STATE OF CONNECTICUT *v.* ROBERT L. WALKER (AC 41114)

Alvord, Bright and Beach, Js.

Syllabus

The defendant, who had been convicted in 2001 of the crimes of aggravated sexual assault in the first degree, sexual assault in the first degree, kidnapping in the first degree with a firearm, kidnapping in the first degree, threatening, criminal possession of a weapon, credit card theft, illegal use of a credit card, fraudulent use of an automatic teller machine and larceny in the sixth degree, appealed to this court from the trial court's dismissal in part and denial in part of his motion to correct an illegal sentence. The defendant was sentenced for his 2001 convictions on the basis of a presentence investigation report that contained, inter alia, detailed information concerning his past criminal history, including facts underlying certain previous convictions in 1991. In his motion to correct an illegal sentence, the defendant claimed, inter alia, that the facts referenced in the 2001 presentence investigation report and in the supplemental material concerning his 1991 convictions were inaccurate and prejudicial. *Held*:

1. The trial court properly concluded that it lacked subject matter jurisdiction to consider the defendant's claim that his sentence was imposed in an illegal manner due to the failure of the sentencing court to canvass him or his counsel as to their review and the accuracy of the 2001 presentence investigation report; our Supreme Court has determined previously that our statutes and rules of practice do not require a court to make an affirmative inquiry as to the accuracy of the information contained in a presentence investigation report and that, consequently, such a claim does not invoke the jurisdiction of the trial court.

2. The trial court lacked subject matter jurisdiction to consider the merits of the defendant's claim that his sentence was imposed in an illegal manner due to the sentencing court's reliance on inaccurate facts regarding his 1991 convictions contained in the presentence investigation report, as it was not plausible that the defendant sought to challenge the manner in which his sentence was imposed, as opposed to the underlying convictions: because the defendant's challenge to his 2001 sentence was predicated on his claim that the presentence investigation report contained inaccurate facts regarding his 1991 convictions, which he alleged were unconstitutional due to the ineffective assistance of his then defense counsel in failing to point out to the court contradictions in the assertions of the complaining witness, failing to do an adequate investigation and advising the defendant to plead guilty, his claim clearly challenged his 1991 convictions and not the sentencing proceeding for

his 2001 convictions, and although the defendant's 2001 sentencing proceeding may have been different had his 1991 convictions been set aside, he could not use that theoretical possibility as the basis to launch a wholesale attack on the performance of his then defense counsel through a motion to correct an illegal sentence filed twenty-four years after he pleaded guilty and long after his sentence for the 1991 convictions had been served; accordingly, the trial court should have dismissed, rather than denied, the defendant's motion to correct an illegal sentence as to this claim.

Argued October 24, 2018—officially released February 12, 2019

Procedural History

Substitute information, in the first case, charging the defendant with three counts of the crime of fraudulent use of an automated teller machine, two counts of the crime of credit card theft, two counts of the crime of illegal use of a credit card and one count of the crime of larceny in the sixth degree, and substitute information, in the second case, charging the defendant with four counts each of the crimes of sexual assault in the first degree and kidnapping in the first degree, two counts each of the crimes of aggravated sexual assault in the first degree and kidnapping in the first degree with a firearm, and with the crimes of threatening and possession of a weapon, brought to the Superior Court in the judicial district of Middlesex and tried to the jury before *Clifford, J.*; thereafter, the court denied the defendant's motion for a mistrial; verdicts and judgments of guilty, from which the defendant appealed to this court, which affirmed the judgments; subsequently, the court, *Vitale, J.*, dismissed in part and denied in part the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Improper form of judgment*; *affirmed in part*; *judgment directed in part.*

Temmy Ann Miller, assigned counsel, with whom was *Aimee Lynn Mahon*, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom were *Russell C. Zentner*, senior assistant state's attorney, and, on the brief, *Peter A. McShane*, former state's attorney, and *Caitlyn S. Malcynsky*, certified legal intern, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Robert L. Walker, appeals[1] from the judgment of the trial court dismissing in part and denying in part his motion to correct an illegal sentence. On appeal, the defendant claims that the court improperly (1) dismissed for lack of subject matter jurisdiction his claim that the sentencing court failed to canvass him or his counsel regarding their review and the accuracy of the presentence investigation report, and (2) denied on the merits, without first providing him with an adequate hearing before the sentencing court, his claim that the sentencing court relied on inaccurate facts contained in the presentence investigation report. We conclude that the court lacked subject matter jurisdiction to consider both of the defendant's claims raised by the motion to correct an illegal sentence. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the defendant's claims. On February 14, 1991, the defendant entered a guilty plea pursuant to *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970),[2] to one count of

[1] The defendant originally appealed to this court. The appeal subsequently was transferred to our Supreme Court, which then transferred the appeal back to this court pursuant to Practice Book § 65-4.

[2] "Under *North Carolina* v. *Alford*, [supra, 400 U.S. 25], a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Pentland*, 296 Conn. 305, 308 n.3, 994 A.2d 147 (2010).

robbery in the first degree in violation of General Statutes (Rev. to 1989) § 53a-134 (a) (4) and one count of sexual assault in the third degree in violation of General Statutes § 53a-72a (1991 convictions). The Office of Adult Probation then prepared a presentence investigation report. On March 22, 1991, pursuant to the parties' plea agreement, the court sentenced the defendant to a total effective term of fourteen years incarceration, execution suspended after nine years, with three years probation. On January 12, 1996, the defendant was discharged from the custody of the Department of Correction.

Between late 1999 and early 2000, the defendant engaged in further criminal misconduct. On January 23, 2001, the defendant was convicted in absentia,[3] following a jury trial, of two counts of aggravated sexual assault in the first degree in violation of General Statutes § 53a-70a (a) (1), four counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), two counts of kidnapping in the first degree with a firearm in violation of General Statutes § 53a-92a, four counts of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A), threatening in violation of General Statutes (Rev. to 1999) § 53a-62 (a) (2), criminal possession of a weapon in violation of General Statutes (Rev. to 1999) § 53a-217, two counts of credit card theft in violation of General Statutes § 53a-128c (a), three counts of fraudulent use of an automatic teller machine in violation of General Statutes § 53a-127b, two counts of illegal use of a credit card in violation of General Statutes § 53a-128d, and one count of larceny in the sixth degree in violation of General Statutes (Rev. to 1999) § 53a-125b (2001 convictions).

[3] The defendant fled the country after he testified but prior to the completion of trial, and, upon his return, he pleaded guilty in a separate proceeding to two counts of failure to appear in the first degree, and one count of failure to appear in the second degree.

Thereafter, the Office of Adult Probation prepared a presentence investigation report (2001 PSI report) in advance of the defendant's sentencing for the 2001 convictions. The 2001 PSI report contained detailed information concerning the defendant's past criminal history, including the facts underlying his 1991 convictions. Also attached to the 2001 PSI report was a "Synopsis of Facts" provided by the Office of the State's Attorney that detailed the facts underlying the 2001 convictions.

On April 27, 2001, the sentencing court conducted the defendant's sentencing hearing at which it heard statements from the state, the victim, the victim's mother, defense counsel, and the defendant.[4] At the conclusion of the hearing, the court sentenced the defendant to a total effective term of fifty years incarceration, execution suspended after thirty-two years, followed by twenty years probation. The defendant's 2001 convictions were affirmed on direct appeal by this court. See *State* v. *Walker*, 80 Conn. App. 542, 835 A.2d

[4] On April 27, 2001, prior to the sentencing hearing, defense counsel filed a "Motion for Order to Remove the State's Synopsis of the Facts from the Presentence Investigation." (Internal quotation marks omitted.) At the outset of the sentencing hearing, defense counsel argued in support of the motion that the state's synopsis detailing the facts underlying the 2001 convictions should be stricken because it contained numerous inaccuracies, including that the defendant never registered as a sex offender in connection with his 1991 convictions. The court afforded defense counsel the opportunity to go through all of the purported inaccuracies, but counsel declined to do so. The court then denied the defendant's motion and, in accordance with defense counsel's request, ordered that the motion, the transcript, and the court's order denying the motion be attached to the 2001 PSI report.

The state, during its remarks at the sentencing hearing, recited some of the facts that were the basis for the 1991 convictions. Defense counsel objected to those statements as being unnecessary and redundant because the events leading to those convictions were set forth in the 2001 PSI report. Defense counsel did not object on the ground that any of that information was inaccurate, and neither defense counsel nor the defendant during their sentencing remarks claimed that the information regarding the 1991 convictions contained in the 2001 PSI report was inaccurate.

1058 (2003), cert. denied, 268 Conn. 902, 845 A.2d 406 (2004).

On August 25, 2015, the defendant, pursuant to Practice Book § 43-22,[5] filed an amended motion to correct an illegal sentence.[6] Therein, the defendant alleged that the facts "referenced in [the 2001 PSI] report and in the supplemental materials concerning his 1991 conviction[s] . . . [were] inaccurate and prejudicial" because the 1991 convictions were unconstitutional in three ways: (1) "they were based on contradictory assertions of the complaining witness as to whether a sexual assault had ever taken place," (2) "counsel in the 1991 case failed to investigate possible connections between organized crime figures and the complaining witness that may have tainted the complainant's credibility," and (3) "counsel was ineffective for advising [the defendant] that he should plead guilty because his case would be a 'tough case to win.' " The defendant claimed that, as a result, his sentence "was imposed in an illegal manner" because the sentencing court: (1) "fail[ed] to specifically canvass the [defendant] or his counsel as to their review and the accuracy of the [2001 PSI] report . . . in violation of [Practice Book §] 43-10" and (2) "specifically rel[ied] upon unconstitutional and inaccurate information contained in the [2001 PSI report] . . . ."[7]

[5] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[6] On August 26, 2014, the defendant, as a self-represented party, filed a motion to correct an illegal sentence that claimed that his sentence had been imposed in an illegal manner because the sentencing court "relied on false information and perjured statements—which influenced [its] sentencing decisions." The defendant then filed the amended motion to correct an illegal sentence after he had been appointed counsel.

[7] The defendant argues on appeal that the trial court misinterpreted his amended motion to correct as alleging two distinct claims. Rather, the defendant asserts that his sole claim was that "his sentence was imposed in an illegal manner due to the fact that the court failed to canvass either

On October 23, 2015, the state filed a motion to dismiss the defendant's motion to correct an illegal sentence on the ground that the court lacked subject matter jurisdiction to entertain it. In its memorandum of law in support of the motion, the state argued that the court lacked subject matter jurisdiction over the defendant's claim that the sentencing court failed to canvass him or his attorney because such a claim had been foreclosed by our Supreme Court in *State* v. *Parker*, 295 Conn. 825, 840–41, 992 A.2d 1103 (2010) (claims that defendant "had been deprived of an opportunity to review his presentence report and to address inaccuracies therein; and . . . [defense counsel] had failed to review the presentence report with him or to bring any inaccuracies in the report to the court's attention" did not provide jurisdictional basis for correcting sentence imposed in illegal manner). The state also argued that the court lacked subject matter jurisdiction over the defendant's claim that the sentencing court relied on inaccurate information in the 2001 PSI report because "[s]uch a claim falls outside the purview of Practice Book § 43-22" for the reason that it attacked an underlying conviction, not the sentence imposed. The defendant did not file a written opposition to the state's motion. On May 4, 2016, the court conducted a hearing on the motion to dismiss at which it heard arguments from both the state and defense counsel.

him or his counsel as to the accuracy of the information contained within the [2001 PSI report] (and supplemental materials provided by the state), which in turn caused the court to rely on inaccurate information about his prior conviction when imposing his sentence on the underlying conviction." We disagree with the defendant's interpretation and, thus, separately consider his two claims, as they were raised and decided before the trial court. See *State* v. *Evans*, 329 Conn. 770, 784–85, 189 A.3d 1184 (2018) (interpreting motion to correct illegal sentence to determine "specific legal claim raised therein"); *State* v. *Bozelko*, 154 Conn. App. 750, 763 n.16, 108 A.3d 262 (2015) (interpretation of claims raised in motion to correct illegal sentence is question of law).

On May 23, 2016, the court issued a memorandum of decision in which it dismissed in part and denied in part the defendant's motion to correct an illegal sentence. In particular, the court dismissed for lack of subject matter jurisdiction the defendant's first claim that the sentencing court failed to canvass the defendant or his counsel because "such a claim is untenable" pursuant to *State* v. *Parker*, supra, 295 Conn. 825. The court denied on the merits the defendant's second claim that the sentencing court relied on inaccurate information because it concluded that "the sentencing court did not rely on materially false or prejudicial information. The defendant was in fact convicted in 1991 of the crimes referenced in the [2001 PSI report]. . . . The record before this court does not support the defendant's claim that the information regarding the 1991 convictions was materially false." (Citations omitted; footnote omitted.) This appeal followed. Additional facts will be set forth as necessary.

We begin with our standard of review and relevant legal principles. "[I]t is axiomatic that [t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner . . . . Practice Book § 43-22. A motion to correct an illegal sentence constitutes a narrow exception to the [common-law] rule that, once a defendant's sentence has begun, the authority of the sentencing court to modify that sentence terminates. . . . Indeed, [i]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack." (Internal quotation marks omitted.) *State* v. *Francis*, 322 Conn. 247, 259, 140 A.3d 927 (2016).

"In Connecticut, [Practice Book] § 43-22 sets forth the procedural mechanism for correcting invalid sentences. . . . Because the judiciary cannot confer jurisdiction on itself through its own rule-making power,

§ 43-22 is limited by the common-law rule that a trial court may not modify a sentence if the sentence was valid and its execution has begun." (Internal quotation marks omitted.) *State* v. *Parker*, supra, 295 Conn. 836.

"Although [our Supreme Court] had not defined the parameters of an invalid sentence prior to the adoption of § 43-22, the rules of practice are consistent with the broader common-law meaning of illegality, permitting correction of both illegal sentences and sentences imposed in an illegal manner. . . . An illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . Sentences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way which violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . . This latter category reflects the fundamental proposition that [t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 837–39.

"[T]he claims that may be raised in a motion to correct an illegal sentence are strictly limited to improprieties that may have occurred at the sentencing stage of the proceeding. . . . Thus . . . for the trial court to have jurisdiction to consider the defendant's claim of an illegal sentence, the claim must fall into one of [several specific] categories of claims that, under the common law, the court has jurisdiction to review." (Citation

omitted; internal quotation marks omitted.) *State* v. *Francis*, supra, 322 Conn. 264. A determination of whether a trial court has subject matter jurisdiction to consider a motion to correct an illegal sentence presents a question of law, and, therefore, our review is plenary. *State* v. *Evans*, 329 Conn. 770, 776–77, 189 A.3d 1184 (2018).

I

The defendant first claims that the court improperly dismissed for lack of subject matter jurisdiction his claim that his sentence was imposed in an illegal manner because the sentencing court failed to canvass him or his counsel "as to their review and the accuracy of the [2001 PSI] report . . . ." The state argues that the court properly determined that *State* v. *Parker*, supra, 295 Conn. 825, is dispositive of this claim.[8] We agree with the state.

In *Parker*, the defendant entered a plea under the *Alford* doctrine to the charge of murder. Id., 828. After the defendant unsuccessfully pursued an appeal challenging his conviction and plea, he filed a motion to correct an illegal sentence claiming that his sentence was imposed in an illegal manner. Id., 830–31. In his motion, the defendant asserted that his right not to be sentenced on the basis of inaccurate information was violated because "(1) he had been deprived of an opportunity to review his presentence report and to address inaccuracies therein; and (2) [defense counsel] had

[8] The defendant additionally argues on appeal to this court that if *State* v. *Parker*, supra, 295 Conn. 825, is determined to be controlling, that decision should be overruled. Notwithstanding the fact that this argument also was contained in his brief that originally was submitted to our Supreme Court; see footnote 1 of this opinion; we reject this argument because it is axiomatic that we cannot overrule Supreme Court precedent. See *Hadden* v. *Capitol Region Education Council*, 164 Conn. App. 41, 48–49, 137 A.3d 775 (2016) (Appellate Court is bound by and cannot overrule decisions of our Supreme Court).

failed to review the presentence report with him or to bring any inaccuracies in the report to the court's attention." Id., 840. After a hearing, the trial court dismissed the defendant's motion to correct an illegal sentence for lack of subject matter jurisdiction. Id., 833.

On appeal, our Supreme Court concluded that "the defendant's claims [did] not fall within the limited circumstances under which the trial court has jurisdiction to correct a sentence imposed in an illegal manner . . . ." Id., 828. It first outlined that our statutes and rules of practice, particularly General Statutes § 54-91b and Practice Book §§ 43-7 and 43-10 (1), protect a defendant's due process right not to be sentenced on the basis of untrue or unreliable information. Id., 843–46. It held, nonetheless, that these authorities did not provide a basis for jurisdiction because the defendant had not claimed that the sentencing court's actions violated any of the mandates therein contained. Id., 847–48. Rather, it rejected the premise of "[t]he defendant's claimed constitutional basis for jurisdiction . . . that the rules of practice and the statutes afford him a personal right to review, and an opportunity to seek corrections to, the presentence report" as unsupported by our statutes and rules of practice. (Footnote omitted.) Id., 849–50. Specifically, it held that "[a]lthough it may be the better practice, *neither our rules of practice nor our statutes require a sentencing court to make an affirmative inquiry about the accuracy of the information in the presentence report*." (Emphasis added.) Id., 849.

In the present case, the defendant's first claim is that his sentence was imposed in an illegal manner because the sentencing court, allegedly in violation of Practice Book § 43-10,[9] failed to canvass the defendant or his

[9] The defendant expressly relied on the provision of Practice Book § 43-10 (1) that provides in relevant part: "The judicial authority shall afford the parties an opportunity to be heard and . . . to explain or controvert the presentence investigation report . . . ."

counsel as to their review and the accuracy of the 2001 PSI report. Our Supreme Court, in *Parker*, explicitly held that our statutes and rules of practice, including Practice Book § 43-10, do not require a court to make an affirmative inquiry as to the accuracy of facts contained in a presentence investigation report, and that, consequently, such a claim does not invoke the jurisdiction of the trial court. Id. Therefore, because our Supreme Court's decision in *Parker* is definitively binding on this court; see footnote 8 of this opinion; we conclude that the trial court properly concluded that it lacked subject matter jurisdiction to consider this claim.[10]

II

The defendant also claims that the court improperly denied on the merits his claim that his sentence was imposed in an illegal manner because the sentencing court relied on inaccurate facts regarding his 1991 convictions that were contained in the 2001 PSI report. In particular, the defendant argues on appeal that the court improperly ruled on the merits of his amended motion to correct without first conducting an "adequate hearing," and that his motion to correct should have been heard and decided by the 2001 sentencing court. The state argues that the court lacked subject matter jurisdiction to consider this claim because "the defendant's attempt to use a motion to correct to challenge the legal validity of . . . his [1991] convictions did not constitute a challenge to the sentencing proceeding itself,

[10] It is worth noting that the 2001 sentencing court invited defense counsel to discuss any and all claimed inaccuracies in the 2001 PSI report in as much detail as he wanted. See footnote 4 of this opinion. Counsel declined to do so, even though he expressed his view that the synopsis attached to the report contained so many inaccuracies that going through them could take "all afternoon." Thus, the suggestion that the defendant and defense counsel were unaware of any alleged inaccuracies in the 2001 PSI report, or that they were unable to bring those inaccuracies to the attention of the court, is wholly inaccurate.

but instead, constituted a challenge to a long final prior conviction."[11] The defendant argues that the trial court had subject matter jurisdiction because his claim did "not attempt to attack the underlying conviction. By its very nature it is attacking the manner in which the sentence was imposed because of the court's actions, or lack thereof, during the sentencing proceeding." We agree with the state.

Our Supreme Court repeatedly has held that "a challenge to the legality of a sentence focuses not on what transpired during the trial or on the underlying conviction. In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, *the sentencing proceeding, and not the trial leading to the conviction*, must be the subject of the attack." (Emphasis in original; internal quotation marks omitted.) *State* v. *Evans*, supra, 329 Conn. 779; see *State* v. *Lawrence*, 281 Conn. 147, 158, 913 A.2d 428 (2007) (same); see also *State* v. *Francis*, supra, 322 Conn. 264 ("the claims that may be raised in a motion to correct an illegal sentence are strictly limited to improprieties that may have occurred at the sentencing stage of the proceeding"). "In determining whether it is plausible that the defendant's motion challenged the sentence, rather than the underlying trial or conviction, we consider the nature of the specific legal claim raised therein." *State* v. *Evans*, supra, 784–85; see *State* v. *Delgado*, 323 Conn. 801, 810, 816, 151 A.3d 345 (2016) (if defendant fails to allege claim that, if proven, would require resentencing, sentencing court has no jurisdiction to consider motion to correct).

[11] The state alternatively argues that we should decline to review this claim because it is raised for the first time on appeal, and, therefore, was not properly preserved. In light of our conclusion that the court lacked subject matter jurisdiction to consider the defendant's claim that the court relied on inaccurate information regarding his 1991 convictions, we need not reach the preservation issue.

In the present case, the defendant alleged in his motion to correct an illegal sentence that the facts "referenced in [the 2001 PSI] report and in the supplemental materials concerning his 1991 conviction[s] . . . [were] inaccurate and prejudicial" because the 1991 convictions were unconstitutional in three ways: (1) "they were based on contradictory assertions of the complaining witness as to whether a sexual assault had ever taken place," (2) "counsel in the 1991 case failed to investigate possible connections between organized crime figures and the complaining witness that may have tainted the complainant's credibility," and (3) "counsel was ineffective for advising [the defendant] that he should plead guilty because his case would be a 'tough case to win.' " The defendant claims that, as a result, his sentence was imposed in an illegal manner because the sentencing court "specifically rel[ied] upon unconstitutional and inaccurate information contained in the [2001 PSI report] . . . ."

In determining whether it is plausible that the defendant's second claim challenges the sentencing proceeding, as opposed to an underlying conviction, we first examine our decisions that have confronted the same issue. For example, in the relevant instances in which this court has concluded that the trial court had subject matter jurisdiction over a motion to correct an illegal sentence, the defendant claimed either that the sentencing proceeding violated our rules of practice, or that the presentence investigation report contained purported inaccuracies that did not stem from the underlying conviction. See *State* v. *Fairchild*, 155 Conn. App. 196, 202–203, 208–209, 108 A.3d 1162 (trial court had subject matter jurisdiction over defendant's motion to correct illegal sentence that claimed sentencing court, in violation of Practice Book § 43-10, "failed to give him adequate notice of the date of the sentencing hearing, and

thereby denied him a meaningful opportunity for allocution and violated his due process right to contest the evidence upon which the court relied for sentencing purposes"), cert. denied, 316 Conn. 902, 111 A.3d 470 (2015); *State* v. *Bozelko*, 154 Conn. App. 750, 752, 757–58, 108 A.3d 262 (2015) (trial court had subject matter jurisdiction over defendant's motion to correct illegal sentence that claimed that "the [presentence investigation report] utilized by the sentencing court had been prepared without her input, contrary to the relevant rules of practice, depriving her of the benefit of mitigating evidence she would otherwise have presented as a basis for imposing a lesser sentence . . . [and] that the incomplete [presentence investigation report] that was prepared by [the probation officer] and furnished to the court contained material and harmful misrepresentations about her, particularly concerning her purported refusal to participate in the presentence investigation interview"); *State* v. *Charles F.*, 133 Conn. App. 698, 701, 703–704, 36 A.3d 731 (trial court had subject matter jurisdiction over defendant's motion to correct illegal sentence that claimed that "he did not receive the [presentence investigation report] forty-eight hours before sentencing as required by Practice Book § 43-7 and that, as a result of this untimely receipt, he was unable to correct several inaccuracies, including (1) the statement in the report that the defendant did not want to include an 'offender's version,' (2) the statement in the report that the defendant's son was 'one of the victims in [the defendant's] pending case' and (3) the prosecution's statement that the defendant had committed thirty felonies" [footnote omitted]), cert. denied, 304 Conn. 929, 42 A.3d 390 (2012); *State* v. *Osuch*, 124 Conn. App. 572, 574, 576–77, 5 A.3d 976 (trial court had subject matter jurisdiction over motion to correct that claimed that sentencing court relied on presentence investigation report that contained incorrect information, including, that defendant received drug treatment and

admitted to police five burglaries instead of one), cert. denied, 299 Conn. 918, 10 A.3d 1052 (2010).

Consistent with the foregoing, in the relevant instances in which this court has concluded that the trial court lacked subject matter jurisdiction over a motion to correct an illegal sentence, the defendant challenged either the facts or the viability of the underlying conviction. See *State* v. *Meikle*, 146 Conn. App. 660, 662, 663, 79 A.3d 129 (2013) (trial court lacked subject matter jurisdiction over motion to correct illegal sentence that claimed that "the shotgun introduced at [his] trial was not in fact the murder weapon and . . . the state fraudulently concealed this fact from his trial counsel" because defendant "improperly [sought] to address a trial-related claim through a motion to correct an illegal sentence"); *State* v. *Mollo*, 63 Conn. App. 487, 489, 491, 776 A.2d 1176 (trial court lacked subject matter jurisdiction over motion to correct illegal sentence in that "a latent defect existed as to the factual basis for [the defendant's] guilty plea" because "[t]he purpose of Practice Book § 43-22 is not to attack the validity of a conviction by setting it aside but, rather to correct an illegal sentence or disposition, or one imposed or made in an illegal manner"), cert. denied, 257 Conn. 904, 777 A.2d 194 (2001).

Applying the foregoing principles to the present case, we conclude that the trial court lacked subject matter jurisdiction to consider the merits of the defendant's second claim because it is not plausible that he sought to challenge the manner in which his sentence was imposed, as opposed to an underlying conviction. The defendant's second claim, unlike that in *State* v. *Fairchild*, supra,155 Conn. App. 202–203, 208–209, does not challenge the sentencing proceeding for his 2001 convictions as violating our rules of practice.[12] Rather, the

[12] The defendant's first claim alleges that the sentencing court's failure to canvass him or his attorney as to their review and accuracy of the 2001 PSI report violated Practice Book § 43-10. We concluded in part I of this opinion

defendant claims that his sentence for the 2001 convictions was imposed illegally because the sentencing court relied on inaccurate facts contained in the 2001 PSI report regarding his 1991 convictions, which he alleged were unconstitutional because they were based on contradictory assertions of the complaining witness and because defense counsel rendered ineffective assistance. Thus, in essence, the defendant's challenge to his 2001 sentence is predicated on his claim that his 1991 convictions were unconstitutional. The trial court lacked jurisdiction to consider this claim on the merits because it blatantly challenges his 1991 convictions, not the sentencing proceeding for his 2001 convictions.

The basis for the defendant's claim that his 1991 convictions were unconstitutional—contradictory assertions of the complaining witness and defense counsel rendering ineffective assistance—further demonstrates that his challenge is to an underlying conviction. A challenge to whether his 1991 convictions were based on contradictory statements by the complaining witness does not provide a basis for jurisdiction because, as in *State* v. *Meikle*, supra, 146 Conn. App. 662–63, and *State* v. *Mollo*, supra, 63 Conn. App. 488–90, it seeks to dispute the factual basis of his prior convictions. Indeed, the defendant's claim in the present case transcends the claims asserted in *Meikle* and *Mollo* in that it calls into question the factual basis for his 1991 convictions to which he pleaded guilty under the *Alford* doctrine, as opposed to the 2001 convictions for which he was being sentenced. Unlike the claims of factual inaccuracies stemming from the presentence investigation reports at issue in *State* v. *Bozelko*, supra, 154 Conn. App. 750, 752, 757–58, *State* v. *Charles F.*, supra, 133 Conn. App. 700–701, and *State* v. *Osuch*, supra, 124

that the court lacked subject matter jurisdiction over this claim pursuant to *State* v. *Parker*, supra, 295 Conn. 844–47.

Conn. App. 576–77, the defendant's claim in the present case directly challenges his 1991 convictions.

Likewise, his ineffective assistance of counsel claim also is directed at the viability of his 1991 convictions. In *Parker*, our Supreme Court concluded that the trial court lacked jurisdiction over the claim that defense counsel rendered ineffective assistance at the sentencing hearing because "[t]here is no specific rule authorizing a defendant to bring his ineffective assistance of counsel claim by way of a motion to correct . . . [and] the conduct by [defense counsel] of which the defendant complains cannot be construed as a violation by the *court* of the defendant's rights at sentencing." (Emphasis in original.) *State* v. *Parker*, supra, 295 Conn. 852; see *State* v. *Evans*, supra, 329 Conn. 781 ("the motion to correct is not another bite at the apple in place of challenges that are more properly brought on direct appeal or in a petition for a writ of habeas corpus").[13] In addition, as compared to the claim in *Parker*, the defendant's ineffective assistance claim in the present case is further attenuated from the sentencing proceeding because it is directed at the defense counsel who represented him in connection with his *Alford* plea leading to his 1991 convictions, not the defense counsel who represented him at the sentencing hearing stemming from his 2001 convictions.

We are unpersuaded by the defendant's attempt to repackage his attack on his 1991 convictions as a claim

[13] It appears that the defendant decided to attack his 1991 convictions through his motion to correct an illegal sentence because he cannot seek relief through a writ of habeas corpus. The defendant recognizes that he "was barred from seeking to overturn [the 1991 convictions] in the habeas court because he was not in custody on that sentence, and so the habeas court would be without jurisdiction to consider an ineffective assistance of counsel claim as it relates to that prior conviction." See *Richardson* v. *Commissioner of Correction*, 298 Conn. 690, 698, 6 A.3d 52 (2010) ("petitioner [must] be in custody on the conviction under attack at the time the habeas petition is filed" [emphasis omitted; internal quotation marks omitted]).

that the 2001 sentencing court relied on inaccurate information regarding those convictions. The defendant, in his motion or otherwise, has not identified a single fact that he alleges to be inaccurate.[14] Instead, a plain reading of the defendant's amended motion to correct makes clear that the defendant claimed that the 1991 *convictions* were unconstitutional due to the ineffective assistance of his then defense counsel in failing to point out to the court contradictions in the complaining witness' assertions,[15] failing to do an adequate investigation, and advising the defendant to plead guilty. Although the defendant's 2001 sentencing proceeding may have been different had his 1991 convictions been set aside, he may not use that theoretical possibility as the basis to launch a wholesale attack, through a motion to correct an illegal sentence filed twenty-four years after he pleaded guilty and long after his sentence for the 1991 convictions had been served, on his then defense counsel's performance. Our Supreme Court could not have been more clear when it held in *State* v. *Parker*, supra, 295 Conn. 852, that the trial court lacked jurisdiction to consider the defendant's substantially similar claim. Therefore, we conclude that the court lacked subject matter jurisdiction over the defendant's second claim because it is not plausible that he sought to challenge the manner in which his sentence for his 2001 convictions was imposed, as opposed to an underlying conviction.

[14] Most recently, at oral argument before this court, defense counsel was asked to identify any such inaccuracies and could not.

[15] The precise language used in the amended motion is that "the 1991 convictions were unconstitutional because they were based on contradictory assertions of the complaining witness as to whether a sexual assault had ever taken place." There is, of course, no rule, constitutional or otherwise, that requires that convictions can be based only on uncontroverted, completely consistent evidence. The only conceivable basis for the defendant's claim, therefore, is that his then counsel's performance was constitutionally deficient for failing to bring the purported contradictions to the court's attention.

The form of the judgment is improper, the judgment is reversed only with respect to the denial of the defendant's motion to correct an illegal sentence as to the claim that the sentencing court relied on inaccurate facts, and the case is remanded with direction to render judgment of dismissal; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

HECTOR G. MORERA *v.* STEPHENIE C. THURBER (AC 40176)

Elgo, Bright and Flynn, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court dismissing his motion for modification of the court's visitation orders and requesting court assistance in reunifying him with his teenaged daughter. On the day of a scheduled status conference regarding the motion for modification, the court and the parties received a report from a reunification therapist who had been appointed by the court. During the status conference, the plaintiff stated that he disagreed with the report and wanted to present his own evidence to dispute it, and complained that he was given only two hours to review the report before the status conference was scheduled to begin. The trial court stated that it had reviewed the report and, subsequently, dismissed the plaintiff's motion, determining that ordering the plaintiff and the daughter to take part in additional therapy would alienate the daughter further. On appeal, the plaintiff claimed that the court violated his right to due process of law by improperly dismissing his motion without an evidentiary hearing. *Held* that the trial court improperly denied the plaintiff the opportunity, at a properly noticed evidentiary hearing, to present his own evidence and to cross-examine the court-appointed reunification therapist; given that the plaintiff informed the court that he disputed the report and that he wanted to present evidence to support his position, and that he was given less than two hours to review the report on which the court relied in ruling on the motion for modification, the court did not offer the plaintiff an adequate opportunity to review the therapist's report and to present evidence in opposition to the report and in favor of the plaintiff's own position before the court ruled.

Argued October 11, 2018—officially released February 12, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Carbonneau, J.*; judgment dissolving the marriage in accordance with the parties' agreement and granting certain other relief; thereafter, the court, *Simón, J.*, granted the plaintiff's request for leave to file a motion to modify; subsequently, the court, *Simón, J.*, dismissed the plaintiff's motion to modify, and the plaintiff appealed to this court. *Reversed; further proceedings.*

Hector G. Morera, self-represented, the appellant (plaintiff).

Opinion

BRIGHT, J. The plaintiff, Hector G. Morera, appeals from the judgment of the trial court dismissing his motion for modification of the court's visitation orders, and requesting court assistance in reunifying him with the teenaged daughter he shares with his former wife, the defendant, Stephenie C. Thurber.[1] On appeal, the plaintiff claims that the court violated his right to due process of law by improperly dismissing his motion without giving him the benefit of an evidentiary hearing. We agree and, accordingly, reverse the judgment of the trial court.

The following facts and procedural history, which we have ascertained from the record, are relevant to this appeal. The court dissolved the marriage of the parties on June 18, 2012, ordered that the defendant would have sole legal and physical custody of the parties' two minor children, a son and a daughter, and entered detailed parental access orders. The court also ordered

[1] The defendant has not filed a brief in this appeal.

the defendant to consult with the plaintiff on all material issues concerning the children, and the parties were ordered to obtain the assistance of a parenting coordinator. On May 17, 2013, the defendant filed a motion to modify the orders contained in the dissolution judgment. Following an evidentiary hearing, the court, in an October 10, 2013 oral ruling, granted the defendant's motion for modification and ordered that "[a]ll access with the children by [the plaintiff] shall be as directed and supervised by the Klingberg Institute until written agreement of the parties with the input of Klingberg's experts or further order of the court." The court also ordered that "[n]either party shall file any motion with this court without first seeking and receiving the permission of the presiding judge." Later, the court further clarified that its order was meant to encompass a reunification program through the Klingberg Institute and that the matter was referred to Family Relations with direction to implement that order.[2]

On February 25, 2016, the plaintiff filed a request for leave to file a motion for modification, along with a motion for modification in which he sought an order for reunification therapy with his daughter. The defendant did not file an objection. On October 13, 2016, the court granted the plaintiff's request for leave, referred the matter to Family Services with specific direction, and continued the matter until November 30, 2016.

On November 30, 2016, the court ordered, inter alia, that the parties each submit the names of three reunification therapists for the court's consideration, which they did. The court, however, was dissatisfied with the

[2] Additional proceedings have taken place in this case, which, in part, resulted in the unification of the plaintiff and the parties' minor son. Because these proceedings are not relevant to the present case, they are not discussed herein. For further background information see *Morera* v. *Thurber*, 162 Conn. App. 261, 131 A.3d 155 (2016).

names submitted by the parties, and, on December 15, 2016, it appointed Dr. Bruce Freedman as the reunification therapist.

The parties again appeared before the court at a February 15, 2017 status conference.[3] The court and the parties each had received a copy of Dr. Freedman's report earlier that day. During the status conference, the court stated that it had reviewed the report, and that it did not know what more it could do to help with the plaintiff's reunification with his daughter, short of physically forcing the daughter to participate in counselling or visitation with the plaintiff. The plaintiff stated that he understood that there were consequences to his pursuing this matter further, but that he believed he needed to proceed because his "daughter deserves a father and that overweighs [any] negatives . . . ." The plaintiff also suggested to the court that it could order him and his daughter to participate in an intensive seminar with Linda J. Gottlieb, a licensed marriage and family therapist. The plaintiff then told the court that he disputed the contents of Dr. Freedman's report and that he had evidence he would like to present to the court. He also complained that he had been given only two hours to review Dr. Freedman's report before the status conference.

The court explained that it understood the loss felt by the plaintiff, but that it believed any further interference would alienate the daughter further. The court then ruled: "[h]aving said that, having taken this under care-

[3] There is a discrepancy between the date set forth on the front of the transcript, February 11, 2017, which was a Saturday, and the date set forth on the certification page of the transcript, February 15, 2017, which was a Wednesday. It does appear that the status conference was held on February 15, 2017, and that the date listed on the front page of the transcript is a scrivener's error.

ful consideration and having spent . . . the last two years pursuing avenues of redress regarding the relationships between [the plaintiff] and his children, the court sees no cure for the current status of the relationship between father and his daughter that this court can in any way heal. And, I'm going [to], at this time, dismiss the motion for modification as to the daughter."[4] This appeal followed.

On appeal, the plaintiff claims that the court violated his right to due process of law by improperly dismissing his motion without giving him the benefit of an evidentiary hearing. He argues that he had approximately two hours to review Dr. Freedman's report before the status conference, that he notified the court that he disagreed with the report, and that he told the court that he wanted to present his own evidence. He contends that the failure of the court to schedule and conduct an evidentiary hearing under such circumstances, constitutes a violation of his right to due process of law under the federal and state constitutions. We agree.

"A fundamental premise of due process is that a court cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved. . . . Generally, when the exercise of the court's discretion depends on issues of fact which are disputed, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses. . . . It is a fundamental tenet of due process of law as guaranteed by the fourteenth amendment to the United States constitution and article first, § 10, of the Connecticut constitution that persons whose . . . rights will be affected by a court's decision are entitled

[4] We note that the court's form of judgment also was improper. Because it ruled on the merits of the motion, the form of judgment should have been a denial rather than a dismissal.

to be heard at a meaningful time and in a meaningful manner. . . . Where a party is not afforded an opportunity to subject the factual determinations underlying the trial court's decision to the crucible of meaningful adversarial testing, an order cannot be sustained." (Internal quotation marks omitted.) *Bruno* v. *Bruno*, 132 Conn. App. 339, 350–51, 31 A.3d 860 (2011); see also *Kelly* v. *Kelly*, 54 Conn. App. 50, 58, 732 A.2d 808 (1999) (in protracted dissolution case, where parties were hostile toward each other, trial court's ruling ordering resumption of family therapy with particular therapist was improper because court failed to hold evidentiary hearing at which plaintiff could present evidence in opposition).

In the present case, the plaintiff was given less than two hours to review the report on which the court relied in ruling on his motion for modification. The plaintiff informed the court that he disputed the report and that he wanted to present evidence to support his own position. The court did not offer the plaintiff an adequate opportunity to review Dr. Freedman's report and to present evidence in opposition to the report and in favor of the plaintiff's own position before the court ruled. We conclude, therefore, that the plaintiff was denied the opportunity, at a properly noticed evidentiary hearing, to present his own evidence and to cross-examine Dr. Freedman.

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

In this opinion the other judges concurred.

IN RE ANGELINA M.*
(AC 41577)

Prescott, Elgo and Bear, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child. *Held:*

1. The respondent mother's claim that the trial court erred in concluding that she failed to achieve the requisite degree of personal rehabilitation required by statute (§ 17a-112) was unavailing; the cumulative effect of the evidence submitted at trial was sufficient to justify the court's determination that the mother had failed to achieve a sufficient degree of personal rehabilitation that would encourage the belief that, within a reasonable time frame, she could assume a responsible position in the life of the child.
2. The trial court's finding that the termination of the respondent mother's parental rights was in the best interest of the child was not clearly erroneous; that court made specific findings with respect to each of the seven factors delineated by statute (§ 17a-112 [k]), including findings that the minor child had no attachment to the mother and was attached fully with her foster parents, that the mother had not made an effective effort to improve her rehabilitative circumstances, that ongoing contact with the mother would be detrimental to the child, and that the mother could not provide a permanent, nurturing, emotionally and physically supportive and stable home to the minor child, and those findings were substantiated by ample evidence in the record.

Argued November 26, 2018—officially released February 1, 2019**

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 London, Juvenile

* 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 Appellate Court.

** February 1, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Matters at Waterford, where the case was tried to the court, *Driscoll*, *J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Mary M., self-represented, the appellant (respondent mother).

Sara N. Swallen, assistant attorney general, with whom, on the brief, were *George Jepsen*, former attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Jean Park, for the minor child.

Opinion

PER CURIAM. The self-represented respondent mother appeals from the judgment of the trial court terminating her parental rights as to Angelina M., her minor child.[1] She contends that the court improperly concluded that (1) she failed to achieve the requisite degree of personal rehabilitation required by General Statutes § 17a-112 and (2) termination of her parental rights was in the best interest of the child.[2] We affirm the judgment of the trial court.

To prevail on a nonconsensual termination of parental rights, the petitioner, the Commissioner of Children

[1] The court also terminated the parental rights of Angelina's father, whom we refer to by that designation. As the court noted in its memorandum of decision, the father was defaulted due to his failure to appear at trial. Because he has not appealed from the judgment of the trial court, we refer in this opinion to the respondent mother as the respondent.

We also note that pursuant to Practice Book § 67-13, the attorney for the minor child filed a statement adopting the brief of the petitioner in this appeal.

[2] The respondent also alleges that the court misapplied Connecticut law, claiming that "[i]n making its decision terminating her rights [the] court did not properly follow the applicable provisions of General Statutes §§ 17a-112 (j) (3) (B) (i) and 17a-112 (j) (3) (E)." That claim is belied by the record and, thus, is without merit.

and Families, must prove, by clear and convincing evidence, one of the seven statutory grounds for termination. See General Statutes § 17a-112 (j) (3). In the present case, the petitioner principally alleged, and the court ultimately concluded, that the respondent failed to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B).[3] On appeal, that ultimate conclusion presents a question of evidentiary sufficiency. See *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015). On our careful review of the record, construing the evidence submitted at trial in a manner most favorable to sustaining the judgment; see id., 588; we conclude that the cumulative effect of that evidence was sufficient to justify the court's determination that the respondent had failed to achieve a sufficient degree of personal rehabilitation that would encourage the belief that, within a reasonable time frame, she could assume a responsible position in the life of the child.

We further conclude that the court's finding that termination of the respondent's parental rights was in the best interest of the child is not clearly erroneous. See *In re Brayden E.-H.*, 309 Conn. 642, 657, 72 A.3d 1083 (2013). The court expressly considered and made specific findings with respect to each of the seven factors delineated in § 17a-112 (k). Of particular significance, the court found that Angelina "has no attachment" to the respondent and "is attached fully with her foster parents," that the respondent had not made an "effective effort to improve [her] rehabilitative circumstances," that "ongoing contact [with the respondent] would be detrimental to and confusing to the child,"

[3] We note that the petitioner also alleged and proved the statutory ground set forth in § 17a-112 (j) (3) (E), which is implicated when a respondent who fails to achieve rehabilitation previously had her "parental rights in another child . . . terminated pursuant to a petition filed by the Commissioner of Children and Families . . . ."

and that the respondent cannot provide "a permanent, nurturing, emotionally and physically supportive and stable home" to Angelina. Those findings are substantiated by evidence in the record before us, including the testimony of the respondent's individual therapist, Trinette Conover, the respondent's "parenting education/supervised visitation provider," Sarah Laisi Lavoie, and Kelly Rogers, an expert in clinical and forensic psychology. Because there is ample supporting evidence in the record, and this court is not left with a definite and firm conviction that a mistake has been made; see *In re Elijah G.-R.*, 167 Conn. App. 1, 29–30, 142 A.3d 482 (2016); the court's finding that termination of the respondent's parental rights was in the best interest of the child is not clearly erroneous.

The judgment is affirmed.

IN RE TRESIN J.*
(AC 41829)

DiPentima, C. J., and Alvord and Beach, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights with respect to his minor child. The trial court had determined, pursuant to statute (§ 17a-112 [j] [3] [D]), that the father had no ongoing parent-child relationship with the child. The father, who had last spoken to the child when the child was less than two years old, was incarcerated for the next three years, after which the child was placed into the custody of the petitioner, the Commissioner of Children and Families. The trial court determined that the child did not know who his father was and had no positive parental memories of him. On appeal, the father claimed that the trial court improperly determined that he had no ongoing parent-child relationship with the child. He alleged that the petitioner had interfered with his

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relationship with the child by, inter alia, failing to allow him any contact with the child despite his requests for phone calls while he was incarcerated. *Held* that the trial court properly applied the law, and its legal conclusion that the petitioner established the elements of § 17a-112 (j) (3) (D) was supported by clear and convincing evidence; the respondent father presented no evidence that he sought visitation with or attempted to call the child during the three years that he was incarcerated, the petitioner presented undisputed evidence that when the child was placed into the petitioner's custody and before any alleged interference took place, the child did not know who the father was, and, thus, the father did not present evidence that the petitioner's alleged interference led to the lack of an ongoing parent-child relationship between him and the child, and there was no legal support for the father's contention that the court should have considered his feelings toward the child when he was incarcerated and the child was less than two years old, as it was the age of the child when the alleged interference began that was significant, and that alleged interference did not begin until the child was five years old.

Argued January 2—officially released February 6, 2019**

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 Hartford, Juvenile Matters, and tried to the court, *C. Taylor*, *J.*; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

David J. Reich, for the appellant (respondent father).

Hannah F. Kalichman, certified legal intern, with whom were *Benjamin Zivyon*, assistant attorney general, and, on the brief, *Michael J. Besso*, assistant attorney general, and *George Jepsen*, former attorney general, for the appellee (petitioner).

Opinion

ALVORD, J. The respondent father, Aceion B., appeals from the judgment of the trial court terminating

** February 6, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

his parental rights with respect to his minor child, Tresin J.[1] On appeal, the respondent claims that the trial court erred when it determined, pursuant to General Statutes § 17a-112 (j) (3) (D), that no ongoing parent-child relationship exists between the respondent and Tresin. We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of the respondent's claim. Tresin was born in June, 2011. The respondent last spoke to Tresin in April, 2013, when Tresin was less than two years old. In May, 2013, the respondent was convicted of possession of marijuana, his probation was revoked,[2] and he was sentenced to a term of incarceration. The respondent subsequently was taken into custody by federal authorities and detained for immigration violations. The respondent remained in federal custody until the fall of 2017.

In July, 2016, the petitioner, the Commissioner of Children and Families, filed a neglect petition with respect to Tresin and his two half-siblings, who were in the care of Tresin's mother. In addition, the petitioner obtained an order of temporary custody with respect to all three children.

In August, 2017, the petitioner filed a petition to terminate the parental rights of the respondent. The petitioner alleged that, pursuant to § 17a-112 (j) (3) (D), the respondent had no ongoing parent-child relationship with Tresin. The termination of parental rights trial was held on February 5 and March 9, 2018.

In a thoughtful memorandum of decision, issued on May 22, 2018, the court found that the petitioner had

[1] The parental rights of Tresin's mother also were terminated, and she has not appealed.

[2] The respondent previously had been convicted of drug related offenses. In 2008, the respondent was convicted of possession of marijuana, and in 2011, he was convicted of possession of marijuana with intent to sell.

proved by clear and convincing evidence that there was no ongoing parent-child relationship with respect to the respondent and Tresin. In reaching its conclusion, the court found that "Tresin does not know who his father is and has no positive parental memories of his biological father."[3] Additional facts and procedural history will be set forth as necessary.

We begin by setting forth the standard of review and legal principles that guide our analysis of the respondent's claim. "Although the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. . . . On review, we must determine 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. . . . To the extent we are required to construe the terms of § 17a-112 (j) (3) [(D)] or its applicability to the facts of this case, however, our review is plenary. . . .

"Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . .

[3] The court also determined that it would be detrimental to Tresin's best interests to allow further time for a relationship with the respondent to develop. The respondent does not challenge this determination.

grounds for termination of parental rights set forth in § 17a-112 [(j)(3)] exists by clear and convincing evidence. The [petitioner] . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds." (Citation omitted; internal quotation marks omitted.) *In re Lilyana L.*, 186 Conn. App. 96, 104–105, A.3d (2018).

The statutory ground set forth in § 17a-112 (j) (3) (D) provides that a trial court may grant a petition for termination of parental rights if it finds by clear and convincing evidence that "there is no ongoing parent-child relationship, which means the relationship that ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child . . . ."

"Because [t]he statute's definition of an ongoing parent-child relationship . . . is inherently ambiguous when applied to noncustodial parents who must maintain their relationships with their children through visitation . . . [t]he evidence regarding the nature of the respondent's relationship with [the] child at the time of the termination hearing must be reviewed in the light of the circumstances under which visitation has been permitted. . . .

"In determining whether such a relationship exists, generally, the ultimate question is whether the child has no present [positive] memories or feelings for the natural parent." (Internal quotation marks omitted.) *In re Jacob W.*, 178 Conn. App. 195, 208, 172 A.3d 1274 (2017), cert. granted on other grounds, 328 Conn. 902, 177 A.3d 563 (2018).

On appeal, the respondent claims that the trial court erred when it determined, pursuant to § 17a-112 (j) (3)

(D), that no ongoing parent-child relationship exists between the respondent and Tresin. Specifically, the respondent argues that the court failed to apply the law set forth in this court's decision in *In re Carla C.*, 167 Conn. App. 248, 143 A.3d 677 (2016).[4] He argues that, in accordance with *In re Carla C.*, the trial court should have considered (1) the petitioner's interference with the development of the parent-child relationship between himself and Tresin, and (2) Tresin's young age, in light of which the respondent's feelings toward Tresin are significant. We disagree.

The trial court did consider this court's decision in *In re Carla C.* During closing arguments, the court, sua sponte, raised the question of whether the guidance set forth in *In re Carla C.* applied to the circumstances of the present case. The petitioner argued that *In re Carla C.* did not apply because neither a parent nor the petitioner had interfered with the respondent's relationship with Tresin.[5] The respondent, in his subsequent closing

[4] In *In re Carla C.*, supra, 167 Conn. App. 272, this court recognized that there are "two relevant variables on which the inquiry into whether an ongoing parent-child relationship exists may turn: (1) a child's very young age, in light of which the parent's positive feelings toward the child are significant; and (2) another party's interference with the development of the relationship, in light of which the parent's efforts to maintain a relationship, even if unsuccessful, may demonstrate positive feelings toward the child."

[5] The trial court and the petitioner's counsel engaged in the following colloquy:

"The Court: . . . I seem to recall *In re Carla C.* and Judge Mullins—now Justice Mullins'—position concerning that similar type of argument. How do you separate that case from this one?

"[The Petitioner's Counsel]: Well, Your Honor . . . while the child [is] alive . . . [the respondent's] already on probation. He goes out and continues the same activity. It's not the mere fact that he's incarcerated and kept away from Tresin. That's not what in of itself matters. *And it's not as if someone from outside were—a parent, a grandparent, another parent, for example—were attempting to keep him. It's his own actions in this case. So, it's not as if he didn't have this relationship because* [*the petitioner*] *removed the child from him. It's not as if it was an outside state agency or a parent who created the conditions of interference.*" (Emphasis added.)

argument, did not indicate any disagreement with the petitioner's argument with respect to the inapplicability of *In re Carla C.*

The facts in the present case are not aligned with the facts of *In re Carla C.* In *In re Carla C.*, supra, 167 Conn. App. 251–52, the respondent was arrested and incarcerated when his child was less than one month old. On at least ten different occasions, the child's mother, the petitioner, took the child to visit the respondent in prison. Beginning when the child was two years old, however, the petitioner began limiting the respondent's access to the child by refusing to facilitate visits or permit other contact.[6] Id., 273. She then filed a petition to terminate the respondent's parental rights on the basis of no ongoing parent-child relationship. On appeal, this court concluded that "the petitioner may not establish the lack of an ongoing parent-child relationship on the basis of her own interference with the respondent's efforts to maintain contact with [the child] . . . ." Id., 280–81.

In the present case, the respondent claims that, as in *In re Carla C.*, the petitioner interfered with his relationship with Tresin. He argues that "[the petitioner] failed to allow any contact between [the respondent] and Tresin, despite the fact that [the respondent]

[6] The petitioner stopped taking the child to visit the respondent because she "unilaterally decided that visits with the respondent were no longer in [the child's] best interest." *In re Carla C.*, supra, 167 Conn. App. 252. The petitioner "obtained an order from the correctional facility that barred the respondent from initiating any contact with her or [the child], on pain of disciplinary action. Subsequently, she sought and obtained sole custody of [the child], stipulating that the respondent would have bimonthly visits with [the child] at the prison. She nevertheless neither facilitated those visits nor moved to modify visitation. Additionally, the petitioner has not told [the child] that the respondent is her father or shown her pictures of the respondent; indeed, she has discarded the respondent's cards and letters to [the child]. Short of 'extraordinary and heroic efforts' by the respondent . . . the petitioner was able completely to deny him access to [the child]." (Citation omitted; footnote omitted.) Id., 273.

requested phone calls when he was incarcerated . . . . The written record shows that [the respondent] reached out to [the petitioner] and requested possible phone calls with the child and expressed his hope that a paternal relative could care for the child."[7]

First, we note that Tresin was not placed in the custody of the petitioner until July, 2016.[8] As previously stated, the respondent last had contact with Tresin in April, 2013, before he was incarcerated. Accordingly, the respondent was incarcerated for more than three years, from April, 2013 to July, 2016, before Tresin was placed into the petitioner's custody. The respondent presented no evidence that he sought visitation or attempted to call Tresin during those three years. The respondent does not allege any interference by the child's mother, who had custody of Tresin during that time.

Moreover, the petitioner presented undisputed evidence that, in July, 2016, when Tresin was placed into the petitioner's custody and before any alleged interference took place, Tresin did not know who his father was. Therefore, unlike in *In re Carla C.*, the respondent did not present evidence that the petitioner's alleged

[7] The respondent also argues that the petitioner interfered with his relationship with Tresin because "[o]nce he was released, he requested visits through counsel, which [were] effectively opposed by [the petitioner]." The respondent, however, did not file the requests for visitation until November, 2017. The petition for termination of parental rights was filed in August, 2017, three months earlier. Practice Book § 35a-7 (a) provides in relevant part: "In the adjudicatory phase, the judicial authority is limited to evidence of events preceding the filing of the petition . . . ." Accordingly, because the court could not have considered the respondent's belated requests for visitation in its analysis of whether there was an ongoing parent-child relationship between the respondent and Tresin, any alleged interference with respect to those requests similarly was irrelevant to the court's analysis.

[8] On July 11, 2016, the petitioner was granted temporary custody of Tresin. Accordingly, any alleged interference by the petitioner, as Tresin's custodian, could only have occurred after that date.

interference *led to* the lack of an ongoing parent-child relationship between the respondent and Tresin.[9]

The respondent also argues that, in accordance with *In re Carla C.*, the trial court should have taken into consideration his positive feelings toward Tresin because Tresin was less than two years old when the respondent was incarcerated. This court, however, in *In re Carla C.*, did not look to the child's age at the time that the respondent was incarcerated. Rather, the age of the child when the petitioner began interfering was significant. This court noted that "[the child] was . . . *only two years old* when the petitioner began denying the respondent visitation and otherwise severed contact," and determined that, "[i]n light of the petitioner's denial of visitation beginning when [the child] was still *in the earliest stages of life*, [this court] also must be mindful of the positive feelings of the respondent toward the child." (Emphasis added; internal quotation marks omitted.) *In re Carla C.*, supra, 167 Conn. App. 274.

In the present case, the petitioner's alleged interference did not begin until, at the earliest, July, 2016,[10] when Tresin was five years old. Therefore, *In re Carla C.* is markedly distinct from the present case, and there is no legal support for the respondent's contention that the court should have considered the respondent's positive feelings toward Tresin. See id., 266 ("[w]e recognize that the child's positive feelings for the noncustodial parent generally are determinative . . . except where the child is *too young to have any discernible feelings*"

[9] See *In re Carla C.*, supra, 167 Conn. App. 262 ("a parent whose conduct inevitably has led to the lack of an ongoing parent-child relationship may not terminate parental rights on this ground"); see also *In re Jacob W.*, supra, 178 Conn. App. 215 ("interference exists only if a custodian's unreasonable interference with a noncustodial parent's efforts to maintain an ongoing parent-child relationship leads inevitably to the lack of such relationship").

[10] See footnote 8 of this opinion.

[citation omitted; emphasis added]); see also *In re Valerie D.*, 223 Conn. 492, 532, 613 A.2d 748 (1992) ("where the child involved is *virtually a newborn infant* whose present feelings can hardly be discerned with any reasonable degree of confidence . . . the inquiry must focus, not on the feelings of the infant, but on the positive feelings of the natural parent" [emphasis added]).

On the basis of the foregoing, we conclude that the trial court properly applied the law, and that its legal conclusion that the petitioner established the elements of § 17a-112 (j) (3) (D) is supported by clear and convincing evidence.

The judgment is affirmed.

In this opinion the other judges concurred.