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Table of Contents

CONNECTICUT REPORTS

CONNECTICUT APPELLATE REPORTS

NOTICE OF CONNECTICUT STATE AGENCIES

(continued on next page)

MISCELLANEOUS

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MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 228

MEMORANDUM DECISIONS

CAROL RICCIO *v.* HOWARD GREENBERG
(AC 46647)

Clark, Westbrook and DiPentima, Js.

Submitted on briefs September 11—officially released September 24, 2024

Plaintiff's appeal from the Superior Court in the judicial district of New Haven, *Grossman*, *J.*

Per Curiam. The judgment is affirmed.

CLAYVERN FOTHERGILL *v.* CITY OF HARTFORD
(AC 46742)

Clark, Seeley and Harper, Js.

Argued September 12—officially released September 24, 2024

Defendant's appeal from the Superior Court in the judicial district of New Britain, *Hon. Joseph M. Shortall*, judge trial referee.

Per Curiam. The judgment is affirmed.

CONNECTICUT REPORTS

Vol. 351

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* LATROY JOHNSON (SC 20778)

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

Syllabus

Convicted of two counts of murder and one count of assault in the first degree, among other crimes, in connection with the shooting of multiple victims, the defendant appealed to this court. The defendant claimed that the evidence was insufficient to defeat his claims of self-defense and defense of others with respect to the murder of one of the murder victims, W, and that the trial court improperly denied his request to admit evidence that another victim, T, previously had been convicted in New Jersey of the crime of arson to demonstrate T's violent character. *Held*:

The evidence was sufficient to defeat the defendant's claims of self-defense and defense of others with respect to the murder of W.

The defendant did not contest the sufficiency of the evidence to defeat his justification defenses with respect to his shooting of certain other victims, the evidence plainly demonstrated that those shootings, as well as the shooting of W, were part of a single, continuous episode occurring at the same location and time, and the jury reasonably could have credited testimony that W was acting defensively, rather than offensively toward the defendant, in an unsuccessful effort to protect one of the other victims from the defendant's violent assault.

Any error in the trial court's exclusion of evidence of T's New Jersey arson conviction was harmless, as that evidence would not have substantially swayed the jury's verdict.

There was no evidence that T was armed or the aggressor in the shootings, although the facts underlying T's arson conviction were not reflected in the record, the fact that T intentionally had set fire to a building or structure at some point in time for some unknown purpose did not make it more likely that he would use a firearm with the intent to kill or to inflict serious bodily injury, and there was abundant evidence to support a finding that, even if T had been the aggressor during the confrontation, the defendant had a duty to retreat.

Argued November 4, 2024—officially released January 14, 2025

Procedural History

Substitute information charging the defendant with two counts of the crime of murder, and with one count

each of the crimes of assault in the first degree, criminal use of a firearm, criminal possession of a firearm and carrying a pistol without a permit, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *D'Addabbo*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

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

Rocco A. Chiarenza, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, *Erika Brookman*, senior assistant state's attorney, and *Vicki Melchiorre*, former supervisory assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. In the early morning hours of September 23, 2017, the defendant, Latroy Johnson, shot and killed two victims, Joshua Taylor and Jovan Wooten, and seriously injured a third, Kiwan Smith. At trial, the defendant testified on his own behalf, admitting that he intentionally shot and killed Taylor and Wooten, but claiming that the killings were justified on the grounds of self-defense and defense of others. The jury rejected the defendant's justification defenses and found him guilty of the crimes of murder, assault in the first degree, criminal use of a firearm, criminal possession of a firearm, and carrying a pistol without a permit. In this direct appeal, the defendant contends that (1) the evidence was insufficient to defeat his claims of self-defense and defense of others with respect to Wooten, and (2) the trial court improperly excluded evidence of Taylor's violent character under § 4-4 (a) (2) of the Connecticut Code of Evidence. We affirm the judgment.

The jury reasonably could have found the following facts. On September 22, 2017, two of the victims, Smith

and Taylor, traveled from New York to Hartford in a Mercedes-Benz sport utility vehicle to provide financial assistance to Karee Iverson and his friends. Iverson had asked Smith to bring money, but, instead, Smith brought seventy-four bags of heroin. Smith and Taylor first went to the home of Iverson's cousin, Wooten, and then to the home of Iverson, where the defendant was present. At some point in the evening, the defendant, Smith, Taylor, Wooten, and Iverson decided to drive to Albany Avenue to purchase alcohol from a package store and food from a nearby pastry shop. On the way to the pastry shop, Smith traveled with Taylor in the Mercedes-Benz, while Wooten drove with Iverson and the defendant in another vehicle.

The area around the pastry shop is known as a popular "party scene," and the five men stayed there to socialize. Everyone was getting along until approximately 12:37 a.m., when Smith and Taylor got into a verbal disagreement with Iverson and the defendant. Wooten tried to defuse the situation without success. When Taylor walked over to the Mercedes-Benz and opened the trunk, the defendant stood up, walked toward Taylor, and shot him once in the head with a semiautomatic pistol. The defendant then approached Smith, spoke to him briefly, and shot him four times—three times in the chest and once in the arm. Neither Taylor nor Smith was armed. After the shooting began, Wooten, who was carrying a pistol, ducked behind the Mercedes-Benz and attempted to protect Smith by shooting in the defendant's direction. The defendant shot Wooten once in the head and then fled the scene on foot, heading in the direction of Oakland Terrace. The defendant did not call the police or summon emergency medical assistance for the victims.

Authorities responded to the shooting within minutes. Taylor was pronounced dead upon their arrival, and Wooten was transported to the hospital, where he later died as

a result of the gunshot wound inflicted by the defendant. Although Smith survived the shooting, he suffered serious bodily injuries, including a collapsed lung and nerve damage to his arm. A fourth victim, Keane Skyers, was caught in the crossfire. Skyers suffered multiple gunshot wounds but was not killed in the shooting.[1]

The police found no firearms or other weapons in their search of the trunk of the Mercedes-Benz and the area surrounding Taylor's body. Wooten was found holding a .40 caliber Smith & Wesson pistol in his hand. Nearby were three .40 caliber shell casings stamped "Federal .40 S & W." Later investigation revealed that Wooten had a valid permit to carry a firearm, that the Federal .40 S & W shell casings had been fired from Wooten's pistol, and that Wooten had gunshot residue on his right hand. The bullets that killed Taylor and Wooten, however, had not been fired from Wooten's pistol.

Although no other firearm was found at the scene, a group of three additional .40 caliber shell casings was discovered directly behind the Mercedes-Benz. These shell casings differed from the ones found near Wooten because they were marked "Sig .40 S & W." Subsequent forensic testing showed that they had not been fired from Wooten's firearm. Approximately one month after the shooting, a semiautomatic, .40 caliber Glock pistol was found abandoned on Oakland Terrace, the street toward which the defendant had fled on the night in question. The state's forensic examiner later determined that the Sig .40 S & W shell casings had been discharged from this weapon. The state presented expert testimony that the bullets that killed Taylor and Wooten were consistent with having been fired from a Glock pistol, but the expert witness could not say

[1] Skyers declined to cooperate with the police investigation, and the defendant was not charged with any crime in connection with Skyers' injuries.

definitively whether they had been fired from the particular Glock pistol found on Oakland Terrace.

The police obtained video surveillance footage of the shooting from nearby businesses. In the surveillance footage, Taylor can be seen casually approaching the trunk of a parked Mercedes-Benz, opening the trunk, and rubbing his face with his hands. The defendant is sitting nearby, while Smith, Wooten, Iverson, and other individuals mill about. After Taylor opens the trunk, the defendant suddenly stands up, approaches Taylor, and shoots him in the head. Taylor falls to the ground, and the defendant walks toward Smith as bystanders scatter. Smith and the defendant appear to communicate briefly as Wooten ducks behind the Mercedes-Benz. Seconds later, Smith falls to the ground, and the defendant walks to the other side of the Mercedes-Benz toward Wooten. Wooten and the defendant appear to exchange gunfire, after which Wooten falls to the ground. The defendant then puts his firearm in his pants and quickly walks away. As he is leaving, the defendant hurries past Skyers, who stumbles and collapses. The entire encounter, from the time the defendant shot Taylor until he fled the scene, lasted less than one minute.

Both Smith and Iverson testified at the defendant's trial. Their testimony was largely consistent, although they disagreed as to what prompted the shooting and whether any threats were made. Smith testified that the shooting was preceded by a verbal disagreement between him, Iverson, and the defendant over Iverson's and the defendant's use of the illegal drug phencyclidine (PCP) that night, and that neither Taylor nor Smith threatened the defendant or Iverson. Smith identified the defendant as the individual who shot him, Taylor, and Wooten. Iverson testified that he did not use PCP that night and that the disagreement was not over PCP but, instead, was about money that Smith claimed was owed to him by Iverson. Iverson stated that Smith had

threatened to kill him, that he did not see anyone with a gun that night, and that he did not know who shot Taylor, Smith, and Wooten because he ran away as soon as he heard gunshots.

The defendant testified in his own defense. He admitted that he was carrying a handgun that night, even though he was a convicted felon who was not permitted or licensed to carry a firearm.[2] The defendant explained that he had obtained the handgun from someone standing outside of the package store because he knew Wooten was armed and because Smith had told him earlier in the evening that he and Taylor were "riding dirty," which he understood to mean that they were carrying firearms. The defendant wanted the firearm for protection because he walks with a limp and is unable to run quickly as a result of a prior injury.

Like Smith and Iverson, the defendant testified that the shooting was precipitated by a verbal disagreement, but, according to the defendant, the disagreement was not about drugs or money; it was about a woman. The defendant stated that Taylor was trying to talk to Skyers' girlfriend, but she was ignoring him, which sent Taylor into a rage. Smith was also in a rage because the defendant and Iverson had interceded on the woman's behalf. Taylor said to the defendant, "if I had it on me already, I would've popped you just now," which the defendant interpreted to mean that Taylor would have shot him with a firearm. Wooten attempted to calm Taylor and Smith down, but Taylor "was still enraged, and he said, 'nah, I got something in my trunk that'll light the whole block up.' " The defendant believed that this meant that Taylor had "a machine gun, [an] AK-47—something big, something [that would] . . . shoot a lot of bullets at

[2] The defendant denied that the Glock pistol found on Oakland Terrace was the one he used that night. According to the defendant, he was carrying a .38 caliber special revolver, not a semiautomatic .40 caliber Glock pistol.

once . . . .'' The defendant was afraid for his own safety and for that of others around him, particularly a woman who was pregnant. When Smith told Taylor to ''go ahead,'' and Taylor walked over to the Mercedes-Benz and opened the trunk, the defendant felt ''obligated'' to do something to protect himself and the public. So, he walked up to Taylor and shot him.

The defendant testified that, after shooting Taylor, he approached Smith and asked him, ''what are you doing? Why did you bring these guys?'' While the defendant was talking to Smith, Wooten went behind the Mercedes-Benz and began shooting toward Skyers and Iverson. Contrary to Smith's testimony, the defendant stated that it was Wooten, not him, who shot and injured Skyers and Smith. The defendant explained that he shot and killed Wooten to eliminate the threat he posed to the public. After shooting Wooten, the defendant walked toward Oakland Terrace, passing an injured Skyers, whom he told ''to sit and wait for an ambulance.'' The next day, the defendant returned the handgun to the person who had given it to him, telling him that it was ''dirty,'' meaning that it had been used to shoot someone.

On cross-examination, the defendant acknowledged that he did not see Taylor point a gun at him, did not attempt to retreat or run away, and did not warn Taylor to ''stop, or I'm going to shoot you,'' before pulling the trigger and killing him. The defendant explained that the incident escalated quickly and that he could not retreat safely due to his disability and the ongoing risk to the public. He also stated that he told Taylor to ''stop'' as he shot him. The defendant conceded that, after the shooting, he did not contact the police and tell them that he had acted in self-defense or defense of others; nor did he summon emergency medical assistance for the victims.

The jury found the defendant guilty of two counts of murder in violation of General Statutes § 53a-54a (a)

and one count each of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), criminal use of a firearm in violation of General Statutes § 53a-216, criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). The trial court rendered judgment in accordance with the jury's verdict and sentenced the defendant to a total effective sentence of 105 years of incarceration. This appeal followed.

I

The defendant contends that the evidence was insufficient to defeat his claims of self-defense and defense of others with respect to Wooten because, "[a]t the time the defendant shot Wooten, Wooten was an active shooter who was shooting at members of the defendant's community." The state responds that the evidence was sufficient to support the jury's verdict because the defendant shot Wooten during the same deadly encounter in which he murdered Taylor and assaulted Smith, and, therefore, "a rational fact finder could conclude that the state had disproved at least one of the components of self-defense, or [had proved] the disqualifier that the defendant failed to abide by his duty to retreat." We agree with the state.

Self-defense and defense of others are justification defenses. As such, they "operate to exempt from punishment otherwise criminal conduct when the harm from such conduct is deemed to be outweighed by the need to avoid an even greater harm or to further a greater societal interest. . . . Thus, conduct that is found to be justified is, under the circumstances, not criminal." (Internal quotation marks omitted.) *State* v. *Bryan*, 307 Conn. 823, 832–33, 60 A.3d 246 (2013). Pursuant to General Statutes § 53a-19 (a), a person is justified in using deadly physical force to defend himself or others against an imminent use of physical force by a third

person only if "the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm." Thus, four conditions must exist for an act of violence to be justified on the grounds of self-defense or defense of others: "(1) the defendant must actually have believed that the victim was using or was about to use physical force against him [or others], (2) a reasonable person, viewing all the circumstances from the defendant's point of view, would have shared that belief, (3) the defendant must actually have believed that the degree of force he used was necessary for defending himself or herself [or others], and (4) a reasonable person, viewing all the circumstances from the defendant's point of view, also would have shared that belief." (Internal quotation marks omitted.) *State* v. *Washington*, 345 Conn. 258, 278–79 n.8, 284 A.3d 280 (2022); see also *State* v. *Bryan*, supra, 833–34 (self-defense and defense of others are governed by same legal principles).

There are statutory exceptions to self-defense and defense of others, only one of which—the duty to retreat—is applicable in the present appeal.[3] Pursuant

[3] The state relies on another statutory exception, the initial aggressor exception, which is codified at § 53a-19 (c) (2). See General Statutes § 53a-19 (c) (2) ("a person is not justified in using physical force when . . . he is the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of physical force"). Although the state requested an initial aggressor jury instruction, the trial court never issued the requested instruction, and, consequently, the jury was not presented with this legal theory at trial. We therefore have no basis for determining whether the jury reasonably could have found the evidence sufficient to reject the defendant's justification defenses under this alternative legal theory. Moreover, neither the state nor the defendant has challenged the propriety of the trial court's jury instructions on appeal; nor have they asked us to recharacterize the defendant's evidentiary insufficiency claim as an instructional impropriety claim. See *State* v. *Russell*, 101 Conn. App. 298, 327 n.30, 922 A.2d 191 (claim predicated on insufficient evidence under trial court's "jury charge rather than [directed] to the elements of the crime as statutorily defined and as set out in the

to § 53a-19 (b) (1), "a person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety . . . by retreating . . . ." "The underlying policy of the duty to retreat is that the protection of human life has a higher place in the scheme of social values than the value that inheres in standing up to an aggression." *State* v. *Anderson*, 227 Conn. 518, 530, 631 A.2d 1149 (1993).

The state bears the burden of disproving the defendant's justification defenses beyond a reasonable doubt. See *State* v. *Revels*, 313 Conn. 762, 779, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015); see also General Statutes § 53a-12 (a). To sustain its burden, the state must disprove beyond a reasonable doubt any of the components of these defenses or establish "beyond a reasonable doubt that any of the statutory exceptions . . . codified [at] § 53a-19 (b) and (c) applied." *State* v. *Grasso*, 189 Conn. App. 186, 200, 207 A.3d 33, cert. denied, 331 Conn. 928, 207 A.3d 519 (2019). In assessing the sufficiency of the evidence, we must focus on the theory of self-defense and defense of others that was presented at trial. See *State* v. *Revels*, supra, 779; *State* v. *Grasso*, supra, 197–98; see also footnote 3 of this opinion.

The standard of review governing a challenge to the sufficiency of the evidence to defeat a claim of self-defense or defense of others "is the same [as the] standard used when examining claims of insufficiency of

information" is one that "sounds in alleged instructional error," not insufficiency of evidence), cert. denied, 284 Conn. 910, 931 A.2d 934 (2007). Because we conclude that the evidence is sufficient under the instructions charged to the jury, we need not address the applicability of the initial aggressor exception. See, e.g., *State* v. *Brown*, 345 Conn. 354, 378–79 and n.10, 285 A.3d 367 (2022) (declining to recharacterize insufficiency of evidence claim as instructional impropriety claim because evidence was sufficient to support verdict on basis of charge given to jury).

the evidence." (Internal quotation marks omitted.) *State* v. *Revels*, supra, 313 Conn. 778. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict." (Internal quotation marks omitted.) Id.

We note at the outset that the defendant does not challenge the sufficiency of the evidence to defeat his justification defenses with respect to the murder of Taylor and the assault of Smith. Thus, for purposes of the present appeal, it is undisputed that the jury reasonably could have found that the defendant unjustifiably killed Taylor and injured Smith mere seconds before he shot and killed Wooten. The jury's factual findings in this regard are consistent with the testimonial, physical, and video evidence. Smith testified that he and Taylor got into a verbal disagreement with Iverson and the defendant, during which no punches were thrown, no threats were made,[4] and no weapons were brandished or visibly displayed. Smith stated that neither he nor Taylor was armed with firearms or other weapons and that there were no firearms or weapons in the Mercedes-Benz. According to Smith, Wooten was not a participant in the verbal disagreement. Instead, Wooten was attempting to act as "the peacemaker" and to defuse the situation.

The jury was also entitled to credit Smith's testimony that, as a result of this verbal disagreement, the defen-

[4] Although the defendant and Iverson testified that Taylor and Smith threatened violence prior to the shooting, the jury was free to discredit their versions of events. See, e.g., *State* v. *Hughes*, 341 Conn. 387, 399–400, 267 A.3d 81 (2021) (in assessing whether evidence is sufficient to defeat claim of self-defense, "the trier of fact is entitled to believe or disbelieve all, part, or none of any witness' testimony").

dant shot Taylor "in the head . . . at point-blank range . . . ." After shooting Taylor, the defendant turned to Smith, who said, "you just shot my boy." The defendant responded by shooting Smith four times. Wooten attempted to protect Smith, and "that's when [the defendant] shot [Wooten] in the head."

Smith's testimony largely was corroborated by the video surveillance footage, which does not depict any physical violence or the display of any firearms or weapons prior to the defendant's approaching Taylor and shooting him at close range. After the defendant shoots Taylor, there is a short pause of approximately fifteen seconds, during which the defendant appears to communicate briefly with Smith. Smith then falls to the ground. The defendant and Wooten promptly appear to exchange gunfire before Wooten collapses. The entire encounter lasted less than one minute.

The physical evidence was also consistent with Smith's version of events.[5] The subsequent police investigation

[5] The defendant contends that Smith's testimony was inconsistent with the physical evidence for two reasons. First, only three Sig .40 S & W shell casings were found at the scene of the crime, which he claims is inconsistent with Smith's testimony that the defendant shot him four times, in addition to shooting Taylor and Wooten each once. Second, the defendant observes that the .40 caliber Glock pistol that he purportedly used had a fifteen round magazine but still contained eleven bullets when it was recovered on Oakland Terrace, which the defendant argues indicates that it had been used to discharge five bullets at most (four bullets from the magazine and one from the chamber). According to the defendant, this evidence demonstrates that it was factually impossible for him to have discharged his firearm six times consistent with Smith's testimony. We reject both claims. With respect to the number of Sig .40 S & W casings found at the scene, although only six bullet casings were found, three of which had been discharged by Wooten's firearm, the evidence demonstrated that more than a total of six bullets had been fired; in addition to the six bullets that hit Taylor, Wooten, and Smith, Skyers also was shot multiple times. From this evidence, the jury reasonably could have inferred that there were additional shell casings that were lost in the aftermath of the shooting. As for the Glock pistol used by the defendant, it was found on Oakland Terrace after it had been abandoned for more than one month. Given the passage of time between the date on which the pistol was used to commit the crimes charged in this case and the date on which

revealed that neither Taylor nor Smith was armed with any firearms or other weapons; nor were any firearms or other weapons found in the Mercedes-Benz. Moreover, Wooten's pistol did not fire the fatal bullets. The bullet that killed Taylor was .40 caliber in size and consistent with having been fired by a semiautomatic .40 caliber Glock pistol, such as the make and caliber of the firearm found on Oakland Terrace.

By not raising a sufficiency claim with respect to Taylor and Smith, the defendant concedes, as we think he must, that the foregoing evidence was sufficient to meet the state's burden of defeating the defendant's justification defenses with respect to those victims. The jury rationally could have found, beyond a reasonable doubt, and contrary to the defendant's testimony, that he did not actually believe that Taylor or Smith was about to use deadly physical force against him or others, that, even if he harbored such a belief, it was not objectively reasonable under the circumstances, and that the degree of deadly force used by the defendant was not subjectively or objectively reasonable. See, e.g., *State* v. *Hughes*, 341 Conn. 387, 400, 267 A.3d 81 (2021) ("[the jury] was free to discredit the defendant's version of the events immediately preceding and following the shooting and, instead, could have credited the testimony of the other witnesses"); *State* v. *Terry*, 161 Conn. App. 797, 807–808, 128 A.3d 958 (2015) ("the jury was free to disbelieve the defendant's voluntary statement and to conclude beyond a reasonable doubt that he could not reasonably have believed that he was faced with the imminent use of deadly physical force or that the degree of deadly physical force that he used against [the victim] was necessary to defend himself"), cert. denied, 320 Conn. 916, 131 A.3d 751 (2016). The evi-

it was discovered, the jury reasonably could have inferred that the defendant or another person had substituted the magazine or altered its contents at some point after the shooting and before the pistol was found.

dence likewise is sufficient to support, beyond a reasonable doubt, the conclusion that the shootings of Taylor and Smith were not justified because the defendant could have retreated in complete safety and thereby avoided the necessity of using deadly physical force. See, e.g., *State* v. *Garrison*, 203 Conn. 466, 471–72, 525 A.2d 498 (1987) (evidence was sufficient to support factual finding that defendant knew he could have retreated in complete safety because he was familiar with apartment and was positioned near unobstructed doorway); *State* v. *Pranckus*, 75 Conn. App. 80, 94, 815 A.2d 678 (evidence that defendant initiated confrontation, that victim "merely was defending himself from the defendant's attacks and that the defendant strode six feet toward the victims to stab [them] instead of retreating was sufficient to allow the jury reasonably to conclude that the defendant knew no harm would have befallen him in making that retreat"), cert. denied, 263 Conn. 905, 819 A.2d 840 (2003).

On appeal, the defendant attempts to separate the murder of Taylor and the assault of Smith from the killing of Wooten, arguing that the state failed to establish beyond a reasonable doubt that the shooting of Wooten was not justified. The defendant's argument ignores the evidence plainly demonstrating that the three shootings were part of a single continuous episode occurring at the same location and time. The defendant shot two unarmed men and then shot Wooten as Wooten was attempting to protect others and himself from the defendant's criminal conduct. By all accounts, prior to the shootings, Wooten was not involved in the verbal altercation, did not threaten the defendant or anyone else, and tried to defuse the situation. In addition to Smith's testimony that Wooten was attempting to prevent the outbreak of violence, Iverson testified that Wooten "was trying to break . . . up" the argument before the defendant began his shooting spree. Even the

defendant testified that, prior to the shooting, Wooten urged Smith to avoid violence because Wooten was concerned about the safety of innocent bystanders.

Although Wooten was armed with a firearm that night, his possession of the firearm was lawful, and there was no evidence that he brandished the weapon or threatened anyone with it until after the defendant shot Taylor and Smith. Wooten fired his firearm three times, but the jury reasonably could have credited Smith's testimony that Wooten was acting defensively, rather than offensively, in an unsuccessful effort to protect Smith from the defendant's violent assault. Stated another way, the evidence supported a reasonable inference that Wooten was trying to repel the defendant's unprovoked attack and that he posed no threat to the defendant or others if the defendant had stopped shooting and retreated.[6] We therefore reject the defendant's challenge to the sufficiency of the evidence to defeat his claims of self-defense and defense of others with respect to the murder of Wooten.

II

We next address whether the trial court improperly excluded evidence of Taylor's violent character under § 4-4 (a) (2) of the Connecticut Code of Evidence, which provides that evidence is admissible "in a homicide or criminal assault case, after laying a foundation that the accused acted in self-defense, of the violent character of the victim to prove that the victim was the aggressor

[6] This conclusion is consistent with the state's theory at trial, which was that the shooting of Wooten was not justified because Wooten was protecting Smith from the defendant's attack. In her rebuttal closing argument, the prosecutor argued: "Watch the video. The first person to shoot is the defendant. Wooten runs. He runs off. . . . He runs off . . . toward the direction of Woodland Street. He then sees his friend [Smith] getting shot. He comes back to help [Smith]. And then, you can see . . . right between the cars, you can see him go down. . . . You can see the defendant jumping over the vehicle to shoot . . . Wooten."

. . . .”[7] The following additional facts and procedural history are relevant to our disposition of this claim.

Prior to trial, defense counsel filed a motion in limine to introduce evidence of Taylor’s New Jersey criminal record. Specifically, defense counsel moved to admit evidence that Taylor had been convicted in New Jersey of aggravated assault and possession of a weapon for an unlawful purpose. During a pretrial hearing, the prosecutor objected to the motion in limine. The prosecutor contended that Taylor had been arrested for, but not convicted of, aggravated assault and possession of a weapon for an unlawful purpose in New Jersey. The prosecutor acknowledged that Taylor had “a felony conviction for arson” in New Jersey but argued that the arson conviction was inadmissible because it was “not [for] a crime of violence against a person.” The trial court deferred ruling on defense counsel’s motion to give the parties additional time to inquire into the status of Taylor’s New Jersey criminal record.

The issue did not arise again until after the close of evidence, when defense counsel moved to reopen the defendant’s case for the purpose of arguing the admissi-

[7] Section 4-4 of the Connecticut Code of Evidence provides in relevant: “(a) Evidence of a trait of character of a person is inadmissible for the purpose of proving that the person acted in conformity with the character trait on a particular occasion, except that the following is admissible:

* * *

“(2) Evidence offered by an accused in a homicide or criminal assault case, after laying a foundation that the accused acted in self-defense, of the violent character of the victim to prove that the victim was the aggressor, or by the prosecution to rebut such evidence introduced by the accused. . . .”

Subsection (b) of § 4-4 delineates the methods by which the character of the victim may be proved: “In all cases in which evidence of a trait of character of a person is admissible to prove that the person acted in conformity with the character trait, proof may be made by testimony as to reputation or in the form of an opinion. In cases in which the accused in a homicide or criminal assault case may introduce evidence of the violent character of the victim, the victim’s character may also be proved by evidence of the victim’s conviction of a crime of violence.”

bility of Taylor's New Jersey arson conviction. Defense counsel argued that § 4-4 (a) (2) of "the Connecticut Code of Evidence provides that, in homicide cases [in which] the defendant is claiming self-defense, [the defendant] can introduce evidence of any violent convictions any victim has, just to show [the victim's] proclivity for violence." Pursuant to this provision, defense counsel sought to admit evidence of Taylor's arson conviction on the ground that "arson is a crime of violence." In support of her argument, defense counsel pointed out that the Connecticut Department of Correction (DOC) considers the crime of arson "to be an 85 percent offense that's on the [list of] violent crimes . . . at [the] DOC.[8] And arson can definitely result in the deaths of

[8] Defense counsel appears to be referring to crimes involving "the use, attempted use or threatened use of physical force against another person" under General Statutes § 54-125a (b) (2), the conviction of which disqualifies a defendant from parole eligibility until he or she "has served not less than eighty-five per cent of the definite sentence imposed." Under regulations promulgated by the Board of Pardons and Paroles (board), certain offenses are designated as involving "the use, attempted use or threated use of physical force against another person," including the crimes of arson in the first degree and arson in the second degree. Regs., Conn. State Agencies § 54-125a-5 (a); see General Statutes § 53a-111 (first degree arson); General Statutes § 53a-112 (second degree arson). Defense counsel urged the trial court to conclude that the conviction of an offense that requires a defendant to serve 85 percent of his sentence under § 54-125a (b) (2) qualifies as the conviction of a crime of violence for purposes of § 4-4 (a) (2) of the Connecticut Code of Evidence.

Although not essential to our disposition of the defendant's evidentiary claim, we observe that the generalization made by defense counsel regarding the classification of arson as a crime of violence is not entirely accurate. The crime of arson in the third degree, which does not involve the use, attempted use, or threatened use of physical force against another person, is not listed in the board's regulations as a crime requiring a person to serve 85 percent of the imposed sentence. See Regs., Conn. State Agencies § 54-125a-5 (a); see also General Statutes § 53a-113 (a) ("[a] person is guilty of arson in the third degree when he recklessly causes destruction or damage to a building . . . of his own or of another by intentionally starting a fire or causing an explosion").

We further note that, like Connecticut, New Jersey recognizes different degrees of the crime of arson, some of which require proof of a danger of death or bodily injury to another person, but others of which only require

one to large amounts of people. I think it's very relevant in this case, particularly in . . . light of [the defendant's] testimony that he was concerned [that] they wanted to injure more people. We would like to introduce . . . the arson conviction of . . . Taylor into evidence." (Footnote added.)

In response, the trial court inquired: "Let's assume that I agree with you and allow it. How do you plan to do it?" Defense counsel responded, "[p]erhaps by stipulation or a copy of the—," at which point the trial court interrupted, stating, "[t]he state's not going to stipulate, I'm assuming." The trial court then asked the prosecutor whether he was willing to stipulate to the admissibility of Taylor's New Jersey arson conviction, and the prosecutor responded, "[n]o." In the absence of a stipulation, the trial court asked defense counsel, "how are [you] going to get it in?" At this point, the following colloquy occurred:

"[Defense Counsel]: It's a conviction, I believe, from either New Jersey or New York.

"The Court: Do you have a certified copy of it?

"[Defense Counsel]: I don't have a certified copy, Your Honor.

"The Court: So, you just have your investigative notes?

"[Defense Counsel]: Yes.

proof of damage or destruction to property. See N.J. Stat. Ann. § 2C:17-1 (a) (1) (West 2015) (second degree arson, requiring "danger of death or bodily injury" to another person); N.J. Stat. Ann. § 2C:17-1 (a) (2) (West 2015) (second degree arson, requiring only "[the] destroying [of] a building or structure of another"); N.J. Stat. Ann. § 2C:17-1 (b) (2) (West 2015) (third degree arson, requiring only "danger of damage or destruction" to another's building or structure); see also footnote 11 of this opinion. The record does not reflect the nature of Taylor's New Jersey arson conviction or whether it involved the use, threatened use, or attempted use of physical force against another person.

"The Court: Thank you. State?

"[The Prosecutor]: I'll leave it to the court.

"The Court: Okay. All right. Let me think about that for a couple of minutes."

Following a brief recess, the trial court denied the defendant's request to admit evidence of Taylor's New Jersey arson conviction, stating that subsection (b) of § 6-7 of the "Connecticut Code of Evidence . . . which addresses evidence of conviction of a crime . . . says: 'Methods of proof. Evidence that a witness has been convicted of a crime may be introduced by the following methods.' Now, obviously, [Taylor is] not a witness, but he is involved in this case. '[1] Examination of the witness as to the conviction; or (2) introduction of a certified copy of the record of conviction into evidence, after' there's been an identification and authentication of the person and the conviction. Obviously, the defense doesn't have a certified copy. So, therefore, the court declines to allow the defense to put that into evidence."[9]

The defendant claims that the trial court improperly determined that a certified copy of Taylor's New Jersey arson conviction was required because § 4-4 (b) of the Connecticut Code of Evidence, not § 6-7 (b), controls the method of proof for the admission of character evidence. See footnotes 7 and 9 of this opinion. The state responds that the evidence of Taylor's arson conviction was inadmissible because the defendant could not identify a "witness or document, which would not be barred

[9] Section 6-7 (a) of the Connecticut Code of Evidence provides in relevant part that, "[f]or the purpose of impeaching the credibility of a witness, evidence that a witness has been convicted of a crime is admissible if the crime was punishable by imprisonment for more than one year. . . ." The method of proof is set forth in subsection (b) of § 6-7, which provides that a prior conviction may be established by "(1) examination of the witness as to the conviction; or (2) introduction of a certified copy of the record of conviction into evidence, after the witness has been identified as the person named in the record."

by the hearsay rule, [and] through which [the defendant was able] to present [this] evidence . . . .'' The state further argues that the exclusion of the evidence may be affirmed on the alternative grounds that (1) Taylor's New Jersey arson conviction was not a crime of violence under § 4-4 (b), and (2) the alleged evidentiary error was harmless.[10]

We need not decide whether the trial court erred in excluding evidence of Taylor's New Jersey arson conviction because we conclude that any evidentiary error was harmless. The defendant's claim is solely evidentiary in nature, and he ''bears the burden of demonstrating that the error was harmful.'' (Internal quotation marks omitted.) *State* v. *Jordan*, 329 Conn. 272, 287–88, 186 A.3d 1 (2018). To satisfy this burden, the defendant must demonstrate that ''the jury's verdict was substantially swayed by the error.'' (Internal quotation marks omitted.) Id., 288; see also *State* v. *Osimanti*, 299 Conn. 1, 19, 6 A.3d 790 (2010) (''a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict'' (internal quotation marks omitted)).

As we explained in *Osimanti*, evidence of a victim's violent criminal record is admissible under § 4-4 (a) (2) of the Connecticut Code of Evidence for two purposes. The first purpose is to demonstrate ''the violent, dangerous or turbulent character of the victim to show that the accused had reason to fear serious harm, after laying a proper foundation by adducing evidence that he acted in self-defense and that he was aware of the victim's violent character.'' (Internal quotation marks omitted.) *State* v. *Osimanti*, supra, 299 Conn. 13. The second

[10] The state also claims that the defendant's evidentiary claim is not preserved for appellate review because defense counsel failed to object to the trial court's application of § 6-7 (b) of the Connecticut Code of Evidence. We need not address this claim in light of our conclusion that the alleged evidentiary error was harmless.

purpose is "to prove that the victim was the aggressor, regardless of whether such character evidence had been communicated to the accused prior to the homicide." (Internal quotation marks omitted.) Id., 14. There was no evidence that the defendant was aware of Taylor's arson conviction at the time of the shooting, and, consequently, only the second purpose, to prove that Taylor was the aggressor, is relevant to the present appeal.

On the basis of our thorough examination of the record, we conclude that evidence that Taylor previously had been convicted in New Jersey of the crime of arson would not have substantially swayed the jury's verdict. Although there was evidence that Taylor had threatened Iverson, the defendant, and/or others prior to the shooting, there was no evidence that Taylor was armed with a firearm or deadly weapon or that there were any firearms or deadly weapons in the trunk of the Mercedes-Benz that Taylor could access. Additionally, the video surveillance footage does not support a reasonable inference that Taylor was the aggressor in the shooting. The footage does not depict Taylor making any threatening gestures or approaching the trunk of the Mercedes-Benz with any urgency. Nor does it appear that anyone was trying to escape from Taylor's alleged threats or to flee the scene to avoid an imminent risk of harm.

Against this factual background, we conclude that evidence of Taylor's arson conviction would not have affected the jury's verdict. The facts underlying Taylor's conviction are not reflected in the record, and the crime of arson does not necessarily involve a risk of harm to a person, violent physical conduct, or the use or threatened use of physical force against another.[11] In

[11] In New Jersey, arson is considered a crime against property. See *State* v. *Hill-White*, 456 N.J. Super. 1, 16, 191 A.3d 688 (App. Div. 2018) (concluding "that the [l]egislature deemed arson as an offense against property, the gravamen of which is, in general, setting a fire"), cert. denied, 237 N.J. 188, 203 A.3d 904 (2019). Even the most severe category of arson, aggravated

light of the nature of the offense, we cannot say that it is likely that evidence of Taylor's arson conviction would have impacted the jury's resolution of whether the defendant was acting in self-defense or defense of others when he shot Taylor. Simply put, the fact that Taylor intentionally had set fire to a building or structure at some unknown point in time for some unknown purpose does not make it more likely that he would use a firearm with the intent to kill or to inflict serious bodily injury.

Moreover, evidence of Taylor's arson conviction was tangential at best to the jury's resolution of whether the defendant could have avoided the necessity of using deadly physical force by retreating in complete safety. See *State* v. *Osimanti*, supra, 299 Conn. 21–22 (exclusion of evidence of victim's criminal record was harmless in part because of its "tangential relationship" to "[the] central factual issue" of whether defendant had duty to retreat); see also part I of this opinion. During closing argument, the prosecutor argued that, even if the jury believed that Taylor had threatened to kill the defendant or others, the defendant "could have just left when he heard this threat. He didn't have to keep going. He didn't have to sit there. He could have just left. He could have taken [Iverson] by the arm and said, 'come on, we're out of here. We don't need—nobody needs to get shot tonight. We're out of here.' " The prosecutor

arson, does not necessarily require proof that the defendant engaged in conduct that posed a risk of danger to human life or health. See N.J. Stat. Ann. § 2C:17-1 (a) (2) and (5) (West 2015) (defining "aggravated arson" in relevant part as "start[ing] a fire or caus[ing] an explosion, whether on his own property or another's," either "[w]ith the purpose of destroying a building or structure of another" or "[w]ith the purpose of destroying or damaging any forest"). Unlike the crimes of murder and assault, New Jersey's arson statute does not "differentiate the grading and the punishment depending on the degree of harm or attempted harm to [a] victim . . . suggesting that its primary focus is . . . on punishing for the act of setting [a] fire." *State* v. *Hill-White*, supra, 19.

urged the jury to find that the defendant did not retreat because "he had a gun with him . . . [and] came prepared to do violence." There was abundant evidence to support a factual finding that the defendant had a duty to retreat even if Taylor had been the aggressor during the confrontation. For the foregoing reasons, we conclude that any evidentiary error was not harmful.

The judgment is affirmed.

In this opinion the other justices concurred.

KAYLA SUPRYNOWICZ ET AL. *v.* NARENDRA B. TOHAN (SC 20992)

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

Syllabus

The plaintiffs appealed from the judgment of the trial court for the defendant, a reproductive endocrinologist who, in connection with certain in vitro fertilization procedures he performed, allegedly used his own sperm to impregnate the plaintiffs' mothers without consent. The plaintiffs claimed that, in striking their amended complaint, the trial court had incorrectly determined that their negligence claims sounded in wrongful life, which the defendant argued was not a legally cognizable cause of action in Connecticut, rather than ordinary negligence. *Held*:

The trial court incorrectly determined that the plaintiffs' negligence claims sounded in wrongful life rather than ordinary negligence.

The plaintiffs' negligence claims bore none of the hallmarks of wrongful life claims and, instead, could be properly adjudicated as ordinary negligence claims, as the plaintiffs alleged that the defendant, through his deception, was directly responsible for the mental anguish, physical injury and compromised familial relations they have suffered, and they were not seeking to be made whole by being restored to a state of nonbeing but, rather, to be compensated for injuries and losses that they claimed could have been prevented or substantially mitigated if the defendant had acted with due care.

Accordingly, this court reversed the trial court's judgment with respect to the plaintiffs' negligence claims and remanded the case with direction to

deny the defendant's motion to strike as to those claims and for further proceedings.

Argued October 30, 2024—officially released January 14, 2025

Procedural History

Action to recover damages for, inter alia, the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the judicial district of Hartford, Complex Litigation Docket, where the court, *Farley*, *J.*, granted the defendant's motion to strike the plaintiffs' amended complaint; thereafter, the court, *Farley*, *J.*, granted the plaintiffs' motion for judgment and rendered judgment for the defendant, from which the plaintiffs appealed. *Reversed in part*; *judgment directed*; *further proceedings*.

David B. Newdorf, pro hac vice, with whom were *Leslie Gold McPadden* and, on the brief, *James R. Brakebill*, for the appellants (plaintiffs).

Thomas J. Plumridge, with whom were *Joseph M. Walsh* and, on the brief, *Sally O. Hagerty* and *Stuart C. Johnson*, for the appellee (defendant).

Opinion

MULLINS, C. J. The plaintiffs, Kayla Suprynowicz and Reilly Flaherty, who were strangers for most of their lives, discovered through the genetic testing company 23andMe that they are half siblings. They allege in this action that their biological father is the defendant, Narendra B. Tohan, the reproductive endocrinologist who assisted the plaintiffs' parents in the parents' efforts to conceive children. The plaintiffs claim that, in treating their parents' infertility, the defendant utilized his own sperm rather than the sperm of the men they believed to be their fathers to impregnate their mothers, causing the plaintiffs physical and emotional harm. Although the plaintiffs' causes of action were labeled in the com-

plaint as ordinary negligence claims, the defendant moved to strike them on the ground that they were noncognizable wrongful life claims.[1] The trial court agreed and granted the motion to strike the plaintiffs' complaint.

The dispositive issue in this appeal is whether the trial court correctly determined that the plaintiffs' negligence claims sounded in wrongful life rather than ordinary negligence. We conclude that the answer to that question is no and that our recent decision in *Lynch* v. *State*, 348 Conn. 478, 308 A.3d 1 (2024), controls the outcome. In *Lynch*, this court clarified that a claim arising from hospital staff's alleged negligence in using sperm infected with a virus in the course of a therapeutic donor insemination (TDI) procedure sounded in medical negligence, not wrongful life. See id., 484–87, 489–91, 505, 507. Similarly, the plaintiffs' claims in the present case are ordinary negligence claims rather than wrongful life claims because they arise from the defendant doctor's alleged negligence in using his own sperm to impregnate the plaintiffs' mothers during in vitro fertilization (IVF) procedures. Accordingly, we reverse in part the judgment of the trial court.[2]

The following facts, as alleged in the plaintiffs' amended complaint,[3] and procedural history are relevant to our

[1] Courts have defined a wrongful life claim as one that is brought by or on behalf of an individual born with a congenital abnormality who asserts that, but for a physician's failure to detect and educate the parents regarding the abnormality, the child's mother would have terminated the pregnancy, and the child never would have been born or had to suffer the pain of his or her existence. See *Lynch* v. *State*, 348 Conn. 478, 507, 509, 308 A.3d 1 (2024). This court has not yet determined whether claims for wrongful life are cognizable in this state. Id., 506.

[2] The plaintiffs argue in the alternative that, if we conclude that their allegations do not sound in ordinary negligence, then we should recognize a cause of action for wrongful life and allow their claims to proceed under that theory. Because we conclude that the plaintiffs' claims sound in ordinary negligence, we do not reach this issue.

[3] It is axiomatic that, in reviewing a trial court's granting of a motion to strike, we take the facts to be those alleged in the complaint and construe them in the manner most favorable to sustaining the complaint's legal suffi-

resolution of this appeal. The plaintiffs, who are both in their thirties, were conceived through IVF. The defendant is the reproductive endocrinologist who performed the IVF procedures for the plaintiffs' respective parents.[4] Unbeknownst to the plaintiffs' parents, the defendant used his own sperm in the IVF procedures. The plaintiffs' parents never agreed to the use of donor sperm, and no genetic testing was performed to ensure that the defendant was a suitable donor. Kayla Suprynowicz' mother acknowledged that, after she became pregnant, she was informed that her pregnancy was the result of " 'mixed sperm.' "

In 2019, the plaintiffs learned of the defendant's deception through genetic testing. As a result, they learned that the men they believed to be their fathers were in fact not their biological fathers. In 2021, the plaintiffs brought this action. In their eight count, amended complaint, the plaintiffs alleged negligence, fraudulent concealment, lack of informed consent and violations of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. With respect to their negligence claims, the plaintiffs alleged that the defendant's unauthorized use of his own sperm has negatively impacted their familial relations and caused them mental anguish and physical injury.[5] In her claim of negli-

ciency. See, e.g., *Lestorti* v. *DeLeo*, 298 Conn. 466, 472, 4 A.3d 269 (2010). "[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 398, 142 A.3d 227 (2016).

[4] The plaintiffs' parents are not parties to this action.

[5] Specifically, in count one of the amended complaint, Kayla Suprynowicz alleged that the defendant "negligently [1] mixed his sperm with [Gary] Suprynowicz' sperm to impregnate [her mother]; [2] replaced the sperm of Gary Suprynowicz with his own; [3] failed to offer the Suprynowiczes the choice of sperm donor; [4] utilized sperm that contained a genetic trait, including a genetic disease . . . ."

In count four of the amended complaint, Flaherty alleged that, "[a]s a result of [the defendant's] carelessness and negligence, [the defendant] . . . [i]mproperly used his sperm to conceive and impregnate [Flaherty's mother]."

gence against the defendant, Kayla Suprynowicz further alleged that the defendant's sperm carried a genetic trait that caused her to contract "a cerebral condition and mast cell activation disorder," which has resulted in her having a reduced earning capacity.

Before the plaintiffs filed their amended complaint, the defendant filed a motion to dismiss the original complaint on the ground that, notwithstanding the labels applied to the individual counts, the entire complaint sounded in medical malpractice. Consequently, he argued that, because the plaintiffs had failed to comply with the requirements of General Statutes § 52-190a, the trial court had no personal jurisdiction over him. The defendant further argued that the plaintiffs lacked standing to assert their medical malpractice claims because he and the plaintiffs never had a doctor-patient relationship.

The trial court disagreed with both contentions, concluding that, except for Kayla Suprynowicz' claim that "the defendant used sperm containing a disease causing genetic trait," the plaintiffs' claims were ordinary negligence claims, not medical malpractice claims, such that compliance with § 52-190a was not required.[6] The court further concluded that there was "a sufficient nexus between [the plaintiffs'] injuries and the defendant's alleged misconduct to give [the plaintiffs] standing to prosecute their claims."

The defendant thereafter filed a motion to strike the operative amended complaint in its entirety. With respect to the negligence counts, the defendant argued that they should be stricken because (1) the defendant owed

[6] In denying the defendant's motion to dismiss, the trial court noted a disagreement among our trial courts as to whether § 52-190a allows for the dismissal of only a portion of a claim. Because the defendant did not move to dismiss only the portion of Kayla Suprynowicz' negligence claim sounding in medical malpractice, the trial court concluded that it need not determine whether it would have authority to do so. The defendant does not challenge the trial court's decision on the applicability of § 52-190a in this appeal.

no duty of care to the plaintiffs, and (2) the plaintiffs' claims sounded in wrongful life, which is not a cognizable claim in Connecticut. In response, the plaintiffs argued that the defendant owed them each a duty of care because they were readily identifiable victims of his alleged misconduct, and the harm that they suffered was entirely foreseeable. The plaintiffs also argued that, contrary to the defendant's assertions, their claims sounded in ordinary negligence, not wrongful life.

The trial court agreed with the plaintiffs that they "were sufficiently identifiable [persons] to warrant the imposition of a duty of care upon the defendant . . . ." The court reasoned that "the relationship between the defendant and the plaintiffs' mothers was aimed specifically at the objective of producing offspring, an exceptionally narrow class of identifiable persons to which the plaintiffs obviously belong." The court agreed with the defendant, however, that the plaintiffs' negligence claims sounded in wrongful life.

Specifically, the trial court reasoned: "The plaintiffs argue that their claims do not constitute claims for wrongful life because they are 'styled as [negligence] counts.' That distinction is lost on the court. In a wrongful life claim, a child alleges that, but for the negligence of a medical professional, the child would not have been conceived or born, and the child has suffered harm as a result of [his or her] birth. . . . This is precisely what the plaintiffs allege. Had the defendant not used his own sperm to inseminate the plaintiffs' mothers, the plaintiffs would not have been born. . . . The plaintiffs' claims, like other 'wrongful life' claims, present the paradox of [plaintiffs] alleging harm that could only have been avoided if they had never been born at all." (Citations omitted; footnote omitted.) The court further observed that, of the states that recognize wrongful life, all of them limit recovery to extraordinary medical expenses, which the plaintiffs have not alleged. In light

of the foregoing, the court granted the defendant's motion to strike the amended complaint in its entirety. The plaintiffs opted not to replead, and the trial court rendered judgment for the defendant.

The plaintiffs appealed to the Appellate Court, claiming that the trial court incorrectly determined that their negligence claims sounded in wrongful life rather than ordinary negligence. We transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

After the parties filed their briefs, this court issued its decision in *Lynch* v. *State*, supra, 348 Conn. 478, which required us to decide whether the claims of the plaintiffs in that case sounded in wrongful life or medical malpractice. See id., 504–505, 507. In *Lynch*, the plaintiffs brought an action on behalf of their infant son, Joshua Isaac Monroe-Lynch (Joshua), who was conceived through a TDI procedure. See id., 484, 489. In their complaint, the plaintiffs alleged that the hospital staff who performed the TDI procedure negligently impregnated Joshua's mother with sperm from a cytomegalovirus (CMV)[7] positive donor, causing Joshua serious physical and catastrophic neurological injuries. See id., 489–90, 514. On appeal, the named defendant, the state of Connecticut, argued that Joshua's claims "must be understood as 'wrongful life' claims and that this court should follow the majority of states and decline to recognize such claims." Id., 505. We concluded that those claims were not wrongful life claims but, rather, conventional medical malpractice claims. Id., 505, 507. Our reasons for doing so are dispositive of this appeal.[8]

[7] CMV is "a type of herpes virus . . . ." *Lynch* v. *State*, supra, 348 Conn. 485.

[8] As we previously indicated, the defendant moved to strike the plaintiffs' negligence claims on the additional ground that he owed them no duty of care. The trial court rejected that contention, and the defendant has not challenged that determination on appeal. Thus, the defendant's sole contention on appeal is that the plaintiffs' negligence claims sound in wrongful

We explained in *Lynch* that, "[a]t the most basic level, courts use the terms 'wrongful birth' and 'wrongful life' to refer to claims that are based on the theory that a child would not have been born but for the defendant's negligence. . . . 'Wrongful birth' generally refers to claims of this sort brought by the parent or parents whereas 'wrongful life' refers to claims brought by the child. . . . This court has recognized claims for wrongful birth; see *Ochs* v. *Borrelli*, 187 Conn. 253, 256–60, 445 A.2d 883 (1982); but has not yet had occasion to [decide] the wrongful life issue." (Citations omitted.) *Lynch* v. *State*, supra, 348 Conn. 506. "Although courts and commentators often speak of wrongful life and wrongful birth as torts in themselves, it is more accurate to view these terms as describing the result of a physician's negligence. The asserted negligence may involve any number of distinguishable negligent acts including, but not limited to, the misdiagnosis of [a] hereditary condition, the misrepresentation of the risks associated with conception and delivery of a child, the negligent interpretation of diagnostic tests, or the negligent performance of a sterilization procedure." *Lininger ex rel. Lininger* v. *Eisenbaum*, 764 P.2d 1202, 1205 (Colo. 1988).

As we noted in *Lynch*, there are two distinct characteristics of a wrongful life claim. See *Lynch* v. *State*, supra, 348 Conn. 490, 507, 511–12. First, the defendant is not directly responsible for the injury to the child. See id., 507. "[C]ases that bear the 'wrongful life' label [typically] involve a child who has a congenital abnormality born to a mother who would not have proceeded with the pregnancy had she received timely notice of that condition. . . . The alleged negligence is the failure to detect and educate the parents regarding the congenital abnormality [in time for an abortion to be

life and that this court should follow the vast majority of courts in other jurisdictions and decline to recognize such claims.

performed]. Indeed, it has been said that the hallmark of a wrongful life case is that the defendant bears no direct responsibility for the child's condition, and courts have relied in part on that fact in declining to recognize such claims." (Citation omitted; emphasis omitted.) Id.; see, e.g., *Wilson* v. *Kuenzi*, 751 S.W.2d 741, 744–45 (Mo.) ("The heart of the problem in [wrongful life] cases is that the physician cannot be said to have caused the [abnormality]. The disorder is genetic and not the result of any injury negligently inflicted by the doctor. In addition it is incurable and was incurable from the moment of conception. . . . The child's [disability] is an inexorable result of conception and birth." (Internal quotation marks omitted.)), cert. denied, 488 U.S. 893, 109 S. Ct. 229, 102 L. Ed. 2d 219 (1988).

A second characteristic of a wrongful life claim is the inherent difficulty of measuring damages. See *Lynch* v. *State*, supra, 348 Conn. 511–12. "The basic rule of tort compensation is that the plaintiff be put in the position that he would have been in [without] the defendant's negligence." *Siemieniec* v. *Lutheran General Hospital*, 117 Ill. 2d 230, 240, 512 N.E.2d 691 (1987), overruled on other grounds by *Clark* v. *Children's Memorial Hospital*, 955 N.E.2d 1065 (Ill. 2011). In the wrongful life context, that position is nonexistence. Thus, "the cause of action involves a calculation of damages dependent upon the relative benefits of an impaired life as opposed to no life at all, [a] comparison [many courts have concluded] the law is not equipped to make." (Internal quotation marks omitted.) *Siemieniec* v. *Lutheran General Hospital*, supra, 240; see also, e.g., *Lininger ex rel. Lininger* v. *Eisenbaum*, supra, 764 P.2d 1210 ("a person's existence, however handicapped it may be, does not constitute a legally cognizable injury relative to [nonexistence]").

In *Lynch*, the trial court denied the named defendant's motion to strike the plaintiffs' medical malprac-

tice claims on the ground that they were noncognizable wrongful life claims. *Lynch* v. *State*, supra, 348 Conn. 490. In so doing, the trial court reasoned that the claims the plaintiffs brought on behalf of Joshua "were ordinary medical malpractice claims in that they alleged that the negligence of [the hospital] staff, in using sperm from a CMV positive donor to inseminate [Joshua's mother], caused . . . Joshua [to sustain] severe life-lasting injuries . . . . [T]he court [further] observed that [n]owhere in [the medical malpractice] counts [did] the plaintiffs assert that the [named defendant] negligently failed to diagnose the CMV infections in sufficient time to allow the [plaintiffs] the ability to terminate the pregnancy, the touchstone of a wrongful life claim." (Internal quotation marks omitted.) Id., 490–91.

This court agreed with the trial court that a wrongful life claim does not allege that the defendant caused the mother's pregnancy or the fetus' congenital abnormality. See id., 507–508. We concluded that *Lynch* did not involve a claim for wrongful life because the plaintiffs had alleged and established that the named defendant was "directly responsible both for Joshua's birth and for his condition; [the hospital] staff created the pregnancy, and it was precisely their negligence in doing so that was the proximate cause of Joshua's injuries." (Emphasis omitted.) Id., 508. The named defendant's direct responsibility for the injury to Joshua led this court to conclude that the claims brought by the plaintiffs on behalf of Joshua were not wrongful life claims but were, instead, medical malpractice claims. See id., 507–11.

Likewise, in the present case, the plaintiffs' claims differ fundamentally from wrongful life claims. Unlike wrongful life claims, in which "the defendant bears no direct responsibility for the child's condition"; id., 507; in this case, the defendant is alleged to be responsible both for the pregnancies and the alleged harm. The plaintiffs alleged that the defendant's unauthorized use

of his own sperm to impregnate their mothers directly caused the harm of which they complain. As in *Lynch*, this is not a case in which the alleged injury is a condition for which the defendant bears no direct responsibility. See id., 508. To the contrary, it is the plaintiffs' contention that the defendant's deception is directly responsible for the mental anguish, physical injury and compromised familial relations they have suffered.

Moreover, as in *Lynch*, a calculation of damages does not require a comparison between life in an impaired state and no life at all. See id., 509–12. The plaintiffs do not claim that the defendant's alleged negligence prevented their mothers from terminating their pregnancies, or that the plaintiffs would have been better off had they never been born. That is, the plaintiffs are not asking to be "made whole" by being restored to a state of nonbeing; rather, they are seeking compensation for injuries and losses that they claim could have been prevented or substantially mitigated if the defendant had acted with due care. The plaintiffs' injuries, in other words, were directly and proximately caused by the defendant's misconduct.[9] See, e.g., *Maldonado* v. *Flannery*, 343 Conn. 150, 189, 272 A.3d 1089 (2022) ("[the law allows] a plaintiff [to] recover all of the damages suffered as a result of a tortfeasor's negligence" (emphasis omitted)). In short, the present case bears none of the hallmarks of a wrongful life claim and is

[9] In reaching a contrary conclusion, the trial court reasoned that the plaintiffs' claims, "like other 'wrongful life' claims, present the paradox of [plaintiffs] alleging harm that could only have been avoided if they had never been born at all." We disagree. In fact, one can easily imagine a scenario in which the plaintiffs were born and avoided the emotional harm of which they complain. For example, the alleged mental anguish could have been avoided completely if the defendant had simply advised the plaintiffs' parents of his intention to use his own sperm in the IVF procedures. If the plaintiffs' parents had agreed to proceed with the IVF procedures, the plaintiffs could have been born without being subjected to the emotional anguish of learning as adults, through an ancestry testing service, that the men who raised them are not their biological fathers.

properly understood and can be properly adjudicated within the context of ordinary negligence claims.

The judgment is reversed with respect to the plaintiffs' negligence claims and the case is remanded with direction to deny the defendant's motion to strike as to those claims and for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

Cumulative Table of Cases
Connecticut Reports
Volume 351

(Replaces Prior Cumulative Table)

CONNECTICUT APPELLATE REPORTS

Vol. 230

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE MIKHAIL M.*
(AC 47684)

Moll, Clark and Lavine, Js.

Syllabus

The respondent father appealed from the judgment of the trial court for the petitioner, the Commissioner of Children and Families, terminating his parental rights as to his minor child. He claimed that the court improperly determined that he had failed to achieve a sufficient degree of personal rehabilitation as required by statute (§ 17a-112 (j) (3) (B) (i)). *Held*:

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the court.

There was sufficient evidence in the record to support the trial court's conclusion that the respondent father had failed to achieve a sufficient degree of rehabilitation pursuant to § 17a-112 (j) (3) (B) (i) that would encourage a belief that, in a reasonable time, he could assume a responsible position in his child's life.

Argued November 12, 2024—officially released January 3, 2025**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Knight, J.*; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, for the appellant (respondent father).

Seon A. Bagot, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Nisa Khan*, assistant attorney general, for the appellee (petitioner).

Opinion

PER CURIAM. The respondent father,[1] Daniel R., appeals from the judgment of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights with respect to his minor child, Mikhail M. On appeal, the respondent claims that the court improperly determined that he failed to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B) (i). We find no merit to the respondent's claim and, accordingly, affirm the judgment of the court.

** January 3, 2025, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The parental rights of Brittney M., the biological mother of Mikhail, also were terminated. She has not appealed, and all references in this opinion to the respondent are to Daniel R. only.

"Failure of a parent to achieve sufficient personal rehabilitation is one of [the] statutory grounds on which a court may terminate parental rights pursuant to § 17a-112." (Internal quotation marks omitted.) *In re G. Q.*, 158 Conn. App. 24, 25, 118 A.3d 164, cert. denied, 317 Conn. 918, 118 A.3d 61 (2015). Concerning the failure to achieve personal rehabilitation, § 17a-112 (j) (3) (B) (i) provides for the termination of parental rights when the minor child has been found to have been neglected, abused or uncared for in a prior proceeding and the parent of such child "has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child."

"Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to [his] former constructive and useful role as a parent. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his] ability to manage [his] own life, but rather whether [he] has gained the ability to care for the particular needs of the child at issue. . . . An inquiry regarding personal rehabilitation requires us to obtain a historical perspective of the respondent's child-caring and parenting abilities. . . . Although the standard is not full rehabilitation, the parent must show more than any rehabilitation. . . . Successful completion of the petitioner's expressly articulated expectations is not sufficient to defeat the petitioner's claim that the parent has not achieved sufficient rehabilitation. . . . [E]ven if a parent has made successful strides in [his] ability to manage [his] life and may have achieved a level of stability within [his] limitations, such improvements, although commendable, are not dispositive on the issue of whether, within a reasonable period of time, [he] could assume a responsible position in the life of [his child]. . . .

"[T]he appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court

could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court."[2] (Citations omitted; internal quotation marks omitted.) *In re Fayth C.*, 220 Conn. App. 315, 319–20, 297 A.3d 601, cert. denied, 347 Conn. 907, 298 A.3d 275 (2023).

Concerning the issue of personal rehabilitation, the court found in its well reasoned decision that the respondent "has a long history of substance abuse. He started using and selling drugs in the eighth grade. He has strained relations with his family because of his past substance dependence, which includes the use of cocaine, fentanyl and methamphetamines. He refused the [Department of Children and Family's (department)] initial attempts to engage him in substance abuse treatment, declining to participate in any services after the child was placed in care, and he went missing from December, 2021, until March, 2022." The court questioned "whether the [respondent] will maintain his sobriety given the chronicity of the issue and his history of relapse even after substantial interventions" and noted that "Mikhail has issues that need to be attended to by a reliable and sober caregiver including medical

[2] The respondent also claims that the standard of review of evidentiary sufficiency established by our Supreme Court in *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015), is improper and therefore "should be replaced by the former clear error standard." He states that this claim was made only for purposes of preservation and acknowledges that this court does not have the authority to overturn the precedent of our Supreme Court. We agree that we are bound by our Supreme Court's decision in *In re Shane M.*, and, therefore, reject the respondent's standard of review claim. See e.g., *State* v. *Henry*, 76 Conn. App. 515, 551, 820 A.2d 1076 ("it is not the province of an intermediate appellate court to overturn the precedent of the jurisdiction's highest court"), cert. denied, 264 Conn. 908, 826 A.2d 178 (2003).

concerns, allergies and a speech delay." The court further found that, "[d]espite engaging in an intensive intervention which included inpatient treatment, [the respondent] relapsed almost immediately after discharging from programming in December, 2022, and again in July, 2023, after participating in outpatient care. He is forty years old and has not demonstrated any meaningfully significant period of sobriety. Moreover, Dr. [Ines] Shroeder [a licensed psychologist, who conducted an independent, court-ordered psychological evaluation of the respondent], upon whose opinion this court relies, also expressed concerns regarding the [respondent's] ability to manage his abstinence. She stated that, during his evaluation, the [respondent] minimized his substance abuse dependence and had little insight into the impact his issues could have on Mikhail. Further, he has not demonstrated that he has adequately addressed his mental health issues, which include depression and [post-traumatic stress disorder]. Moreover, the [respondent] has yet to address an outstanding arrest warrant pending out of California. This legal matter, though purportedly nonextraditable, is disquieting given the [respondent's] involvement in the criminal justice system, which includes his history of felony convictions, probationary stints, and fleeing the state of California without his probation officer's knowledge. During his time in Connecticut, he was arrested twice, once for a number of felonies and another time for getting into a domestic incident with his brother with whom he lives." The court additionally stated that the respondent's "parenting deficits are glaring," that his prior history of parenting includes the termination of his parental rights as to another child, which "event seemingly did not motivate the [respondent] to address his substance abuse issues when the mother became pregnant with Mikhail. He continued to misuse substances, left California while under court supervision,

and disappeared for substantial periods during the child protection proceedings—failing to communicate and cooperate with the department." The court also found that the respondent lacked stable housing and that he "did not visit with [Mikhail] consistently during the first year of the child's life, seeing him only four times from December, 2021, to October, 2022. The [respondent] completed a parenting course and has been visiting with [Mikhail] more regularly since March of 2023." The court concluded that, under the totality of the circumstances, "the degree of rehabilitation achieved by the [respondent] falls short of that which would reasonably encourage a belief that in a reasonable time he can assume a responsible position in Mikhail's life."

We conclude that ample evidence exists in the record to support the court's determination in its well reasoned decision that the respondent failed to achieve sufficient rehabilitation that would encourage the belief that, within a reasonable time, he could assume a responsible position in Mikhail's life. Accordingly, we disagree with the respondent's contention that the court's decision to terminate his parental rights as to Mikhail requires reversal.

The judgment is affirmed.

IN RE HYRUM D. ET AL.*
(AC 47796)

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

Syllabus

The petitioner, the Commissioner of Children and Families, appealed from the judgments of the trial court revoking the commitment of the respondent

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the court.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization

mother's minor children to the custody of the petitioner and returning the children to the custody of the respondent. The petitioner claimed that the court exceeded its statutory authority (§ 46b-129 (m)) when it sua sponte revoked commitment of the minor children to the petitioner's custody when there was no motion pending before it and without providing all parties notice and a full evidentiary hearing. *Held*:

The trial court, in sua sponte soliciting evidence from one party, the respondent, while denying that it was holding an evidentiary hearing, and, by failing to provide the petitioner notice that it intended to take additional evidence on the petitioner's own motion at a status review proceeding, effectively prevented the petitioner from meeting her burden as to the best interests of the children by preventing the petitioner from participating fully in the proceeding, and this court was not persuaded that the trial court's error was harmless.

Argued December 10, 2024—officially released January 3, 2025**

Procedural History

Petitions by the Commissioner of Children and Families to adjudicate the respondents' minor children neglected, brought to the Superior Court in the judicial district of Middlesex, Juvenile Matters at Middletown, where the respondents entered pleas of nolo contendere; thereafter, the court, *Hon. Juliett L. Crawford*, judge trial referee, rendered judgments adjudicating the minor children neglected; subsequently, the court denied the petitioner's motion to transfer guardianship and the respondents' motion to revoke commitment; thereafter, the court vacated its order denying the respondents' motion to revoke commitment and revoked the commitment of the minor children to the custody of the petitioner, from which the petitioner appealed to this court. *Reversed.*

Nisa Khan, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellant (petitioner).

Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

** January 3, 2025, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Karen Oliver Damboise, assistant public defender, for the appellee (respondent mother).

Opinion

BRIGHT, C. J. The petitioner, the Commissioner of Children and Families, appeals from the judgments of the trial court revoking the commitment of the minor children, Hyrum D. and Antonio D., to the custody of the petitioner and returning the children to the custody of the respondent mother, Stephanie V. On appeal, the petitioner claims that the court exceeded its statutory authority when it sua sponte revoked commitment of the minor children to the petitioner's custody without providing all parties notice and a full evidentiary hearing. We agree and, accordingly, reverse the judgments of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. After the respondent was arrested in connection with an incident in which she was intoxicated on phencyclidine (PCP) and alcohol while caring for Hyrum and Antonio, the petitioner invoked a ninety-six hour hold on the children due to concerns about the respondent's mental health and substance abuse issues. The children's father, Danny D.,[1] "was out of state at the time." The petitioner sought and obtained ex parte orders of temporary custody for the children, which were sustained on November 27, 2019, and subsequently filed neglect petitions, alleging that they were being denied proper care and attention and that they were being permitted to live under conditions injurious to their well-being. On December 27, 2019, the Department of Children and Families (department) placed the children with Yvonne F. (foster mother) in accordance with the respondent's request.

[1] Danny D. did not participate in the present appeal. Accordingly, all references to the respondent in this opinion are to Stephanie V.

"On January 12, 2021, [the respondent] and [Danny D.] each entered a nolo contendere plea to the neglect petition. The court . . . accepted each plea, adjudicated the children . . . neglected, committed them to the care and custody of [the petitioner], and ordered updated final steps." At that time, "[i]t was understood that [the respondent's] issues centered around substance use and mental health." "By June 23, 2021, the permanency plan was now transfer of guardianship with a concurrent plan of permanent transfer of guardianship. . . . On May 17, 2022, [the petitioner] filed [a] motion to transfer guardianship. On February 28, 2023, the parents filed a motion to revoke the commitment to [the petitioner] and [to] have their children returned to them." (Citation omitted.)

The court, *Hon. Juliett L. Crawford*, judge trial referee, held a consolidated trial on both motions over the course of several days, beginning on March 3, 2023, and ending on October 16, 2023. On December 14, 2023, the petitioner moved to open the evidence, claiming that, "[o]n November 21, 22 and 23, [2023], the Meriden Police Department conducted several investigations . . . concerning [the respondent]. In the course of those investigations, [the respondent] admitted, among other matters, to being homeless and to having suicidal intent."

At a hearing on January 29, 2024, the court granted the motion to open the evidence, and the petitioner submitted three police reports, dated November 21, 22 and 23, 2023, which were admitted as full exhibits by agreement of the parties. The November 21, 2023 police report stated that the respondent's mother, Lissette R., reported that the respondent was causing a disturbance at Lissette's house, that the respondent was homeless, and that she believed the respondent was under the influence of PCP. The November 22, 2023 report stated that the officer was dispatched to Lissette's house for

a report of a domestic dispute between the respondent and Lissette and, upon arrival, found the respondent with a knife in her hand. The respondent told the officer that "she wanted to kill herself and that she was planning on cutting herself." As a result, the respondent was transported to a hospital pursuant to a police request for an emergency evaluation. Last, the November 23, 2023 police report stated that the respondent's cousin called the police for an emergency committal because the respondent was sending him suicidal text messages. When officers located the respondent, she was "very emotional," and she was taken to the hospital as an emergency committal for further evaluation. The petitioner also presented testimony from Kaylee Rugar, the department social worker assigned to the children's cases, who testified that the respondent became homeless in November, 2023, when her landlord sold the rental property where she was living, and that the respondent had not obtained stable housing since that happened.

On May 24, 2024, the court issued a memorandum of decision denying the petitioner's motion to transfer guardianship and the parents' motion to revoke commitment. As to the parents' motion to revoke commitment, the court concluded that (1) "the parents met their burden of proof that the cause for commitment no longer exists and [that] it is in the best interests of the children to return them to the care and custody of the [respondent]," and (2) the petitioner "failed to prove that it would not be in the best interests of the children to return them to the mother." The court nonetheless denied the parents' motion to revoke commitment "without prejudice" and explained that it "retains jurisdiction over this matter, and it is thoroughly familiar with the history and evidence in the trial." Finally, the court ordered that "[a]n on the record status review should be scheduled within thirty days."

At the ensuing status review on June 20, 2024, the respondent appeared, but her attorney was not present, and Danny D. did not appear, but his attorney was present. The court proceeded to explain that, when it denied the parents' motion without prejudice, it meant that "any other motions can be filed without waiting [six months]" as required under General Statutes § 46b-129 (m).[2] The court then discussed the police reports from November, 2023, explaining that "there are like gaps [in the evidence]. . . . [The police reports indicate that the respondent] was transported to [a hospital]. No information on what that was about, how long she was there, what was it, was it observation, what were their findings. Nothing. And, so, I'm just indicating that, although a police report is evidence, that by itself was not sufficient, but it was enough where the court felt that it had to pause. So, all that being said—now the question is where we are. I don't know if anybody wants to offer anything, but I've given you some idea of what the court was thinking in terms of orders, but [I] didn't just want to simply issue the orders in case something wasn't like detailed enough or—but that's essentially where I am. . . . I guess what is pending is really the decision to deny without prejudice.

* * *

"I just wanted to at least give you a sense of where the court is, and I'll hear from you. I've indicated to you what I was considering in terms of some of the orders and how they need to be structured, if we actually need a short hearing to flush out [that] information that I had indicated to you that the court felt should've been available at the time I did grant the hearing on the motion. . . . So, let me hear from you and, you know, hopefully we won't keep the staff much longer, but that's in terms of the next step."

[2] General Statutes § 46b-129 (m) provides in relevant part: "No [motion to revoke a commitment] shall be filed more often than once every six months."

Counsel for Danny D. stated that his client's "position at the time of trial was that the children should be returned to [the respondent], and since that time, I've had no contact with him. So, as far as moving forward, I wouldn't be able to—without him being present or speaking with me, I'm not really in a position to request . . . anything at this point in time."

The court continued the proceeding, stating: "Now, in terms of [the respondent], the court still—I am inclined to have [one] more short hearing scheduled and—so that I can at least get the information because I will reconsider my decision on the denial without prejudice. But it was basically because I didn't have enough information on what happened in November.

"So, you folks, especially counsel for the children—and I realize that [the respondent's] attorney isn't here and [that Danny D. also is not present] . . . . I've indicated to you how I got to where I did and what I look at and so I'm telling you what I'm considering at this point and—but there's going to be the issue of [the respondent's] stability in terms of housing. I still don't understand the circumstances around the sale and the eviction and what that's about."

The respondent then addressed the court, explaining that she had "moved into another place. [The department] can come to check out my house whenever they feel like it. I'm on probation for the incident with [Danny D.], but he dropped the restraining order. So, I have been in contact with him. He has not been seeing the . . . children, but I have been at every single visit and I'm—now that I'm back inside my—in my place, I've been looking for work and I've been doing everything I have to do with my probation officer and stuff like that."

At that point, the court said it was "ready to issue some orders," but the petitioner's counsel interrupted and noted that the court could not order the petitioner

to file a specific permanency plan. The following exchange ensued:

"[The Petitioner's Counsel]: [T]he only issue I'll make, because the court was talking about November, the department had suggested . . . at the time that the incidents in November were important because it was the [respondent's] own statements . . . . And, so, regardless of what [the hospital] might say, this is what the [respondent] herself was saying about where she was in life at that point in time. . . . [T]he only other thing I will say then is if the court does set a hearing, there's been continued ongoing developments. The respondent . . . has just made some representations. There's been additional information that, if the court is to set a hearing, [the petitioner] needs to be clear that all of that information comes in. For example, she's admitted to relapse on substance use and . . . there have been criminal convictions since then. So, there's a lot of information that, if this court is going to have a new hearing, then it's going to need to hear—

"The Court: No, I—well, actually given what . . . I've heard, I'm pretty sure that the order will not be for a new hearing. . . . I was sort of indicating that the information that I expected at the hearing—

"[The Petitioner's Counsel]: Right.

"The Court: —was more than just the police report[s]. I understand that but—

"[The Petitioner's Counsel]: Okay.

"The Court: —that's actually not an issue at this point.

"[The Petitioner's Counsel]: Oh, okay. So, Your Honor, thank you.

"The Court: Yeah. Anything else then?

"[The Petitioner's Counsel]: I guess I'll wait to hear what the orders actually are and then—

"The Court: Yep. Okay.

"[The Petitioner's Counsel]: Thank you, Your Honor."

Without explanation or notice to the parties that it intended to take evidence at the status review, the court then directed the courtroom clerk to "put [the respondent] under oath." After the oath was administered, the court asked the respondent about a document that the respondent had attempted to give to the court earlier in the proceeding. The respondent explained that the document confirms that she still was in therapy. When the court explained that all parties "have the right to see it" and directed that the document be shared with counsel, the petitioner's counsel engaged in the following exchange with the court:

"[The Petitioner's Counsel]: While the court is giving me an opportunity to look at this, is this now an evidentiary hearing?

"The Court: No. I was just going to ask—there were a couple of things that she said and I just—because you guys are officers of the court, but there's some—a couple of things that she said. I just wanted to have her under oath. That's all. . . .

"[The Petitioner's Counsel]: The [petitioner] . . . has no objection to that letter coming in. . . . [T]he . . . only suggestion is that it be interpreted in [the] context of evidence that did come in during the trial regarding how frequently [the respondent] had been meeting with [the therapist]. The court does have evidence from the trial—

"The Court: Yeah. . . . Anything else? I actually think now that I am ready to issue an order."

The court then vacated its order denying the parents' motion to revoke commitment and granted the motion, ordering that custody of the children be returned to the respondent. The court also increased the respondent's visitation from two to three times each week, until the order returning the children to the respondent was facilitated, and ordered that the foster mother not be involved with those visits. The petitioner's counsel expressed concern that the court had minimal information regarding the respondent's housing and stated that the "court ultimately will probably need an evidentiary hearing because, again, this court's decision is based on the [respondent] having no residence . . . . For the court to learn about whether she even has a place to live, the court's going to have to open up the evidence and learn that info." The court stayed its order revoking commitment until August 31, 2024, and it scheduled a status review for August 23, 2024. At that point, the petitioner's counsel renewed his concerns regarding the nature of the status review proceeding in the following exchange with the court:

"[The Petitioner's Counsel]: The evidence in the record is [that the respondent] has no place to live.

"The Court: I understand, but I also heard her say, which is part of why I put her under oath—I didn't want her just saying things that she has housing, she has her Section 8, and I believe you said that the department would need time to check things out. . . .

"[The Petitioner's Counsel]: It can't be that . . . the court . . . is relying now on evidence in fashioning its orders, yet the court has said this is not an evidentiary hearing. For the court to rely on the [respondent's] self-representation about Section 8, we don't know how big the apartment is, is it enough to have a five year old and nine year old in there. We don't know these things.

"The Court: I know. That's why there's a stay.

"[The Petitioner's Counsel]: Your Honor . . . . This court needs evidence in the record. If it issues an order without evidence in the record without holding an evidentiary hearing—

"The Court: Look, if you want to file a motion—I indicated to you why I issued the decision I did without prejudice, and the main part had to do with [the motion to open the evidence and] the last report that you submitted where everyone agreed [that] the court would have been remiss in not at least hearing some information on it. But in terms of what the court had before it, I made the decision based on what the court had before it."

The court adjourned shortly thereafter. This appeal followed.

After filing this appeal, the petitioner filed a motion to reargue in the trial court, asserting that the court was required to hold an evidentiary hearing before granting a contested motion to revoke commitment. As support, the petitioner cited *In re Shanaira C.*, 297 Conn. 737, 758–59, 1 A.3d 5 (2010) (holding that § 46b-129 (m) and what is now Practice Book § 35a-14A "implicitly mandate" that court hold evidentiary hearing "at least when a motion for revocation of commitment is contested"), and *In re Nasia B.*, 98 Conn. App. 319, 330, 908 A.2d 1090 (2006) (holding that "[w]hen the court sua sponte revoked the child's commitment to the petitioner, it acted outside the scope of its authority"). The petitioner argued that the court denied her the opportunity to present evidence that revocation was not in the best interests of the children as of June 20, 2024.

On July 17, 2024, the court issued a memorandum of decision denying the motion to reargue on the papers. The court noted that it had reviewed *In re Shanaira C.* and *In re Nasia B.* and reasoned that "[t]hese cases

can be distinguished from the present case, as here a trial was held over several days, the evidence was reopened and further evidence presented, and there was further information provided on the record during the status review. . . . After several days of hearings, the court rendered a decision with the required findings. All parties made representations and provided additional information at the in-court status review. . . . As there were multiple days of evidence and an appeal has been filed, there is no need to toll the period for filing an appeal. Accordingly, the motion to reargue . . . is denied." The petitioner subsequently amended her appeal to challenge the denial of the motion to reargue. This court stayed the judgments revoking the children's commitment pending the final disposition of the petitioner's appeal.[3]

On appeal, the petitioner claims that the court exceeded its statutory authority when it sua sponte revoked commitment of the minor children when there was no motion pending before it and without providing all parties notice and a full evidentiary hearing.[4] The respondent contends that the court was not required to hold an evidentiary hearing because it already had conducted a trial on the parties' motions and, in the alternative, assuming arguendo that an evidentiary hearing was required, the failure to do so was harmless

[3] On July 31, 2024, the petitioner filed a motion for stay, requesting that the trial court grant a stay of its June 20, 2024 order until the petitioner's appeal is decided. The trial court heard argument on the motion during the August 23, 2024 status conference and denied the motion for stay that same day. On August 27, 2024, the petitioner filed a motion for review of that order, and this court sua sponte stayed the judgments pending resolution of the motion for review on August 29, 2024. On September 11, 2024, this court granted the motion for review and ordered that the judgments be stayed pending the final resolution of this appeal.

[4] On appeal, the attorney for the minor children adopted the position and briefs of the petitioner.

error.[5] We agree with the petitioner and are not persuaded that the court's error was harmless.

Whether the court exceeded its statutory authority is a question of law subject to plenary review. See *GMAT Legal Title Trust 2014-1, U.S. Bank, National Assn.* v. *Catale*, 213 Conn. App. 674, 687, 278 A.3d 1057 ("[t]he proper scope of a court's statutory authority . . . presents a question of law over which our review is plenary"), cert. denied, 345 Conn. 905, 282 A.3d 980 (2022).

Section 46b-129 (m) provides in relevant part that the petitioner, "a parent or the child's attorney may file a motion to revoke a commitment, and, upon finding that cause for commitment no longer exists, and that such revocation is in the best interests of such child or youth, the court may revoke the commitment of such child or youth. . . ."

Our Supreme Court has determined that, although the statute does "not expressly require an evidentiary hearing, [it] implicitly mandate[s] one, at least when a motion for revocation of commitment is contested." *In re Shanaira C.*, supra, 297 Conn. 759. Accordingly, when a motion for revocation of commitment is "neither uncontested nor the subject of undisputed facts, the court [is] required to conduct an evidentiary hearing . . . ." Id., 762.[6]

[5] The respondent also contends that the petitioner's claim is unpreserved because it was raised for the first time in her motion to reargue. The transcript of the June 20, 2024 proceeding, however, belies this contention, as the petitioner's counsel alerted the trial court to the need for an evidentiary hearing several times before and immediately after the court issued its orders without notice. Thus, we conclude that the petitioner complied with our rules of preservation, which require a party "to alert the trial court to potential error while there is still time for the court to act." (Internal quotation marks omitted.) *Forestier* v. *Bridgeport*, 223 Conn. App. 298, 313, 308 A.3d 102 (2024).

[6] The court reasoned that, "before the commitment may be revoked upon motion, § 46b-129 (m) directs the court to make two findings: first, that there no longer is cause for commitment and, second, that revoking the commitment is in the child's best interest. This provision carries the implication that an evidentiary hearing shall be held because it strongly suggests that evidence must be presented by the moving party to establish facts

In *In re Shanaira C.*, the petitioner moved to revoke Shanaira C.'s commitment on the ground that reunification with the child's mother was in the child's best interest. Id., 741. The intervenor, who was the girlfriend of the child's father, "opposed the motion to revoke and informed the court that she would be calling witnesses, including her [own] mother and Shanaira's aunt, who was also [Shanaira's] foster mother." (Internal quotation marks omitted.) Id. "[Although] [t]he court allowed testimony from Shanaira's aunt and teacher [it essentially did not allow the intervenor to call or question those or any other witnesses, including the intervenor's mother, who never testified. Furthermore, the court itself examined the witnesses who did testify with little or no input or questioning from the parties]." (Footnotes omitted; internal quotation marks omitted.) Id., 742. After the hearing, "the court found that revocation of the commitment was in Shanaira's best interest and granted sole custody of Shanaira to the respondent mother." (Internal quotation marks omitted.) Id. This court affirmed the judgment, and our Supreme Court granted the intervenor certification to appeal. Id., 743.

On appeal, the intervenor claimed that the trial court improperly denied her the right to call and cross-examine witnesses and otherwise to participate fully at the

necessary to warrant revocation of the commitment. Indeed, a determination of the best interest of a child frequently requires an evidentiary hearing. . . . In the absence of a waiver of the right to a hearing by all parties who otherwise would be entitled to participate, this approach makes eminent good sense because the determination of a child's best interest is generally a fact intensive inquiry. . . . Moreover, frequently, either the facts or the inferences to be drawn therefrom are disputed by the parties. For these reasons, revocation hearings sometimes entail lengthy proceedings involving multiple witnesses." (Citations omitted.) Id., 759–60. The court further observed that what is now Practice Book § 35a-14A, which allocates the burdens of proof with respect to the necessary findings, "clearly indicates that an evidentiary hearing is required because [i]t is obvious that allocations of burdens of proof imply an evidentiary hearing." (Internal quotation marks omitted.) Id., 761.

hearing on the petitioner's motion to revoke Shanaira's commitment pursuant to § 46b-129 (m). Id., 740. Our Supreme Court concluded that "the intervenor did not receive the hearing to which she was entitled. . . . [T]he intervenor, who opposed the revocation of commitment, bore the burden of proving that revocation was not in Shanaira's best interest. Only if the intervenor had been afforded the opportunity to present evidence and to examine witnesses would she have had any meaningful possibility of meeting this burden. Although the intervenor was not precluded from participating in the hearing entirely, the limitations that the trial court improperly placed on that participation were significant and deprived her of a genuine opportunity to present her case." Id., 762. The court rejected the petitioner's harmless error contention because "the intervenor was unable to call and question witnesses whose testimony might have caused the court to reach a different conclusion with respect to Shanaira's best interest. . . . In addition, the intervenor was barred from cross-examining witnesses who had been called by other parties, and we simply do not know how such cross-examination might have affected the court's ultimate decision . . . ." (Footnote omitted.) Id., 762–63.

The same reasoning applies in the present case, in which the court sua sponte solicited evidence from one party while denying that it was holding an evidentiary hearing. By failing to provide the petitioner notice that it intended to take additional evidence on its own motion at the status review proceeding and by then denying that it was holding an evidentiary hearing, the court effectively prevented the petitioner from meeting her burden as to the best interests of the children. Thus, as in *In re Shanaira C.*, the limitations that the court's ad hoc procedure placed on the petitioner's ability to participate meaningfully in the evidentiary hearing "were significant and deprived [the petitioner] of a genuine

opportunity to present her case." Id., 762. Moreover, the court was required to consider the children's best interests as of June 20, 2024, when it revoked the children's commitment. See id., 763 ("the focus of the new dispositional hearing must be on [the child's] status and her best interest at the time of that hearing"). The court, however, denied that it even was required to hold an evidentiary hearing in that regard. Accordingly, we conclude that the court's truncated evidentiary hearing prevented the petitioner from participating fully in the June 20, 2024 proceeding, and we are not persuaded that the court's error was harmless.

The court's actions also were in clear contravention of this court's holding in *In re Nasia B.*, supra, 98 Conn. App. 319. In that case, after the petitioner rested her case-in-chief at the termination of parental rights trial, the trial court granted the respondents' oral motion to dismiss the petition for failure to make out a prima facie case. Id., 322. Immediately thereafter, "the court stated that it had reviewed and considered the permanency plan for termination of parental rights and adoption and found, for the reasons stated with respect to the motion to dismiss, that the plan was not in the best interest of the child. . . . The court ordered the parties to return to court the following day to determine the steps to be taken to continue reunification.

"[The next day], following colloquy with counsel and the court's questioning of the department supervisor on the case, the court rendered judgment revoking the child's commitment on the basis of the evidence presented during the trial on the petition to terminate parental rights. The court ordered that the child's commitment to the petitioner be opened and that the department provide modified protective supervision until . . . the child would be returned to the respondent mother's custody." Id., 327–28.

The petitioner appealed, claiming, inter alia, that the court "failed to abide by the provisions of § 46b-129 (m) . . . when it sua sponte opened the judgment and revoked the child's commitment." Id., 327. This court agreed, reasoning that, because "neither the parties nor the foster mother had notice that the court was going to open and revoke the child's commitment"; id., 330; the court "acted outside the scope of its authority pursuant to § 46b-129 (m) and ([p]), which are intended to provide for the orderly administration of justice, protect the due process rights of the petitioner, the respondents and the foster mother, and to protect the best interest of the child." Id.

Although the respondent argues, and the trial court concluded, that the present case is distinguishable from *In re Nasia B.* "because a motion to revoke was filed in this matter and the trial court heard testimony and received evidence over six days regarding whether cause for commitment no longer existed," she ignores that the trial court already had denied that motion on the basis of the evidence in the record as of January 29, 2024. As a result, when the court sua sponte revoked commitment at the June 20, 2024 status review without notifying the parties of its intention to do so, the parties did not have "notice that the court was going to open and revoke the [children's] commitment"; *In re Nasia B.*, supra, 98 Conn. App. 330; and, therefore, they did not have "a reasonable opportunity to prepare to appear and be heard" in that regard. Id., 329. Consequently, because the court improperly held a truncated evidentiary hearing at which it took evidence only from the respondent without providing the parties notice and a reasonable opportunity to be heard on the contested issue, *In re Nasia B.* dictates that the judgments revoking the children's commitment to the petitioner must be reversed.

The judgments revoking the children's commitment are reversed.

In this opinion the other judges concurred.

JOSEPH WALKER *v.* COMMISSIONER OF CORRECTION
(AC 46422)

Elgo, Cradle and Prescott, Js.

Syllabus

The petitioner, who had been convicted, after a jury trial, of murder and other crimes, appealed from the habeas court's judgment denying his petition for a writ of habeas corpus. He claimed that the court improperly concluded that he had failed to demonstrate that his criminal trial counsel provided ineffective assistance by failing to move for a mistrial after an exhibit was published to the jury indicating that the petitioner had been incarcerated near the time of his criminal trial, which he claimed vitiated his right to the presumption of innocence and constituted structural error. *Held*:

The petitioner failed to explain why the rule of *State* v. *Rose* (305 Conn. 594), that a conviction is reversible per se when a defendant is compelled to stand trial in identifiable prison clothing, should apply to his claim, nor did he provide any precedent requiring the application of structural error under the circumstances at issue.

The petitioner could not prevail on his ineffective assistance of counsel claim, as he failed to establish that he was prejudiced under *Strickland* v. *Washington* (466 U.S. 668) as a result of counsel's failure to move for a mistrial.

Argued September 9, 2024—officially released January 14, 2025

Procedural History

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

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Raynald A. Carre, deputy assistant state's attorney, with whom, on the brief, were *Marc G. Ramia* and *Amy Sedensky*, supervisory assistant state's attorneys, and *Kelly A. Masi* and *Terence D. Mariani, Jr.*, senior assistant state's attorneys, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Joseph Walker, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the court improperly concluded that he failed to demonstrate that his trial counsel provided ineffective assistance by failing to move for a mistrial during his criminal trial because an exhibit, specifically, an RT-60 form,[2] was admitted into evidence and briefly published to the jury, and that exhibit evidenced that he had been incarcerated near the time of that trial. The petitioner asserts that publication of this evidence vitiated the presumption of innocence to which he was entitled, and a mistrial was the only way to remedy this violation of due process. We disagree and affirm the judgment of the habeas court denying the petition.

The facts underlying the petitioner's conviction of murder in violation of General Statutes § 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a (a), robbery in the first degree in violation of General Statutes § 53a-134 (a)

[1] The habeas court granted certification to appeal.

[2] "An RT-60 is a document generated by the Department of Correction that describes, among other things, an inmate's movements within the Department of Correction, including such things as dates of entry into corrections, furloughs, releases, and the facilities where an inmate was housed." (Internal quotation marks omitted.) *State* v. *Daye*, Superior Court, judicial district of Hartford, Docket No. CR-11-0234742 (February 28, 2013) (55 Conn. L. Rptr. 705, 710); see also *Landy* v. *McLaurin*, Superior Court, judicial district of New Haven, Docket No. CV-07-4025898 (March 2, 2010) (RT-60 contains history of individual's movements within Department of Correction).

(2), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1), were set forth by this court in its decision disposing of the petitioner's direct appeal. See *State* v. *Walker*, 169 Conn. App. 794, 796, 153 A.3d 38 (2016), remanded, 325 Conn. 920, 163 A.3d 619 (2017); see also *State* v. *Walker*, 178 Conn. App. 345, 347 and n.1, 175 A.3d 576 (2017), cert. denied, 327 Conn. 999, 176 A.3d 557 (2018). "On May 10, 2012, the [petitioner] arranged to purchase $6150 worth of cocaine from the victim, David Caban. . . . On May 12, 2012, at approximately 9 p.m., the victim was inside his home with his close friend and cousin, Angelo Caban (Angelo). . . . At approximately 9:30 p.m., the [petitioner], accompanied by his close friend, Solomon Taylor, drove . . . to the home of the victim to purchase the [crack] cocaine. The [petitioner] parked the vehicle directly in front of the house so that the passenger's side of the vehicle was facing it.

"The victim left the house and approached the vehicle. The victim momentarily leaned into the rear passenger's side of the vehicle, and then returned to the inside of his house, where he went into his bedroom. . . . As the victim [returned and] approached the vehicle, he was carrying the crack cocaine in a brown paper bag, which was tucked in his waistband.

"The victim again leaned into the rear passenger's side of the vehicle, with his feet hanging out. Shortly thereafter, a struggle began between the victim and the occupants of the vehicle. One of the occupants of the vehicle had a revolver, and the victim was attempting to hold his arm in an effort to avoid being shot; that occupant then fired a shot through the roof of the vehicle. After hearing the shot, [friends of the victim] ran toward the vehicle, but, by the time they reached it, more shots had been fired, and the victim had been hit twice, once in the arm and once in the head. As a result of his injuries, the victim was slumped over with his

body only partially inside the vehicle. [One of the victim's friends] . . . tried to pull the victim out of the vehicle, but, as he did so, more shots were fired. . . . [The victim's other friend] then went to the driver's side of the vehicle, where he encountered the [petitioner], who was pointing a revolver directly at him. The barrel of the revolver was within arm's reach of [his] face. Taylor then yelled to the [petitioner] to 'forget it,' and both men reentered the vehicle and drove away with the rear passenger's side door open and the victim only partially inside the vehicle.

"[The victim's friend and girlfriend drove after the petitioner and Taylor.] Within approximately one quarter of a mile, [they] saw the victim's body in the street. [The driver] stopped the car, and . . . called for help. . . . The victim was transported to Saint Mary's Hospital, where he died from his wounds." (Footnote omitted.) *State* v. *Walker*, supra, 169 Conn. App. 796–98. The police arrested the petitioner on September 12, 2012, in New York. Id., 800. After a jury trial, the petitioner was found guilty of all charges against him. Id. The court imposed a total effective sentence of sixty years of incarceration. Id., 801.

The petitioner filed a direct appeal with this court. We reversed the judgment of the trial court with respect to the charge of conspiracy to commit robbery in the first degree and remanded the case with direction to vacate that conviction and its accompanying sentence and affirmed the judgment in all other respects. Id., 812. The petitioner sought further review from our Supreme Court, which remanded the case to this court.[3] "The

[3] Specifically, our Supreme Court stated: "On consideration of the [petitioner's] petition for certification for appeal from the Appellate Court . . . it is ordered as follows: Granted as to the [petitioner's] claim of plain error and denied as to all other questions presented for review. It is further ordered that upon the [petitioner's] filing of the certified appeal pursuant to Practice Book § 84-9, the case is remanded to the Appellate Court with direction to consider the [petitioner's] claim of plain error in light of *State* v. *McClain*,

sole question presented on remand [was] whether the trial court committed plain error in failing to instruct the jury, sua sponte, on accomplice testimony with regards to [Alexia Bates, the girlfriend of Taylor]. The [petitioner claimed] that Bates' assistance with the coverup of the crimes, by helping clean the vehicle, provided a basis for an accomplice instruction. In particular, he [argued] that Bates' participation in the coverup resulted in her being charged with tampering with evidence, and, therefore, she had the same motive to curry favor with the prosecution as an accomplice to the murder. Thus, according to the [petitioner], the court had a duty to instruct the jury to scrutinize her testimony carefully." (Internal quotation marks omitted.) *State* v. *Walker*, supra, 178 Conn. App. 350. We concluded that the petitioner had failed to demonstrate plain error and, accordingly, affirmed the judgment of conviction. Id., 356.

The petitioner subsequently commenced the underlying habeas action. On January 11, 2021, the petitioner, through counsel, filed an amended petition for a writ of habeas corpus. The petitioner alleged that he had received ineffective assistance of counsel from his criminal trial attorney, Tashun Bowden-Lewis. His amended petition set forth twenty-one allegations of deficient performance and asserted that he suffered prejudice as a result of these alleged deficiencies. The respondent, the Commissioner of Correction, filed a return that denied or left the petitioner to his proof as to nearly all of the allegations in the amended petition.

The habeas court, *M. Murphy, J.*, conducted a trial on November 16 and 17, 2021, and July 14, 2022. During the habeas trial, the court heard testimony from various witnesses, including Bowden-Lewis; Attorney Frank

324 Conn. 802, 155 A.3d 209 (2017)." (Internal quotation marks omitted.) *State* v. *Walker*, 325 Conn. 920, 920, 163 A.3d 619 (2017).

Riccio, the petitioner's legal expert; and the petitioner. Bowden-Lewis testified that, after discussing the matter with her client, her strategy was "to be open [with the jury] about the fact that . . . [the petitioner and the victim met] while they were incarcerated, they were friendly, they were friends, and that [the petitioner] didn't [shoot the victim]." She further explained that she and the petitioner developed the strategy to be honest with the jury about his dealing drugs, his relationship with the victim, his criminal record, and his presence in the vehicle when the victim was shot and killed.[4]

At the conclusion of the habeas trial, the court ordered the parties to submit posttrial briefs. In his posttrial brief, the petitioner argued, inter alia, that there was no legitimate reason for Bowden-Lewis to refrain from moving for a mistrial after the jury was shown his RT-60, which indicated that he was incarcerated near the time of his criminal trial.

The habeas court issued its memorandum of decision on February 24, 2023. The court limited its consideration and discussion to the claims addressed in the petitioner's posttrial brief. With respect to the issue of Bowden-Lewis' failure to move for a mistrial following the publication of the RT-60 to the jury during the examination of a Department of Correction witness, the court concluded that the petitioner failed to establish both deficient performance and the requisite prejudice necessary to prevail on a claim of ineffective assistance

[4] Bowden Lewis testified that, if the jury saw the concerning portions of the petitioner's RT-60 form, she would not have been concerned. She further explained: "We wanted this—we wanted this to be an open situation, that the jury knew what his lifestyle was, knew his prior criminal record, knew [about his] convictions, the whole thing, that he may not have been, again, someone that they know, or someone that they—maybe in their family, but even with all of that, he's being honest with them about what he is, what he was doing, that he did not commit this murder and this robbery. That was the whole situation."

of counsel. Ultimately, the court denied the amended petition for a writ of habeas corpus, and this appeal followed.

On appeal, the petitioner claims that the habeas court improperly concluded that he failed to demonstrate that Bowden-Lewis rendered ineffective assistance of counsel by failing to move for a mistrial after the jury observed the RT-60 document that included information that he was incarcerated near the time of his criminal trial. Specifically, the petitioner argues that Bowden-Lewis' failure to move for a mistrial constituted deficient performance because there were no legitimate strategic reasons to not seek a mistrial and that a mistrial was the only remedy sufficient to cure the alleged due process violation caused by publication of the exhibit to the jury. He further asserts that, had Bowden-Lewis moved for a mistrial, the criminal trial court likely would have granted such a motion. Accordingly, he contends that the habeas court improperly denied his petition for a writ of habeas corpus on the basis of ineffective assistance of counsel. We are not persuaded.

"The legal principles governing our review of the denial of a petition for a writ of habeas corpus alleging the ineffective assistance of counsel are well settled. A criminal defendant's right to the effective assistance of counsel . . . is guaranteed by the sixth and fourteenth amendments to the United States constitution and by article first, § 8, of the Connecticut constitution. . . . 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; footnote 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); see also *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 637–38, 153 A.3d 1264 (2017).

The following additional facts are necessary for the resolution of this appeal. During the petitioner's criminal trial, which occurred over several days in September and October, 2014, the prosecutor called Bernard Hailey, an employee of the Department of Correction, as a witness. Hailey testified that his duties as an operations officer included documenting the movements of prisoners at a detention facility located on Whalley Avenue in New Haven. Hailey then was shown RT-60 forms for both the victim and the petitioner. He described an RT-60 as "a form that basically tells you the first time someone's been incarcerated all the way to their current incarceration." The prosecutor moved to admit both of the RT-60 forms into evidence. Bowden-Lewis remarked that she had no objection, and the court admitted the RT-60 forms relating to the petitioner and the victim into evidence as exhibits 20 and 21, respectively. The prosecutor published the victim's RT-60 form and elicited testimony from Hailey regarding the victim's time at the New Haven detention facility. Hailey testified that, on the basis of his review of Department of Correction records, the victim was held at the New Haven detention facility from February 8 to April 7, 2011.

The prosecutor then inquired about the petitioner's RT-60 form, which was published to the jury via an overhead projector. At this point, the court sua sponte excused the members of the jury from the courtroom.[5] After the jurors left, the court inquired if there was an

[5] The transcript reveals the following colloquy:

"[The Prosecutor]: Now, I'm going to show you what's been marked as state's exhibit 20. And again, bear with me a minute. And this RT-60 you indicated earlier refers or is the RT-60 of [the petitioner], and that's at the top there?

"Hailey: Yes.

"[The Prosecutor]: And again, the number here, his inmate number on the document is 3-6-2-7-4-2?

"Hailey: Yes.

"The Court: I have to ask [the jury] to step out again."

"issue" with a specific entry on the petitioner's RT-60. The prosecutor remarked that he had disclosed this exhibit to the defense and that there had been no objection to it from Bowden-Lewis. The court replied that it had the responsibility of ensuring that no prejudice occurred during the trial and directed the parties to redact an entry on the petitioner's RT-60 indicating that he was incarcerated in September, 2014.[6] The court emphasized: "This is my determination that the entry of [September, 2014] should not go to the jury. It's my conclusion. . . . It's not [defense] counsel's. It's mine. . . . And for the record, I don't want the jury to see that [the petitioner] may be currently incarcerated, and the reference [to September, 2014] concerns me in that regard. Nothing to do with counsel. This is my own view."[7]

After further discussion, the prosecutor suggested that additional information should be redacted from the petitioner's RT-60.The court replied that the only relevant information "is the period of time that . . . that both [the victim and the petitioner] were in [the New Haven detention facility]. . . . Everything else should be removed." The prosecutor suggested that the victim's RT-60 should also be redacted. The parties then discussed a possible factual stipulation, in lieu of certain documents that had been admitted into evidence,

[6] Specifically, the court stated: "I want it gone. We're going to have to mark another exhibit. That will be for identification and then the redacted copy will be the one that will go to the jury. So, I'm not going to let the jury see this until it's redacted."

[7] We note that "[t]he trial judge is the arbiter of the many circumstances which may arise during the trial in which his [or her] function is to assure a fair and just outcome." (Internal quotation marks omitted.) *Thompson* v. *Commissioner of Correction*, 184 Conn. App. 215, 225, 194 A.3d 831, cert. denied, 330 Conn. 930, 194 A.3d 778 (2018); see also *State* v. *Pouncey*, 40 Conn. App. 624, 633, 673 A.2d 547 (1996) (trial court was in best position to determine extent of prejudicial effect where prosecutor's examination of witness created implication that defendant was incarcerated), aff'd, 241 Conn. 802, 699 A.2d 901 (1997).

including the petitioner's RT-60. The court suggested that it would be preferable to admit a written stipulation into evidence and excused the jury for the remainder of the day to allow counsel time to discuss such a stipulation.

On the next day of trial, the parties reported to the court on their progress regarding the proposed stipulation. The prosecutor and Bowden-Lewis indicated that they agreed that the RT-60 forms for both the petitioner and the victim that previously had been admitted as full exhibits should be marked for identification only. The prosecutor then noted that he had redacted the RT-60 forms for the petitioner and the victim and would seek to have these new documents admitted into evidence when Hailey's testimony resumed. The court ordered the clerk to mark exhibits 20 and 21, the original RT-60 forms for the petitioner and the victim, for identification only.

Hailey then resumed his testimony, during which the court admitted into evidence the redacted RT-60 forms for the victim and the petitioner as state's exhibits 25 and 26, respectively. The parties' written stipulation also was admitted into evidence as state's exhibit 27. Hailey then testified that the petitioner and the victim entered the New Haven detention facility on February 8, 2011, were housed in the same units for the next few weeks, and would have had the opportunity to interact with each other.

Next, we identify the constitutional principles, namely, the presumption of innocence, underlying the petitioner's claim in this appeal. "The right to a fair trial is a fundamental liberty secured by the [f]ourteenth [a]mendment. . . . The presumption of innocence, although not articulated in the [c]onstitution, is a basic component of a fair trial under our system of criminal justice. . . . In order to implement that presumption,

courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. . . . Put another way, for the presumption to be effective, courts must guard against practices which unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone conclusion. . . . In order for a criminal defendant to enjoy the maximum benefit of the presumption of innocence, our courts should make every reasonable effort to present the defendant before the jury in a manner that does not suggest, expressly or impliedly, that he or she is a dangerous character whose guilt is a foregone conclusion." (Citation omitted; internal quotation marks omitted.) *State* v. *Marcus H.*, 190 Conn. App. 332, 346, 210 A.3d 607, cert. denied, 332 Conn. 910, 211 A.3d 71, cert. denied, U.S. , 140 S. Ct. 540, 205 L. Ed. 2d 343 (2019); see *State* v. *Prutting*, 40 Conn. App. 151, 165–66, 669 A.2d 1228, cert. denied, 236 Conn. 922, 674 A.2d 1328 (1996); see also *State* v. *Woolcock*, 201 Conn. 605, 612–13, 518 A.2d 1377 (1986).

Factors that may negatively impact the presumption of innocence include compelling a defendant to wear identifiable prison clothing at his or her jury trial,[8]

[8] In *Estelle* v. *Williams*, 425 U.S. 501, 504, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), the United States Supreme Court noted that, in most circumstances, an accused should not be compelled to appear at trial in prison or jail clothing due to the potential impairment of the presumption of innocence, a right basic to the adversary system. It held, however, that, "although the [s]tate cannot, consistently with the [f]ourteenth [a]mendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." Id., 512–13; see also *State* v. *Williamson*, 206 Conn. 685, 705, 539 A.2d 561 (1988) (defendant failed to object at trial and record was unclear as to whether he, in fact, wore identifiable prison clothing, which precluded our Supreme Court from reviewing defendant's claim or affording him relief on "barren record").

requiring a defendant to wear restraints in view of the jury,[9] and referring to a defendant's incarceration during or near the time of trial. Nevertheless, this court has recognized that "[n]ot every reference to a defendant's

[9] In *State* v. *Brawley*, 321 Conn. 583, 585, 137 A.3d 757 (2016), on the first day of trial, defense counsel moved to have the defendant's shackles removed. The trial court denied the motion and referred to "the standard procedure . . . to leave the shackles on during trial . . . [except for] jury selection when a juror is in the back row . . . ." (Internal quotation marks omitted.) Id. The defendant appealed his conviction, and this court affirmed the judgment of conviction. Id. He sought further review from our Supreme Court, where he claimed that the trial court had determined improperly that he would be required to remain shackled throughout the guilt phase of the trial. Id. In response to an articulation order from our Supreme Court, the trial court indicated that the defendant wore only leg shackles and that efforts were made to ensure that the jury did not see the defendant's shackles. Id., 586.

Our Supreme Court began its analysis by stating: "It is well established that, [a]s a general proposition, a criminal defendant has the right to appear in court free from physical restraints. . . . Nonetheless, a defendant's right to appear before the jury unfettered is not absolute. . . . A trial court may employ a reasonable means of restraint [on] a defendant if, exercising its broad discretion in such matters, the court finds that restraints are reasonably necessary under the circumstances. . . . Despite the breadth of that discretion, however, [t]he law has long forbidden routine use of visible shackles during the guilt phase; it permits a [s]tate to shackle a criminal defendant only in the presence of a special need." (Citation omitted; internal quotation marks omitted.) Id., 587. This rule serves to preserve a defendant's presumption of innocence by avoiding a suggestion, express or implied, that he or she is a dangerous individual whose guilt is a foregone conclusion. Id., 588. Nevertheless, the defendant "bears the burden of showing that he has suffered prejudice by establishing a factual record demonstrating that the members of the jury knew of the restraints." (Internal quotation marks omitted.) Id.; see also *State* v. *Flowers*, 69 Conn. App. 57, 63, 797 A.2d 1122 (negative connotations of restraints are without significance unless their use comes to attention of jury), cert. denied, 260 Conn. 929, 798 A.2d 972 (2002).

In a situation where no justification for the use of shackles exists in the record, and the jury is aware of such restraints, the state must satisfy the constitutional harmless error standard to prevail on appeal. "When, however, a court, without adequate justification, orders [a] defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The [s]tate must prove beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Brawley*, supra, 321 Conn. 588–89; see also *State* v. *McCarthy*, 210 Conn. App. 1, 41–42, 268 A.3d 91, cert. denied, 342 Conn. 910, 271 A.3d 136 (2022).

pretrial incarceration is grounds for a mistrial. . . . There is nothing sacrosanct about a defendant's pretrial incarceration." (Internal quotation marks omitted.) *State* v. *McCleese*, 94 Conn. App. 510, 515, 892 A.2d 343, cert. denied, 278 Conn. 908, 899 A.2d 36 (2006); see also *State* v. *Reddick*, 197 Conn. 115, 129, 496 A.2d 466 (1985), cert. denied, 474 U.S. 1067, 106 S. Ct. 822, 88 L. Ed. 2d 795 (1986); *State* v. *Cote*, 136 Conn. App. 427, 451–52, 46 A.3d 256 (2012), aff'd, 314 Conn. 570, 107 A.3d 367 (2014).

We focus our analysis on the prejudice prong of the *Strickland* standard. At oral argument before this court, the petitioner's counsel indicated that he was pursuing a claim of structural error.[10] "An error is structural only

[10] The petitioner did not argue structural error before the habeas court. Nor did he contend that, under the facts and circumstances of the present case, it was unnecessary for him to establish prejudice with respect to his claim of ineffective assistance of counsel resulting from the failure of Bowden-Lewis to move for a mistrial following the display of his RT-60 on the overhead projector. "It is well established that this court is not bound to consider any claimed error unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim. . . . It is equally well settled that a party cannot submit a case to the trial court on one theory and then seek a reversal in the reviewing court on another." (Internal quotation marks omitted.) *Robles* v. *Commissioner of Correction*, 169 Conn. App. 751, 763, 153 A.3d 29 (2016), cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017).

Further, the petitioner did not expressly argue structural error in his brief to this court. It was raised for the first time at oral argument, which is not proper under our rules and precedent. "It is well settled that claims on appeal must be adequately briefed, and cannot be raised for the first time at oral argument before the reviewing court." (Internal quotation marks omitted.) *Studer* v. *Studer*, 320 Conn. 483, 493 n.11, 131 A.3d 240 (2016); see also *LaSalle* v. *Commissioner of Correction*, 227 Conn. App. 520, 527 n.5, 321 A.3d 499, cert. denied, 350 Conn. 919, 325 A.3d 217 (2024).

Typically, we would decline to review the petitioner's claim because it was not raised in the habeas court. We have, however, elected to exercise our discretion and consider the merits of the petitioner's structural error claim. See, e.g., *L. K.* v. *K. K.*, 226 Conn. App. 279, 287–88, 318 A.3d 243 (2024); *State* v. *Lanier*, 205 Conn. App. 586, 628 n.9, 258 A.3d 770 (2021), aff'd, 347 Conn. 179, 296 A.3d 770 (2023). We emphasize that, had the petitioner prevailed on such a claim, he would have demonstrated that the constitutional violation undermined the integrity of the proceedings to such

[if] the error renders a trial fundamentally unfair and is not susceptible to a harmless error analysis . . . .'' (Internal quotation marks omitted.) *State* v. *Morales*, 121 Conn. App. 767, 772, 996 A.2d 1206, cert. denied, 298 Conn. 909, 4 A.3d 835 (2010). In cases of structural error, actual prejudice is presumed, and reversal is required even if no particular prejudice is shown and even if overwhelming evidence of guilt exists. See *Dennis* v. *Commissioner of Correction*, 134 Conn. App. 520, 536–37, 39 A.3d 799 (2012); but see *Weaver* v. *Massachusetts*, 582 U.S. 286, 300–302, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017) (certain types of structural error, such as improper closing of courthouse during jury voir dire, may require showing of prejudice or fundamental unfairness if raised for first time in habeas proceeding).[11]

The petitioner has failed to provide us with any authority to support his contention that structural error

an extent that automatic reversal was necessary. See *State* v. *Cushard*, 328 Conn. 558, 570, 181 A.3d 74 (2018). Additionally, the respondent did not assert that we should decline to address the merits of the petitioner's claim of structural error at oral argument. For these reasons, and under the specific facts and circumstances of the present case, we have addressed the merits of the petitioner's structural error claim despite his noncompliance with our rules.

[11] Additionally, we note that the United State Supreme Court has recognized that, in certain limited circumstances, prejudice is presumed in the context of an ineffective assistance of counsel claim. ''*Strickland* recognized, however, that [i]n certain [s]ixth [a]mendment contexts, prejudice is presumed. . . . In . . . [*United States* v. *Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)] . . . which was decided on the same day as *Strickland*, the United States Supreme Court elaborated on the following three scenarios in which prejudice may be presumed: (1) when counsel is denied to a [petitioner] at a critical stage of the proceeding; (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) when counsel is called upon to render assistance in a situation in which no competent attorney could do so. . . . This is an irrebuttable presumption.'' (Citation omitted; internal quotation marks omitted.) *Edwards* v. *Commissioner of Correction*, 183 Conn. App. 838, 843–44, 194 A.3d 329 (2018). The petitioner in the present case has not raised a claim under *Cronic*.

applies to this claim of ineffective assistance of counsel. Cf. *State* v. *Brawley*, 321 Conn. 583, 588–89, 137 A.3d 757 (2016) (state must prove beyond reasonable doubt that shackling error did not contribute to verdict when court ordered defendant to wear shackles that were in view of jury); *State* v. *Tweedy*, 219 Conn. 489, 508, 594 A.2d 906 (1991) (in absence of evidence that jury was aware defendant was shackled, it was clear beyond reasonable doubt that presumption of innocence was not abridged by court's decision to have defendant shackled during trial); see generally *State* v. *Lopez*, 271 Conn. 724, 733–34, 859 A.2d 898 (2004) (structural error applies to very limited class of cases where errors, such as defective instruction on reasonable doubt, racial discrimination in selection of grand jury, denial of public trial, and denial of self-representation at trial, transcend criminal process and deprive defendant of basic protections without which trial cannot reliably serve its function to determine guilt or innocence and no criminal punishment may be regarded as fundamentally fair).

We recognize that our Supreme Court, in *State* v. *Rose*, 305 Conn. 594, 605–606, 46 A.3d 146 (2012), determined under its inherent supervisory authority over the administration of justice that the conviction of a defendant who is compelled to stand trial in identifiable prison clothing is reversible per se.[12] The petitioner has

[12] In *State* v. *Rose*, supra, 305 Conn. 596, the defendant, a pretrial detainee, was charged with, and convicted of, assaulting public safety personnel. In his appeal to this court, the defendant claimed, inter alia, that the trial court improperly had compelled him to wear prison clothes, namely, a yellow jumpsuit, during his jury trial in violation of his federal constitutional rights and Practice Book § 44-7. Id., 597–98. At the outset of his trial, the defendant objected to wearing prison attire as opposed to "civilian clothing . . . ." Id., 599. The trial court specifically instructed the venire panels during jury selection not to consider the defendant's attire. Id. The court's instructions to the jury prior to its deliberations did not, however, contain a curative measure regarding his clothing. Id., 599–600.

This court agreed with the defendant's constitutional claim and concluded that "it is evident that the defendant did not receive a fair trial." (Internal quotation marks omitted.) Id., 598. First, we concluded that it was not

not presented us with any argument or explanation as

appropriate to apply a harmless error analysis where the defendant in that case had raised an objection to being forced to wear identifiable prison clothing and the trial court had failed to make any findings regarding "an essential state policy militating in favor of compelling the defendant to stand trial in prison clothing." (Internal quotation marks omitted.) Id., 601. Second, this court determined that, even if harmless error analysis was appropriate, the state had failed to satisfy that standard under the facts and circumstances of that case. Id., 601–602. Accordingly, we reversed the judgment of conviction. Id., 600.

On appeal to our Supreme Court, the state claimed that we improperly had concluded that the harmless error doctrine did not apply to the defendant's claim and that his appearance in identifiable prison clothing was not harmless beyond a reasonable doubt. Id., 603–604. The defendant countered that compelling him to wear such clothing constituted structural constitutional error. Id., 604. Following oral argument, the parties were directed to submit supplemental briefs on the issue of whether the judgment of this court should be affirmed on the alternative ground that the defendant's conviction should be reversed on the basis of our Supreme Court's supervisory authority over the administration of justice. Id., 604–605. Our Supreme Court concluded that "reversing the defendant's conviction is warranted in the exercise of our inherent supervisory authority over the administration of justice. Pursuant to that authority, we adopt a rule that the conviction of a defendant who is compelled to stand trial in identifiable prison clothing in violation of his or her constitutional rights is reversible per se. Because we decide this case on the basis of our supervisory authority, we need not resolve the issue of whether a trial court's constitutionally erroneous decision to compel a defendant to stand trial before a jury in identifiable prison clothing is susceptible to harmless error analysis, as the state claims, or instead amounts to structural error, as the defendant contends and as the Appellate Court apparently concluded." (Footnote omitted.) Id., 605–606.

In support of its conclusion, our Supreme Court explained that compelling a defendant to wear identifiable prison clothing undermined the integrity of the trial and diminished the perceived fairness of the judicial system as a whole. Id., 608. Specifically, it compromised the ability of the jury to engage in neutral fact-finding and eroded the presumption of innocence. Id. Further, in contrast to situations involving the need for physical restraints, "compelling an accused to wear jail clothing furthers no essential state policy." (Internal quotation marks omitted.) Id., 609. Finally, the court reasoned that "compelling a defendant to stand trial in identifiable prison clothing is unfair not merely because it inject[s] . . . improper evidence of the defendant's imprison[ment] status into the presentation of the case . . . but also, more fundamentally, because the defendant's appearance in prison clothes invites and indeed tempts jurors to draw highly unfavorable inferences about his character and likely conduct. . . . Because prison clothing is a constant and vivid indication that its wearer is a detainee and

to why the rule set forth in *Rose* should be extended to his appeal, nor has he provided any binding or persuasive precedent requiring the application of structural error under these facts and circumstances.

Thus, we consider whether the habeas court properly determined that the petitioner failed to demonstrate, under *Strickland*'s second prong, that he was prejudiced by counsel's failure to move for a mistrial. In the present case, the petitioner was required to show that it was reasonably probable that the criminal court would have granted a motion for a mistrial. See *Sinchak* v. *Commissioner of Correction*, 126 Conn. App. 670, 679, 14 A.3d 348 (to show prejudice, petitioner was required to prove that, if motion for mistrial had been filed, it was reasonably probable that such motion would have been granted), cert. denied, 301 Conn. 901, 17 A.3d 1045 (2011); see also *Streater* v. *Commissioner of Correction*, 143 Conn. App. 88, 108, 68 A.3d 155 (prejudice established by showing that court would have granted motion for mistrial), cert. denied, 310 Conn. 903, 75 A.3d 34 (2013).

"[Although] the remedy of a mistrial is permitted under the rules of practice, it is not favored. [A] mistrial should be granted only as a result of some occurrence

perhaps a flight risk and a threat, a defendant's appearance in identifiable prison clothing does something substantially worse than inject improper evidence into the case, namely, it causes jurors to deliberate under a cognitive bias. Because this bias is subtle and ever present, jury instructions may not be adequate to cure it." (Emphasis omitted; footnote omitted; internal quotation marks omitted.) Id., 610–11.

Our Supreme Court then explained why the per se rule of reversibility under these circumstances was necessary. Id., 611. First, it alerted the trial court that compelling a criminal defendant to wear identifiable prison clothing simply cannot be sanctioned. Id. Second, it sent a strong message to the public that our Supreme Court accorded the highest importance to the presumption of innocence and basic fairness. Id., 611–12. In conclusion, it noted that this specific type of error is "clear-cut and unambiguous," "avoidance is virtually costless," and is "not an error of the sort that can be excused as occurring in the heat of battle." Id., 614.

upon the trial of such a character that it is apparent to the court that because of it a party cannot have a fair trial . . . and the whole proceedings are vitiated. . . . If curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided." (Internal quotation marks omitted.) *Sinchak* v. *Commissioner of Correction*, supra, 126 Conn. App. 679; see also *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 68–69, 967 A.2d 41 (2009) (same); see generally *State* v. *Hawthorne*, 176 Conn. 367, 372, 407 A.2d 1001 (1978) (mistrial should be granted if, as result of some occurrence at trial it is apparent to court that party cannot have fair trial and entire proceedings should be vitiated); *State* v. *Barber*, 173 Conn. 153, 157, 376 A.2d 1108 (1977) (same).

In the present case, the petitioner asserts that the admission into evidence and publication of his RT-60 form to the jury caused a significant issue that irreparably prejudiced him because it destroyed the presumption of innocence to which he was entitled. The record, however, does not establish to what degree, if any, the jury was affected by the publication of the RT-60. The record is unclear as to the specific details regarding the manner and duration in which the petitioner's RT-60 form was displayed on the overhead projector.[13] It is unknown whether one or more members of the jury even noticed the entry showing the petitioner's incarcerated status near the time of his criminal trial. Furthermore, the record does not reflect whether any jurors, even if they saw the entry regarding the petitioner's incarceration near the time of his criminal trial, comprehended its significance.

In *Thompson* v. *Commissioner of Correction*, 184 Conn. App. 215, 226, 194 A.3d 831, cert. denied, 330 Conn. 930, 194 A.3d 778 (2018), we declined to assume

[13] See footnote 5 of this opinion and accompanying text.

that the jury heard the complainant's testimony that she was not the first person that the petitioner in that case had assaulted merely because her statement was recorded and subsequently included in the transcript, given the trial judge's statement that he was " 'very confident' " that the jury had not heard the testimony. "The petitioner cannot rely on mere conjecture or speculation to satisfy either the performance or prejudice prong but must instead offer demonstrable evidence in support of his claim. . . . If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim." (Citation omitted; internal quotation marks omitted.) Id., 224; see also *State* v. *Williamson*, 206 Conn. 685, 704–706, 539 A.2d 561 (1988) (Supreme Court declined to review claim when record was unclear as to whether defendant wore prison clothes). Similarly, given the factual lacuna in the present case, we cannot conclude that the petitioner has established prejudice necessary to prevail on his claim.

Although it is unclear as to precisely how long the RT-60 was displayed to the jury, nothing in the record supports a conclusion that this document remained in the view of the jury for an extended or substantial period of time. Further, this was the sole instance during the trial where the jury was shown the petitioner's unredacted RT-60 form.

We considered an analogous situation in *State* v. *Marcus H.*, supra, 190 Conn. App. 332. In that case, the state moved to increase the defendant's bond during the course of his criminal trial. Id., 344. The court granted this request, and the defendant was taken into custody, during which time he was shackled during a recess in the court proceedings. Id. After the recess, the trial resumed, and his leg shackles were not visible

to the jury. Id. At some point, the self-represented defendant, stood up and started to approach a witness with the permission of the court. The defendant's shackles on his ankles briefly were visible to the jury. Id. The prosecutor immediately requested that the jury be excused. Id. After the trial court ordered the shackles to be removed, the defendant moved for a mistrial, which was denied. Id., 344–45. The court subsequently instructed the jury to not consider during its deliberations that the defendant had been shackled. Id., 345.

On direct appeal from his conviction, the defendant raised a constitutional claim alleging that the exposure of his shackles to the jury vitiated his presumption of innocence. Id., 345–46. In rejecting the defendant's claim, this court duly recognized that the presence of shackles, similar to compelling a defendant to appear in court wearing prison attire, implicated due process concerns, as both have an erosive effect on the presumption of innocence. Id., 348. We noted, however, that "[t]his does not mean . . . that every practice tending to single out the accused from everyone else in the courtroom must be struck down." (Internal quotation marks omitted.) Id., 345. Furthermore, we reasoned that "*the defendant has not provided any case law that stands for the proposition that a defendant's right to due process is violated if the jury is briefly exposed to facts that would lead it to believe that the defendant is in custody*." (Emphasis added.) Id., 350. We explained that the shackles were visible for only a brief period of time. Id. We then cited to federal precedent to support our conclusion that a brief exposure to the jury of the defendant's shackles, along with a curative instruction, did not deprive the defendant of a fair trial.[14]

[14] "For example, in *Ghent* v. *Woodford*, 279 F.3d 1121, 1132 (9th Cir. 2002), a defendant claimed that his constitutional right to due process was violated because he was physically restrained by the state in the presence of the jury. Specifically, jurors saw the defendant in the hallway at the entrance to the courtroom in handcuffs and other restraints. Id., 1133. The reviewing court stated that [t]he jury's brief or inadvertent glimpse of a shackled

Id., 351. Likewise, the record in the present case does not indicate that the members of the jury viewed the RT-60 document for an extended period of time, and, even if one or more members of the jury briefly noticed that the RT-60 contained information regarding the petitioner's incarceration near the time of his criminal trial, such a minimal exposure to this fact would not constitute a violation of due process.

We also note that the court instructed the jury that it could consider only the evidence admitted into evidence during the trial. Specifically, the court stated that, in reaching its verdict, the jury was limited to the testimony and the full exhibits that had been admitted into evidence. The jury is presumed to follow the court's instructions. See, e.g., *State* v. *Outlaw*, 350 Conn. 251, 284, 324 A.3d 107 (2024) (in absence of evidence to contrary, jury is presumed to follow court's instructions); *State* v. *Hughes*, 341 Conn. 387, 429, 267 A.3d 81 (2021) (same).

Further, the petitioner baldly asserts that the trial court would have granted a motion for a mistrial at his criminal trial had Bowden-Lewis made such a motion. He has not, however, provided any support for that assertion. We emphasize that a "mistrial is considered an extreme remedy and is disfavored where the harm can be mitigated through other means." *Robinson* v.

defendant is not inherently or presumptively prejudicial, nor has [the defendant] made a sufficient showing of actual prejudice. Id.

"Additionally, in *United States* v. *Jones*, 468 F.3d 704, 706 (10th Cir. 2006), a defendant claimed that his right to due process was violated because a juror briefly saw him in leg shackles during the afternoon break on the second day of trial. The court held that there was no due process violation and stated that, [i]n itself, a juror's brief view of a defendant in shackles does not qualify as a due process violation worthy of a new trial. Id., 709. *We agree* with the courts in *Ghent* and *Jones*, *that a jury's brief or inadvertent glimpse of a shackled defendant is not inherently or presumptively unconstitutional.* Unlike cases in which the defendant was ordered to remain shackled throughout the entirety of the trial, here, the exposure lasted for only a brief period of time." (Emphasis added; internal quotation marks omitted.) *State* v. *Marcus H.*, supra, 190 Conn. App. 351.

Commissioner of Correction, 167 Conn. App. 809, 823, 144 A.3d 493, cert. denied, 323 Conn. 925, 149 A.3d 982 (2016). Although it is true that the trial judge sua sponte acted quickly upon recognizing a potential issue with the unredacted RT-60 form, such alacrity demonstrated his commendable efforts to ensure that the petitioner's right to due process right was not violated and obviated the need to declare a mistrial. In other words, it does not follow, a fortiori, from the court's prompt actions after the exhibit was published to the jury that a motion for a mistrial would have been granted. Finally, given the strategy employed by Bowden-Lewis during the petitioner's criminal trial to be honest and up-front with the jury about his association with the victim, including their prior incarcerations, and participation in the sale of illegal drugs, the jury was aware that the petitioner had been incarcerated at least once prior to the trial, and thus it would be of reduced significance if it learned of an additional period of incarceration near the time of his criminal trial. For these reasons, we conclude that the petitioner has failed to demonstrate prejudice as a result of Bowden-Lewis' failure to move for a mistrial. Accordingly, his claim of ineffective assistance of counsel must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

CARRI ROUX, COADMINISTRATOR (ESTATE OF LUKE M. ROUX), ET AL. *v.* JACOB N. COFFEY ET AL.
(AC 46898)

Alvord, Elgo and Cradle, Js.

Syllabus

The plaintiffs appealed from the judgment of the trial court granting the defendant's motion to strike all counts of the complaint against it. They claimed, inter alia, that the court improperly granted the motion to strike

as to the counts alleging negligence and public nuisance on the ground that the controlling authority of *Demond* v. *Project Service, LLC* (331 Conn. 816) precluded their claims. *Held*:

The trial court properly granted the defendant's motion to strike the plaintiffs' negligence claim, as the Supreme Court's reliance in *Demond* on public policy against imposing liability on a defendant for the harm caused off-premises by a drunk driver was equally applicable to the negligence claim in the present case.

The trial court properly granted the defendant's motion to strike the plaintiffs' public nuisance claim, as the Supreme Court's explanation in *Demond*, namely, that established legal principles deem the sole proximate cause of a crash to be an intoxicated driver's choice to consume alcohol immoderately and then drive on public roads, precluded the plaintiffs' public nuisance claim.

Argued November 13, 2024—officially released January 14, 2025

Procedural History

Action to recover damages for, inter alia, injuries sustained by the plaintiffs' decedent as a result of the alleged negligence of the defendants, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *S. Connors, J.*, granted the motion to strike filed by the defendant Live Nation Worldwide, Inc., and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Ryan K. Sullivan, with whom was *Julianne Lombardo Klaassen*, for the appellants (plaintiffs).

Wesley W. Horton, with whom were *Michael A. Lanza* and *John C. Pitblado*, and, on the brief, *Brendan N. Gooley*, for the appellee (defendant Live Nation Worldwide, Inc.).

Opinion

PER CURIAM. The plaintiffs, Carri Roux and Stephen J. Roux, coadministrators of the estate of their son, Luke M. Roux (Roux), appeal from the judgment of the trial court rendered in favor of the defendant Live

Nation Worldwide, Inc.,[1] following the court's granting of the defendant's motion to strike all counts of the complaint brought against it. On appeal, the plaintiffs claim that the court improperly struck counts four and five of their complaint, which alleged negligence and public nuisance claims, respectively.[2] We affirm the judgment of the court.

The following facts, as alleged in the operative amended complaint filed March 10, 2023, and procedural history are relevant to the plaintiffs' claims on appeal. The plaintiffs commenced the present action in December, 2022. In count four of the complaint, the plaintiffs alleged that the defendant[3] "owned, leased, rented, controlled, possessed, operated, managed, and/or maintained the premises at 61 Savitt Way, Hartford," which is known as the Xfinity Theatre. On June 25, 2022, the defendant organized, promoted, and held the Dierks Bentley "Beers On Me" concert (concert) at the Xfinity Theatre and "permitted patrons to loiter and consume alcoholic beverages (hereinafter referred to as 'tailgating') in the parking lots located on the aforementioned premises before the start of the [concert]." The plaintiffs alleged that the defendant "knew, or should have known, that . . . there would be thousands of patrons present on the aforementioned premises, many of whom would consume alcohol excessively

[1] Jacob N. Coffey and Robin Coffey also were named as defendants in the underlying matter. The claims against them remain pending in the trial court. Contemporary Services Corporation also was named as a defendant, but subsequently, the plaintiffs withdrew the action as against it. The defendant Live Nation Worldwide, Inc., filed an apportionment complaint against Nicholas Duey.

Because Live Nation Worldwide, Inc., is the only defendant participating in this appeal, we refer to it as the defendant.

[2] The court also granted the defendant's motion to strike the plaintiffs' claim alleging a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. On appeal, the plaintiffs do not challenge the trial court's ruling striking the CUTPA count.

[3] All relevant allegations against the defendant included "its officers, agents, apparent agents, and/or employees."

to the point of intoxication and would foreseeably operate motor vehicles while in an intoxicated state, [and that] . . . based on past events, there would be a substantial number of arrests, criminal acts, and motor vehicle accidents, directly and proximately caused by the consumption of alcohol by patrons who participated in tailgating on the defendant's premises."

The plaintiffs further alleged: "At the same time and place, one Jacob Coffey was a ticket holder for the . . . concert and was present on the defendant's premises for the purposes of attending the concert and tailgating in the parking lot prior to the show," Coffey "consumed an excessive amount of alcohol to the point of intoxication while on the defendant's premises," and the defendant "knew, or should have known, that . . . Coffey was intoxicated and, as a result thereof, presented an unreasonable risk of harm to others." The plaintiffs alleged that the defendant denied Coffey "entry into the concert due to this level of intoxication," and that, "upon being informed that he was denied entry into the concert, [Coffey] became combative with the defendant." According to the plaintiffs' allegations, Coffey then "left the entrance area and walked to a portable toilet in the parking lot and, due to his intoxication, passed out inside the portable toilet for an extended period of time." The plaintiffs alleged that Coffey was "extricated from the portable toilet by two friends, who alerted the defendant . . . of the concerns that they had for . . . Coffey and his level of intoxication" and that the defendant "responded to the friends' request for assistance" but "took no action to address the concerns regarding" Coffey. The plaintiffs alleged that "Coffey became combative and argumentative with his friends and, at some point thereafter, went back to his vehicle and drove off the premises."

The plaintiffs alleged that, "[s]hortly thereafter, at approximately 8:24 p.m. . . . Coffey was operating a

motor vehicle in a westerly direction on Colt Highway, at or near its intersection with Birdseye Road, both of which are public roads or highways in Farmington," and Roux "was operating a motor vehicle in a southerly direction on Birdseye Road, at or near its intersection with Colt Highway." "Coffey, as a result of his intoxication, disregarded the red traffic signal that governed his lane of travel and proceeded into the intersection of Colt Highway and Birdseye Road and collided with the motor vehicle operated by . . . Roux, causing [Roux] to sustain and suffer . . . catastrophic fatal injuries and losses . . . . [F]ollowing the collision, at approximately 9:40 p.m. . . . Coffey had his blood drawn, which indicated a blood alcohol content of 0.191."[4]

The plaintiffs alleged that the fatal injuries and losses sustained were caused by the negligence and carelessness of the defendant in one or more of the following ways: "[T]hey voluntarily undertook to deny . . . Coffey entry to the venue due to his level of intoxication but, in so doing, failed to properly address the danger that he presented, thereby increasing the risk of harm to others; and/or . . . they voluntarily undertook to investigate and/or respond to concerns presented by other patrons regarding . . . Coffey but, in so doing, failed to take additional action to prevent or address the danger . . . Coffey presented, thereby increasing the risk of harm to others; and/or . . . they knew, or should have known, the risks attendant to tailgating, including the heightened risk that patrons would consume alcohol excessively on the premises and subsequently operate motor vehicles and failed to take adequate measures to prevent such conduct; and/or . . .

[4] In count two of the operative complaint, alleging recklessness against Coffey, the plaintiffs alleged that Coffey "was operating a motor vehicle at a high rate of speed—specifically, more than eighty [miles per hour] in an area with a posted speed limit of forty-five [miles per hour] . . . ."

they knew, or should have known, that there would be a large number of patrons on the premises who would consume alcohol excessively but failed to implement adequate security or safety measures to control and prevent such persons from presenting an unreasonable risk of harm to others, including [Roux]; and/or . . . they encouraged, promoted, and/or permitted the consumption of alcohol on the premises but failed to implement adequate security and/or safety measures to prevent excessive alcohol consumption and drunk driving; and/or . . . they knew, or should have known, that . . . Coffey was intoxicated and presented a foreseeable risk to others, including by way of operating a motor vehicle under the influence, but failed to prevent him from doing so; and/or . . . they failed to have adequate policies, procedures, or guidelines to address and prevent the excessive consumption of alcohol by patrons tailgating in the parking lot and/or to prevent such patrons from operating a motor vehicle while under the influence of alcohol; and/or . . . they failed to ensure that there were adequate security personnel in the parking lot during the permitted tailgating hours to prevent the excessive consumption of alcohol and drunk driving; and/or . . . they failed to train their officers, agents, apparent agents, and/or employees in proper procedures for identifying and responding to reports of intoxicated individuals, such as the one involving . . . Coffey, on the premises and/or preventing such persons from leaving the premises through the operation of a motor vehicle; and/or . . . they failed to notify municipal police officers, including officers on the premises, that . . . Coffey was highly intoxicated and intending to operate a motor vehicle on a public thoroughfare, at substantial risk to other motorists, including" Roux. The plaintiffs alleged that, as a result of the negligence and carelessness of the defendant, Roux suffered catastrophic personal injuries resulting in his untimely death.

In count five, the plaintiffs incorporated certain allegations of count four and further alleged that the defendant "knew, or should have known, that tailgating without adequate security and/or safety measures in place to prevent or control thousands of patrons from consuming alcohol excessively and/or driving while under the influence, had a natural tendency to create danger and inflict injury to other persons," the "risks attendant to tailgating at the Xfinity Theatre were continuous and ongoing," and "the use of the premises at the Xfinity Theatre, including the parking lots located thereon, by the defendant . . . was unreasonable under the circumstances." The plaintiffs alleged that "[t]he public nuisance created by the unreasonable use of the land interfered with a right common to the general public to use public roads and highways; specifically, given the risks presented by intoxicated drivers who had consumed alcohol excessively while on the defendant's premises." The plaintiffs alleged that the public nuisance "was a direct and proximate cause of the catastrophic fatal injuries and losses sustained" by Roux. All counts alleged against the defendant were brought pursuant to the wrongful death statute, General Statutes § 52-555.

In response to the complaint, on April 10, 2023, the defendant filed a motion to strike the three counts[5] brought against it and an accompanying memorandum of law in support of its motion to strike. In support of its motion to strike, the defendant argued that counts four and five of the complaint were legally insufficient. With respect to count four, the defendant argued that "a premises owner has no duty to prevent an intoxicated person from leaving the premises and causing an accident off the premises." With respect to count five, the defendant also argued that there was no cognizable duty supporting a public nuisance claim and that "the

[5] See footnote 2 of this opinion.

type of nuisance alleged [could not] as a matter of law, be considered the 'proximate cause' of a drunk driving accident off the premises." The defendant argued that the claims asserted in counts four and five were precluded by our Supreme Court's decision in *Demond* v. *Project Service, LLC*, 331 Conn. 816, 208 A.3d 626 (2019).

On April 21, 2023, the plaintiffs filed a memorandum of law in opposition to the motion to strike. The plaintiffs argued, inter alia, that the defendant, in "voluntarily undert[aking] to respond to concerns regarding" Coffey's intoxication, incurred a legal duty not to increase the risk of harm Coffey presented to others and that the defendant breached this duty in the actions it took in relation to Coffey by "denying him entry to the premises and instructing him to wait in the parking lot." With respect to the defendant's argument that its conduct could not be considered the proximate cause of the accident, the plaintiffs responded that, because "a defendant can be liable for conduct that increases or contributes to the risk of intoxicated driving," the court should conclude that the plaintiffs' public nuisance claim was legally sufficient as pleaded. The plaintiffs further argued that our Supreme Court in *Demond* "overlooked controlling precedent in rejecting the plaintiffs' public nuisance claim."

On May 5, 2023, the defendant filed a reply. On June 12, 2023, the plaintiffs, with permission of the court, filed a surreply brief, in which they analyzed authority from jurisdictions outside of Connecticut in support of their position that count four of their complaint alleged a valid legal duty. On June 29, 2023, the defendant, also with permission of the court, filed a surreply brief, in which it reiterated its argument that our Supreme Court's decision in *Demond* is controlling and, accordingly, asserted that it would be inappropriate to look to out of state authority.

On July 11, 2023, the parties appeared before the court, *Connors*, *J.*, for oral argument. On August 29, 2023, the court issued a memorandum of decision, in which it granted the motion to strike. As to counts four and five, the court determined that *Demond* was controlling. Addressing count four, the court determined that *Demond* "preclude[d] any duty by the defendant toward a third party on public roads harmed by an adult who consumes alcohol on the defendant's premises." With respect to count five, the court quoted the Supreme Court's explanation in *Demond* that "established legal principles in Connecticut . . . deem the sole proximate cause of the crash to be [the intoxicated driver's] choice to consume alcohol immoderately and then drive on [public roads]." (Internal quotation marks omitted.) Accordingly, the court granted the motion to strike. This appeal followed.[6]

We begin with our standard of review. "Our review of a trial court's decision to grant a motion to strike is plenary. . . . This is because a motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Citation omitted; internal quotation marks omitted.) *Cenatiempo* v. *Bank of America, N.A.*, 333 Conn. 769, 788, 219 A.3d 767 (2019).

[6] The plaintiffs originally appealed on September 8, 2023, following the court's granting of the defendant's motion to strike. The defendant filed a motion to dismiss the appeal for lack of a final judgment. In response, the plaintiffs filed a motion for judgment pursuant to Practice Book § 10-44, requesting the court to render judgment on the stricken counts, which the court granted. Thereafter, the plaintiffs amended their appeal to reflect the trial court's judgment.

The following legal principles are applicable. "[A] cause of action in negligence is comprised of four elements: duty; breach of that duty; causation; and actual injury. . . . Whether a duty exists is a question of law for the court, and only if the court finds that such a duty exists does the trier of fact consider whether that duty was breached. . . . If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant. . . . Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. . . . Foreseeability is a critical factor in the analysis, because no duty exists unless an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result . . . . Our law makes clear that foreseeability alone, however, does not automatically give rise to a duty of care . . . . A further inquiry must be made, for we recognize that duty is not sacrosanct in itself . . . but is only an expression of the sum total of those considerations of policy [that] lead the law to say that the plaintiff is entitled to protection. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." (Citation omitted; internal quotation marks omitted.) *Raspberry Junction Holding, LLC* v. *Southeastern Connecticut Water Authority*, 340 Conn. 200, 210–11, 263 A.3d 796 (2021).

"The substantive law governing public nuisance claims is also well established. Section 821B of the

Restatement (Second) of Torts defines a public nuisance as an unreasonable interference with a right common to the general public. . . . Whether an interference is unreasonable in the public nuisance context depends, according to the Restatement (Second), on (a) [w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by [law] . . . . The rights common to the general public can include, but certainly are not limited to, such things as the right to use a public park, highway, river or lake. . . .

"To prevail [on] a claim for public nuisance . . . a plaintiff must prove the following elements: (1) the condition complained of had a natural tendency to create danger and inflict injury upon person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the nuisance was the proximate cause of the plaintiffs' injuries and damages. . . . In addition, the plaintiff must prove that the condition or conduct complained of interferes with a right common to the general public. . . . Nuisances are public where they . . . produce a common injury . . . . The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence." (Citations omitted; internal quotation marks omitted.) *Demond* v. *Project Service, LLC*, supra, 331 Conn. 860–61.

Because the plaintiffs claim on appeal that the court improperly struck counts four and five of their complaint on the basis that *Demond* was controlling authority precluding their claims, we begin with a discussion of that case. In *Demond*, a temporarily homeless man, Willis Goodale, was living in his Jeep in the parking lot

of a service plaza on Interstate 395 for approximately one week prior to March 9, 2012. Id., 822. On March 9, 2012, Goodale consumed a large amount of alcohol and drove his vehicle on the interstate, where he caused a multivehicle crash, killing Benjamin Demond and injuring others. Id., 823–24. The plaintiffs commenced an action against the parties responsible for operating and maintaining the service plaza. Id., 824. They alleged "that the defendants created a public nuisance by permitting Goodale to loiter and to consume alcohol on the service plaza premises, and also breached a duty owed to passing motorists . . . to protect them from the increased risk of harm created by the defendants' failure to perform their contractual obligations"; id., 820–21; including obligations pursuant to a concession agreement under which the defendant, Project Service, LLC, and its subcontractors agreed not to permit the consumption of alcohol or loitering at the service plaza. Id., 822. The trial court rendered summary judgment on the plaintiffs' public nuisance claims but submitted the negligence claims to the jury, which returned a verdict in favor of the plaintiffs. Id., 821. The defendants appealed, claiming that the court improperly denied their motions to set aside the verdict and to direct judgment in their favor on the negligence claims, and the plaintiffs cross appealed the rendering of summary judgment on their public nuisance claims. Id., 822.

In considering whether the defendants owed the plaintiffs a duty of care, our Supreme Court explained that "an owner or possessor of property in this state generally cannot be held liable in negligence for harms caused by adults who consume alcohol on that property but cause injury only after leaving to drive on the public roads. This limitation holds true even when the owner or possessor plays an *active* role in creating the risk by actually serving the defendant the alcohol." (Emphasis in original; footnote omitted.) Id., 837. Accordingly,

the court determined that "Project Service [LLC] had no common-law duty, arising from its status as possessor of the premises, to prevent the risk of harm to the plaintiffs . . . ." Id., 838. The court additionally considered whether a duty of care arose from the contractual undertakings of the defendants and concluded that it did not. Id., 848.

Turning to policy considerations, the court explained: "The common-law rules that govern the premises liability of a property owner or possessor in this context embody the public policy determinations of the courts and the legislature regarding the appropriate allocation of rights and obligations among the various parties. . . . There may or may not come a time in the future when those common-law rules change in response to policy developments relating to the serious social problem of drunken driving. This case presents no occasion to consider the issue. In the absence of an express contractual provision or evidence of an unambiguous intention on the part of the contracting parties, we can perceive no reason why the policy considerations underlying our existing common-law rules of premises liability should automatically or presumptively be abrogated when a party's contract with a property owner includes an obligation to prevent alcohol consumption on the premises, without more. We therefore conclude that the duty proposed by the plaintiffs will not arise unless the parties to such a contract agree to expand the undertaking party's obligations beyond what is imposed by the existing law." (Citations omitted.) Id., 849–50. Accordingly, the court concluded that the trial court improperly denied the defendants' motions to set aside the verdict and to render judgment in their favor on the plaintiffs' negligence claims. Id., 858–59.

With respect to the plaintiffs' public nuisance claims, the court in *Demond* found indistinguishable the facts of its prior decision in *Quinnett* v. *Newman*, 213 Conn.

343, 345, 568 A.2d 786 (1990), overruled on other grounds by *Craig* v. *Driscoll*, 262 Conn. 312, 813 A.2d 1003 (2003), and relied on the proposition in *Quinnett* that, "[t]o the extent that the defendants' conduct contributed to the creation of the dangerous condition (i.e., the intoxication of the motorist), their liability was cut off by the intoxicated motorist's own choice to consume alcohol immoderately and then drive." *Demond* v. *Project Service, LLC*, supra, 331 Conn. 862.

The court concluded that, even assuming that "the defendants' conduct in allowing Goodale to live and consume alcohol at the service plaza contributed to the 'dangerous condition' (i.e., Goodale's presence at the service plaza in an intoxicated state), established legal principles in Connecticut, which the plaintiffs have not asked us to overrule, deem the sole proximate cause of the crash to be Goodale's choice to consume alcohol immoderately and then drive" on the interstate. Id., 862–63. Accordingly, the court determined that the trial court properly granted the defendants' motions for summary judgment on the plaintiffs' public nuisance claims. Id., 863.

On appeal, the plaintiffs maintain that they are not asking this court to overrule *Demond*, rather, they argue that *Demond* is distinguishable. Specifically, they "acknowledge that [the defendant] did not have a common-law duty, arising solely from its status as a landowner, to . . . Roux and other Connecticut motorists." However, they contend that "the facts of the present case, as pleaded, demonstrate that [the defendant], by and through its actions in, inter alia, permitting the excessive consumption of alcohol on its premises, refusing entry to . . . Coffey, and constructively ejecting him into the parking lot of the Xfinity Theatre, did owe a duty to the foreseeable victims of Coffey's intoxicated driving, and specifically . . . Roux." In other words, the plaintiffs contend that a duty arose based on the defendant's "direct contact with the intoxi-

cated invitee and its action that caused him to drive drunk."[7]

We agree with the court that *Demond* is controlling of the plaintiffs' negligence and public nuisance claims. With respect to the negligence claim, we are not persuaded that the plaintiffs' allegations that the defendant's contact with the intoxicated individual, including the refusal of entry into the concert and constructive ejectment into the parking lot, are sufficient to distinguish the present case from *Demond*. *Demond*'s reliance on the public policy against imposing liability on a defendant for the harm caused off-premises by a drunk driver is equally applicable to the present case. Similarly, the Supreme Court's explanation that "established legal principles in Connecticut . . . deem the sole proximate cause of the crash to be [the intoxicated driver's] choice to consume alcohol immoderately and then drive on [public roads]," precludes the plaintiffs' public nuisance claim.[8] As the plaintiffs recognize, "we

[7] In the present case, the plaintiffs argue on appeal in support of the viability of their public nuisance claim that "the 'established legal principles' referenced in *Demond* are based on a causation analysis in *Quinnett* v. *Newman*, [supra, 213 Conn. 343] . . . that the Supreme Court overruled in *Craig* v. *Driscoll*, [supra, 262 Conn. 312]." The defendant responds that the "causation analysis that *Quinnett* relied on for analysis of its nuisance claim was reiterated by the *Demond* court" and, because *Demond* is binding precedent, the plaintiffs' argument is unavailing. Moreover, the defendant notes, and our Supreme Court has recognized, that, "shortly after [the] decision in *Craig*, the legislature effectively overruled [the] holding in that case by expressly abrogating the common-law negligence action that [our Supreme Court] court had recognized." *O'Dell* v. *Kozee*, 307 Conn. 231, 265, 53 A.3d 178 (2012). Accordingly, we conclude that the plaintiffs' argument is unavailing.

[8] As our Supreme Court explained in *Demond* v. *Project Service, LLC*, supra, 331 Conn. 838 n.16, both duty and causation "are driven in significant part by considerations of policy, separate and apart from the foreseeability of harm, and it is fair to say that the causation doctrine developed in these cases is based primarily on policy considerations. For this reason, it is difficult to perceive any meaningful distinction between a doctrine holding that landowners have no duty to prevent harm to roadway travelers caused by drunk drivers and one holding that landowners have such a duty but their liability is categorically barred by the intervening act of the drunk driver."

are bound by Supreme Court precedent and are unable to modify it. . . . [W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *Stamford Property Holdings, LLC* v. *Jashari*, 218 Conn. App. 179, 198 n.12, 291 A.3d 117, cert. denied, 347 Conn. 901, 296 A.3d 840 (2023). We conclude, therefore, that the court properly granted the defendant's motion to strike the plaintiffs' negligence and public nuisance claims.

The judgment is affirmed.

ROBERT DEARING *v.* COMMISSIONER OF CORRECTION
(AC 46279)

Alvord, Westbrook and Bear, Js.

Syllabus

The petitioner, who had been convicted of sexual assault in the first degree and risk of injury to a child, appealed, on the granting of certification, from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner claimed that the court improperly failed to conclude that he received ineffective assistance from his criminal trial counsel, appellate counsel, and prior habeas counsel. *Held*:

The habeas court properly concluded that the petitioner's criminal trial counsel did not provide ineffective assistance by failing to hire, consult with, or present the testimony of a child abuse expert, as the petitioner failed to establish that his counsel's performance fell outside the wide range of reasonable professional assistance, and, even assuming that it was professionally unreasonable for his counsel not to have engaged his own child abuse expert and that this failure amounted to deficient performance under the facts of this case, the petitioner failed to establish that he was prejudiced by his counsel's performance.

The habeas court properly concluded that the petitioner's criminal trial counsel did not provide ineffective assistance by failing to obtain the victim's confidential medical records or to object to or seek to have stricken certain testimony from the state's child forensic interview expert, the petitioner having failed to demonstrate that his counsel's performance was deficient.

The habeas court properly determined that the petitioner's appellate counsel did not provide ineffective assistance by not raising as an appellate issue in the petitioner's direct appeal that the trial court improperly denied the petitioner's request for the disclosure of the victim's medical and psychological records on the ground that they contained nothing exculpatory, the petitioner having failed to satisfy his burden of demonstrating deficient performance.

Because this court concluded that the habeas court correctly determined that the petitioner had failed to establish that either his criminal trial counsel or his appellate counsel provided constitutionally ineffective assistance, his claim of ineffective assistance against his prior habeas counsel also necessarily failed.

Argued October 9, 2024—officially released January 14, 2025

Procedural History

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

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

Jo Anne Sulik, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Nancy L. Chupak* and *Mark G. Ramia*, senior assistant state's attorneys, for the appellee (respondent).

Opinion

WESTBROOK, J. The petitioner, Robert Dearing, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his amended petition for a writ of habeas corpus in which he alleged the ineffective assistance of his criminal trial counsel, appellate counsel, and prior habeas counsel. The petitioner claims on appeal that the habeas court improperly failed to conclude that (1)

his criminal trial counsel provided ineffective assistance by failing (a) to engage and present the testimony of a child abuse expert, (b) to obtain certain confidential records of the victim, and (c) to object to or have stricken certain testimony provided by the state's expert on child forensic interviews; (2) appellate counsel provided ineffective assistance in his direct criminal appeal by failing to challenge the trial court's decision not to release the victim's confidential records; and (3) prior habeas counsel provided ineffective assistance by failing to raise in his previous habeas action the foregoing claims of ineffective assistance directed at trial and appellate counsel. We disagree and, accordingly, affirm the judgment of the habeas court.

This court previously set forth the following facts pertaining to the petitioner's criminal conviction as reasonably could have been found by the jury. See *State* v. *Dearing*, 133 Conn. App. 332, 334–38, 34 A.3d 1031, cert. denied, 304 Conn. 913, 40 A.3d 319 (2012). "The [petitioner] was born in 1978. The victim [K] was born in 2000; she suffers from [a] pervasive developmental disorder not otherwise specified.[1] [K's parents] . . . and the [petitioner] were longtime intimate friends, and [K's] father frequently went to the [petitioner's] home on weekends to work on automobiles with the [petitioner]. [K] referred to the [petitioner] as Uncle Rob, although there was no familial relationship between

[1] A pervasive developmental disorder is one that is "characterized by distortions in the development of the basic psychological functions such as language, social skills, attention, perception, reality testing, and movement." (Internal quotation marks omitted.) *State* v. *Dearing*, supra, 133 Conn. App. 334 n.2. The term "pervasive developmental disorder not otherwise specified" is used "when there is a severe and pervasive impairment in the development of reciprocal social interaction associated with impairment in either verbal or nonverbal communication skills or with the presence of stereotyped behavior, interests, and activities, but the criteria are not met for a specific [disorder]." (Internal quotation marks omitted.) Id., quoting the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th Ed. Text Rev. 2000), p. 84.

them. Often, [K] accompanied her father to the [petitioner's home], where she sat in the living room watching television while her father and the [petitioner] worked on automobiles in the garage . . . . The father frequently would go to an auto parts store or to a convenience store while the [petitioner] ostensibly remained in the garage working on the automobiles, and the father would leave [K] at the [petitioner's] home . . . sometimes [for] more than one-half hour. . . .

"[I]n November, 2008, [K] and her father again were at the [petitioner's] home, and the father left to go to a convenience store to purchase drinks. When the father returned, the [petitioner] was in the living room sitting on the couch with [K]. The [petitioner] proceeded to tell the father that [K] had had 'an accident' and that he had taken care of it. [K] appeared to be somewhat upset. The father recalled that [K] had not soiled herself since she was three or four years old and that she only needed help on occasion with her belt or her buttons when using the bathroom.

"On Friday, November 14, 2008, [K's] mother was preparing [K] for a nap when the mother discovered [K] touching her genitals. After asking [K] some questions, the mother became concerned. On Monday, the mother contacted [K's] clinician, Natasha Jackson, who met with the mother on Tuesday and urged her to tell the father about her conversation with [K]. Later that night, the mother told the father that [K] had made allegations of sexual abuse against the [petitioner]. On Thursday, November 20, 2008, the father and the mother took [K] to the Waterbury police department to file a complaint. . . . [Shortly thereafter] Officer Cathleen Knapp . . . met [with the mother] at the family home . . . . An employee from the [D]epartment of [C]hildren and [F]amilies (department), Sheila Negron, accompanied Knapp to that meeting. Knapp learned that when the mother was putting [K] down for a nap,

[K] revealed that the [petitioner] had told [her] that her private parts were dirty and needed to be cleaned and that the [petitioner] then 'cleaned' her private parts using his private parts. The mother told Knapp that [K] pointed to her vaginal and anal areas when explaining what the [petitioner] had done. After speaking with the mother, Knapp and Negron also spoke with [K], who reported to them that the [petitioner] had done a 'no-no' and that after telling her that she was dirty and that he had to clean her, the [petitioner] then 'cleaned' her private parts using his private parts.

"Approximately one week later, on December 1, 2008, [K] was taken to [meet with] Jessica Alejandro, a clinical child interview specialist, [who] conducted a forensic interview. The interview was observed by Knapp and Negron. During the interview . . . [K gave a detailed description of her assault by the petitioner].

"On December 3, 2008, the police interviewed the [petitioner], advised him of his rights, applied for and were issued an arrest warrant, and ultimately arrested the [petitioner] that same night. The [petitioner] was charged with sexual assault in the first degree [in violation of General Statutes § 53a-70 (a) (2)] and risk of injury to a child [in violation of General Statutes § 53-21 (a) (2)]. He was tried before a jury, found guilty on both counts and sentenced to a total effective term of thirty years [of] incarceration, execution suspended after twenty years, with fifteen years the mandatory minimum, and twenty years [of] probation." (Footnote added; footnotes omitted.) Id., 334–38. This court affirmed the judgment of conviction; id., 334; and our Supreme Court denied certification to appeal. See *State* v. *Dearing*, 304 Conn. 913, 40 A.3d 319 (2012).

While his direct appeal was pending, the petitioner filed a petition for a writ of habeas corpus as a self-represented party (first habeas action). He thereafter

was appointed counsel, Attorney Hilary Carpenter, who filed an amended petition on his behalf. The petitioner alleged in his amended petition that his criminal trial counsel, Attorney Kevin Smith, had provided ineffective assistance of counsel regarding a pretrial plea offer by the state.[2] The habeas court denied the amended petition. This court, by memorandum decision, dismissed the petitioner's appeal from the judgment of the habeas court, and the Supreme Court denied certification to appeal. See *Dearing* v. *Commissioner of Correction*, 156 Conn. App. 903, 112 A.3d 238, cert. denied, 317 Conn. 908, 114 A.3d 1223 (2015).

On June 4, 2014, the petitioner initiated this second habeas action, which underlies the present appeal. Appointed counsel filed the operative amended petition for a writ of habeas corpus on October 1, 2021. The petitioner again claimed that his constitutional right to the effective assistance of counsel was violated by Smith. He also claimed that he received ineffective assistance from his appellate counsel—then Attorney, now Judge, Auden Grogins—and from his previous habeas counsel, Carpenter. The petitioner alleged that Smith was ineffective because he failed (1) to conduct an adequate pretrial investigation and legal research; (2) to adequately prepare and present a defense; (3) to properly cross-examine and impeach the testimony of K; (4) to consult with or provide testimony from experts

[2] "Specifically, the petitioner allege[d] . . . that [Smith] never 'meaningfully' conveyed the plea offer to him; that [Smith] never fully informed the petitioner about the state of the evidence for and against him; that [Smith] misadvised him that a guilty plea would entail sex offender registration which could bar the petitioner from residing with his own children; that [Smith] failed to explain that the maximum sentence after trial could be thirty-five years imprisonment; and that [Smith] failed to discuss the possibility of an *Alford* plea and the beneficial aspects of the *Alford* doctrine." *Dearing* v. *Warden*, Docket No. CV-11-4004258-S, 2014 WL 1344600, *1 (Conn. Super. March 6, 2014), appeal dismissed, 156 Conn. App. 903, 112 A.3d 238, cert. denied, 317 Conn. 908, 114 A.3d 1223 (2015); see also *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

in the fields of child sexual abuse, child psychology, and forensic toxicology; (5) to obtain, utilize, and present at trial K's confidential medical and psychiatric records; and (6) to object to or move to strike the testimony of Diane Edell, the state's expert in the field of child forensic interviews, whose testimony the petitioner alleged improperly bolstered K's credibility. The petitioner alleged that Grogins was ineffective by failing adequately (1) to research the legal issues of the case, (2) to review the record, and (3) to raise a claim that the trial court improperly failed to turn over K's medical and psychiatric records to Smith following the court's in camera review of those records. Finally, the petitioner alleged that Carpenter was ineffective by failing to raise in the first habeas action the ineffective assistance of counsel claims that he raised in the present action regarding Smith and Grogins. The respondent, the Commissioner of Correction, filed a return to the amended petition on May 3, 2022, essentially leaving the petitioner to his proof.

The habeas court, *M. Murphy*, *J.*, conducted a trial on May 3 and 4, 2022.[3] The petitioner testified and also presented testimony from Smith; Grogins; Carpenter; forensic psychologist Nancy Eiswirth; and Attorney Brian Carlow, the petitioner's criminal defense expert.[4] The respondent called no witnesses. The petitioner filed

[3] A trial initially had begun on September 11, 2018, before Judge John M. Newson. Sometime after the first day of trial, however, the petitioner's assigned counsel became unable to continue representing the petitioner, and, as a result, the court declared a mistrial and ordered new counsel appointed.

[4] Carlow testified regarding the standard of care for an attorney representing a criminal defendant. The habeas court made the following findings regarding Carlow's testimony: "Carlow opined as to several areas [Smith] could have further examined or addressed regarding [K's] testimony, preparation, and responses to the trial judge's rulings. This court did not find . . . Carlow's testimony sufficiently persuasive to establish that [Smith] had acted ineffectively as counsel."

a posttrial brief. The respondent declined to file a posttrial brief, indicating in a notice filed with the court that it believed the petitioner had failed to proffer any evidence to support his claims. On January 3, 2023, the court issued a memorandum of decision denying the petition.

In its decision, the court concluded that the petitioner had failed to meet his burden of demonstrating that Smith's performance was deficient or, even if it was, that he was prejudiced by counsel's performance. Relevant to the claims raised by the petitioner in the present appeal, the habeas court found that the petitioner failed to sustain his burden of establishing either deficient performance or prejudice with respect to Smith's decision not to present testimony from an expert on child sexual abuse or child psychology. The court found that Smith's decision not to call an expert witness at the petitioner's trial constituted a reasonable strategic choice, crediting Smith's testimony that (1) he had consulted with an expert prior to trial; (2) he had handled prior sexual assault cases and was familiar with forensic interviews, including how they are conducted and the case law addressing their admissibility; (3) the petitioner would not authorize him to hire or call an expert; and (4) in Smith's view, calling an expert was not necessary in this case. Moreover, although acknowledging the expert testimony provided by Eiswirth at the habeas trial regarding potential areas of inquiry that Smith might have raised to an expert regarding K's forensic interview, the court was not persuaded by Eiswirth's testimony that the petitioner had established a reasonable probability that the outcome of the criminal trial would have been different if Smith had called her or another expert to testify.

Next, the habeas court found that the petitioner had failed to sustain his burden of establishing either deficient performance or prejudice with respect to his claim

regarding Smith's handling of K's medical records. Underlying the petitioner's claim is his assertion that the trial court applied an incorrect legal standard when it denied Smith's request to disclose K's confidential health records to the defense following an in camera review because it had found nothing of an exculpatory nature in the records. In rejecting the petitioner's claim, the court stated that, "[i]n light of the requirement that this court indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, the court finds that the petitioner failed to prove that [Smith's] attempts to obtain [K's] confidential records constituted deficient performance. Moreover, the petitioner failed to demonstrate that a different approach by [Smith] would have been successful in obtaining the records or that there is a reasonable probability that the introduction of the records would have changed the outcome of the petitioner's trial."

Finally, the court determined that the petitioner failed to sustain his burden of establishing either deficient performance or prejudice with respect to his claim that during Edell's testimony, Smith failed to adequately object to or move to strike Edell's response to a hypothetical question posed by the state to which Smith had objected. The court found that Smith's failure to raise any additional objection following Edell's response to the state's question did not fall outside the wide range of reasonable professional assistance nor did the petitioner establish prejudice by demonstrating that Smith would have been successful if he had sought to have Edell's response stricken or that striking Edell's response would have had a reasonable probability of changing the outcome of the petitioner's trial.

Turning to the claims against appellate counsel, the court concluded that the petitioner also had failed to prove that Grogins' performance on direct appeal was deficient. The court credited Grogins' testimony at the

habeas trial regarding her general practices in preparing for an appeal, which included narrowing down the number of issues that ultimately would be raised based on their relative strength. The court also credited Grogins' testimony that she had elected not to raise a claim regarding K's medical records because the trial court properly had conducted an in camera review as requested by the petitioner and she had no clear basis for challenging the trial court's determination that there was no disclosable information because there was nothing in the record that demonstrated otherwise. The habeas court also determined that the petitioner had not demonstrated that he was prejudiced by Grogins' failure to raise the issue on appeal.

Lastly, the court determined that the petitioner's claim that Carpenter provided ineffective assistance of counsel in his prior habeas action by not raising the foregoing claims regarding Smith's and Grogins' performance necessarily also failed. The court explained that, in order to establish his claim against Carpenter, the petitioner first needed to establish that Smith or Grogins was ineffective, and, because the court already had determined that the petitioner failed to prove that either of them provided ineffective assistance of counsel, the claim against Carpenter necessarily also failed. The habeas court rendered judgment on the petition in favor of the respondent. This appeal followed. Additional facts will be set forth as necessary.

Before turning to the petitioner's claims on appeal, we first set forth well settled principles of law that govern our review. "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To

satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may [deny] a petitioner's claim if he fails to meet either prong. . . .

"With respect to the performance prong, the court in *Strickland* further elaborated as follows: Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess [trial] counsel's assistance after conviction . . . 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. . . . Our Supreme Court has stated that to establish deficient performance by counsel, a [petitioner] must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms. . . .

"Our Supreme Court, in *Lozada* v. *Warden*, [223 Conn. 834, 843, 613 A.2d 818 (1992)], established that habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing . . . a second petition for a writ of habeas corpus . . . challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus . . . [that] had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal. . . . Nevertheless, the court in *Lozada* also emphasized that a petitioner asserting a habeas on a habeas faces the herculean task . . . of proving in accordance with [*Strickland*] both (1) that his appointed habeas counsel was ineffective, and (2) that his trial [or appellate] counsel was ineffective. . . .

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

"The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed [on appeal] unless they are clearly erroneous. . . . Thus, the [habeas] court's factual findings are entitled to great weight. . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; footnote omitted; internal quotation

marks omitted.) *Crocker* v. *Commissioner of Correction*, 220 Conn. App. 567, 583–86, 300 A.3d 607, cert. denied, 348 Conn. 911, 303 A.3d 10 (2023).

I

The petitioner first claims that the habeas court improperly failed to conclude that his criminal trial counsel, Smith, provided ineffective assistance. In particular, the petitioner argues that Smith was ineffective because he failed (1) to hire, consult with, or present the testimony of a child abuse expert; (2) to obtain K's confidential medical records; and (3) to object to or seek to have stricken certain testimony from Edell, the state's child forensic interview expert. We disagree and address each of the petitioner's arguments in turn.

A

The petitioner first argues that Smith provided ineffective assistance by failing to hire, consult with, and present testimony at trial from an expert on child sexual abuse. According to the petitioner, an expert would have aided his defense by undermining K's credibility in the minds of the jurors. For instance, an expert would have informed a jury that a child suffering from pervasive developmental disorder (PDD) may be more susceptible to the influence of other people. See footnote 1 of this opinion. The petitioner further contends that, contrary to the finding of the habeas court, Smith never consulted with a child abuse expert as to the unique facts and circumstances of the present case. According to the petitioner, Smith's failure to consult with an expert left him unaware of how an expert might have viewed the petitioner's case, and, therefore, his decision not to engage an expert to testify at trial cannot reasonably be construed as a product of sound trial strategy. Rather, the petitioner contends that Smith's decision not to engage an expert was made solely because he

was representing the petitioner pro bono and the petitioner was unable to pay for an expert. We are not persuaded.

"[T]here is no per se rule that requires a trial attorney to seek out an expert witness. . . . [T]his court [has] noted [however] that in some cases, the failure to use any expert can result in a determination that a criminal defendant was denied the effective assistance of counsel." (Citation omitted; internal quotation marks omitted.) *Stephen S.* v. *Commissioner of Correction*, 134 Conn. App. 801, 811, 40 A.3d 796, cert. denied, 304 Conn. 932, 43 A.3d 660 (2012). "In *Stephen S.*, after analyzing relevant case law, [this court] concluded that cases involving child sexual abuse may, depending on the circumstances, require some pretrial investigation and consultation with expert witnesses. . . . This can be true of both medical experts and psychological experts. . . . [If] trial counsel has consulted with such experts, however, but made the tactical decision not to produce them at trial, such decisions properly may be considered strategic choices." (Citations omitted; internal quotation marks omitted.) *Antonio A.* v. *Commissioner of Correction*, 148 Conn. App. 825, 833–34, 87 A.3d 600, cert. denied, 312 Conn. 901, 91 A.3d 907 (2014). It is the petitioner's burden to demonstrate that an expert was necessary to establish an asserted defense. See *Kellman* v. *Commissioner of Correction*, 178 Conn. App. 63, 78, 174 A.3d 206 (2017).

The following additional facts are relevant to our consideration of the petitioner's argument. Smith was not appointed as counsel but, rather, had been hired privately by the petitioner. Smith explained at the habeas trial that all fees and costs associated with consulting and hiring an expert are the responsibility of the client and are not covered by the flat fee charged for pretrial representation. Smith also testified that the

theory of the defense was that the sexual abuse allegations against the petitioner had been concocted out of spite by K's mother after the petitioner ended a romantic relationship with her[5] and that she or K's father had taken advantage of the cognitive difficulties associated with K's PDD to manipulate K into accusing the petitioner of abuse. Smith acknowledged that a significant part of the defense strategy was to undermine K's credibility as a witness. Smith testified that he did not recall whether he had consulted with an expert regarding K's cognitive issues or K's forensic interview, although he did recall consulting with such an expert, Dr. James J. Connolly, in a different matter around that time with whom he may have discussed the petitioner's case. Smith further recalled discussing with the petitioner the possibility of consulting and calling to testify at trial an expert in child sexual assault. Smith remembered discussing the cost of such an expert with the petitioner, which he testified would have been between $5000 and $10,000. In response to a question about whether the decision to engage an expert was driven solely by the petitioner's inability to pay, Smith responded: "No. . . . I wouldn't say it was inability. I . . . think it was just an unwillingness." Smith recalled that the petitioner did not think an expert was necessary and did not "want to spend the financial resources on it."

At the habeas trial, to establish the importance of an expert in this case, the petitioner presented testimony

[5] As this court noted on direct appeal, K's mother testified at the criminal trial that she had maintained a sexual relationship with the petitioner for ten of the approximately twelve years that she had known him. See *State* v. *Dearing*, supra, 133 Conn. App. 335 n.3. "She also testified that the father was aware of the relationship, that he also was involved in it and that the three of them had sexual relations in the garage at the [petitioner's] home, sometimes while [K] was in the adjoining living room. The mother admitted that she did not tell the police or anyone involved in the investigation about this relationship, which she said ended when [K] made allegations against the [petitioner]." Id.

from Eiswirth, who had reviewed all of the criminal trial transcripts as well as some of K's medical, department, and school records. Eiswirth testified that children with PDD tend to have a higher level of suggestibility than other children and that, because K's initial disclosure of sexual abuse by the petitioner came in response to her mother asking her if someone had touched her, it was possible that K's mother planted the idea in K's mind. Eiswirth also noted that PDD can affect a child's ability to recall an event. She opined that, if counsel had hired her as an expert, she would have pointed out portions of K's forensic interview that she viewed as problematic. On cross-examination, however, the respondent was able to undermine some of that testimony.[6] Moreover, Eiswirth admitted on cross-examination that she had not personally evaluated K and, as a result, could not offer an opinion as to whether K's PDD increased her level of suggestibility. Eiswirth also acknowledged, on the basis of her review of K's trial testimony and K's forensic interview, that K's ability to recall and provide such highly detailed descriptions of the petitioner's assault would have undercut any expert opinion or argument that her PDD affected her ability to recall events.

We acknowledge that, in a matter like the present one in which there was no physical evidence of sexual abuse and the case turned on the credibility of a child

[6] Eiswirth believed that the forensic interviewer had not effectively followed up about inconsistencies in K's statement or about K's claim that the petitioner had anally penetrated her, which Eiswirth characterized as "implausible" because such an assault was, in her opinion, unlikely to have occurred without applying some form of lubricant, which K never mentioned and the interviewer never asked K about. Under cross-examination, however, Eiswirth acknowledged that it would have been consistent with K's testimony if the petitioner tried to engage in anal intercourse but stopped when K complained that it hurt. Thus, calling attention to K's failure to mention lotion or other lubricant would not necessarily have rendered her account any less plausible to a jury.

victim with an established developmental disorder, counsel reasonably could be expected to engage in a thorough pretrial investigation that included more than a cursory consultation with expert witnesses. See *Stephen S.* v. *Commissioner of Correction*, supra, 134 Conn. App. 811. As we have often repeated, however, "[i]n a habeas trial, the court is the trier of fact and, thus, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony . . . . It is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court." (Internal quotation marks omitted.) *Hilton* v. *Commissioner of Correction*, 225 Conn. App. 309, 340, 315 A.3d 1135 (2024). Here, the habeas court credited Smith's explanation that he had discussed with the petitioner the possibility of consulting with a child abuse expert and potentially calling an expert to testify at trial but that the petitioner would not authorize him to hire or call an expert because, in the petitioner's view, an expert was not necessary in this case. The habeas court was free to conclude on the basis of the evidence presented that the petitioner would have been able to pay for an expert if he believed one was necessary after consulting with Smith, and the petitioner's own legal expert testified that the petitioner would have needed to be indigent for Smith to have successfully sought public funding for an expert. The habeas court also credited Smith's testimony that he was familiar with child forensic interviews and the legal issues related to them from his handling of other sexual assault cases and that he had discussed some aspects of the present case prior to trial with an expert that he was consulting in another matter. The petitioner has failed to demonstrate that any of the court's factual findings are clearly erroneous or that the testimony credited by the habeas court does not form a sufficient factual basis for concluding that Smith's performance, under the circumstances, did not fall outside the wide range of reasonable professional assistance.

Nevertheless, even if we were to assume without deciding that it was professionally unreasonable for counsel not to have engaged his own child abuse expert in this matter, and that this failure amounted to deficient performance under the facts of this case, we nevertheless agree with the habeas court and the respondent that the petitioner failed to establish, either through Eiswirth's testimony or otherwise, that he was prejudiced by counsel's performance. See *Raynor* v. *Commissioner of Correction*, 222 Conn. App. 584, 616, 306 A.3d 25 (2023) ("[a] court need not determine the deficiency of counsel's performance if consideration of the prejudice prong will be dispositive of the ineffectiveness claim" (internal quotation marks omitted)), cert. denied, 348 Conn. 944, 307 A.3d 910 (2024).

In *Strickland*, the United States Supreme Court offered the following guidance to courts regarding the prejudice prong: "Even if a [petitioner] shows that particular errors of counsel were unreasonable . . . the [petitioner] must show that they actually had an adverse effect on the defense. It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. . . . [A]ny error, if it is indeed an error, impairs the presentation of the defense . . . . On the other hand . . . a [petitioner] need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard . . . is not quite appropriate. . . . [Rather, under] the appropriate test for prejudice . . . [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." (Citations omitted; emphasis added; internal quotation marks omitted.) *Strickland* v. *Washington*, supra, 466 U.S. 693–94.

Our review of the record leads us to conclude that any error by Smith in failing to engage his own child abuse expert did not establish a reasonable probability that the results would have been different, thus depriving the petitioner of a fair trial. Smith was able to use his prior experience in other child sexual abuse cases, the knowledge he gained from his consultation with Connolly, and his own research, including regarding PDD, to effectively cross-examine K and Edell, the state's expert witness, including eliciting testimony from Edell regarding the potential unreliability of K's forensic interview and her allegations of sexual abuse by the petitioner. See *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 102, 52 A.3d 655 (2012) (defense counsel's failure to call defense expert did not prejudice petitioner because counsel was able to sufficiently establish points essential to defense through cross-examination of state's experts and by arguing points in closing argument to jury). K also testified before the jury and, therefore, the jury was able to directly evaluate how she understood and answered questions. Smith was able to demonstrate during his cross-examination of K that she had difficulties in communicating and sometimes gave contradictory answers. Moreover, Smith established through Edell that forensic interviewers generally are not trained regarding the effects of PDD; that children should be asked open-ended, rather than yes or no, questions during interviews to avoid planting false facts in the child's mind; that interviewers should follow up on inconsistencies within a child's statement; and that strict guidelines must be followed when using dolls and drawings. All

of this allowed Smith to effectively challenge the credibility of K's testimony to the jury in his closing argument.[7]

In short, we are unconvinced on this record that any claimed failures by Smith regarding the use of a child abuse expert had any appreciable effect on the trial or undermine our confidence in the outcome of the criminal trial. The petitioner did not meet his burden of demonstrating that testimony from a defense expert was necessary to establish a defense. See *Kellman* v. *Commissioner of Correction*, supra, 178 Conn. App. 78. Accordingly, even if we viewed Smith's failure to utilize his own child abuse expert in this matter as deficient performance, the petitioner has failed to establish the prejudice prong of *Strickland*.

[7] For example, during closing argument, Smith argued in relevant part as follows: "[D]id anybody else in this case that you heard of ever make a single attempt to find out whether what this child was saying was true, whether or not there was any reliability to it? We heard from the state's own experts that there are issues of suggestibility. That these folks need to be trained when they're doing these interviews, these forensic interviews. . . . [W]e don't want to interview these children too many times [because] there is a danger of contamination. Well, yeah, there is. Was that danger present here? Yeah, it sure was. Did anybody who was conducting these interviews bother to find out whether or not there was that danger of contamination? No. Who . . . talked to this child? Well, according to the mom, she talked to her. According to the mom, the child was giving her all sorts of details. According to the dad, he talked to the child as well before she went to the . . . forensic interview. [When] [h]e talked to her, he asked her one question and the child began to narrate and could recollect and recall [with] no problem. All he asked her was that one question. Really? Does that jive with what you saw here? . . .

"You watched the video [of the forensic interview]. Did you ever see [the forensic interviewer] say, K, do you know what it means to tell the truth? No, you don't see any of that. What do you see? What was she consistent about? . . . And what happened when she was tested? She told us the big no-no never happened. She couldn't identify [the petitioner], though he's right there and he's the only uncle that she's had. . . . What happened when I asked her, who's talked to you about this? She shuts down. She is, frankly, we'll never know what is going on there. We'll never [know] what's going on in her head."

B

The petitioner next argues that Smith provided ineffective assistance of counsel because he failed to obtain the release of K's medical records and have them admitted as evidence, in accordance with *State* v. *Bruno*, 197 Conn. 326, 497 A. 2d 758 (1985), cert. denied, 475 U.S. 1119, 106 S. Ct. 1635, 90 L. Ed. 2d 181 (1986), and its progeny. We agree with the habeas court that the petitioner has failed to demonstrate that Smith's performance was deficient.

"In *State* v. *Bruno*, [supra, 197 Conn. 326], and *State* v. *Esposito*, 192 Conn. 166, 471 A.2d 949 (1984), [our Supreme Court] considered the question of when a trial court or a criminal defendant should be permitted to examine psychiatric records of a state's witness to determine whether there was relevant impeaching evidence in light of the statutory psychiatric-patient privilege of General Statutes § 52-146e. In both cases the trial court refused to conduct an in camera inspection of the records because it determined that the statutory privilege protecting the confidentiality of the records precluded it from doing so. In [*Esposito*], [the court] enunciated a procedure, approved in [*Bruno*], [that] would protect the witness' statutory right to confidentiality while simultaneously safeguarding the defendant's constitutional right effectively to cross-examine the witness. . . . That procedure is as follows: If . . . the claimed impeaching information is privileged there must be a showing that there is reasonable ground to believe that the failure to produce the information is likely to impair the defendant's right of confrontation such that the witness' direct testimony should be stricken. Upon such a showing the court may then afford the state an opportunity to secure the consent of the witness for the court to conduct an in camera inspection of the claimed information and, if necessary, to turn over to the defendant any relevant material for

the purposes of cross-examination. If the defendant does make such showing and such consent is not forthcoming then the court may be obliged to strike the testimony of the witness. If the consent is limited to an in camera inspection and such inspection, in the opinion of the trial judge, does not disclose relevant material then the resealed record is to be made available for inspection on appellate review. If the in camera inspection does reveal relevant material then the witness should be given an opportunity to decide whether to consent to release of such material to the defendant or to face having her testimony stricken in the event of refusal." (Citation omitted; internal quotation marks omitted.) *In re Robert H.*, 199 Conn. 693, 708–709, 509 A.2d 475 (1986).

"[T]he linchpin of the determination of [a] defendant's access to the records is *whether they sufficiently disclose material especially probative of the ability to comprehend, know and correctly relate the truth* . . . so as to justify breach of their confidentiality and disclosing them to the defendant in order to protect his right of confrontation. . . . [If] . . . the witness' records are sought for the purpose of obtaining evidence of a mental condition bearing on the witness' testimonial capacity, we require the defendant, who is afforded an opportunity to voir dire persons with knowledge of the contents of the records sought, to adduce a factual basis from which the trial court may conclude that there is a reasonable ground to believe that the records will reveal that at any pertinent time [the witness' mental problem] affected his testimonial capacity to a sufficient degree to warrant further inquiry." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Hickey*, 135 Conn. App. 532, 557–58, 43 A.3d 701, cert. denied, 306 Conn. 901, 52 A.3d 728 (2012).

The following additional facts are relevant to our consideration of the petitioner's argument that Smith provided ineffective assistance by failing to obtain the release of K's medical records and have them admitted as evidence. Prior to trial, Smith filed a motion asking the court to conduct an in camera review of K's medical and counseling records to determine if they contained disclosable information in accordance with *State* v. *Esposito*, supra, 192 Conn. 166. The court, *Crawford*, *J.*, conducted a hearing at which Smith was able to establish, over objection from the state, reasonable grounds for the court to conduct an in camera review of K's medical records. The court granted Smith's motion and conducted an in camera review of the records. Following that review, the court declined to release any documents to the petitioner. In an oral decision, the court indicated that it "did not find anything of an exculpatory nature. . . . [T]here isn't any mention of the [petitioner] personally."

As reflected in the operative petition for habeas corpus, the issue before the habeas court and, thus, this court on appeal, was whether Smith provided ineffective assistance with respect to his efforts to obtain the release of the medical records. The habeas court concluded that the petitioner had failed to establish both that Smith's performance in that regard was deficient and that the petitioner was prejudiced by Smith's alleged deficiency. On appeal, rather than identify in his principal appellate brief any clear deficiency in Smith's attempt to secure access to K's confidential records, the petitioner, after acknowledging that "Smith successfully obtained an in camera review of K's medical and psychological records," focuses his discussion on what he perceives to be the trial court's application of an incorrect legal standard in conducting that review and declining to release the records to Smith.[8] The petitioner

[8] The petitioner contends that it is clear from the criminal trial court's statement declining to release any of the medical records to the petitioner

also asserts that the habeas court could not have determined that the petitioner was not prejudiced by counsel's failure to obtain the record because the habeas court did not conduct its own, independent review of the confidential records, which the petitioner argues it was required to do. None of these arguments, however, addresses the habeas court's determination that the petitioner failed to meet his burden of demonstrating that Smith's performance vis-à-vis the medical records was deficient. To prevail on appeal, the petitioner must demonstrate reversible error on the part of the habeas court with respect to both the performance and prejudice prongs as applied to counsel's performance. Because the petitioner has failed to explain adequately how the trial court's purported legal error in conducting the in camera review establishes that Smith's efforts to obtain access to the confidential files fell below an objective standard of reasonableness as measured by prevailing professional norms,[9] and mindful of our highly deferential scrutiny of counsel's performance, we reject the petitioner's argument.

that the court erroneously had limited its review of the record to "exculpatory" information, whereas the court's review also should have included any information probative of K's ability to comprehend, know, and correctly relate the truth.

Our review of the hearing on the motion seeking in camera review of the records, however, demonstrates that the court clearly understood the proper scope of its review. For example, at one point the court asked Smith to explain "[h]ow would a review of the records concerning her treatment for a seizure disorder lead to a conclusion about whether or not credibility or reliability is a factor? That's what I'm not following." The record further reveals, as argued by the respondent on appeal, that both the court and the parties used the term "exculpatory" as a term of convenience to refer to any disclosable material under the appropriate standard.

[9] In his reply brief, the petitioner states for the first time that Smith's performance was deficient because he had a "duty to object [to] or otherwise remediate the [court's use of an incorrect standard of review] but failed to do so." Nevertheless, "[i]t is . . . a well established principle that arguments cannot be raised for the first time in a reply brief. . . . [I]t is improper to raise a new argument in a reply brief, because doing so deprives the opposing party of the opportunity to respond in writing." (Internal quotation marks omitted.) *Lewis* v. *Commissioner of Correction*, 211 Conn. App. 77, 101,

C

The petitioner finally argues that Smith provided ineffective assistance of counsel by failing to object to or seek to have stricken certain criminal trial testimony by Edell. Again, we disagree.

The following additional facts are relevant to our consideration of the petitioner's argument. During her redirect examination of Edell at the criminal trial, the prosecutor asked Edell to assume the following facts: "that a child is present in a forensic interview, that she is eight years of age and [has] developmental delays, and through the course of the interview the child [discloses] that a family friend had sexually abused her, and the abuse was penile/vaginal and penile/anal intercourse. And that that child, during the interview when asked by the interviewer how it felt, indicates that the vaginal intercourse felt okay [but] [w]hen asked about anal intercourse the child indicates, oh, no, it hurt. And, actually, the child then goes and holds her bottom as she's saying that. And further on in the interview when asked if anything came out of the family friend's . . . penis, the child indicated pee-pee and that the family friend had to wipe it out with a sponge." The prosecutor then asked Edell whether those facts had "any significance" "based on [her] training and experience . . . ." Smith objected to the question on the ground that it "sounds like it's going to elicit an opinion as to the ultimate issues in this case." The prosecutor responded that it was a proper hypothetical given Edell's testimony on cross-examination regarding the reliability of forensic interviews and whether certain sensory details and other factors could be applied to determine whether a child was telling the truth. The court overruled the objection "to the extent that the question pending was

271 A.3d 1058, cert. denied, 343 Conn. 924, 275 A.3d 1213, cert. denied sub nom. *Lewis* v. *Quiros*, U.S. , 143 S. Ct. 335, 214 L. Ed. 2d 150 (2022).

whether or not it had any significance . . . .'' Edell then answered: ''The things that stand out for me from that are that . . . if the child was eight years old, the child should not be expected to know about either intercourse or anal penetration, so there is inappropriate sexual knowledge. The fact that she made a distinction between the front and the back . . . also goes to reliability and that it just gives a little more credibility to the fact that . . . she experienced them rather than somebody told her to say that that happened. . . . [A]gain, the level of detail in terms of something coming out of the penis, again, is inappropriate sexual knowledge for a child, not something necessarily that somebody would know we were going to ask about. Having the detail of what the person did with whatever came out is, again, just detail of the sexual act that we do look for.''

Smith did not object to Edell's answer or ask to have any portion stricken. On recross-examination, however, Smith posed his own hypothetical questions to Edell using factual scenarios that elicited responses that aided his defense strategy by undercutting K's credibility. Stated differently, the record demonstrates that Smith made a strategic choice not to renew his objection to the state's hypothetical or seek to have Edell's response stricken but, instead, elected to use Edell's responses to his own hypotheticals to further the defense.

We agree with the habeas court that it is unlikely that a renewed objection or motion to strike would have been successful given the court's earlier ruling allowing the question, and Smith's strategy regarding Edell's testimony was reasonable under the circumstances and, thus, did not constitute deficient performance. Because we conclude that the petitioner failed to establish deficient performance, we need not consider *Strickland*'s prejudice prong.

In sum, on the basis of our review of the trial and habeas records, the habeas court's decision, and the briefs of the parties, we conclude that the court properly concluded that the petitioner failed to meet his burden of demonstrating that Smith provided ineffective assistance of counsel. Accordingly, we reject the petitioner's claim to the contrary.

II

The petitioner next claims that the court improperly determined that Grogins did not provide ineffective assistance of counsel by not raising as an appellate issue in the petitioner's direct appeal that the trial court misapplied or misapprehended the holdings of *State* v. *Bruno*, supra, 197 Conn. 326, and its progeny, when it denied the petitioner's request for the disclosure of K's medical and psychological records on the ground that they contained nothing exculpatory. We agree with the habeas court that the petitioner has failed to satisfy his burden of demonstrating deficient performance.

The following additional facts are relevant to our resolution of the claim. Grogins had been an appellate lawyer for more than ten years at the time she was assigned to represent the petitioner in his direct criminal appeal. Her practice when assigned a case was to review the entire file provided by the public defender's office. In considering potential issues to raise on appeal, she would meet with the client, consider both preserved and unpreserved claims, and rank them in terms of their possibility for success. She ordinarily would raise only the strongest of those claims so as not to risk diluting the appeal with weaker claims. See *Saucier* v. *Commissioner of Correction*, 139 Conn. App. 644, 652–53, 57 A.3d 399 (2012) ("[appellate counsel's] strategy of culling out weaker claims is sound, not deficient, practice"), cert. denied, 308 Conn. 907, 61 A.3d 530 (2013).

At the habeas trial, Grogins recalled that one of the potential issues for appeal in the petitioner's case involved the court's in camera review of K's confidential medical and psychological records. She testified that she elected not to raise the issue because the criminal court properly had conducted an in camera review at the petitioner's request but found no information to disclose, and she had no specific information with which to challenge that finding. The court credited Grogins' testimony regarding her reasonable efforts in researching and reviewing the petitioner's file and found that she had made a reasonable strategic choice not to raise that particular issue on appeal. The petitioner has failed to demonstrate otherwise.

Grogins chose, as a matter of sound strategy, only to raise on appeal those claims that she had reason to believe would be successful. Specifically, Grogins pursued the petitioner's claims that K was not competent to testify; that the hypothetical question posed to Edell by the state went to K's credibility, the ultimate issue in the case; and that the prosecutor had committed improprieties during trial and closing argument. See *State* v. *Dearing*, supra, 133 Conn. App. 334. Although these claims proved unsuccessful, this court will not, in hindsight, second-guess appellate counsel's strategic choices. As both our Supreme Court and this court repeatedly have explained, an appellate counsel's reasoned choice to pursue those claims with a likelihood of success, intentionally leaving out other, weaker claims, "is an appropriate and sound strategy." *Couture* v. *Commissioner of Correction*, 160 Conn. App. 757, 768, 126 A.3d 585, cert. denied, 320 Conn. 911, 128 A.3d 954 (2015), citing *State* v. *Pelletier*, 209 Conn. 564, 567, 552 A.2d 805 (1989) ("[t]he effect of adding weak arguments will be to dilute the force of the stronger ones" (internal quotation marks omitted)); see also *Saucier* v. *Commissioner of Correction*, supra, 139 Conn. App.

652–53. Because the petitioner has failed to demonstrate that Grogins made anything other than a reasonable strategic choice not to challenge the criminal court's decision not to turn over K's confidential records to trial counsel following an in camera review, the petitioner has failed to establish deficient performance. Accordingly, his claim of ineffective assistance of appellate counsel fails.

III

Finally, the petitioner claims that the court improperly failed to conclude that his prior habeas counsel, Carpenter, provided ineffective assistance by failing to raise in his first habeas action those claims raised in the present action directed at trial and appellate counsel. As previously set forth, to prevail on an ineffective assistance of counsel claim against prior habeas counsel for failing to raise one or more claims of ineffective assistance directed at trial or appellate counsel, the petitioner necessarily needed to accomplish the " 'herculean task' " of essentially satisfying the *Strickland* standard twice by establishing that both prior habeas counsel *and* trial or appellate counsel were ineffective. *Sanchez* v. *Commissioner of Correction*, 203 Conn. App. 752, 774, 250 A.3d 731, cert. denied, 336 Conn. 946, 251 A. 3d 77 (2021). Because we have concluded in parts I and II of this opinion that the habeas court correctly concluded that the petitioner failed to establish that either Smith or Grogins provided constitutionally ineffective assistance, his claim against Carpenter also fails.

The judgment is affirmed.

In this opinion the other judges concurred.

CHRISTINE PASCIOLLA *v.* JAMES PASCIOLLA
(AC 46576)

Moll, Clark and Lavine, Js.

Syllabus

The intervenor appealed from the trial court's judgment granting the plaintiff's motion to dismiss her postjudgment motion to modify a lifetime alimony award for lack of subject matter jurisdiction. The intervenor claimed that the court improperly concluded that, as executrix of the defendant's estate, she lacked standing. *Held*:

The trial court improperly concluded that the intervenor lacked standing to seek modification of the alimony award because the potential harm to the defendant's estate, namely, the depletion of its assets, was direct and, as the sole legal representative of the estate, the intervenor was the only individual who could properly move to modify the alimony award on its behalf.

Argued November 12, 2024—officially released January 14, 2025

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Dunnell*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' settlement agreement; thereafter, the court, *Tindill*, *J.*, granted the motion to intervene filed by Carollyn Mainolfi Pasciolla, as executrix of the estate of the defendant; subsequently, the intervenor filed a postjudgment motion to modify alimony; thereafter, the court, *Price-Boreland*, *J.*, granted the plaintiff's motion to dismiss, from which the intervenor appealed to this court. *Reversed*; *further proceedings*.

John-Henry M. Steele, with whom was *Laurel A. Ellson*, for the appellant (intervenor).

Anthony Alan Sheffy, for the appellee (plaintiff).

Opinion

MOLL, J. In this postdissolution matter, Carollyn Mainolfi Pasciolla—the executrix of the estate of the defendant, James Pasciolla, and an intervenor in the underlying dissolution action (executrix)—appeals from the judgment of the trial court dismissing, for lack of standing, her second amended postjudgment motion to modify the lifetime alimony award awarded to the plaintiff, Christine Pasciolla. On appeal, the executrix contends that the court incorrectly concluded that she lacked standing to seek a postjudgment modification of alimony. We agree and, accordingly, reverse the judgment of the trial court.

The following facts, as found by the trial court or as are undisputed in the record, and procedural history are relevant to our resolution of this appeal. The plaintiff and the defendant were married on January 25, 1981. On March 24, 1998, the plaintiff commenced the present action seeking a dissolution of the marriage on the ground that the marriage had broken down irretrievably. On November 6, 1998, the court, *Dunnell*, *J.*, issued a memorandum of decision rendering a judgment of dissolution and incorporating into the judgment a separation agreement executed by the plaintiff and the defendant.[1] Section 9 of the parties' separation agreement provides in relevant part: "The defendant . . . shall pay to the plaintiff . . . the sum of . . . $700 . . . per week as alimony for the duration of the plaintiff's life. Said [a]limony shall terminate only upon the occurrence of one of the following events: a) the plaintiff's remarriage; b) the plaintiff's cohabitation as defined

[1] On October 21, 1999, the court, *A. Robinson*, *J.*, modified the provisions of the separation agreement concerning child custody. On February 10, 2000, March 24, 2000, and January 4, 2001, the court, *Levine*, *J.*, modified the provisions of the separation agreement concerning the division of the parties' financial assets. Such modifications have no bearing on the present appeal.

by [s]tatute; or c) the plaintiff's death."[2] The plaintiff's original award of $700 per week in alimony was later modified to $540 per week, and once more to $300 per week (alimony award).[3]

On August 29, 2019, the defendant died. Shortly thereafter, the plaintiff filed a claim in Probate Court against the defendant's estate seeking enforcement of the alimony award. On November 4, 2019, while the plaintiff's claim before the Probate Court was pending, the executrix filed in the dissolution action a motion to open and intervene, as executrix for the defendant's estate (motion to intervene). The same day, the executrix filed a postjudgment motion for termination and/or modification of alimony (2019 motion to modify), in which she argued that (1) pursuant to § 16 of the separation agreement,[4] the plaintiff relinquished her right to claim alimony from the defendant's estate, and (2) there is no stream of income to the estate with which to pay any alimony to the plaintiff. As relief, the executrix sought

[2] Section 9 of the separation agreement also contains, immediately following the cohabitation clause, handwritten language, which is only partially legible and which states in part: "for purposes of caregiving if additional income . . . ." The handwritten portion of § 9, however, is not relevant to the present appeal.

[3] On March 26, 2013, the defendant filed a third postjudgment motion to modify alimony, seeking to reduce the alimony to $100 per week on the basis of a substantial change in circumstances, which the court, *Maureen M. Murphy, J.*, denied on October 7, 2013.

[4] Section 16 of the separation agreement provides: "Except as here and otherwise provided, each party may dispose of his or her property in any way and each party hereby waives and relinquishes any and all right he or she may have or hereafter acquire, under the present and future laws of any jurisdiction to share in the property or the estate of the other as a result of their marital relationship, including, without limitation, dower, curtsey, statutory allowance, widow's allowance, homestead rights, right to take an intestacy, right to take against the will of the other and right to act as administrator or executor of the other's estate and each party will, at the request of the other, execute, acknowledge and deliver any and all instruments which may be necessary or advisable to carry into effect this mutual waiver and relinquishment of all such interests, rights and claims."

termination of the alimony award. On October 15, 2020, without objection, the court, *Tindill*, *J.*, granted the executrix' motion to intervene.

On December 15, 2020, the court, *Tindill*, *J.*, with the 2019 motion to modify still pending before it, heard argument from the executrix and the plaintiff regarding "the [threshold] issue of whether the plaintiff can bring a claim against the defendant's estate for continued alimony . . . ."[5] The plaintiff argued that the separation agreement clearly and unambiguously expressed an intent that alimony would be paid to her for the duration of her life and, therefore, the lifetime alimony provision should be enforced against the defendant's estate. The executrix argued that § 23 of the separation agreement[6] constituted a waiver by the plaintiff and the defendant of any claims against each other's estate, and, therefore, the plaintiff could not make a claim against the defendant's estate based on the alimony award. The executrix also argued that the plaintiff's claim against the estate for alimony could not be enforced because there was no "clear and unequivocal [language] that alimony should continue after the death of the [defendant] . . . ."

Quoting from the separation agreement, the court concluded that § 9 "is crystal clear. . . . The defendant . . . shall pay to the plaintiff . . . the sum of $700 per week as alimony [later reduced to $300 per week] for the duration of the plaintiff's life, period. . . . I don't know what could have made that more clear. Said alimony shall terminate only upon the occurrence of one of the following events: [1] [the plaintiff's] remarriage,

[5] The plaintiff and the executrix also filed memoranda of law in support of their positions regarding the 2019 motion to modify prior to the December 15, 2020 hearing.

[6] Section 23 of the separation agreement provides: "Except as otherwise stated herein, all the provisions of this agreement shall be binding upon their respective heirs, next of kin, or executors and administrators of the parties."

there's no dispute she hasn't remarried; [2] her cohabitation as defined by statute, I haven't heard any argument that she's cohabitating, and then there is some handwritten language . . . I'm not sure what [the handwritten language] says, but I don't think that's dispositive here . . . or [3] the plaintiff's death. None of those things have happened. That's also undisputed." In response to the executrix' argument that the parties waived any claims against each other's estates in § 23 of the separation agreement, the court further noted that the agreement also stated in § 16 that such claims are waived "except as here and otherwise provided; I think the otherwise provided [language] is . . . where your argument fails, it's otherwise provided in § 9, that the plaintiff is paid alimony . . . for the duration of her life or one of [the three delineated] occurrences." The executrix did not appeal from the court's ruling that the alimony award was binding on the defendant's estate,[7] and the executrix does not challenge the validity of the lifetime alimony provision in the present appeal.

On January 29, 2021, the executrix filed an amended postjudgment motion to modify and/or terminate alimony. On February 26, 2021, the plaintiff filed an objection. On July 14, 2022, the executrix filed a second amended postjudgment motion to modify alimony

[7] See *Dombrowski* v. *Noyes-Dombrowski*, 273 Conn. 127, 135–36, 869 A.2d 164 (2005) ("The general rule is that, absent contrary language, the death of the obligor spouse terminates the obligation to pay periodic alimony . . . and the nature of alimony as spousal support means that it ends upon the death of the obligee spouse. There is no Connecticut statute addressing this issue, and we are unaware of any case in which this court has ever held that alimony orders, which do not explicitly address the contingency of death, survive the death of either party. . . . By contrast, we *have* given effect to alimony orders with specific directives. See *McDonnell* v. *McDonnell*, 166 Conn. 146, 150–51, 348 A.2d 575 (1974) (concluding that husband's estate was obligated to continue making alimony payments only because decree 'clearly and unequivocally' imposed such obligation upon husband and his ' "heirs, executors and representatives" ')." (Citations omitted; emphasis in original; footnote omitted.)).

(operative motion to modify) on the basis that (1) "there is nothing in the defendant's estate to provide any alimony payment to the plaintiff," (2) pursuant to § 16 of the separation agreement, the plaintiff waived any claim against the defendant's estate, and/or (3) prior to and since the death of the defendant, the plaintiff has been cohabitating, such that the alimony obligation terminated pursuant to § 9 of the separation agreement. As relief, the executrix sought "to terminate and/or substantially reduce" the alimony award. On November 4, 2022, the plaintiff filed a motion to dismiss the executrix' operative motion to modify for lack of subject matter jurisdiction. On December 9, 2022, the executrix filed an objection to the plaintiff's motion to dismiss, to which the plaintiff replied on December 23, 2022.

On May 23, 2023, the court, *Price-Boreland*, *J.*, heard argument regarding the plaintiff's motion to dismiss. The plaintiff argued that, although the court, *Tindill*, *J.*, had jurisdiction when it ruled in December, 2020, that the plaintiff had a valid claim against the defendant's estate based on the lifetime alimony provision, the court, *Price-Boreland*, *J.*, was without jurisdiction to hear the executrix' operative motion to modify because a dissolution action is personal and terminates upon the death of one of the parties. The executrix argued that, notwithstanding Judge Tindill's December, 2020 ruling, the court still had jurisdiction to consider the operative motion to modify because the motion cited other reasons to support the termination or modification of alimony, such as cohabitation and/or a change in the financial circumstances of the plaintiff and the defendant. The executrix also cited *Ferraiolo* v. *Ferraiolo*, 157 Conn. App. 350, 116 A.3d 366 (2015), for the proposition that "a court does not truly lack subject matter jurisdiction if it has confidence to entertain the action before it," and, therefore, because the

court concluded that the alimony award was enforceable against the defendant's estate, the court must also have continuing jurisdiction to modify such award.

The court concluded that it "had jurisdiction to determine the preliminary issue of whether the plaintiff was entitled to bring a claim of lifetime alimony for her life and to permit the executrix a chance to object. Under a permissive grant to intervene by the executrix, the court had jurisdiction between the plaintiff and the executrix to determine if the separation agreement expressed an intent for lifetime alimony for the life of the plaintiff, as that issue was pending before the court, the court had not rendered a determination on it prior, and it did not involve opening and modifying the dissolution decree. Rather, that issue involved interpretation of the language of the agreement to determine the present rights and obligations between the parties.

"[The] court is without jurisdiction, however, to hear the executrix' postjudgment [operative] motion [to modify] . . . as the executrix is a stranger to the action.

"Although the executrix is a fiduciary to the defendant's estate, she does not have a direct claim or interest in the dissolution decree. She may have an indirect interest as the order to pay alimony may impact the estate, but the executrix has not asserted any right or interest she may have in the dissolution decree in her original motion to intervene . . . nor in her current objection to the motion to dismiss . . . ."[8] (Citations

[8] In support of its order granting the plaintiff's motion to dismiss, the court also relied on General Statutes § 52-107, which provides: "The court may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the court may direct that such other parties be brought in. If a person not a party has an interest or title which the judgment will affect, the court, on his application, shall direct him to be made a party."

The court concluded that § 52-107 did not lend the executrix any support because, in the court's view, the statute does not apply postjudgment. The

omitted.) Thus, the court granted the plaintiff's motion to dismiss for lack of subject matter jurisdiction. This appeal followed.

We begin by setting forth the applicable standard of review and legal principles that are relevant to our resolution of the executrix' claim. "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] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time. . . .

"Because lack of standing implicates the trial court's subject matter jurisdiction, it is properly raised by way of a motion to dismiss. . . . Our standard of review of a trial court's findings of fact and conclusions of law in connection with a motion to dismiss is well-settled. A finding of fact will not be disturbed unless it is clearly erroneous. . . . [If] the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts . . . . Thus, our review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo. . . .

"A motion to dismiss [for lack of standing] . . . properly attacks the jurisdiction of the court, essentially

executrix does not assert, however, that § 52-107 affords her standing and, accordingly, we do not address the merits of the court's conclusion regarding § 52-107.

asserting that the [complaining party] cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . .

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Citation omitted; internal quotation marks omitted.) *Hamburg* v. *Hamburg*, 182 Conn. App. 332, 344–45, 193 A.3d 51, cert. denied, 330 Conn. 916, 193 A.3d 1211 (2018).

Importantly, "[o]ur standing jurisprudence consistently has embodied the notion that there must be a colorable claim of a direct injury to the [complaining party], in an individual or representative capacity. . . . The requirement of directness between the injuries claimed by the [complaining party] and the conduct of the [opposing party] also is expressed, in our standing jurisprudence, by the focus on whether the [complaining party] is the proper party to assert the claim at issue. In order for a [complaining party] to have standing, it must be a proper party to request adjudication of the issues. . . . Standing focuses on whether a party is the proper party to request adjudication of the issues, rather than on the substantive rights of the aggrieved parties. . . . [I]f the injuries claimed by the [complaining party] are remote, indirect or derivative with respect to the [opposing party's] conduct, the [complaining party] is not the proper party to assert them and lacks standing to do so. Where, for example, the harms asserted to have been suffered directly by a [complaining party] are in reality derivative of injuries to a third party,

the injuries are not direct but are indirect, and the [complaining party] has no standing to assert them. . . . The task of the court in a case such as this is to determine whether the facts, as stated in the complaint and taken as true, demonstrate that the injuries, on one hand, are direct or, on the other hand, are indirect, remote or derivative." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 346–48, 780 A.2d 98 (2001).

With these legal principles in mind, we turn to the merits of the executrix' claim on appeal. The executrix argues that the court improperly concluded that she lacked standing to move to modify postjudgment the plaintiff's alimony award. In connection with this claim, the executrix asserts that she has a direct interest in the dissolution decree and, therefore, has standing to seek modification of the alimony award. The plaintiff argues that the executrix does not have standing because the lifetime alimony provision was agreed upon by the plaintiff and the defendant during the course of their divorce proceedings and, therefore, the enforcement of the alimony payments constitutes a harm to the defendant, whereas any harm alleged by the executrix is derivative of such harm to the defendant. We agree with the executrix that the court improperly concluded that she lacked standing to seek modification of the alimony award.

As we previously iterated, Judge Tindill, in her December 15, 2020 ruling, concluded that the alimony award was binding upon the defendant's estate. If the defendant were still alive, he would have a procedural mechanism to move to modify the alimony award based on a substantial change in circumstances pursuant to General Statutes § 46b-86,[9] which gives the court continuing jurisdiction to modify alimony. The defendant is

[9] General Statutes § 46b-86 provides in relevant part: "(a) Unless and to the extent that the decree precludes modification, any final order for the

deceased, however, and the estate of the defendant can be heard only through the executrix.

The plaintiff contends that, although the defendant would suffer a direct harm from the alimony payments if he were alive, the executrix' potential harm is merely derivative of the defendant's harm. We disagree with this notion. The defendant in this case is deceased and, therefore, cannot suffer any harm. Rather, the executrix "stands in the shoes" of the defendant. *Iino* v. *Spalter*, 192 Conn. App. 421, 427, 218 A.3d 152 (2019); see id. (permitting exercise of personal jurisdiction over decedent's executrix because executrix "stands in the shoes of the decedent for purposes of the action"). The present action is distinct from the cases cited by the plaintiff, in which the courts determined that the purported harms claimed to have been incurred by the plaintiffs were indirect, in that in those cases there were other identifiable parties who had been harmed directly and were free to seek a remedy. See *Connecticut State Medical Society* v. *Oxford Health Plans (CT), Inc.*, 272 Conn. 469, 479, 863 A.2d 645 (2005) (holding that plaintiff lacked standing because "all of the injuries that the plaintiff allegedly suffered derive[d] solely and exclusively from the harm allegedly visited upon [other individuals] . . . [and] those directly injured by the defendant's allegedly improper conduct . . . [were] themselves free to seek redress" (emphasis omitted)); *Ganim* v. *Smith & Wesson Corp.*, supra, 258 Conn. 359 (holding that harm was indirect and there were identifiable "directly injured parties who could presumably . . . remedy the harms directly caused by the defendants' conduct and thereby obtain compensation,

periodic payment of permanent alimony or support, an order for alimony or support pendente lite or an order requiring either party to maintain life insurance for the other party or a minor child of the parties may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . ."

and deter the defendants from continuing their tortious conduct"). By contrast, in the present case, the harm that would have been incurred by the defendant were he still alive, i.e., the depletion of his assets, would instead be incurred directly by his estate, for which the executrix is the sole legal representative. Thus, the potential harm to the estate, which the executrix represents, by way of alimony payments is not "indirect, remote or derivative" of any injury to the defendant, who is not alive and experiencing such harm but, rather, is "direct." *Ganim* v. *Smith & Wesson Corp.*, supra, 346–48.

To support her argument, the plaintiff also cites to *Manter* v. *Manter*, 185 Conn. 502, 441 A.2d 146 (1981). In *Manter*, our Supreme Court upheld the trial court's denial of a postdissolution motion to intervene filed by the plaintiff's former spouse and the adoptive father of the plaintiff's children, who was seeking to intervene to request custody or visitation rights of the plaintiff's children. Id., 503–504, 509. In its decision, our Supreme Court stated that the "intervenor's posture is derivative; he assumes his role only by virtue of an action already shaped by the original parties. He must, therefore, take his controversy as he finds it and may not use his own claims to restyle or resuscitate their action." Id., 506. The court concluded that, "[i]n the circumstances of this case, the trial court could reasonably have concluded that no controversy existed when [the proposed intervenor] attempted to intervene." Id., 507. The case at hand is factually distinct from *Manter*, however, as the executrix is not using her own claims to restyle or resuscitate the dissolution action but, rather, is taking the place of the defendant in "an action already shaped by the original parties." Id., 506. The modification of alimony was a controversy contemplated by the plaintiff and the defendant and was an ongoing issue over which the court had continuing jurisdiction.

The plaintiff's reliance on *Welsh* v. *Welsh*, 4 Conn. Supp. 470 (1937), also is misplaced, as that case pertains to the issue that was adjudicated in Judge Tindill's December, 2020 ruling. As the plaintiff notes, *Welsh* stands for the proposition that the death of that plaintiff's former husband did not terminate the separation agreement between them because the agreement was validly entered into and expressly indicated that the alimony would be binding against the husband's estate. Id., 473. This holding, although potentially relevant to the issue of whether the alimony award was enforceable against the defendant's estate, is not relevant to the present issue of whether the executrix has standing to seek modification of the alimony based on the terms outlined in the separation agreement. As set forth previously in this opinion, the court maintains continuing jurisdiction to modify alimony pursuant to § 46b-86. Moreover, the plaintiff and the defendant included specific provisions in the separation agreement that could terminate the defendant's alimony obligation, including the plaintiff's cohabitation, remarriage, or death. Thus, although it is true that the defendant's estate, via the executrix, is bound to adhere to the alimony award, there are delineated circumstances pursuant to which the award may be modified or terminated in the separation agreement and/or § 46b-86.

As the executrix notes, this conclusion is further bolstered by General Statutes § 45a-234, which enumerates several responsibilities of the executrix that are consistent with this holding. Section 45a-234 (18), for example, provides the executrix with the power "[t]o compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate or trust as the fiduciary shall deem advisable . . . ." Moreover, § 45a-234 (30) provides the executrix with the power to "complete performance of the decedent's valid executory contracts which, at the

time of the decedent's death, had not been fully performed."

Simply stated, the fundamental question underlying the doctrine of standing is "whether the [complaining party] is the proper party to assert the claim at issue"; (emphasis omitted; internal quotation marks omitted) *Hamburg* v. *Hamburg*, supra, 182 Conn. App. 345; and, in the present case, the executrix is the only individual who properly can move to modify the alimony award on behalf of the estate. See *Silver* v. *Holtman*, 114 Conn. App. 438, 443, 970 A.2d 740 (2009) (holding that executrix is "only person who has standing to bring . . . claims [on behalf of estate] because of her representative capacity"). In sum, we conclude that the executrix had standing to seek modification of the alimony award.

The judgment is reversed and the case is remanded for further proceedings to consider the merits of the executrix' second amended postjudgment motion for modification of the alimony award.

In this opinion the other judges concurred.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 230

(Replaces Prior Cumulative Table)

NOTICES OF CONNECTICUT STATE AGENCIES

Notice for Public Review– Keys Amendment Compliance Certification

Pursuant to federal regulations at Section 1616(e) of the Social Security Act (the Keys Amendment) States must assure the development of State standards for safe and appropriate residential settings as an alternative to institutional living for Supplemental Security Income (SSI) recipients; limit the use of SSI funds for substandard facilities; and publicize the standards and enforcement procedures for these facilities as a means of involving the public in monitoring the standards.

Annually states are required to make available for public review a summary of the standards that are developed and make available to any interested individual a copy of such standards along with the enforcement procedures, a list of waivers of such standards, and any violations.

The summary includes State Agency contact persons who will make available to any interested individual a copy of such standards along with additional information concerning enforcement procedures, waivers and/or violations, if any.

A copy of the Summary List of Standards may be requested by contacting Daniel Giacomi, Director of Program Oversight and Grant Administration, at the Department of Social Services by email to Daniel.Giacomi@ct.gov. Please address any written communication to that office at 55 Farmington Avenue, Hartford, CT 06105.

Statement of Purpose: To make available for public review a summary or a copy of standards along with enforcement procedures.

STATE OF CONNECTICUT
SUMMARY OF STANDARDS FOR RESIDENTIAL FACILITIES FOR RECIPIENTS OF SSI

In accordance with Section 1616(e) of the Social Security Act, the following is a summary of the standards applied to residential facilities in Connecticut where a significant number of SSI recipients reside or might reside. Contact persons are listed for each participating Agency for those who wish information concerning enforcement procedures, waivers and/or violations.

Department of Public Health

- Residential Care Homes
  - Connecticut General Statutes (CGS) Section 19a-490
  - CGS Section 19a-491c
  - Disciplinary Action for Failure to Comply: CGS Section 19a-494
  - CGS Section 19a-495c
  - Regulations of Connecticut State Agencies (RCSA) Section 19-13-D6
- Licensure of Private Freestanding Community Residences
  - CGS Section 19a-495c
  - CGS Section 19a-507a
  - Disciplinary Action for Failure to Comply: CGS Section 19a-494
  - RCSA Section 19a-495-560
- Licensure of Private Freestanding Mental Health Residential Living Centers
  - CGS Section 19a-495c
  - Disciplinary Action for Failure to Comply: CGS Section 19a-494
  - RCSA Section 19a-495-551
- Licensure of Private Freestanding Facilities for the Care of Treatment of Substance Abusive or Department Persons
  - Connecticut General Statutes (CGS) Section 19a-490
  - Disciplinary Action for Failure to Comply: CGS Section 19a-494
  - CGS Section 19a-495(c)
  - RCSA Section 19a-495-570

Contact: Jennifer Olsen Armstrong, MS, RD
Section Chief
Facility Licensing & Investigations Section
Healthcare Quality & Safety Branch
Department of Public Health
410 Capitol Avenue
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Connecticut Housing Finance Authority

- Elderly Housing
  - CGS Statutes Section 8-115a

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Department of Developmental Services

- Community Living Arrangements Licensing
  - RCSA Section 17a-227-1 through 17a-227-22
- Community Training Home Licensing
  - RCSA Section 17a-227-23 through 17a-227 30:

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Department of Children and Families

- Operation of Child Placing Agencies:
  - RCSA Sections 17a-150 88(d) and 17a-150-41 through 17a-151-123
- Licensure of Residential Facilities
  - RCSA Sections 17a-145-48 through 17a-145-98
- Licensure of Foster Homes
  - RCSA Sections 17a-145-130 through 17a-145-160
- Foster and Adoptive Family Process
  - Policy Sections 41-16-2 through 41-16-10
- Foster Care Matching
  - Policy Sections 41-19-1 through 41-19-5
- Post-licensing Support for Foster Families
  - Policy Section 41-25-1 through 41-25-26
- Licensing Policy Process
  - Policy Sections 20-22

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Department of Housing

- Congregate Housing for the Elderly
  - CGS Chapter 128, Section 8-119d through 8-119m
  - RCSA Sections 8-119g-1 through 8-119g-15
- Congregate Housing
  - Department Policy, Housing Manual Chapter 4

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NOTICES

Notice of Reprimand of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on January 6, 2025, this Court reprimanded Attorney Dana J. Beyer, Juris #401372. See UWYCV246081692S, *Office of Chief Disciplinary Counsel* v. *Beyer, Dana* for the full order of the Court.

Patrick J. Carroll III, *Judge Trial Referee*

Notice of Interim Suspension of Attorney

Pursuant to Practice Book §2-54, notice is hereby given that Erica Todd-Trotta, Juris Number 407314, was placed on interim suspension from the practice of law on January 10, 2025 until further order of the Court.

Pursuant to Practice Book § 2-64, Assistant Chief Disciplinary Counsel Lee N. Johnson, ("OCDC Trustee," Juris No. 443752), 100 Washington Street, Hartford, CT 06106, is appointed Trustee to take such steps as are necessary to protect the interests of Respondent's clients, inventory the active client files, receive the business mail, and take control of Respondent's clients' funds, IOLTA, and fiduciary accounts.

The complete orders and conditions may be viewed in the electronic file, docket number *UWYCV24-6078511-S, Office of Chief Disciplinary Counsel v. Todd-Trotta, Erica*

Barbara N. Bellis, *Judge*