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particular defense strategy—something generally obtained at the habeas trial through the testimony of trial counsel or someone directly familiar with her strategy—was utterly lacking. Ordinarily, such evidence is crucial to meet the high hurdle imposed on a petitioner to show that his counsel’s exercise of professional judgment fell outside the wide range considered competent for constitutional purposes. See *O’Neil v. Commissioner of Correction*, 142 Conn. App. 184, 190–91, 63 A.3d 986 (lack of testimony by defense counsel about strategy was factor in determining petitioner failed to meet burden of demonstrating deficient performance), cert. denied, 309 Conn. 901, 68 A.3d 656 (2013). Like the claim of ineffective assistance regarding self-defense, because the petitioner bears the burden of demonstrating that counsel’s representation was deficient, the habeas court was required to consider whether Polan’s decision not to pursue a formal third-party culpability instruction might be viewed as a reasonable strategic decision under the facts and circumstances of this case as viewed from the position of counsel at the time of the decision. The habeas court failed to conduct this inquiry and made no relevant factual findings.

To summarize, we agree with the respondent that the habeas court, in analyzing whether Polan’s performance fell outside the wide range of competent performance, failed affirmatively to entertain whether Polan properly had weighed the pros and cons of various trial strategies and chose to defend the petitioner in a manner different than the strategy the habeas court thought she should have pursued. Although the death of counsel arguably made the petitioner’s case more difficult to prove than it might otherwise have been, that unfortunate reality does not lessen the petitioner’s significant burden. Because the petitioner was unable, due to a lack of evidence, to negate all possibility that Polan engaged in a reasonable, albeit only partially successful, defense strategy on the record available, he failed to meet his

NOTE: These pages (197 Conn. App. 871 and 872) are in replacement of the same numbered pages that appear in the Connecticut Law Journal of 9 June 2020.

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burden and the habeas court should have denied his petition for a writ of habeas corpus.

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

In this opinion the other judges concurred.

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MICHAEL DEVINE, ADMINISTRATOR (ESTATE  
OF TIMOTHY DEVINE) v. LOUIS  
FUSARO, JR., ET AL.\*  
(AC 42164)

DiPentima, C. J., and Keller and Norcott, Js.

*Syllabus*

The plaintiff administrator of the estate of the decedent, D, sought to recover damages from the defendants, four members of the tactical unit of the State Police, for the wrongful death of D following his suicide after a standoff with law enforcement on certain public property in Groton. The plaintiff's complaint alleged that, in response to a Groton police captain's request for the assistance of the tactical unit, the defendants arrived at the scene of the standoff, and, after several hours of unsuccessful negotiations with D, who was suicidal and armed with a handgun, they used less than lethal ammunition on him. D then shot himself in the head and died as a result of the gunshot. The trial court granted the defendants' motion to dismiss on the ground that the action was barred by the doctrine of sovereign immunity. In reaching its decision, the court determined that the wrongful death action, as alleged in the complaint, satisfied the four criteria of the test set forth in *Spring v. Constantino* (168 Conn. 563), and, therefore, it was brought against the defendants in their official, rather than individual, capacities. On the plaintiff's appeal to this court, *held* that the trial court properly granted the defendants' motion to dismiss the plaintiff's action on the ground of sovereign immunity: contrary to the plaintiff's contention, the four criteria of the *Spring* test were satisfied, and, therefore, the defendants were sued in their official, rather than their individual, capacities, as the defendants were state officials, the action against them concerned a matter in which they were representing the state and acting in the scope of their official police duties, the state was the real party in interest because the damages sought by the plaintiff were premised entirely on injuries alleged to have been caused by the official acts of the defendants, and a judgment against the defendants would impact

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\* The plaintiff's motion for reconsideration was granted by this court on August 5, 2020. This opinion has been superseded by *Devine v. Fusaro*, 205 Conn. App. 554, A.3d (2021).