courts have acknowledged that [t]rial courts addressing motions to dismiss for lack of subject matter jurisdiction . . . may encounter different situations, depending on the status of the record in the case. . . . [L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed. When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most

[19] For ease of discussion, we address the plaintiff's claims in a different order than that in which they are set forth in its principal appellate brief.

favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

"In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . [or] other types of undisputed evidence . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings." (Citations omitted; internal quotation marks omitted.) *Fountain of Youth Church, Inc.* v. *Fountain*, 225 Conn. App. 856, 867–68, 317 A.3d 106 (2024). In the present case, no additional proceedings to resolve contested jurisdictional facts were requested or conducted; rather, as the court stated, it "consider[ed] the allegations of the complaint, construed favorably to the plaintiff, as well as the affidavits and documents submitted by the parties to the extent they reflect[ed] undisputed facts."

The dispositive issue on appeal is whether the court properly concluded that the plaintiff lacked standing to pursue its claims against the defendants. "A trial court's determination of whether a plaintiff lacks standing is a conclusion of law that is subject to plenary review on appeal. . . . The question of whether a party has standing to bring an action implicates the court's

subject matter jurisdiction. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury [that he or she has suffered or is likely to suffer]. Similarly, standing exists to attempt to vindicate arguably protected interests. . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Citation omitted; internal quotation marks omitted.) *Martinelli* v. *Martinelli*, 226 Conn. App. 563, 572–73, 319 A.3d 198 (2024).

I

We first address the plaintiff's claim that the trial court improperly determined that the RFP was not governed by the competitive bidding requirements of (1)

§ 4b-91 or (2) § 2-548 of the code, such that the plaintiff lacked standing to assert its claims for declaratory and injunctive relief. This claim fails.

"As a matter of common law, an unsuccessful bidder on a state or municipal contract has no contractual right that would afford standing to challenge the award of a contract. [A] bid, even the lowest responsible one, submitted in response to an invitation for bids is only an offer which, until accepted . . . does not give rise to a contract between the parties. . . . An unsuccessful bidder, therefore, has no legal or equitable right in the contract. Not unlike any other person whose offer has been rejected, the disappointed bidder has no right to judicial intervention. . . .

"Moreover, no statute grants unsuccessful bidders standing to challenge the award of a state contract. . . . In particular, state and local competitive bidding laws have not been enacted in order to protect bidders. These laws serve to guard against abuses in the award of contracts such as favoritism, fraud or corruption and are enacted solely for the benefit of the public and in no sense create any rights in those who submit bids. . . .

"Despite these substantial constraints, we have recognized a limited exception to the rules of standing in order to provide a means of protecting the public's interest in properly implemented competitive bidding processes." (Citations omitted; internal quotation marks omitted.) *Connecticut Associated Builders & Contractors* v. *Hartford*, 251 Conn. 169, 178–79, 740 A.2d 813 (1999). Specifically, judicial intervention is proper "only where fraud, corruption or favoritism has influenced the conduct of the bidding officials or when the very object and integrity of the competitive bidding process is defeated by the conduct of [the bidding] officials." *Spiniello Construction Co.* v. *Manchester*, 189 Conn. 539, 544, 456 A.2d 1199 (1983). As our

Supreme Court has further explained, "[i]n [*Spiniello Construction Co.*], we recognized that our prior decisions had the effect of preventing judicial review of potentially meritorious claims concerning the implementation and execution of competitive bidding statutes. We also acknowledged the fact that the group most benefitted by the statute—the public—had no effective means of protecting their interests. We substantially adopted the position . . . that [t]he public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a private attorney general. . . . Thus, we held that where fraud, corruption or acts undermining the objective and integrity of the bidding process existed, an unsuccessful bidder did have standing under the public bidding statute [at issue]." (Citations omitted; internal quotation marks omitted.) *Ardmare Construction Co.* v. *Freedman*, supra, 191 Conn. 504–505. "Our policy to limit standing so as to deny some claims brought by unsuccessful and precluded bidders is designed to protect twin goals that serve the public interest in various, sometimes conflicting, ways. The standing rules aim to strike the proper balance between fulfilling the purposes of the competitive bidding statutes and preventing frequent litigation that might result in extensive delay in the commencement and completion of government projects to the detriment of the public." (Internal quotation marks omitted.) *Connecticut Associated Builders & Contractors* v. *Hartford*, supra, 180.

Pursuant to the foregoing legal principles, the plaintiff had no standing to assert claims predicated on the fact that it was not awarded a contract flowing from the RFP, unless the aforementioned limited exception to the standing rules applied. This limited exception,

however, contemplates the existence of a *competitive* bidding process, the integrity of which has been compromised. See id., 179 ("we have recognized a limited exception to the rules of standing in order to provide a means of protecting the public's interest in properly implemented *competitive bidding processes*" (emphasis added)); *Spiniello Construction Co.* v. *Manchester*, supra, 189 Conn. 544 (judicial intervention is proper "only where fraud, corruption or favoritism has influenced the conduct of the bidding officials or when the very object and integrity of the *competitive bidding process* is defeated by the conduct of [the bidding] officials" (emphasis added)). Thus, notwithstanding the plaintiff's allegations of fraud and favoritism vis-à-vis the RFP, the threshold inquiry is whether the RFP was subject to the statutory or municipal competitive bidding requirements at issue. For the reasons that follow, we agree with the trial court and conclude that neither the statutory nor municipal competitive bidding requirements applied to the RFP.

These claims require us to interpret statutory and municipal ordinance provisions, thereby raising questions of statutory interpretation subject to plenary review. See *Townsend* v. *Commissioner of Correction*, 226 Conn. App. 313, 331, 317 A.3d 1147 (2024) (interpretation of statutes raises question of law requiring exercise of plenary review); *Mention* v. *Kensington Square Apartments*, 214 Conn. App. 720, 729–30, 280 A.3d 1195 (2022) (interpretation of ordinances raises question of law requiring exercise of plenary review). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and

unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . It is a basic tenet of statutory construction that [w]e construe a statute as a whole and read its subsections concurrently in order to reach a reasonable overall interpretation." (Citation omitted; internal quotation marks omitted.) *Townsend* v. *Commissioner of Correction*, supra, 331. The principles of statutory construction also apply to our examination of municipal ordinances. See *Mention* v. *Kensington Square Apartments*, supra, 730 ("[w]e interpret and construe local ordinances according to the principles of statutory interpretation" (internal quotation marks omitted)).

A

Turning our attention first to § 4b-91, the plaintiff maintains that the court incorrectly determined that the competitive bidding requirements of the statute did not apply to the RFP. We are not persuaded.

The pertinent statutory provision at issue is § 4b-91 (a), which provides in relevant part: "(2) Except as provided in subdivision (3) of this subsection,[20] every contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building or any other public work by the state that is estimated to cost more than one million dollars shall be awarded to the lowest responsible and qualified general bidder who is prequalified pursuant to section 4a-100 on the basis of competitive bids in accordance with the procedures set forth in this chapter, after the awarding authority has invited such bids by posting notice on the State Contracting Portal. The awarding authority shall indicate the prequalification classification required for the contract in such notice. . . .

[20] We note that subdivision (3) of § 4b-91 (a) is not relevant to the facts of this case.

"(4) Every contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building or any other public work by a public agency that is paid for, in whole or in part, with state funds and that is estimated to cost more than one million dollars shall be awarded to a bidder that is prequalified pursuant to section 4a-100 after the public agency has invited such bids by posting notice on the State Contracting Portal . . . . The awarding authority or public agency, as the case may be, shall indicate the prequalification classification required for the contract in such notice. . . ." (Footnote added.)

In concluding that § 4b-91 did not apply to the RFP, the court reasoned that the RFP did not seek bids for " 'the construction, reconstruction, alteration, remodeling, repair or demolition of' [the stadium]" or "specify any 'other public work' to be performed" but, instead, "sought submissions by persons 'interested in using, redeveloping and operating [the stadium].' . . . Rather than asking the respondents to bid on a proposed use, redevelopment and operation of the [stadium], the RFP asked the respondents to submit their own proposals for the use, redevelopment and operation of the [stadium] and expressed a preference for proposals that included a professional sports team. There were only the vaguest categories of submission requirements and none that were amenable to competitive bidding. In this open-ended format, the responses could not be expected to reflect the uniformity required for competitive bidding. The RFP made this clear by providing in its terms that '[i]ssuance of this RFP does not obligate CRDA or the city . . . to undertake any action.' Neither the city nor CRDA was committed to award a contract, and the RFP even reserved the right to use the respondents' submissions as a basis for negotiation with other respondents and nonrespondents on other terms." Moreover, the court observed that the RFP did not

set forth a prequalification requirement. As the court summarized, "[s]imply stated, this was not a competitive bidding process contemplated by § 4b-91."

The plaintiff contests the court's determination that the RFP did not invite bids for "the construction, reconstruction, alteration, remodeling, repair or demolition" of the stadium or "any other public work . . . ."[21] (Internal quotation marks omitted.) The plaintiff maintains that "[t]he very purpose of the RFP . . . was to determine what materials and labor may be needed to meet the requested goals of construction, remodeling, and repair of [the stadium], along with other types of 'public work.' " In support of its position, the plaintiff points out that the RFP (1) provided facts regarding the stadium, including size, turf type, bleacher seating, and parking, (2) specified that one of the five project goals was "[p]rovid[ing] for the upgrade and repair of the [s]tadium," while identifying necessary renovations that included upgrading the playing field, replacing or refurbishing the bleachers, and upgrading the lighting and sound systems, (3) directed respondents to propose budgets and descriptions of " 'capital improvements necessary' " for the identified uses, as well as the sources of funding for such improvements, and (4) included an aerial photo, site photos, and a site plan. Additionally, the plaintiff discounts the court's reliance on the absence of a prequalification requirement in the

[21] The plaintiff relies on subdivision (2) of § 4b-91 (a) in asserting this argument, whereas the court, in its decision, cited subdivision (4) in concluding that the competitive bidding requirements of the statute were inapplicable. This discrepancy is of no moment. Both subdivisions concern contracts "for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building or any other public work," as well as require bidders to be prequalified pursuant to General Statutes § 4a-100, with the awarding authority or the public agency, as the case may be, directed to indicate the necessary prequalification classification in a certain notice. General Statutes § 4b-91 (a) (2) and (4). As we conclude in this opinion, the RFP did not solicit bids for such contracts. For these reasons standing alone, neither subdivision applied to the RFP.

RFP, contending that the lack of such a requirement "does not invalidate the RFP entirely, but only indicates how improperly CRDA conducted the RFP to begin with."

Having carefully reviewed the RFP, we conclude that the RFP did not fall within the ambit of § 4b-91. The RFP did not solicit bids for work to be performed on the stadium in accordance with an established plan with comprehensive specifications for respondents to utilize in developing their submissions; instead, the RFP invited respondents to submit their own proposed plans, taking into account baseline criteria identified in the RFP, for the redevelopment of the stadium. Put another way, the RFP did not invite respondents to bid on a contract for "the construction, reconstruction, alteration, remodeling, repair or demolition of any public building or any other public work"; General Statutes § 4b-91 (a) (2) and (4); but, rather, sought proposed plans that potentially would serve as the bedrock for the future redevelopment of the stadium. Our conclusion is further bolstered by the RFP's provisions that (1) the issuance of the RFP "[did] not obligate CRDA or the [c]ity . . . to undertake any action" or "commit CRDA or the [c]ity . . . to award a contract" and (2) CRDA reserved the right to use RFP submissions in negotiations with other respondents and/or others who did not respond to the RFP, as such provisions are not indicative of a solicitation governed by the competitive bidding requirements of § 4b-91 (a). Moreover, the RFP made no mention of the prequalification requirement that would apply were it subject to the statutory competitive bidding provisions, which further informs our analysis and weighs in favor of interpreting the RFP to fall outside of the scope of § 4b-91 (a).[22]

[22] The plaintiff asserts that, "[e]ven if the RFP [were] not a 'competitive bid,' the very nature of the services requested required that CRDA and the city follow § 4b-91." (Emphasis omitted.) As we have concluded, however, the RFP sought proposed plans created by respondents for the stadium's

In sum, we conclude that the court properly determined that the RFP was not subject to the competitive bidding requirements of § 4b-91.

B

We next consider the plaintiff's contention that the court incorrectly determined that the competitive bidding requirements of § 2-548 of the code did not apply to the RFP. This contention also fails.

Section 2-546 of the code, titled "Methods of source selection," provides in relevant part that, "[u]nless otherwise authorized by the Charter of the City or this Code, all Contracts . . . shall be awarded by one (1) of the following methods: (A) Competitive Offers as set forth in Section 2-548 of this Article, which shall include competitive bidding and competitive proposals . . . ." Section 2-548 of the code, titled "Competitive solicitations," provides in relevant part: "(A) *Conditions for use.* All Agreements, in an amount in excess of the twenty-five thousand dollars ($25,000.00) threshold established by the Charter of the City, shall be awarded through the competitive solicitation process established under this Article . . . ." "Agreement" is defined by the code to mean "an arrangement between the City and other parties regarding a course of action set out in a Contract, Purchase Order[23] or memorandum of understanding." (Footnote added.) Hartford Municipal

redevelopment. In other words, the RFP did not request "services" to be performed, beyond the submission of proposed redevelopment plans.

[23] "Purchase orders" are defined by the code in relevant part to mean "dual purpose instruments which may serve as: (1) A commercial agreement documenting a purchase transaction for the acquisition of Commodities, Services or Construction Items, in accordance with the requirements of this Article and the Regulations and Policies, as proposed by the Purchasing Agent, and a financial tool evidencing the encumbrance of funds and authorization or notice to proceed, if specifically set forth, for the transaction in question. . . .

"(2) A financial tool only for the encumbrance of funds for a transaction and/or authorization or notice to proceed, in support of other forms of agreement, under circumstances as determined in the sole discretion of the Purchasing Agent. . . ." Hartford Municipal Code § 2-537 (FF).

Code § 2-537 (B). "Contract" is defined by the code in relevant part as "a written arrangement between the City and other competent parties to perform or not to perform specific work[24] pertaining to Services and Professional Services[25] or as otherwise set forth in this Chapter. . . . Whenever the term 'Agreement' is used in this Chapter it shall mean a Contract, Purchase Order or memorandum of understanding depending on the context. . . ." (Footnotes added.) Id., § 2-537 (H).

Subsection (B) of § 2-548 of the code, titled "Request for response," provides in relevant part: "A Request for Response shall be issued and shall include Specifications,[26] Scope of Services, System Requirements or any other descriptions of the Commodity,[27] Service, Con-

[24] "Work" is defined by the code to mean "all the effort necessary to provide the Commodities and Services necessary to effectuate the terms of any Agreement under this Article." Hartford Municipal Code § 2-537 (RR).

[25] "Services or contractual services" is defined by the code in relevant part to mean "the furnishing of labor, time, or effort by a Contractor, not involving the delivery of a specific end product other than reports, which are merely incidental to the required performance. . . . Moreover, this term shall include services for which a Contractor is conferred a benefit by the City, whether or not compensated by the City. . . ." Hartford Municipal Code § 2-537 (MM).

"Contractor" is defined by the code in relevant part to mean "any person having a Contract or Purchase Order with the City or any of its Agencies. . . ." Id., § 2-537 (I).

"Professional services" is defined by the code in relevant part to mean "any infrequent, technical and/or unique functions performed by independent contractors whose occupation is the rendering of such services. . . ." Id., § 2-537 (BB).

[26] "Specification" is defined by the code to mean "a detailed written description of the physical or functional characteristics, or of the nature of a Commodity, Service or Construction Item. It may include a description of any requirement for inspecting, testing, or preparing a Commodity, Service or Construction Item for delivery. Said Specifications are to be attached to or, otherwise, made a part of the solicitation." Hartford Municipal Code § 2-537 (OO).

[27] "Commodities" is defined by the code to mean "an article of trade, a movable article of value, something that is bought or sold; any movable or tangible thing that is produced or used as the subject of barter or sale. When used alone the term 'Commodities' shall include equipment, materials and supplies." Hartford Municipal Code § 2-537 (F).

struction[28] or Lease, and all proposed and/or mandatory contractual terms, special terms and conditions applicable to the Procurement,[29] other legal and regulatory requirements. . . .'' (Footnotes added.) ''Request for response'' is defined by the code as ''any competitive process utilized for soliciting a response. A Request for Response may be in the form of a Request for Bid, Request for Proposals or other solicitation method and includes all associated documents, whether attached or incorporated by reference.'' Hartford Municipal Code § 2-537 (KK).

In concluding that the code did not apply to the RFP, the court determined that ''[t]he RFP did not seek proposals to perform 'specific work' under a contract as contemplated by § 2-537 (H) [of the code]. The RFP asked respondents to provide specifications such as proposed uses, cost estimates and sources of funding, rather than itself providing a 'detailed written description' of specifications to the respondents, in accordance with §§ 2-537 (OO) and 2-548 (B) [of the code], and asking respondents for a price. The process did not seek the provision of goods or services within established, detailed specifications, and request respondent bids

[28] ''Construction'' is defined by the code to mean ''the process of building, altering, repairing, improving, or demolishing any Infrastructure Facility, including any public structure, public building, or other public improvements of any kind to City property or other property or space in which the City has an interest. It does not include the routine operation, routine repair, or routine maintenance of any existing Infrastructure Facility, including structures, buildings or real property.'' Hartford Municipal Code § 2-537 (G).

[29] ''Procurement'' is defined by the code to mean in relevant part ''buying, purchasing, renting, leasing, or otherwise acquiring any Commodities, Services, real or personal property or Construction or obtaining a benefit from the City even in the event the City is not responsible for compensation. It also includes all functions that pertain to the obtaining of any Commodity, Service, property or Construction, including description of requirements, selection and solicitation of sources, preparation and award of a Contract or Purchase Order, and all phases of contract administration. . . .'' Hartford Municipal Code § 2-537 (AA).

from which the city would award a contract to a respondent. Hartford [Municipal] Code § 2-548."

The court also observed that, although " 'competitive negotiation[s]' " were authorized under the code, such negotiations "presuppos[ed] the existence of a 'competitive solicitation' under § 2-548 [of the code]. It is not an alternative to that process." The court further stated that, "while the RFP reference[d] CRDA's right to negotiate with the respondents after receipt of their responses, it [went] much further . . . and reserve[d] CRDA's right to use respondents' submissions as a basis for negotiating with nonrespondents."

Additionally, the court determined that the contracts executed following the RFP did not support the plaintiff's position that the RFP was subject to the competitive bidding requirements of the code. The court stated that (1) the term sheet contemplated (a) a license agreement between the city and CRDA for the operation and use of the stadium and (b) a sublicense agreement between CRDA and HSG to enable HSG to utilize the stadium to operate a professional soccer team, (2) the city and CRDA entered into the 2018 license agreement, but CRDA never executed a license agreement with HSG, and (3) "on the strength of the term sheet, HSG made substantial investments to support the redevelopment of the stadium and on February 25, 2019, the HSG created entity, Hartford Athletic, [LLC] obtained a license directly from the city to use the stadium . . . and acquired the right to name the stadium." The court continued: "The fact that these license agreements ultimately materialized sometime after the RFP process does not retroactively transform the RFP into a competitive solicitation under . . . § 2-548 [of the code] or . . . § 4b-91. The undisputed fact is that following the RFP process and CRDA's suggestion that the city negotiate with HSG to redevelop [the stadium], the city and CRDA decided to go in a different direction and have

CRDA oversee the redevelopment of the stadium. The city and CRDA entered into [the 2018] license agreement entrusting CRDA . . . with that responsibility. As the [board] concluded [in the 2020 final report], CRDA and the city 'essentially abandoned' the RFP.

"The plaintiff focuses specifically on the [2019 stadium use agreement] between the city and Hartford Athletic, [LLC], but that agreement bears no resemblance to a contract to redevelop and operate [the stadium]. Nor is it governed by . . . § 4b-91 because it does not involve the 'construction, reconstruction, alteration, remodeling, repair or demolition' of [the stadium]. Nor is it an 'Agreement' under . . . § 2-537 (B) [of the code] because it does not involve the provision of any services to the city for a price paid by the city . . . . The [2018] license [agreement] with CRDA and [the 2019 stadium use agreement with] Hartford Athletic, [LLC], were not contracts subject to competitive bidding laws and were not the product of the RFP process, which, as the [board] concluded, the city and CRDA abandoned." (Citation omitted.)

As the court summarized, "CRDA and the city implemented a process that essentially reversed the role of the parties by seeking proposals from the respondents that would help establish the scope of work and how it could be financed." The court continued: "[T]he RFP . . . was not intended to constitute a 'competitive solicitation' within the scope of the city's procurement ordinances. At most, [the RFP] may have facilitated future competitive processes related to the redevelopment of [the stadium], such as those that CRDA subsequently implemented to procure the reconstruction of the stadium."[30]

[30] In the 2020 final report, the board suggested that CRDA should have considered issuing a Request for Information (RFI), rather than the RFP, if the RFP was intended to be an "advisory exercise." The court noted that the board's advice "ha[d] merit"; however, the court concluded that, "even if inaptly named," the RFP did not constitute a competitive solicitation

The plaintiff asserts that, contrary to the court's determination, the RFP was a "competitive solicitation" under the code because (1) the RFP solicited bids for an "Agreement," as defined in the code, in excess of $25,000, (2) the RFP satisfied the "minimum requirements" to constitute a "Request for Response" under the code, as it delineated (a) "details necessary for a competitor to develop a plan for the stadium's development," (b) the project's five goals, and (c) additional details about, inter alia, information respondents had to provide in their submissions and how a successful respondent would be selected, (3) the code incorporates " 'negotiating' " into the bidding process, such that the RFP's terms concerning negotiation did not militate against the RFP being construed as a competitive bidding process, and (4) following the RFP, contracts were executed providing for the redevelopment of the stadium by HSG, with "HSG . . . [beginning] construction and work on [the stadium] based on contracts issued by the city—contracts whether verbal or written—and which amounted to over $10 million in taxpayer money." We are not persuaded.

The plaintiff's first two contentions are unavailing for the same reasons that we set forth in part I A of this opinion in support of our conclusion that the RFP was not subject to the competitive bidding requirements of § 4b-91. In short, the RFP did not invite bids for a contract entailing "specific work" to be performed in accordance with a developed plan accompanied by "[s]pecifications" to be utilized by respondents in preparing their bids; Hartford Municipal Code §§ 2-537 (H) and 2-548 (B); rather, as the court determined, "CRDA

under the code. The plaintiff maintains on appeal that, pursuant to the code, CRDA and the city could have issued an RFI if they were not seeking to initiate a competitive bidding process. For the reasons set forth in part I B of this opinion, we agree with the court that, although the RFP may have been "inaptly named," it nevertheless did not fall within the ambit of the code's competitive bidding requirements.

and the city implemented a process that essentially reversed the role of the parties by seeking proposals from the respondents that would help establish the scope of work and how it could be financed."

Additionally, we reject the plaintiff's proposition that the negotiation provisions of the RFP weigh in favor of construing the RFP to be governed by the municipal bidding requirements of the code. Section 2-549 (A) of the code, titled "Competitive negotiations with Candidates and revisions to offers," provides: "As provided in the request for response and under regulations or policies, discussions may be conducted, by the Purchasing Agent or a Designee, with the participation of the Using Agency, where practicable, with Candidates who submit responses determined to be reasonably susceptible of being selected for award for the purpose of refinement and clarification to assure full understanding of, and responsiveness to, the solicitation requirements." As the court recognized, the RFP did not merely allow for negotiations with RFP respondents; instead, it authorized CRDA to use RFP submissions to negotiate with one or more respondents, as well as with entities that did not submit proposals in response to the RFP. Thus, as the court determined, the RFP's negotiation terms were more expansive than the provisions of § 2-549 (a) of the code. This distinction bolsters our conclusion that the RFP was not subject to the code's competitive bidding requirements.

The plaintiff's final contention is that contracts were executed following the RFP for the redevelopment of the stadium by HSG, which illustrated that the RFP was a competitive bidding process under the code.[31] The

[31] The plaintiff raises this claim in the section of its principal appellate brief addressing the court's determination that the RFP was not governed by the code's competitive bidding requirements; however, in its reply briefs to the appellate briefs filed by the city defendants and the HSG defendants, respectively, the plaintiff appears to rely on the contracts executed following the RFP to challenge the court's determination that the RFP was not subject to § 4b-91, as well. The court determined that the contracts executed follow-

plaintiff maintains that the written contracts that followed the RFP were subject to the code's competitive bidding requirements. We disagree. The record contains undisputed evidence that (1) the city and CRDA (a) executed the 2018 license agreement, pursuant to which the city entrusted CRDA with the responsibility of managing the redevelopment of the stadium, and (b) later executed the 2019 stadium renovation and operation agreement, which was amended on February 1, 2022, and which contained the "detailed terms and conditions" governing CRDA's renovation and operation of the stadium, including CRDA's duty to enter into construction agreements for the purpose of redeveloping the stadium, and (2) the city and Hartford Athletic, LLC, a nonparty to this action that is owned by HSG, executed the 2019 stadium use agreement, pursuant to which the city authorized Hartford Athletic, LLC, to utilize the stadium to play professional soccer games.[32] Nothing in the terms of these contracts provided for HSG to redevelop the stadium. Moreover, although these contracts detailed CRDA's obligation to manage the stadium's redevelopment, they did not involve the performance or nonperformance of "specific work pertaining to Services and Professional Services or as otherwise set forth in [chapter 2 of the code]," and, therefore, did not constitute "Contract[s]," as defined by the code. Hartford Municipal Code § 2-537 (H); see also id., §§ 2-546 (A) and 2-548 (A). Similarly, these contracts were not "Agreement[s]" governed by the code's competitive bidding requirements because they did not constitute "arrangement[s] between the City and other parties regarding a course of action set out in a Contract";

ing the RFP did not establish that the RFP was a competitive bidding process under either § 4b-91 or the code. Assuming that the plaintiff's claim properly encompasses the court's reasoning regarding the statutory competitive bidding requirements, our rationale for rejecting this claim vis-à-vis the code's competitive bidding requirements applies equally to reject this claim as to the statutory competitive bidding requirements.

[32] Copies of these contracts were appended to the city defendants' memorandum of law in support of their motion to dismiss.

id., § 2-537 (B); or, as we have explained, meet the definition of "Contract[s]" under the code. See id., § 2-537 (H); see also id., § 2-548 (A). In summation, these contracts were not awarded through the code's competitive bidding procedures,[33] and, therefore, they do not provide support for the plaintiff's position that the RFP was a competitive bidding process under the code.

The plaintiff further claims that, in its complaint, it alleged that contracts, whether written or oral, were executed following the RFP providing for HSG to redevelop the stadium, which allegations were unrebutted by the defendants and supported by evidence submitted in connection with the defendants' respective motions to dismiss. We are not persuaded.

In addressing the plaintiff's arguments, we remain mindful that when, as in the present case, "the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . [or] other types of undisputed evidence . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to under-

[33] The board, in essence, reached the same conclusion in the 2020 final report, stating in relevant part: "Since . . . Mandell and [HSG] had an interest in bringing a Tier 2 professional soccer team to a renovated . . . stadium, why not just license the use of the stadium to [HSG]? Why not allow CRDA to do what it does best which is to renovate and redevelop [the] stadium and the surrounding area? In the end, this is what actually occurred here. Why the charade of an RFP and a convoluted procurement process? This question is not answered by this report but may be best left to the [l]egislature and others in the [e]xecutive branch to answer or remedy a solution."

mine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings." (Internal quotation marks omitted.) *Fountain of Youth Church, Inc.* v. *Fountain*, supra, 225 Conn. App. 868.

In its complaint, the plaintiff alleged that, "[o]n February 29, 2019 . . . the city . . . and HSG executed the contracts for the development of [the stadium]"; however, this allegation is not entitled to a presumption of validity in light of the undisputed evidence in the record reflecting that the 2019 stadium use agreement, as opposed to a redevelopment contract, was executed by the city and Hartford Athletic, LLC, rather than with HSG, on February 25, 2019. Additionally, the plaintiff alleged that Mandell's self-reported complaint to the SEEC in 2018 represented that HSG and the city had "entered into an agreement . . . to bring a professional soccer team to play at a municipal stadium . . . with [CRDA] to serve as an administrator for the project." (Internal quotation marks omitted.) Neither this allegation nor the self-reported complaint, a copy of which is part of the record, suggested that HSG was contractually charged with redeveloping the stadium; rather, the self-reported complaint reflected the plans, as contemplated by the term sheet, for HSG to operate a professional soccer team at the stadium. The plaintiff further alleged that, as the 2019 SAPA report found, CRDA improperly spent more than $4 million in bond funds "on . . . [s]tadium construction as CRDA advanced the construction of the stadium to Mandell's specifications despite not having executed contracts." As the plaintiff itself acknowledged, it was CRDA that managed the stadium's construction efforts, and nothing in this allegation implied that HSG was contracted to redevelop the stadium.[34] The plaintiff also alleged that

[34] The plaintiff appended to its memoranda of law in opposition to the defendants' respective motions to dismiss a personal affidavit of Clynch, who averred in relevant part that, in response to Freedom of Information

the city and CRDA "wilfully proceeded with their predetermined plans for [the stadium], which now exists as a privatized soccer stadium managed by HSG." Again, nothing in this allegation reasonably can be construed to suggest that HSG was a party to a contract to redevelop the stadium. Finally, we note that the complaint contains numerous, general allegations that the city or CRDA awarded a contract to redevelop the stadium to HSG and that the city executed such a contract with HSG. Even when viewed in the light most favorable to the plaintiff, these general allegations cannot reasonably be construed as asserting that any agreements beyond those in the record, regardless of whether they were memorialized in writing, were executed between the city and HSG to redevelop the stadium.[35] For these

Act requests, he had received "numerous emails documenting that . . . Calafiore, on behalf of HSG, during the time frame of 2017 through 2018 developed plans and estimates for renovating and constructing [the stadium]." Although the development of plans and estimates concerning the redevelopment of the stadium may be indicative of HSG's being involved in discussions as to how the stadium should be redeveloped, it does not suggest that HSG, in fact, contracted with the city to handle the redevelopment of the stadium as alleged by the plaintiff.

[35] Relatedly, the plaintiff contends that the court improperly found that CRDA had solicited bids for construction contracts vis-à-vis the stadium in April, 2018, which, the plaintiff posits, runs contrary to its unrebutted allegations and is unsupported by the record. As we have concluded, however, insofar as the plaintiff alleged that the city executed a contract with HSG for the redevelopment of the stadium, those allegations were tempered by the undisputed evidence in the record reflecting that the city contracted with CRDA to handle the redevelopment of the stadium and contracted with Hartford Athletic, LLC, by way of the 2019 stadium use agreement. In addition, in the 2020 final report, which the plaintiff attached as an exhibit to its memoranda of law in opposition to the defendants' respective motions to dismiss, the board found that, following an RFP process, CRDA selected a nonparty to the present action named "Newfield Construction" to perform the renovation work at the stadium. Furthermore, in both the 2019 stadium use agreement and the 2019 stadium renovation and operation agreement, the term "Contractor" is defined to mean "Newfield Construction, Inc." Thus, there was unrebutted evidence in the record reflecting that CRDA solicited bids and awarded a contract concerning the redevelopment of the stadium to a nonparty.

reasons, we conclude that the court properly determined that the RFP was not subject to the code's competitive bidding requirements.

To summarize, "[n]ot unlike any other person whose offer has been rejected"; (internal quotation marks omitted) *Connecticut Associated Builders & Contractors* v. *Hartford*, supra, 251 Conn. 179; the plaintiff had no standing to seek judicial intervention stemming from its failure to be awarded a contract in connection with the RFP. Pursuant to the limited exception to the standing rules, the plaintiff's allegations of fraud and favoritism tainting the RFP process would have afforded it standing if the RFP were subject to the competitive bidding requirements of § 4b-91 and/or the code; however, such requirements did not apply to the RFP. Accordingly, we conclude that the court properly dismissed, for lack of standing, the plaintiff's claims seeking injunctive and declaratory relief.

II

The plaintiff also claims that the trial court improperly concluded that it lacked standing to pursue its claims seeking money damages against the individual city defendants, the CRDA defendants, Freimuth, and the HSG defendants.[36] We are not persuaded.

In dismissing the plaintiff's claims against the individual city defendants, the CRDA defendants, and Freimuth, the court stated that "[t]he plaintiff's claims . . . all seek money damages based on various common-law

[36] The plaintiff asserted claims of (1) fraud against CRDA, (2) civil conspiracy to commit fraud against (a) the individual city defendants, (b) the CRDA defendants, (c) Freimuth, and (d) the HSG defendants, (3) tortious interference with a business expectancy against (a) the individual city defendants, (b) the CRDA defendants, and (c) Freimuth, (4) civil conspiracy to commit tortious interference with a business expectancy against (a) the individual city defendants, (b) the CRDA defendants, (c) Freimuth, (d) HSG, and (e) Data-Mail, Inc., and (5) a violation of CUTPA against (a) Bronin and (b) the HSG defendants.

and statutory torts. The damages sought include both lost profits associated with the alleged lost opportunity to redevelop [the stadium] and the costs associated with responding to the RFP. While the plaintiff concedes that its standing to sue the city is limited to claims for injunctive relief, the plaintiff argues that its standing to pursue its money damages claims . . . is distinct from its standing to sue the city and CRDA. The plaintiff argues that these claims do not seek money damages based on a flawed bidding process, but rather for tortious acts that happened contemporaneously with the bidding process. This theoretical distinction is not borne out by the substance of the complaint. The claims for money damages . . . are cloaked in the elements of traditional tort claims, but there is no escaping the fact that they all center on one essential wrong—that the RFP was a sham. Whether the plaintiff was tortiously lured into a sham RFP or wrongfully deprived of the award of a redevelopment contract, all the claims arise directly out of a government solicitation process. The plaintiff cites no authority for the proposition that an unsuccessful bidder who lacks standing to sue the government agency responsible for the solicitation may nevertheless sue individual public officials and agencies who were involved in the process." (Internal quotation marks omitted.) In addition, relying on *Lawrence Brunoli, Inc.* v. *Branford*, 247 Conn. 407, 722 A.2d 271 (1999), the court determined that, even if the plaintiff had standing to pursue equitable relief, "there is no standing to assert claims for money damages arising out of the plaintiff's unsuccessful participation in a government procurement process."

The court further concluded that the plaintiff lacked standing to assert its claims against the HSG defendants, which claims "rest[ed] on the same essential core as the claims asserted against the other defendants, alleging that the HSG defendants participated in a sham

procurement process with the preordained outcome that HSG would be chosen to redevelop [the stadium]." The court determined "that the HSG defendants' status as nongovernmental parties [did] not change the standing analysis. The only legal interest the plaintiff ha[d] in asserting claims arising out of a government procurement process is the public interest underlying the state and municipal bidding statutes and ordinances. . . . The limitations on standing afforded to unsuccessful bidders asserting claims against the soliciting governmental agency apply as well in the context of claims against competitors because the legal interest is the same. There is no legal interest in obtaining a public contract and the plaintiff's claims for money damages against the successful bidder seek to enforce such an interest. Moreover, the policy concerns underlying the standing limitations applicable to claims against government entities are the same in this context. Affording standing to unsuccessful bidders for money damage claims against successful bidders interferes with the public's interest in the government procurement process. The standing limitations are intended to strike the proper balance between fulfilling the purposes of the competitive bidding statutes and preventing frequent litigation that might result in extensive delay in the commencement and completion of government projects to the detriment of the public. . . . Maintaining that balance requires circumscribing claims against successful bidders with the same limitations imposed upon claims against the awarding governmental entity." (Citations omitted; internal quotation marks omitted.)

The plaintiff asserts that, in dismissing the remaining claims at issue, the court relied on the "faulty premise that the [plaintiff] did not have standing because all [of] the claims flowed from the RFP. . . . [T]his conclusion did not properly evaluate the [plaintiff's] standing under the principles of classical aggrievement

. . . .” The plaintiff maintains that if, as the court concluded, the RFP was not a competitive bidding process, then it was not an “ ‘unsuccessful bidder’ ” but, instead, “a traditional plaintiff that must establish classical aggrievement . . . .” The plaintiff further posits that it alleged that it suffered harm independent of the award of any contract following the RFP. Specifically, the plaintiff maintains that it alleged that all of the defendants fraudulently misrepresented the nature of the RFP process, including that it was a “true bidding process” with a contract being awarded to the “ ‘winning’ bidder,” thereby inducing it to submit a bid as part of a “ ‘sham’ ” RFP and causing it harm in the form of costs and fees that it had incurred in developing its bid. Additionally, with respect to its claim alleging a CUTPA violation against Bronin, the plaintiff contends that it alleged that Bronin, while employed as an attorney for Hinckley Allen prior to his tenure as the city’s mayor, learned of Clynch’s plans to bring a professional soccer franchise to the city and used that information gleaned from his attorney-client relationship with the plaintiff to “undermine [the plaintiff’s] position, leverage HSG’s bargaining position, and then obtain state funds for the city . . . .” We do not agree.

“It is well established that the interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court’s interpretation of the pleadings therefore is plenary. . . . Furthermore, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory [on] which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must

be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Emphasis omitted; internal quotation marks omitted.) *Hepburn* v. *Brill*, 348 Conn. 827, 848, 312 A.3d 1 (2024).

Having carefully reviewed the plaintiff's complaint, we agree with the court that, notwithstanding the various legal theories asserted, the plaintiff's claims "all center[ed] on one essential wrong—that the RFP was a sham." (Internal quotation marks omitted.) In substance, the plaintiff alleged that the defendants against which it sought money damages engaged in conduct that tricked it into participating in a solicitation process that, as a result of fraud and favoritism tarnishing it, did not result in a contract awarded in its favor. We are not persuaded by the plaintiff's attempts to deconstruct its claims. Whether the plaintiff was harmed as a result of lost profits or costs and expenses incurred in participating in the RFP, the root issue, as alleged in support of each count of the plaintiff's complaint, is that the plaintiff participated in the RFP and was not awarded a contract. As we determined in part I of this opinion, "[n]ot unlike any other person whose offer has been rejected"; (internal quotation marks omitted) *Connecticut Associated Builders & Contractors* v. *Hartford*, supra, 251 Conn. 179; the plaintiff had no standing to seek judicial intervention under the circumstances of this case.

In sum, we conclude that the court properly dismissed, for lack of standing, the plaintiff's remaining claims seeking money damages against the individual city defendants, the CRDA defendants, Freimuth, and the HSG defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

KHALID IBRAHIM *v.* COMMISSIONER OF CORRECTION (AC 46262)

Clark, Seeley and Harper, Js.

Syllabus

The petitioner, who had been convicted of felony murder and kidnapping in the first degree, appealed, on the granting of certification, from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. The petitioner claimed that the court erred in concluding that he failed to establish good cause for his late filed petition. *Held*:

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

Argued September 12—officially released December 17, 2024

Procedural History

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

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

Jonathan M. Sousa, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

Opinion

HARPER, J. The petitioner, Khalid Ibrahim, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as untimely under General Statutes § 52-470 (d) and (e).[1] On appeal, the petitioner claims that the court erred in concluding that he failed to establish good cause for his late filed petition. In particular, the petitioner argues that evidence of his prior habeas counsel's failure to advise him of the statutory deadline for filing a new habeas petition following the withdrawal of his then pending petition alleging a double jeopardy violation would

[1] General Statutes § 52-470 provides in relevant part: "(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

"(e) In a case in which the rebuttable presumption of delay under subsection (c) or (d) of this section applies, the court, upon the request of the respondent [the Commissioner of Correction], shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section. . . ."

establish ineffective assistance of counsel, which constitutes good cause for the delay in filing. In light of our Supreme Court's recent decision in *Rose* v. *Commissioner of Correction*, 348 Conn. 333, 304 A.3d 431 (2023), and this court's subsequent decisions in *Coney* v. *Commissioner of Correction*, 225 Conn. App. 450, 315 A.3d 1161 (2024), *Michael G.* v. *Commissioner of Correction*, 225 Conn. App. 341, 314 A.3d 659 (2024), *Rapp* v. *Commissioner of Correction*, 224 Conn. App. 336, 311 A.3d 249, cert. denied, 349 Conn. 909, 314 A.3d 601 (2024), and *Hankerson* v. *Commissioner of Correction*, 223 Conn. App. 562, 308 A.3d 1113 (2024), we conclude that the judgment of the habeas court must be reversed and the case remanded for a new good cause hearing.[2]

[2] At oral argument before this court, counsel for the respondent, the Commissioner of Correction, asserted that a remand is not required in the present case because the approximately six year delay in filing the habeas petition underlying this appeal could not, as a matter of law, constitute good cause under § 52-470 (e). We disagree. Whether good cause exists for a petitioner's late filing is left to the discretion of the habeas court, taking into consideration the factors set forth in *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 442–43, 274 A.3d 85 (2022). The length of the delay is just one of the factors for the court to consider.

Counsel for the respondent also contended that, in the event that we determined that a remand was required, such a proceeding should be limited to an evaluation by the habeas court of whether prior habeas counsel rendered ineffective assistance that constituted good cause pursuant to § 52-470 (e) on the basis of the existing record. Counsel for the petitioner countered that such an approach would be contrary to *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 333. In that case, our Supreme Court stated that the habeas court "made no factual findings regarding [the] alleged ineffective assistance, and, in the absence of such findings, we will not address the issue for the first time on appeal." Id., 349. It then remanded the case for a new hearing and good cause determination. Id., 350.

We are not persuaded by the efforts of the respondent to distinguish the present case from *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 333, and its progeny, and note that we are bound to follow the precedent from both our Supreme Court and other panels of this court. See *State* v. *White*, 215 Conn. App. 273, 304–305, 283 A.3d 542 (2022), cert. denied, 346 Conn. 918, 291 A.3d 108 (2023). Accordingly, we follow the path of those cases and remand the case for a new hearing and good cause determination.

The following procedural history is relevant to our resolution of the petitioner's appeal. Following a jury trial, the petitioner was convicted of felony murder in violation of General Statutes § 53a-54c and kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A). See *State* v. *Ibrahim*, 62 Conn. App. 634, 634, 772 A.2d 680, cert. denied, 256 Conn. 919, 774 A.2d 139 (2001). The petitioner received a total effective sentence of fifty years of incarceration. This court affirmed the judgment of conviction; see id.; and our Supreme Court denied the subsequent petition for certification. See *State* v. *Ibrahim*, 256 Conn. 919, 774 A.2d 139 (2001).

Thereafter, the petitioner filed his first habeas petition, in which he alleged ineffective assistance of trial counsel in his criminal trial. The habeas court denied the petition, and this court, in a per curiam decision, affirmed the judgment of the habeas court. See *Ibrahim* v. *Commissioner of Correction*, 132 Conn. App. 902, 30 A.3d 760, cert. denied, 303 Conn. 914, 32 A.3d 964 (2011). The petitioner filed his second habeas petition on January 16, 2014. In that action, he asserted a claim of a double jeopardy violation; additionally, he sought the restoration of his right to sentence review. By way of a stipulated judgment on August 24, 2016, the petitioner's right to sentence review was restored, and he agreed to withdraw his double jeopardy claim.

On or about September 6, 2022, the petitioner filed the underlying habeas petition that is the subject of this appeal. In this petition, he claims that his sentence was illegal because his right to be free from double jeopardy was violated when the state charged him with both murder and felony murder and that his criminal trial counsel was ineffective in failing to inform him of his "right to a plea bargain . . . ." At the request of the respondent, the Commissioner of Correction, the court, *Newson, J.*, ordered the petitioner to show cause as to why this petition should not be dismissed as untimely

because it was filed beyond the time limit for successive petitions in § 52-470 (d). See General Statutes § 52-470 (e). At the show cause hearing, the petitioner's counsel represented to the habeas court, *Bhatt*, *J.*, that the petitioner had wanted to pursue matters that had been withdrawn in the prior habeas action, namely, his double jeopardy claim. The petitioner's counsel further stated that he had spoken with prior habeas counsel, who had acknowledged his failure to advise the petitioner of the time limitation set forth in § 52-470. According to the petitioner's counsel, prior habeas counsel also had indicated that nothing in his file indicated that he had alerted the petitioner to these time constraints. The petitioner testified that he was unaware of the two year limitation of § 52-470.

On December 22, 2022, the habeas court issued a memorandum of decision summarizing the petitioner's argument as being that prior habeas counsel's failure to inform him of the time limitations in § 52-470 constituted ineffective assistance and that, as a result of this alleged constitutional violation, he had demonstrated good cause for the untimely habeas filing. The habeas court noted that this argument had been considered and rejected by this court in *Michael G.* v. *Commissioner of Correction*, 214 Conn. App. 358, 280 A.3d 501 (2022), vacated, 348 Conn. 946, 308 A.3d 35 (2024), and, therefore, concluded that, "in light of binding case law, [the petitioner] cannot demonstrate good cause for the untimely filing of the instant habeas petition." Accordingly, the habeas court dismissed the petition. The petitioner filed a petition for certification to appeal, which the court subsequently granted.

Approximately one year later, while this appeal was pending, our Supreme Court issued its decision in *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 333. In *Rose*, the court discussed several factors relevant to the good cause determination under § 52-470 (e). Id.,

343. "These factors include, but are not limited to: (1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition. . . . No single factor is dispositive, and, in ascertaining whether good cause exists, the habeas court must consider all relevant factors in light of the totality of the facts and circumstances presented." (Citation omitted; internal quotation marks omitted.) Id.

In determining whether deficient performance of counsel may constitute good cause under § 52-470 (e), our Supreme Court turned to the distinction between internal and external factors that cause or contribute to the failure to comply with a procedural rule. Id., 347. Specifically, the court noted that, in the context of the procedural default doctrine, "[*i*]*neffective assistance of counsel is an objective factor external to the defense because the* [*s*]*ixth* [*a*]*mendment itself requires that responsibility for the default be imputed to the* [*s*]*tate*. . . . In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of [the] petitioner's right to counsel, so that the error must be seen as an external factor, i.e., imputed to the [s]tate. . . . Although a petitioner is bound by his counsel's inadvertence, ignorance, or tactical missteps . . . *a petitioner is not bound by the ineffective assistance of his counsel*." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 347–48. It then concluded: "Consistent with this authority, we conclude that ineffective assistance of counsel is an objective factor external to the petitioner that may constitute

good cause to excuse the late filing of a habeas petition under the totality of the circumstances pursuant to § 52-470 (c) and (e)." Id., 348; see also *Rapp* v. *Commissioner of Correction*, supra, 224 Conn. App. 343. Consistent with the principles set forth in *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 333, we conclude that the habeas court, through no fault of its own, did not apply the correct legal standard later set forth in *Rose* when deciding whether the petitioner had demonstrated good cause for the late filing of his petition. See *Hankerson* v. *Commissioner of Correction*, supra, 223 Conn. App. 569. As noted by the court in *Rose*, actions of counsel that are ineffective under the sixth amendment cannot be imputed to the petitioner and, therefore, the ineffective assistance of counsel constitutes an external, objective factor sufficient to establish good cause for the untimely filing. See *Rose* v. *Commissioner of Correction*, supra, 346. Accordingly, the petitioner is entitled to a new hearing at which the habeas court must apply the proper legal standard with respect to § 52-470 (d) and (e). Id., 350; see also *Coney* v. *Commissioner of Correction*, supra, 225 Conn. App. 454; *Michael G.* v. *Commissioner of Correction*, supra, 225 Conn. App. 343; *Rapp* v. *Commissioner of Correction*, supra, 224 Conn. App. 344.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

1ST ALLIANCE LENDING, LLC *v.* DEPARTMENT OF BANKING ET AL.
(AC 46493)

Bright, C. J., and Westbrook and Eveleigh, Js.

Syllabus

The plaintiff appealed from the judgment of the trial court dismissing its administrative appeal from the decision of the defendant Commissioner of

Banking revoking the plaintiff's license to do business as a mortgage lender in this state and imposing a civil penalty for multiple violations of state and federal law. The plaintiff claimed, inter alia, that the commissioner did not have authority to revoke the plaintiff's license because it had already been revoked in a separate administrative action. *Held*:

The trial court did not err in failing to modify or vacate the commissioner's revocation order because the commissioner had the authority to revoke the plaintiff's mortgage lender license in the present matter after the compelled revocation of the plaintiff's license in a separate administrative action.

The trial court did not improperly defer to the defendant Department of Banking's statutory interpretation of the term mortgage loan originator as defined in the Connecticut SAFE Act (§ 36a-485 et seq.) in reaching its conclusion that substantial evidence supported the commissioner's finding that the plaintiff violated that act by using unlicensed individuals to take residential mortgage loan applications.

The commissioner did not improperly apply a provision (§ 36a-498e (b)) of the Connecticut SAFE Act retroactively because substantial evidence supported the commissioner's finding that the plaintiff's improper conduct continued after the provision's effective date.

The trial court properly concluded that substantial evidence in the record supported the commissioner's finding that the plaintiff failed to cooperate with the department's subpoena in violation of the governing statute (§ 36a-17).

There was no merit to the plaintiff's claim that it was deprived of due process, as the department's hearing procedures complied with the Uniform Administrative Procedure Act (§ 4-166 et seq.), the plaintiff failed to establish any facts indicating that the department's hearing officer or commissioner was biased, and this court reviewed the record to ensure that substantial evidence supported the commissioner's challenged findings.

This court declined to review the plaintiff's inadequately briefed claim that the penalties ordered by the commissioner were unconstitutionally excessive.

Argued September 12—officially released December 17, 2024

Procedural History

Appeal from the decision of the defendant Commissioner of Banking revoking the plaintiff's license to serve as a mortgage lender in Connecticut and imposing a civil penalty, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*, *J.*; judgment dismissing the plaintiff's appeal,

from which the plaintiff appealed to this court. *Affirmed.*

Ross H. Garber, with whom, on the brief, were *Mitchel H. Kider*, pro hac vice, and *Michael Y. Kieval*, pro hac vice, for the appellant (plaintiff).

Patrick T. Ring, assistant attorney general, with whom were *John Langmaid*, assistant attorney general, and, on the brief, *William Tong*, attorney general, for the appellees (defendants).

Opinion

WESTBROOK, J. The plaintiff, 1st Alliance Lending, LLC, appeals from the judgment of the trial court dismissing the plaintiff's administrative appeal from the decision of the defendant Commissioner of Banking (commissioner) revoking the plaintiff's license to do business as a mortgage lender and ordering the plaintiff to pay a civil penalty. The plaintiff claims that (1) the commissioner did not have authority to revoke the plaintiff's license that already had been revoked in a separate administrative action, (2) the court improperly deferred to the incorrect interpretation of General Statutes § 36a-485 by the defendant Department of Banking (department), (3) the commissioner improperly applied General Statutes § 36a-498e (b) (1) retroactively, (4) substantial evidence does not support the commissioner's finding that the plaintiff failed to cooperate with the investigation, (5) the court and the department violated the plaintiff's due process rights, (6) the commissioner imposed penalties that are unconstitutionally excessive, and (7) if any of the commissioner's findings of violation were made in error, we must remand the matter for a new penalty hearing. We affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. This dispute arises from the plaintiff's policies and procedures regarding its unlicensed

employees. The plaintiff is a Connecticut limited liability company that was licensed by the department to engage in business as a mortgage lender. The plaintiff employed two relevant classes of employees that assisted customers in applying for and obtaining mortgage loans: mortgage loan originators (MLOs) and home loan consultants (HLCs).[1] MLOs are licensed by the state to take residential mortgage loan applications and to offer and negotiate terms of residential mortgage loans.[2] HLCs, on the other hand, interact with potential borrowers but are not licensed as MLOs. HLCs are not authorized to take residential mortgage loan applications or to offer or negotiate terms of residential mortgage loans. The plaintiff's HLCs used a software program called Byte[3] to input information received from potential borrowers into a database, which was used to populate a loan application with the information collected by the HLCs.

In 2017, the plaintiff's vice president of compliance, Briana Massey, and its compliance analyst, Brianna Privott, prepared an internal compliance audit to assess whether the plaintiff's HLCs were improperly engaging in conduct that required an MLO license and whether the plaintiff was otherwise complying with Connecticut's lending requirements. The audit report, published on February 1, 2018, expressed concerns that the plaintiff was violating, inter alia, General Statutes § 36a-485

[1] Prior to 2018, the class of HLCs held the title of submission coordinators. For the purposes of this appeal, we refer to this class of employees as HLCs.

[2] General Statutes § 36a-485 (20) provides in relevant part that "[m]ortgage loan originator means an individual who for compensation or gain . . . (A) takes a residential mortgage loan application, or (B) offers or negotiates terms of a residential mortgage loan. . . . [T]he [Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (federal SAFE Act), 12 U.S.C. § 5101 et seq.], requires such individual to be licensed as a mortgage loan originator under state laws implementing said [federal SAFE Act] . . . ."

[3] The Byte software program is a loan origination system designed to originate mortgage files including recording mortgage applications, storing documents, and processing and closing loan files.

et seq. (Connecticut SAFE Act); the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 et seq.; the Truth in Lending Act (TILA), 15 U.S.C § 1601 et seq.; and the TILA-RESPA[4] Integrated Mortgage Disclosure Rule (TRID), 12 C.F.R. §§ 1024 and 1026. Specifically, the report stated that "[HLCs] were at times engaging in what may constitute as licensed activity under the [Connecticut] SAFE Act. Further, instances of [HLCs] failing to meet the requirements of the ECOA permissible credit [inquiries] were found." The audit report also found that "[t]he transaction testing found instances where [l]oan [e]stimates were not sent to applicants pursuant to TILA disclosure requirements . . . ." With respect to the Connecticut SAFE Act, the audit stated that HLCs "were found to present an unacceptable amount of risk. The issues found were systemic and required immediate attention. Compliance [t]raining was conducted . . . for all [HLCs] regarding what is and is not unlicensed activity. Additionally, written guidance was provided to all [HLCs] to supplement the training. . . . The most prevalent issues were as follows: Impermissible Credit [Inquiries]; Credit Repair Advice; Discussion of Rate and Term; Credit Decisions; Disqualified Borrowers." Moreover, the report stated that, "[w]hile there are sufficient reporting tools available in Byte to track and monitor TRID compliance, 2017 saw an unusual increase in violations" with "loan estimates sent out late or not sent out at all."

On May 3, 2018, two associate financial examiners from the department visited the plaintiff's place of business unannounced to conduct a routine compliance examination. The plaintiff, along with other mortgage lenders, was scheduled to be examined between the first quarter of 2016 and May 3, 2018. Of the mortgage lenders that the department was required to examine,

[4] RESPA is the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq.

the examiners chose the plaintiff on the basis of the date of its last examination and the location of its place of business. During the examination, Massey and Eric Sanders, the plaintiff's chief executive of loan servicing, completed Uniform Manager's Questionnaires, which the department gives to all licensees for mortgage lender exams. In response to the questionnaire, Massey and Sanders provided the examiners with, inter alia, the plaintiff's 2017 internal audit report, which indicated that the plaintiff was not in compliance with state and federal law governing mortgage lenders. The examiners also interviewed various personnel of the plaintiff, including MLOs, HLCs, and executives. Following the May 3, 2018 examination, the examiners requested additional documents from the plaintiff, which Massey and Sanders provided. Beginning on September 19, 2018, one of the department's attorneys, Stacey Serrano, also emailed Massey requesting documents, some of which she provided.

On December 5, 2018, as a result of the department's compliance examination, the commissioner issued to the plaintiff notices of (1) intent to revoke the plaintiff's mortgage lender license, (2) intent to issue a cease and desist order, (3) intent to impose a civil penalty, and (4) the right to a hearing. Through June 14, 2019, the department, pursuant to General Statutes § 4-182 (c),[5] sent letters notifying the plaintiff of the opportunity to show compliance with the legal requirements for retention of its mortgage lender license. The plaintiff, however, did not show compliance. On July 15, 2019,

[5] General Statutes § 4-182 (c) provides in relevant part that "[n]o revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action and the specific provisions of the general statutes or of regulations adopted by the agency that authorize such intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. . . ."

the commissioner issued amended and restated notices of intent to (1) revoke the plaintiff's mortgage lender license, (2) issue an order to cease and desist, and (3) impose a civil penalty (amended notice). The amended notice alleged eleven grounds for finding that the plaintiff violated state and federal law.[6]

While the revocation proceeding regarding the plaintiff's compliance issues (compliance matter) was pending, the plaintiff's surety company notified the department, in May, 2019, that it was cancelling the plaintiff's

[6] Specifically, the amended notice contained the following allegations: the plaintiff (1) engaged the services of unlicensed MLOs in violation of 12 C.F.R. § 1026.36 (f) (2) (2019) and General Statutes §§ 36a-486 (b) (1) and 36a-678 (a); (2) assisted or aided and abetted the conduct of individuals acting as unlicensed MLOs in violation of § 36a-498e (a) (6); (3) accepted applications or referrals of applicants from, or paid fees to, unlicensed MLOs in violation of General Statutes § 36a-496; (4) failed to comply with General Statutes §§ 36a-485 to 36a-498f, inclusive, 36a-498h, 36a-534a, and 36a-534b, or other state or federal law applicable to its business in violation of § 36a-498e (a) (8); (5) failed to establish, enforce and maintain policies and procedures reasonably designed to achieve compliance with § 36a-498e (a) in violation of § 36a-498e (b) (1); (6) failed to make records available and to cooperate with the department's Consumer Credit Division's examination in violation of General Statutes § 36a-17 (e); (7) failed to provide Connecticut applicants with adverse action notices in violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681m (a); (8) required that Connecticut applicants submit documents verifying information related to the application before providing loan estimates in violation of 12 C.F.R. § 1026.19 (e) (2) (iii) and § 36a-678 (a); (9) failed to identify unlicensed MLOs on the respective loan documents even though such individuals had primary responsibility for origination in violation of 12 C.F.R. § 1026.36 (g) (1) (ii) and § 36a-678 (a); (10) made untrue statements of material fact or omitted to state a material fact necessary to make the statements not misleading or engaged in an act, practice or course of business that operated as a fraud or deceit on persons by holding out unlicensed MLOs to potential borrowers as the individuals primarily responsible for mortgage loan origination and failing to disclose to potential borrowers that such persons were unlicensed to do so, and disclosing to investors, government agencies and regulators that the licensed MLOs were the individuals primarily responsible for the origination of the mortgage loans, in violation of General Statutes § 36a-53b; and (11) made a false or misleading statement to the department when it stated that employees were not informed of their terminations in writing, when in fact, the plaintiff provided employee termination forms to employees informing

surety bond coverage effective July 31, 2019. Upon receiving this notice, the department sent the plaintiff "a letter, dated June 7, 2019, stating that [General Statutes] § 36a-492[7] required the plaintiff to maintain a surety bond running concurrently with the period of the license for the plaintiff's main office, and that the plaintiff's failure to have a bond in effect on July 31, 2019, would result in the commissioner's automatic suspension of the plaintiff's license and inactivation of the licenses of each Connecticut [MLO] sponsored by the plaintiff." (Footnote added.) *1st Alliance Lending, LLC* v. *Dept. of Banking*, 342 Conn. 273, 277, 269 A.3d 764 (2022). The letter further informed the plaintiff that it could avoid these outcomes by reinstating or obtaining a new surety bond or by ceasing to do business and surrendering its license. Id.

On July 29, 2019, the plaintiff sent an email to the department stating that it was voluntarily surrendering its license. Id., 278. The commissioner did not accept the plaintiff's license surrender and instead suspended the plaintiff's mortgage lender license on July 31, 2019. Id. In light of the plaintiff's failure to reinstate or obtain a new surety bond, on August 1, 2019, the commissioner, pursuant to § 36a-492 (c), issued to the plaintiff notices of automatic suspension, intent to revoke its mortgage lender license, and its right to a hearing (surety bond matter). Id. "The plaintiff requested a hearing, which was held in September, 2019. Following the hearing, the commissioner upheld the suspension. The commissioner also concluded that, pursuant to General Statutes

them of their termination of employment, in violation of General Statutes § 36a-53a.

[7] General Statutes § 36a-492 (a) provides in relevant part: "Each licensed mortgage lender . . . shall file with the commissioner a single surety bond, written by a surety authorized to write such bonds in this state, covering its main office and any branch office, in a penal sum determined in accordance with subsection (d) of this section . . . . The bond shall cover all mortgage loan originators sponsored by such licensee. . . ."

§ 36a-494, the plaintiff's failure to maintain a surety bond, as required by § 36a-492, supported the revocation of the plaintiff's mortgage lender license. Accordingly, the commissioner ordered the revocation of the plaintiff's mortgage lender license. The suspension and revocation had national ramifications for the plaintiff because they hampered its ability to conduct business in other states and could result in 'a series of cross-defaults with other counterparties and [other] revocations.' A properly effectuated surrender would not have had these negative ramifications." Id., 278–79.

In November, 2019, the plaintiff appealed the commissioner's order in the surety bond matter to the Superior Court, which subsequently dismissed the appeal. See *1st Alliance Lending, LLC* v. *Dept. of Banking*, Superior Court, judicial district of New Britain, Docket No. CV-19-6056459-S (August 26, 2020) (70 Conn. L. Rptr. 365, 369), aff'd, 342 Conn. 273, 269 A.3d 764 (2022). In March, 2021, the plaintiff appealed to our Supreme Court, which affirmed the judgment of the trial court. See *1st Alliance Lending, LLC* v. *Dept. of Banking*, supra, 342 Conn. 292. In doing so, our Supreme Court rejected the plaintiff's claims that "the governing statutes do not permit the defendants to suspend the plaintiff's license . . . [and] that, even if the relevant statutes gave the defendants discretion to suspend its license, the trial court incorrectly concluded that the commissioner lawfully exercised his discretion." Id., 279–80. The Supreme Court held that the plaintiff's attempted surrender of its license was ineffective because it did not comply with General Statutes § 36a-51 (c), and because "the plaintiff did not properly surrender its license before the expiration of the surety bond . . . the commissioner was statutorily required to suspend the plaintiff's license." Id., 288. Addressing the plaintiff's claim that the commissioner did not lawfully exercise his discretion, the Supreme Court stated: "The plaintiff also

argues that the statutory scheme should not be interpreted to permit the department to decline to take action on a request to surrender, thereby creating a situation in which the lender has a license but no surety bond. In other words, the plaintiff contends, the department's own actions in failing to accept the license surrender created the licensing violation. Neither the plaintiff's brief, nor our independent research, however, indicates that the department is under any statutory or regulatory obligation to take action on a request to surrender within a time certain following receipt of the request. Moreover, in this case, there is no indication in the record that the department unreasonably delayed in taking action on the plaintiff's request; rather, it was the plaintiff that waited to submit its request to surrender until two days before its surety bond was set to be cancelled. After not receiving a response to its June 7 letter, the department even followed up with the plaintiff. The plaintiff was well aware of the ongoing 2018 enforcement proceeding and of the obligation to maintain a surety bond as long as it held a license. At any time following [the surety's] notice of cancellation, the plaintiff could have reached out to the department to discuss the time and conditions for a request to surrender. See General Statutes § 36a-51 (c) (1). The plaintiff failed to do so. To the extent that the plaintiff wants to impose greater time constraints on the department's response to a request to surrender a mortgage license, its recourse is with the General Assembly, not this court." Id., 289–90.

While the appeal of the surety bond matter was pending, the department continued with the revocation proceeding in the compliance matter. Between September, 2019, and February, 2020, the department held fifteen days of administrative hearings on the amended notice, during which the parties presented witness testimony

and thousands of pages of exhibits to the hearing officer, Attorney Cynthia Antanaitis. At the end of the administrative hearings, the hearing officer, pursuant to General Statutes § 4-179,[8] wrote a proposed decision, which she gave to the commissioner for consideration along with the entire administrative record. On April 16, 2021, the commissioner issued a decision in which he found that the plaintiff had violated (1) the Connecticut SAFE Act by engaging the services of unlicensed MLOs; (2) the Fair Credit Reporting Act, 15 U.S.C. § 1681m,[9] by failing to send adverse action notices to prospective borrowers; (3) General Statutes §§ 36a-498e (a) (7)[10] and 36a-678 (a)[11] by providing consumers with loan estimate disclosures without the verification of information or an executed real estate contract; (4) § 36a-498e (a) (6) by aiding and abetting the unlicensed activities of call center employees; (5) General Statutes § 36a-17 (e) by failing to produce subpoenaed records to the department; (6) § 36a-498e (b) by failing to establish,

[8] General Statutes § 4-179 provides in relevant part: "(c) Except when authorized by law to render a final decision for an agency, a hearing officer shall, after hearing a matter, make a proposed final decision. . . ."

[9] The Fair Credit Reporting Act provides in relevant part: "If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall . . . provide oral, written, or electronic notice of the adverse action to the consumer . . . ." 15 U.S.C. § 1681m (a).

[10] General Statutes § 36a-498e (a) provides in relevant part that "[n]o person who is required to be licensed and who is subject to this section . . . may, directly or indirectly . . . (6) Conduct any business as a mortgage lender, mortgage correspondent lender, mortgage broker, lead generator, mortgage loan originator or loan processor or underwriter without holding a valid license as required under this section . . . or assist or aid and abet any person in the conduct of business as a mortgage lender, mortgage correspondent lender, mortgage broker, lead generator, mortgage loan originator or loan processor or underwriter without a valid license . . . (7) Fail to make disclosures as required by this section . . . and any other applicable state or federal law including regulations adopted thereunder . . . ."

[11] General Statutes § 36a-678 (a) provides that "each person shall comply with all provisions of the Consumer Credit Protection Act [15 U.S.C. § 1601 et seq.] that apply to such person . . . ."

enforce, and maintain policies and procedures reasonably designed to achieve compliance with regulatory requirements; (7) General Statutes § 36a-53b (2)[12] by failing to inform potential borrowers that call center employees were not licensed MLOs; and (8) § 36a-53b (3) by failing to dispel the notion that its call center representatives were licensed. On the basis of these violations, the commissioner ordered the plaintiff to cease and desist its violations, revoked the plaintiff's license to act as a mortgage lender in Connecticut, and imposed a civil penalty in the amount of $750,000.

Pursuant to General Statutes § 4-183,[13] the plaintiff appealed the commissioner's decision to the Superior Court. The plaintiff subsequently filed a motion for leave to present additional evidence. The plaintiff argued that certain Byte data logs, which the hearing officer had excluded during the administrative hearings, demonstrated that the HLCs did not conduct activities that require an MLO license. The court, *Cordani*, *J.*, pursuant to § 4-183 (h),[14] granted the motion and remanded

[12] General Statutes § 36a-53b provides in relevant part that "[n]o person shall, in connection with any activity subject to the jurisdiction of the commissioner . . . (2) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

[13] General Statutes § 4-183 (a) provides in relevant part that "[a] person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . ."

[14] General Statutes § 4-183 (h) provides that, "[i]f, before the date set for hearing on the merits of an appeal, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court."

the matter to the department, ordering it to consider additional evidence from the Byte system. On April 5, 2022, the commissioner issued a supplemental decision in which he found that the additional Byte system evidence did not refute the relevant facts upon which his decision was based and declined to make any changes to his decision. The plaintiff appealed the commissioner's decision and supplemental decision to the Superior Court, which dismissed the plaintiff's administrative appeal. This appeal followed. See General Statutes § 4-184.[15] Additional facts will be set forth as necessary.

I

The plaintiff first claims that the trial court improperly failed to vacate or modify the commissioner's order to revoke the plaintiff's mortgage lender license because the commissioner did not have the authority to revoke it. It argues that the commissioner could not have revoked its license on April 16, 2021, because its license already had been revoked on October 4, 2019, in the surety bond matter. The department, on the other hand, argues that the commissioner had authority to revoke the plaintiff's license because (1) the plaintiff's license was active when the department sought revocation of the plaintiff's license in the compliance matter; (2) the plaintiff attempted to avoid revocation in the compliance matter by attempting to surrender its license in the surety bond matter, in which the department was statutorily required to proceed in revoking the plaintiff's license; and (3) revocation in the compliance matter and revocation in the surety bond matter have materially different purposes and consequences. We agree with the department.

[15] General Statutes § 4-184 provides in relevant part that "[a]n aggrieved party may obtain a review of any final judgment of the Superior Court under this chapter. . . ."

"We begin by articulating the applicable standard of review in an appeal from the decision of an administrative agency. Judicial review of [an administrative agency's] action is governed by the [Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq.][16] . . . and the scope of that review is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Judicial review of the conclusions of law reached administratively is also limited. The court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Citations omitted; footnote added; internal quotation marks omitted.) *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 800, 955 A.2d 15 (2008).

"Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . [Our Supreme Court

[16] General Statutes § 4-183 (j) provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. . . ."

has] determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's timetested interpretation . . . . Whether the relevant statutory scheme granted the commissioner the legal authority to . . . revoke the plaintiff's mortgage lender license is a question of statutory interpretation over which our review is plenary. . . . We review . . . the relevant statutory scheme in accordance with General Statutes § 1-2z and our familiar principles of statutory construction." (Citations omitted; internal quotation marks omitted.) *1st Alliance Lending, LLC* v. *Dept. of Banking*, supra, 342 Conn. 280–81.

We also note that, "[b]ecause the . . . appeal to the trial court [was] based solely on the [administrative] record, the scope of the trial court's review of the [commissioner's] decision and the scope of our review of that decision are the same. . . . In other words, the trial court's decision in this administrative appeal is entitled to no deference from this court." (Citation omitted; internal quotation marks omitted.) *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 63 n.15, 52 A.3d 636 (2012); see also *Hartford Police Dept.* v. *Commission on Human Rights & Opportunities*, 347 Conn. 241, 246 n.1, 297 A.3d 167 (2023).

General Statutes §§ 36a-488 (b)[17] and 36a-492 require mortgage lenders to maintain surety bond coverage. Pursuant to § 36a-492 (c), when a surety company seeks to cancel a mortgage lender's bond, it must notify the commissioner of the effective date of cancellation, at

[17] General Statutes § 36a-488 (b) provides in relevant part: "In the case of an initial application for a [mortgage lender] license, the following supplementary information shall be filed, as applicable . . . (2) a bond as required by section 36a-492 . . . ."

which point the "commissioner *shall* automatically suspend the licenses of a mortgage lender . . . ." [18] (Emphasis added.) Our Supreme Court has stated that "the use of the word 'shall' in § 36a-492 (c) is mandatory, and, as a result, the commissioner is statutorily required to suspend a mortgage lender license in the event of surety bond cancellation unless the mortgage lender satisfies one of the two exceptions to the requirement of automatic suspension." *1st Alliance Lending, LLC* v. *Dept. of Banking*, supra, 342 Conn. 283. Once the automatic suspension is in place, § 36a-492 (c) requires that "the commissioner shall (A) give the licensee notice of the automatic suspension, pending proceedings for revocation or refusal to renew pursuant to section 36a-494 and an opportunity for a hearing on such action in accordance with section 36a-51 . . . ." In the present case, given the plaintiff's notice that it intended to surrender its license, which the commissioner refused to accept, it was clear that the plaintiff was not seeking a renewal of its license, leaving revocation as the only statutory option available to the commissioner under § 36a-492, which the commissioner successfully accomplished.

Essentially, the plaintiff argues that its license, having been revoked once, could not be revoked a second time. The commissioner argues that the plaintiff cannot successfully thwart an ongoing revocation proceeding based on allegedly significant substantive compliance

[18] General Statutes § 36a-492 (c) provides in relevant part: "The surety company shall have the right to cancel the bond at any time by a written notice to the principal stating the date cancellation shall take effect . . . . A surety bond shall not be cancelled unless the surety company notifies the commissioner in writing not less than thirty days prior to the effective date of cancellation. After receipt of such notification from the surety company, the commissioner shall give written notice to the principal of the date such bond cancellation shall take effect . . . . The commissioner shall automatically suspend the licenses of a mortgage lender . . . on such date . . . ."

failures by surrendering its license or by engineering an automatic revocation due to the cancellation of its surety bond. The resolution of this issue is important because the parties agree that not all revocations are equal and that the revocation at issue in the present case has greater regulatory consequences for the plaintiff both in Connecticut and in other jurisdictions.

Section 36a-494 (a) (1) provides that the commissioner has the authority to "suspend, revoke or refuse to renew any mortgage lender . . . license or take any other action . . . for any reason which would be sufficient grounds for the commissioner to deny an application for such license . . . or if the commissioner finds that the licensee . . . has done any of the following . . . (C) violated any of the provisions of this title or of any regulation or order adopted or issued pursuant thereto pertaining to any such person, or any other law or regulation applicable to the conduct of its business . . . ." The statutory scheme further provides that the department may pursue revocation proceedings against a mortgage lender with an inactive license under certain circumstances. Section 36a-51 (c)[19] expressly permits

[19] General Statutes § 36a-51 (c) provides in relevant part: "(1) Any licensee may surrender any license issued by the commissioner under any provision of the general statutes by surrendering the license to the commissioner in person or by registered or certified mail, provided, in the case of a license issued through the system, as defined in section 36a-2, such surrender shall be initiated by filing a request to surrender on the system. No surrender on the system shall be effective until the request to surrender is accepted by the commissioner. Surrender of a license shall not affect the licensee's civil or criminal liability, or affect the commissioner's ability to impose an administrative penalty on the licensee pursuant to section 36a-50 for acts committed prior to the surrender. . . . If no proceeding is pending or has been instituted by the commissioner at the time of surrender . . . the commissioner may still institute a proceeding to suspend, revoke or refuse to renew a license . . . up to the date one year after the date of receipt of the license by the commissioner, or, in the case of a license issued through the system, up to the date one year after the date of the acceptance by the commissioner of a request to surrender a license.

"(2) If any license issued on the system expires due to the licensee's failure to renew such license, the commissioner may institute a revocation

the commissioner to revoke mortgage lender licenses that have expired or been surrendered up to one year after expiration or the date that the commissioner accepted a request to surrender. Although the statutory scheme is silent as to whether the commissioner may revoke a license that already has been revoked, we find that the commissioner has such authority under the circumstances in the present matter.

In *Stern* v. *Medical Examining Board*, 208 Conn. 492, 545 A.2d 1080 (1988), our Supreme Court concluded that the Medical Examining Board (board) had no jurisdiction to revoke the plaintiff's license to practice medicine because the plaintiff allowed his license to expire before the board filed disciplinary charges against him. Id., 501. The court reasoned that the board only had authority to discipline "physicians," and the fact that the plaintiff's license had expired meant that he was not a physician *at the time that the board commenced disciplinary proceedings*. Id., 502. The court further reasoned that, although the board might have had "continuing jurisdiction to levy a monetary fine on the plaintiff," the board only sought revocation of the plaintiff's license. Id., 503.

Although the present matter is similar to *Stern* because the plaintiff did not have an active mortgage lender license at the time that the commissioner revoked its license in the underlying proceedings, the present matter is distinguishable from *Stern* in two significant ways. First, the plaintiff held an active mortgage lender license at the time that the department initiated revocation proceedings against it in the compliance matter. The plaintiff's license did not become inactive until approximately ten months after the commissioner first issued

or suspension proceeding, or issue an order revoking or suspending the license, under applicable authorities not later than one year after the date of such expiration. . . ."

notice of intent to revoke the plaintiff's license in the compliance matter. Second, the department not only sought to revoke the plaintiff's license, but also to impose a civil fine and to issue a cease and desist order, whereas the board in *Stern* sought only to revoke an expired license. Accordingly, unlike the board in *Stern*, the commissioner had authority to pursue revocation proceedings and civil penalties in the compliance matter because the plaintiff was a licensed mortgage lender subject to the department's authority at the time that the proceedings commenced. See *Patel* v. *Board of Healing Arts*, 22 Kan. App. 2d 712, 713, 920 P.2d 477 (1996) (because jurisdiction was proper at time disciplinary proceedings commenced, court found that subsequent cancellation of plaintiff's license did not affect board's jurisdiction).

Moreover, the plaintiff cannot avoid the consequences of violating the mortgage loan statutes merely by forfeiting its surety bond during the department's compliance revocation proceeding. If that were the case, the department's ability to hold mortgage lenders accountable for violating mortgage loan statutes would be significantly circumscribed because compliance revocation proceedings, which by nature require intensive fact finding, take more time than revocation proceedings based on a mortgage lender's failure to maintain proper surety bond coverage. "In construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended." (Internal quotation marks omitted.) *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, supra, 288 Conn. 803. Thus, we conclude that the commissioner had the authority to follow through with its initial revocation proceedings in the compliance matter after the plaintiff forfeited its surety bond, which *required* the commissioner to initiate additional revocation proceedings that carry lesser consequences. See id., 805 ("[t]he plaintiffs' contention that

a provider can place itself beyond the reach of these strong statutory sanctions and provisions simply by terminating its provider agreement on thirty days notice, defies logic and requires a construction of the statute that thwarts its intended purpose, and leads to an absurd result").

Furthermore, the final status of the plaintiff's license was not yet settled when the commissioner revoked the plaintiff's license in the compliance matter. The commissioner issued the order to revoke the plaintiff's license in the compliance matter on April 16, 2021. At that time, the plaintiff's appeal of the surety bond matter to the Supreme Court was still pending. Our Supreme Court's affirmance of the surety bond revocation in February, 2022, would not constitute a basis for the Superior Court to reverse the commissioner's revocation decision in the underlying matter. Clearly, the commissioner had the authority and jurisdiction to revoke the plaintiff's license for its various compliance failures given that that the revocation proceedings were instituted prior to the surety bond matter and the plaintiff was still disputing the revocation of its license in the surety bond matter when the commissioner acted in the present matter. The plaintiff could have chosen to abandon its appeal of the revocation in the present matter because its revocation in the surety bond matter had been upheld by our Supreme Court, but it chose to continue with the appeal because of the regulatory consequences of the revocation in the present matter as well as the substantial penalty that the commissioner imposed. Under these circumstances—where the plaintiff, recognizing the possibility of a compliance revocation, consciously caused the first revocation to avoid the more serious consequences of the second revocation—it is somewhat disingenuous for the plaintiff to argue that, once its license had been revoked, it could not be revoked a second time. This is especially true

given that the more serious revocation proceeding, which resulted in the second revocation, began first.

Because we find that the commissioner had the authority to revoke the plaintiff's mortgage lender license in the compliance matter after the compelled revocation of the plaintiff's license in the surety bond matter, the trial court did not err in failing to modify or vacate the commissioner's revocation order.

II

The plaintiff next claims that the court improperly deferred to the department's statutory interpretation of "mortgage loan originator" as defined in § 36a-485 (20). We disagree.

"[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, supra, 288 Conn. 833. "An appellate court's duty in assessing whether substantial evidence has been presented is to determine whether the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred from the evidence presented." (Internal quotation marks omitted.) Id., 834.

The parties' dispute as to the meaning of "mortgage loan originator" presents a question of statutory interpretation. As previously stated, although courts afford

deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes, such deference is "unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716–17, 6 A.3d 763 (2010). The department's interpretation of "mortgage loan originator" has never been subjected to judicial scrutiny or consistently applied by the agency over a long period of time. Accordingly, the traditional deference normally accorded to an agency's interpretation of a statutory term is not warranted in this case. See id., 717–18. Additionally, because the appeal to the trial court was based solely on the record, we accord no deference to the trial court's interpretation of "mortgage loan originator." See *Commissioner of Correction* v. *Freedom of Information Commission*, supra, 307 Conn. 63 n.15.

The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (federal SAFE Act), 12 U.S.C. § 5101 et seq.,[20] is "the main federal statute governing licensing" of MLOs. *Consumer Financial Protection Bureau* v. *1st Alliance Lending, LLC*, Docket No. 3:21-cv-55 (RNC), 2022 WL 993582, *3 (D. Conn. March 31, 2022). The federal SAFE Act "encouraged states to implement state versions of the SAFE Act, with the minimum standards in the federal statute as a floor. 12 C.F.R. § 1008.1 (b)." *Consumer Financial Protection Bureau* v. *1st Alliance Lending, LLC*, supra, 2022 WL 993582, *2. As a result of the federal SAFE Act, the Connecticut legislature enacted the Connecticut SAFE

[20] Title 12 of the United States Code, § 5102 (4) (A), provides that a loan originator, who must be licensed, "means an individual who—(I) takes a residential mortgage loan application; and (II) offers or negotiates terms of a residential mortgage loan for compensation or gain . . . ."

Act, which provides in relevant part that "[m]ortgage loan originator means an individual who for compensation or gain . . . (A) takes a residential mortgage loan application, or (B) offers or negotiates terms of a residential mortgage loan. . . ." General Statutes § 36a-485 (20). Pursuant to the federal SAFE Act as implemented by the Connecticut SAFE Act, individuals who engage in either activity must be licensed as an MLO.[21]

Both parties agree that the additional definitions set forth in Regulation H, 12 C.F.R. § 1008 et seq., which implements the federal SAFE Act, should govern what conduct constitutes acting as an MLO pursuant to the Connecticut SAFE Act. Regulation H provides that "[a]n individual 'takes a residential mortgage loan application' if the individual receives a residential mortgage loan application for the purpose of facilitating a decision whether to extend an offer of residential mortgage loan terms to a borrower or prospective borrower (or to accept the terms offered by a borrower or prospective borrower in response to a solicitation), whether the application is received directly or indirectly from the borrower or prospective borrower." 12 C.F.R. § 1008.103 (c) (1) (2024). The parties disagree as to whether the conduct of the plaintiff's HLCs meets the definition of "tak[ing] a residential mortgage loan application" as set forth in Regulation H. The plaintiff argues that the department improperly expanded the definition of MLO to include individuals that "collect limited information to enter into a computer [so] that the company can provide a prequalification letter . . . ." The department, on the other hand, argues that it has not expanded the definition of MLO and that the plaintiff's HLCs'

[21] Because we conclude that substantial evidence supports the commissioner's finding that the plaintiff's HLCs took residential mortgage loan applications in violation of the Connecticut SAFE Act, we do not reach the issue of whether substantial evidence also supports the commissioner's finding that the HLCs offered or negotiated terms of residential mortgage loans.

conduct constitutes taking applications under the guise of processing prequalification. We agree with the department.

"In construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended. . . . Moreover, [w]e must avoid a construction that fails to attain a rational and sensible result that bears directly on the purpose the legislature sought to achieve. . . . If there are two possible interpretations of a statute, we will adopt the more reasonable construction over one that is unreasonable." (Citations omitted; internal quotation marks omitted.) *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, supra, 288 Conn. 803–804.

Here, the plaintiff's HLCs communicated with potential borrowers, collected information, and input such information into the Byte database, which automatically generated draft loan applications for the MLOs with that information. The plaintiff argues that this conduct does not constitute "taking a loan application" because HLCs do not collect *all* information necessary for an application. In particular, the plaintiff argues that it avoided the licensure requirement by instructing the HLCs not to collect information on potential borrowers' property addresses. It appears that the plaintiff seeks to apply the definition of "application" set forth in TRID, which provides that "an application consists of the submission of the consumer's name, the consumer's income, the consumer's social security number to obtain a credit report, *the property address*, an estimate of the value of the property, and the mortgage loan amount sought." (Emphasis added.) 12 C.F.R. § 1026.2 (a) (3) (ii) (2024). Regulation H, however, defines application more broadly. It states that "[a]pplication means a request, in any form, for an offer (or a response to a solicitation of an offer) of residential mortgage loan

terms, and the information about the borrower or prospective borrower that is customary or necessary in a decision on whether to make such an offer." 12 C.F.R. § 1008.23 (2024). Because the federal SAFE Act provides the minimum standards for state versions of the SAFE Act, the Connecticut SAFE Act definition of "application" cannot be narrower than the federal definition. We conclude that the broader definition set forth in Regulation H governs the definition of application for the purpose of determining whether the plaintiff violated the Connecticut SAFE Act. Accordingly, the plaintiff cannot avoid the licensing requirement of the Connecticut SAFE Act merely by instructing the HLCs not to obtain property addresses because neither the federal SAFE Act nor Regulation H expressly requires applications to contain that information.

Even if we accepted the plaintiff's contention that property addresses are a necessary element of applications, there is substantial evidence in the record showing that the HLCs routinely collected all information necessary, including property addresses, to complete all six components of the 1003 form, which the plaintiff agrees is a residential mortgage loan application. For example, the plaintiff employed Martin Murdock as an HLC from July, 2016, to January, 2019. The following exchange occurred between the department's counsel and Murdock before the hearing officer:

"Q. So, looking at the first bullet point [of the HLC job description] it says 'obtain all applicable information to complete 1003.' Would you say that while [an HLC for the plaintiff] that you basically obtained all applicable information to complete 1003 for potential borrowers?

"A. Yes.

"Q. And then in parentheses it says 'no property information or final loan amount.' Would you at times obtain property information for a potential borrower?

"A. At times, yes.

"Q. And would you obtain a final loan amount for a potential borrower while employed as [an HLC for the plaintiff]?

"A. Yes.

"Q. So, looking at this description of [HLC while employed by the plaintiff] you would obtain all applicable information to complete a 1003, including property information and final loan amount?

"A. Yeah. . . . [A]t times I sometimes didn't do the full inquiry. I would get income, assets, credit information, and I would ask them if there's a particular property that they had in mind. If they didn't, then I would leave that information out for property information, the final loan amount. If they did, I would let them know if that house is something that they could pursue."

The plaintiff also employed Alexander Cottone as an HLC from June, 2016, to December, 2018. Similar to Murdock, Cottone testified that he would obtain all information necessary to complete all six parts of the 1003, including property addresses, which he used to gather information on loans available to potential borrowers.[22] Sara Jenkins, an HLC employed by the plaintiff

[22] The following exchange occurred between the department's counsel and Cottone before the hearing officer:

"Q. Okay. So, you would obtain information to complete a 1003?

"A. I would, yes. I would absolutely get all parts that were necessary to complete a 1003, all six parts, yes.

"Q. So, this [HLC job description] indicates no property information. So would you at times get property information . . . ? . . .

"A. Yes, when people would tell me that they found a house I would tell them, send me the contract. I wouldn't be the one who would put the address in the system. The majority of the time it was done by the [MLO]. They were the one who put that last part in, which we had a few at the company. I'm sure you guys know. But, yes, we would get that information. It would come in the form of either a purchase and sales contract, which would come directly to us as [an HLC]. And then it was handed off to—which was the last part of the—the application, and then it was handed off to the [MLO] for them to do the official . . . 1003. . . .

from July, 2013, to July, 2019, also testified that she would obtain purchase and sales agreements from potential borrowers, which showed the property addresses. Furthermore, the plaintiff's own internal compliance audit report stated that HLCs engaged in activity that required an MLO license and that the compliance issues were "systemic." Because the plaintiff's HLCs testified that they routinely obtained property addresses from potential borrowers, substantial evidence supports a finding that the HLCs took mortgage loan applications even under the plaintiff's own interpretation of Regulation H.

The plaintiff additionally argues that the HLCs' collection of information does not constitute the taking of a mortgage loan application because the HLCs did not input consumer information directly into applications. The appendix to Regulation H, however, provides that "[a]n individual 'takes a residential mortgage loan application' even if the individual . . . [o]nly inputs the information into an online application or other automated system . . . ." 12 C.F.R. § 1008, Appendix A (a) (1) (i) (2024). Here, HLCs routinely collected all information required for a residential mortgage loan application and input such information into the Byte system, which automatically created draft applications for the MLOs. We conclude that inputting consumer information into the Byte system constitutes taking a residential mortgage loan application pursuant to the definition set forth in Regulation H.

"Q. So, even before you get a purchase and sale contract would you receive information concerning a property address that a borrower was interested [in]?

"A. Yes, absolutely.

"Q. And what if anything would you do with that information?

"A. Usually look up the house, look up taxes, what the purchase price is on Zillow, or . . . something similar to that. That would give me an accurate portrayal of what the potential amount could be for . . . the loan amount."

Lastly, the plaintiff argues that the HLCs' collection of information does not constitute the taking of a mortgage loan application because MLOs independently verify the information before completing the application. The appendix to Regulation H, however, provides that "[a]n individual 'takes a residential mortgage loan application' even if the individual . . . [i]s not responsible for verifying information. The fact that an individual who takes application information from a borrower or prospective borrower is not responsible for verifying that information . . . does not mean that the individual is not taking an application . . . ." 12 C.F.R. § 1008, Appendix A (a) (1) (i) (2024). Accordingly, even if the MLOs were responsible for verifying information collected by HLCs, an HLC's collection of unverified consumer information constitutes taking an application.

The trial court properly concluded that substantial evidence supports the commissioner's finding that the plaintiff violated the Connecticut SAFE Act by using unlicensed HLCs to take residential mortgage loan applications. The administrative record reveals that, under the plaintiff's business model, HLCs collected information from potential borrowers, including their property addresses, and input the collected information into the Byte system, which automatically generated draft applications for the MLOs. We conclude that this conduct constitutes "taking a residential mortgage loan application" under the definitions set forth in Regulation H and the Connecticut SAFE Act. Accordingly, we conclude that the court did not improperly defer to the department's interpretation of the definition of MLO in reaching its conclusion that substantial evidence supports the commissioner's finding that the plaintiff violated the Connecticut SAFE Act.

III

The plaintiff next claims that the commissioner improperly applied § 36a-498e (b) (1) retroactively.

Although the department agrees that § 36a-498e (b), which became effective July 1, 2018, does not apply retroactively, it argues that substantial evidence supports the commissioner's finding that the plaintiff's improper conduct continued after the provision's effective date and, therefore, the commissioner did not apply the statute retroactively.[23] We agree with the department.

The appropriate standard of review is well settled. As previously stated, "[r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable." (Internal quotation marks omitted.) *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, supra, 288 Conn. 833.

Section 36a-498e (b) provides in relevant part: "(1) [n]o person, other than an individual, who is required to be licensed . . . shall fail to establish, enforce and maintain policies and procedures reasonably designed to achieve compliance with [regulatory requirements]. . . . (3) No violation of this subsection shall be found unless the failure to establish, enforce and maintain policies and procedures resulted in conduct in violation of . . . state or federal law . . . ."

[23] The department also argues that the plaintiff did not preserve its retroactivity claim for appeal because it "never made this argument before the commissioner and at best presented a cursory statement about the effective date of the subsection before the trial court." The plaintiff stated the following in its memorandum in support of its appeal to the trial court: "§ 36a-498e (b) was promulgated by Public Act 17-233 and became effective July 1, 2018. None of the sixteen borrower transactions discussed in the [commissioner's decision] extend past May, 2018. Accordingly, [the plaintiff] could not have violated § 36a-498e (b) . . . with regard to the transactions discussed in the [commissioner's decision]." Because this claim presents a question of whether the department improperly applied a statute, the plaintiff properly preserved the claim by raising it to the trial court. We, therefore, reject the department's preservation argument.

Here, the commissioner made the following findings: "While [the plaintiff] had a patchwork of policies and procedures that were modified over time, these were insufficient to address the violations involved in this case. More important, such policies and procedures were not enforced. [The plaintiff] hired employees with no prior experience or training in the financial services industry to be the main point of consumer contact; did not sufficiently address the red flags associated with call center employee conduct; assigned call center employees to sales rather than having them supervised by a licensed MLO; offered only sporadic training . . . which was at odds with the compensation structure and employee contests that encouraged call center employees to snare borrowers at any cost; and did not utilize a predictable and consistent pattern of discipline in dealing with problem employees. While [the plaintiff] argues that it subsequently attempted remedial measures, including discipline, in some instances, this was a case of 'too little, too late.' "

Substantial evidence in the record supports the commissioner's finding that the plaintiff failed to establish, enforce, and maintain policies and procedures reasonably designed to achieve compliance with regulatory requirements and that such failure resulted in conduct that violated state and federal law. The plaintiff's own 2017 internal audit report, which was published on February 1, 2018, stated that its business model increased the likelihood of violations, and communications between the plaintiff's compliance officer and executives confirmed that the plaintiff understood this. Indeed, the plaintiff created a business model that incentivized the HLCs to close loans by paying them commission, holding contests, and offering prizes based on the number of loans they closed. Some HLCs made more in commission than base salary, and many believed they were the primary contact between the plaintiff and potential

borrowers. Although the plaintiff incentivized the HLCs to close loans, it instructed them not to take the property information of potential borrowers to avoid the unlicensed taking of mortgage loan applications. As discussed in part II of this opinion, however, this instruction was often ignored by HLCs, without negative consequences, and, thus, substantial evidence supports the commissioner's finding that the plaintiff violated the Connecticut SAFE Act. Moreover, the plaintiff concedes that it violated TILA and other regulatory requirements related to issuing adverse action notices to borrowers. Accordingly, the plaintiff's policies and procedures resulted in regulatory violations.

It can be reasonably inferred from the administrative record that the plaintiff's systemic compliance issues continued after the effective date of § 36a-498e (b). The plaintiff argues that it could not have violated the Connecticut SAFE Act after July 1, 2018, because its 2018 internal audit report rated its institutional licensing compliance as "satisfactory" and its compliance management as "fair." This report is undercut, however, by the fact that the plaintiff was provided an opportunity to show compliance with the legal requirements for retention of its mortgage lender license on June 14, 2019, but it failed to do so. Additionally, testimony of the plaintiff's employees indicates that the plaintiff did not come into compliance with the Connecticut SAFE Act after July 1, 2018. Massey, the plaintiff's vice president of compliance, testified that from 2017 to 2019, the plaintiff did not focus on compliance. She stated that she had to argue for "even the simplest of compliance," and it was "not something that was well liked or supported." She further testified that after she published the 2017 internal audit report on February 1, 2018, she recommended long-term solutions to ensure that the plaintiff complied with licensing requirements, but the plaintiff never implemented the solutions. In

fact, the plaintiff told Massey that it would not implement her recommendations at least partially because they would cost the plaintiff too much money.

Moreover, Murdock, Cottone, and Jenkins, who were employed by the plaintiff as HLCs before and after July 1, 2018, testified that, throughout their employment with the plaintiff, they collected all information necessary to complete residential mortgage loan applications, which supports the commissioner's finding that the plaintiff violated the SAFE Act, as discussed in part II of this opinion. Neither Murdock, Cottone, nor Jenkins indicated that the plaintiff changed their job responsibilities after July 1, 2018. Because the evidence demonstrates that the plaintiff did not make any significant changes to ensure regulatory compliance after July 1, 2018, the commissioner reasonably could infer from the record that the plaintiff's violations that took place prior to the effective date of § 36a-498e (b) continued after that date.

Substantial evidence in the record supports the commissioner's finding that the plaintiff failed to establish, enforce, and maintain policies and procedures reasonably designed to achieve compliance with regulatory requirements, which resulted in conduct that violated, inter alia, the Connecticut SAFE Act after July 1, 2018. Because substantial evidence supports the commissioner's finding that the plaintiff violated § 36a-498e (b) after its effective date, we conclude that the commissioner did not improperly apply § 36a-498e (b) retroactively.

IV

The plaintiff next claims that the commissioner improperly concluded that the plaintiff failed to fulfill its obligation pursuant to § 36a-17 to cooperate with the department's investigation because (1) the department failed to seek judicial enforcement of its subpoena and

(2) substantial evidence does not support the commissioner's finding that the plaintiff failed to cooperate with it. We disagree.

Section 36a-17 provides in relevant part: "(c) For the purpose of any investigation . . . the commissioner may . . . direct, order or subpoena such person to produce records the commissioner deems relevant or material. . . . (e) Any person who is the subject of any inquiry, investigation, examination or proceeding pursuant to this section shall (1) make its records available to the commissioner in readable form . . . (3) provide copies or computer printouts of records when so requested; (4) make or compile reports or prepare other information as directed by the commissioner . . . and (6) otherwise cooperate with the commissioner. . . ."

The following additional facts are relevant to the resolution of this claim. On September 19, 2018, as part of the department's investigation into the compliance matter, Serrano requested that the plaintiff provide emails sent and received by ten of the plaintiff's employees over a specified four month period. In recognition that the materials requested were voluminous, Serrano offered to allow a "rolling basis for the production of such records" and advised the plaintiff that it did not have to produce emails protected by the attorney-client privilege. Counsel for the plaintiff responded as follows: "[T]here are over 200,000 emails for the custodians and time frame you identified, some of which are protected by the attorney-client privilege and others of which are personal or otherwise irrelevant to regulated lending activities. To review each of these 200,000-plus emails . . . would be time and cost prohibitive." After discussing the production request over a phone call, Serrano emailed the plaintiff's counsel clarifying the scope and relevancy of their production request and explaining that failure to comply would result in a violation of § 36a-17. On October 12, 2018, the department issued

a subpoena ordering the plaintiff to produce the requested emails, with which the plaintiff failed to comply. At the time that the administrative hearings began, the plaintiff still had not produced a significant portion of the requested emails.

The commissioner found that, "[d]uring the hearing, the department noted that no emails were produced in response to the request, notwithstanding the department's subsequent issuance of a subpoena . . . with which [the plaintiff] failed to comply." It further found that "[the plaintiff's] claim of hardship is not persuasive. In addition, as a regulated member of the financial services industry serving consumers in Connecticut and other states, [the plaintiff's] failure to comply with a governmental subpoena is unacceptable." The commissioner thereafter concluded that "[the plaintiff's] failure to produce the requested emails even after the agency subpoenaed them constitutes a violation of [§] 36a-17 (e) . . . . As a then-licensed mortgage lender, [the plaintiff] had an obligation to comply with state laws governing the operation of its licensed business."

On appeal, the plaintiff argues that the commissioner cannot find that it had failed to cooperate in violation of § 36a-17 because the department failed to seek judicial enforcement of the subpoena. Although § 36a-17 grants the commissioner the authority to request the Superior Court to order a party to comply with a subpoena,[24] the department is not required to do so.[25] Obtaining a court

[24] General Statutes § 36a-17 (f) provides: "The [S]uperior [C]ourt for the judicial district of Hartford, upon application of the commissioner, may issue to any person refusing to obey a subpoena issued pursuant to subsection (c) of this section an order requiring that person to appear before the commissioner or any officer designated by the commissioner to produce records so ordered or to give evidence concerning the matter under investigation or in question. Failure to obey the order of the court may be punished by the court as a contempt of court."

[25] The plaintiff additionally argues that the department cannot find that it failed to cooperate because the department failed to "exhaust [its] statutory remedies" by seeking judicial enforcement of the subpoena. Such argument is without merit. "The doctrine of exhaustion of administrative remedies is

order would permit the department to move for contempt in the event of failure to comply, but a court order is not necessary to make the subpoena enforceable. Rather, if the plaintiff wished to avoid the subpoena, it could and should have filed a motion to quash or otherwise objected to the subpoena. See *State* v. *Williams*, 146 Conn. App. 114, 148, 75 A.3d 668 (2013) ("[a] subpoena . . . commences an adversary process during which the person served with the subpoena may challenge it in court before complying with its demands" (internal quotation marks omitted)), aff'd, 317 Conn. 691, 119 A.3d 1194 (2015); *Southridge Capital Management, LLC* v. *Pitkin*, Superior Court, judicial district of Hartford, Docket No. CV-07-4034033-S (March 24, 2008) (45 Conn. L. Rptr. 238, 238–39) ("[b]y its application to quash an investigative subpoena issued pursuant to [the commissioner's statutory authority], the plaintiff is asserting his right to be heard expeditiously on a matter that is limited in scope from an ordinary civil action"). Accordingly, we conclude that the department was not required to seek judicial enforcement in order to find that the plaintiff failed to cooperate with its subpoena.

The plaintiff next argues that the evidence does not support the commissioner's finding that it violated

well established in the jurisprudence of administrative law. . . . Under that doctrine, a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and until that remedy has been sought in the administrative forum. . . . In the absence of exhaustion of that remedy, the action must be dismissed." (Internal quotation marks omitted.) *Direct Energy Services, LLC* v. *Public Utilities Regulatory Authority*, 347 Conn. 101, 145–46, 296 A.3d 795 (2023). The exhaustion of *administrative* remedies doctrine applies to parties that prematurely seek to avail themselves of judicial remedies in an administrative matter. There is no corollary for this doctrine as to judicial remedies, however, as we have never held that an administrative agency is required to seek judicial remedies before enforcing their statutory authority in administrative proceedings. The doctrine is therefore inapplicable where, as here, the department used administrative remedies to enforce its subpoena pursuant to its statutory authority without bringing the matter to the court.

§ 36a-17 because the plaintiff made efforts to resolve the production dispute, and it produced many of the emails requested. The plaintiff contends that it "made repeated attempts to meet and confer with [the department] in order to reach a reasonable resolution" but that the department "largely ignored the plaintiff's request to meet and confer." The record reveals, however, that the department was responsive to the plaintiff's concerns regarding its production request. Between September 26 and October 5, 2018, Serrano and the plaintiff's counsel exchanged multiple emails in which the department narrowed the scope of its request and extended the deadlines for production. On October 5, 2018, the plaintiff's counsel and Serrano talked about the production request over the phone, and Serrano sent a follow-up email again clarifying the scope of its request and deadlines for production.

Despite the department's willingness to work with the plaintiff so that it could meet its burden of production, the record demonstrates that the plaintiff did not produce all emails requested. Although the plaintiff points to emails cited in the commissioner's order as evidence that it complied with the department's production request, Daniel Landini, an associate financial examiner for the department, testified that the plaintiff never produced the emails requested. The plaintiff's counsel also stated before the hearing officer that "our issue is not that we didn't have the emails. It is that there were way too many." Moreover, John DiIorio, the plaintiff's chief executive officer, testified that he did not know if the plaintiff ever produced the emails requested by the department. He also testified, however, that the plaintiff did not produce the emails requested in the department's subpoena because it was "waiting for [the department] to seek enforcement, and [it] didn't." Thus, contrary to the plaintiff's assertions,

substantial evidence supports a finding that the department conferred with the plaintiff to resolve the plaintiff's concerns, but the plaintiff still failed to produce all requested emails.

The department, pursuant to its statutory authority in § 36a-17, issued a valid subpoena on the plaintiff to produce emails sent and received by particular employees during a limited period of time. The plaintiff never effectively challenged the subpoena and refused or failed to fully comply with it. Thus, the trial court properly concluded that substantial evidence in the record supports the commissioner's finding that the plaintiff failed to cooperate with the department's subpoena in violation of § 36a-17.

V

The plaintiff next claims that it was deprived of due process because (1) the department failed to give the plaintiff an opportunity to be heard by an independent fact finder, and (2) the court failed to provide meaningful review of the commissioner's decision.[26] We conclude that the plaintiff's due process claim lacks merit.

[26] The plaintiff also argues that it was deprived of due process because (1) the department failed to formally articulate its interpretation of "mortgage loan originator," and (2) the trial court deferred to the department's interpretation. In part II of this opinion, we concluded that the court did not improperly defer to the department's statutory interpretation because substantial evidence supports the commissioner's finding that the plaintiff violated the Connecticut SAFE Act even pursuant to the plaintiff's own interpretation of MLO. Furthermore, the department applied the definition set forth in Regulation H, which the plaintiff agrees governs the definition of MLO. Accordingly, the department has not changed the law nor applied a "novel" interpretation of MLO as both parties understood the same regulation to apply in the present matter. See *Levinson* v. *Board of Chiropractic Examiners*, 211 Conn. 508, 535, 560 A.2d 403 (1989) ("due process requires that the notice given must . . . fairly indicate the legal theory under which such facts are claimed to constitute a violation of the law" (internal quotation marks omitted)). The fact that the department did not accept the plaintiff's interpretation as to what conduct constitutes acting as an MLO under Regulation H does not amount to a due process violation. Thus, the plaintiff's argument that the department's statutory interpretation violated its due process rights is without merit.

The plaintiff first argues that the department failed to provide a neutral and impartial hearing because both the commissioner and the hearing officer were biased in favor of the department. It argues that the hearing officer was biased because she is employed by the department and reports to the commissioner. It additionally argues that the commissioner was biased because he (1) improperly found that the plaintiff violated the Connecticut SAFE Act and (2) filed the notices of intent and issued the final decision in the administrative matter. We are not persuaded.

Our Supreme Court has "held repeatedly that the procedures required by the UAPA exceed the minimal procedural safeguards mandated by the due process clause." (Internal quotation marks omitted.) *Pet* v. *Dept. of Health Services*, 228 Conn. 651, 661, 638 A.2d 6 (1994). The UAPA provides that, "[i]n a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice." General Statutes § 4-177 (a). "[A] hearing in an agency proceeding may be held before (1) one or more hearing officers, provided no individual who has personally carried out the function of an investigator in a contested case may serve as a hearing officer in that case, or (2) one or more of the members of the agency." General Statutes § 4-176e.

"It is well established that [i]t is not violative of due process for the same authority which initiated the subject of the hearing to listen to and determine its outcome as long as that authority gives the person appearing before it a fair, open and impartial hearing. . . . An administrative agency can be the investigator and adjudicator of the same matter without violating due process." (Internal quotation marks omitted.) *Elf* v. *Dept. of Public Health*, 66 Conn. App. 410, 425, 784 A.2d 979 (2001). Moreover, "there is a presumption that administrative [agency] members acting in an adjudicative

capacity are not biased. . . . To overcome the presumption, the plaintiff . . . must demonstrate actual bias, rather than mere potential bias, of the [agency] members challenged, unless the circumstances indicate a probability of such bias too high to be constitutionally tolerable. . . . The plaintiff has the burden of establishing a disqualifying interest." (Internal quotation marks omitted.) *Moraski* v. *Board of Examiners of Embalmers & Funeral Directors*, 291 Conn. 242, 262, 967 A.2d 1199 (2009).

Here, the department provided the plaintiff with fifteen days of administrative hearings before a hearing officer, and the commissioner subsequently issued a final decision after reviewing the hearing officer's proposed decision as well as the administrative record. The plaintiff does not point to any evidence that shows that the hearing officer personally carried out investigative functions in this matter. The fact that the hearing officer is an employee of the department, standing alone, does not render the proceedings offensive to due process. See *Elf* v. *Dept. of Public Health*, supra, 66 Conn. App. 425. Nor is due process offended merely because the commissioner initiated the administrative proceeding and determined its outcome. See id. Although the plaintiff argues that the evidence relied on by the commissioner does not support his determination that the HLCs took applications and offered or negotiated loan terms, mere disagreement with the commissioner's findings is not sufficient to demonstrate that the commissioner was biased. Rather, the plaintiff attacks the propriety of the structure of the department generally, essentially arguing that there is inherent potential for bias. Because, as previously noted, the combination of investigatory and adjudicative functions within the same agency does not itself offend due process, the plaintiff has not satisfied its burden of showing

that it suffered unconstitutional bias. See id. Accordingly, we conclude that the department's hearing procedures complied with the UAPA and the plaintiff has failed to establish any facts indicating that the hearing officer or commissioner was biased. Thus, the department did not deprive the plaintiff of due process.

The plaintiff additionally argues that the trial court deprived it of due process by failing to provide meaningful review of the commissioner's decision. Again, we are not persuaded. "Our case law establishes that judicial review of administrative decisions is deferential. A statutory right to appeal, however, must be meaningful. [A] court cannot take the view in every case that the discretion exercised by the local [agency] must not be disturbed, for if it did the right of appeal would be empty . . . ." (Internal quotation marks omitted.) *Gibbons* v. *Historic District Commission*, 285 Conn. 755, 766, 941 A.2d 917 (2008). As previously discussed, "[r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable." (Internal quotation marks omitted.) *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, supra, 288 Conn. 833.

The plaintiff argues that the court misapplied the substantial evidence test by deferring to the department and, therefore, violated its due process rights. Such an argument is meritless. The plaintiff has failed to point to anything in the court's memorandum of decision that would support a conclusion that the trial court applied an incorrect standard of review. Instead, the plaintiff merely disagrees with the court's ultimate conclusions. The court, however, properly articulated the substantial evidence test and analyzed whether the record supports the commissioner's findings of violation. Moreover, on appeal to this court, we sit in the same position as

the trial court and conduct a de novo review of the administrative record, employing the same substantial evidence test. See *Commissioner of Correction* v. *Freedom of Information Commission*, supra, 307 Conn. 63 n.15. Because we review the record to ensure that substantial evidence supports the commissioner's challenged findings, we ensure that the court afforded the plaintiff due process by applying the correct test in determining that the commissioner's findings are supported by substantial evidence in the record.

VI

The plaintiff next claims that the penalties ordered by the commissioner are unconstitutionally excessive in violation of the eighth amendment to the United States constitution and article first, § 8, of the Connecticut constitution. We conclude that the plaintiff's claim is inadequately briefed and, therefore, we decline to review it.

"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." (Citation omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016); see also *Getty Properties Corp.* v. *ATKR, LLC*, 315 Conn. 387, 413, 107 A.3d 931 (2015) (claim was inadequately briefed when appellants undertook "no analysis or application of the law to the facts of [the] case"). "Where a claim is asserted in the statement of

issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003).

Here, the plaintiff argues that the penalties ordered by the commissioner are unconstitutionally excessive. The plaintiff uses approximately one and one-half pages to set forth the legal framework for determining whether a civil penalty is an excessive fine in violation of the eighth amendment to the United States constitution or article first, § 8, of the Connecticut constitution. See *Seramonte Associates, LLC* v. *Hamden*, 202 Conn. App. 467, 481, 246 A.3d 513 (2021) ("to determine whether a financial penalty is unconstitutional under the excessive fines clause of the eighth amendment to the federal constitution, courts rely on [a] two step inquiry"), aff'd, 345 Conn. 76, 282 A.3d 1253 (2022). Then, without engaging in legal analysis, the plaintiff concludes that, "[h]ere, the remedies are excessive fines under the federal and state tests." Not only does the plaintiff fail to discuss the facts of the case, but it also fails to specify which penalties the commissioner imposed and analyze how the legal authorities cited support its argument that such penalties are excessive. Because the plaintiff makes no effort to employ the governing "grossly disproportional test"; see *Seramonte Associates, LLC* v. *Hamden*, supra, 481–86; the plaintiff's claim that the commissioner ordered unconstitutionally excessive penalties is inadequately briefed.

VII

Last, the plaintiff claims that if any of the commissioner's findings of violation were made in error, we must remand the matter for a new penalty hearing because

the commissioner failed to specify which violations support the imposition of each penalty. As we have previously concluded in this opinion, the commissioner's challenged findings are supported by substantial evidence in the record. Therefore, remand is unwarranted.

The judgment is affirmed.

In this opinion the other judges concurred.

GMAT LEGAL TITLE TRUST 2014-1, U.S. BANK, NATIONAL ASSOCIATION, LEGAL TITLE TRUSTEE *v.* VITO CATALE ET AL.
(AC 47320)

Bright, C. J., and Moll and Clark, Js.

Syllabus

The defendant homeowners appealed following the trial court's granting of a motion filed by the substitute plaintiff, R Co., to reset the law days in accordance with this court's remand order in the defendants' previous appeal, in which this court had affirmed a judgment of strict foreclosure for R Co. The defendants objected to the motion to reset the law days, claiming that R Co. had not timely filed a new appraisal report or an updated foreclosure worksheet. *Held*:

This court summarily reversed the trial court's judgment resetting the law day and remanded the case to that court to make updated findings as to the amount of the debt and the fair market value of the property, and to set new law days or a sale date pursuant to *Wahba* v. *JPMorgan Chase Bank, N.A.* (349 Conn. 483).

Considered November 26—officially released December 17, 2024

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Spader, J.*, granted the plaintiff's motion for summary judgment as to liability only; thereafter, RMS Series Trust 2020-1 was substituted as the plaintiff; subsequently, the court, *Hon. Dale*

W. Radcliffe, judge trial referee, granted the substitute plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon, from which the named defendant et al. appealed to this court, *Alvord*, *Clark* and *DiPentima*, *Js.*, which reversed the judgment in part and remanded the case for further proceedings; thereafter, the court, *Cirello*, *J.*, rendered judgment of strict foreclosure; subsequently, the Supreme Court denied the petition for certification to appeal filed by the named defendant et al.; thereafter, the court, *Cirello*, *J.*, granted the substitute plaintiff's motion to reset the law days, and the named defendant et al. appealed to this court. *Reversed*; *further proceedings*.

Paul N. Gilmore, in support of the motion.

Douglas R. Steinmetz, in opposition to the motion.

Opinion

PER CURIAM. This case returns to us following the remand ordered in *GMAT Legal Title Trust 2014-1*, *U.S. Bank*, *National Assn.* v. *Catale*, 221 Conn. App. 90, 300 A.3d 1218, cert. denied, 348 Conn. 928, 305 A.3d 265 (2023), in which this court, inter alia, affirmed the trial court's judgment of strict foreclosure and remanded the case to that court for the purpose of setting new law days. See id., 113. Upon remand, on December 21, 2023, the substitute plaintiff, RMS Series Trust 2020-1,[1] filed a motion to reset the law days. On January 8, 2024, the defendants Vito Catale and Maria Catale[2] objected to the motion to reset the law days, arguing that the plaintiff had not filed a new appraisal

[1] On August 4, 2021, RMS Series Trust 2020-1 filed a motion to substitute itself for the original plaintiff, GMAT Legal Title Trust 2014-1, U.S. Bank National Association, as Legal Title Trustee, after the subject note and mortgage were assigned to it. The trial court granted the motion to substitute on August 23, 2021. Accordingly, all references to the plaintiff in this order are to RMS Series Trust 2020-1.

[2] Because Vito Catale and Maria Catale are the only defendants appealing, we refer to them as the defendants.

report within 120 days of the new judgment or an updated foreclosure worksheet. On January 8, 2024, the trial court granted the plaintiff's motion—after "reviewing the plaintiff's motion, the court file and [there being] no objection thereto"—and set the law days to commence on February 6, 2024. On January 12, 2024, the defendants filed a motion to reargue, requesting that the court reconsider its decision because the language in the order indicating that there was "no objection thereto" was incorrect. The plaintiff filed an objection; the defendants' reply and the plaintiff's surreply followed. On January 26, 2024, the court denied the motion to reargue, quoting this court's remand order; see *GMAT Legal Title Trust 2014-1*, *U.S. Bank*, *National Assn.* v. *Catale*, supra, 113; and stating that "[t]he only issue before the court was to reset the law day, which it did." This appeal followed.

On July 17, 2024, this court ordered, sua sponte, the parties to file memoranda addressing "whether the January 8, 2024 judgment resetting the law day should be summarily reversed and the case remanded for the purpose of making new findings as to the amount of the debt and the fair market value of the property, for the setting of new law days or a sale date, and for other proceedings according to law pursuant to *Wahba* v. *JPMorgan Chase Bank*, *N.A.*, 349 Conn. 483, [316 A.3d 338] (2024)." The parties subsequently filed memoranda in accordance with our order. Although the parties agree that the case must be remanded, they disagree as to the parameters of the remand.

In *Wahba* v. *JPMorgan Chase Bank*, *N.A.*, supra, 349 Conn. 483, our Supreme Court concluded: "[A] judgment of strict foreclosure is uniquely susceptible to becoming ineffective and stale over the course of time. Law days pass, the amount of the debt changes, and the property's value fluctuates. It is also axiomatic that foreclosure is peculiarly an equitable action . . . .

Thus, when an appellate court has affirmed a judgment of strict foreclosure and remanded the case to the trial court with direction to set new law days—perhaps years after the original judgment—we deem it necessary, unless expressly prohibited for some reason by the reviewing court's remand order, for the trial court to make a new finding as to the amount of the debt so that the parties know what the mortgagor must pay to redeem the property. . . . That being the case, we see no reason why, if the mortgagor makes an adequate proffer, equity would not also demand that the court determine the property's current value so that the court knows whether a strict foreclosure would result in potential windfall to the mortgagee. And, if a windfall to the mortgagee would result, we also see no reason why, in an appropriate case, equity would not demand that the court exercise its discretion and determine whether to modify the form of the judgment and to order a foreclosure by sale." (Citations omitted; internal quotation marks omitted.) Id., 498–99.

Applying these principles to the present action, we summarily reverse the January 8, 2024 judgment resetting the law day and remand the case for further proceedings pursuant to *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 349 Conn. 483, and in accordance with the rescript herein.

The January 8, 2024 judgment resetting the law day is summarily reversed and the case is remanded for the purpose of making updated findings as to the amount of the debt and the fair market value of the property, to set new law days or a sale date, and for other proceedings according to law pursuant to *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 349 Conn. 483; the indebtedness established in the initial judgment of strict foreclosure shall be treated as proven and established and any calculations changing the amount of the debt shall be based solely on additional debt incurred or payments made by the defendants after the initial judgment.