IN RE RYDER M.*
(AC 44831)

Moll, Clark and Sheldon, 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, R, who previously had been adjudicated neglected and had been in a foster home since infancy. The father claimed, inter alia, that the trial court improperly determined that the Department of Children and Families, as required by statute (§ 17a-112 (j)), had made reasonable efforts to reunify him with R and that he had failed to achieve a sufficient degree of personal rehabilitation so as to adequately demonstrate reasonable parenting ability. *Held*:

1. The trial court properly determined from clear and convincing evidence that the department made reasonable efforts to reunite the respondent father with R: the court's uncontested findings established that the department referred him to two different service providers for mental health and substance abuse issues but that both discharged him as a result of his noncompliance with their requirements, and that he elected to cease his individual counseling with another service provider, tested positive several times for marijuana use and had been arrested on drug charges; moreover, the department provided the father an opportunity to attend a fatherhood program and to visit with R, but he missed scheduled visits, struggled to engage with R and had his visitation suspended temporarily after he was observed to be under the influence of a substance during a supervised visit; furthermore, despite the father's assertion that the department did not do everything reasonable that could have been done for him, even if he would have benefited from the additional actions he suggested to facilitate reunification with R, the department's failure to do so would not defeat the court's reasonable efforts determination.

* 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.

2. The respondent father could not prevail on his claim that the trial court improperly determined that he failed to rehabilitate sufficiently: clear and convincing evidence in the record supported the trial court's finding that the father failed to achieve a sufficient degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering R's age and needs, he could assume a responsible position in R's life, as there was evidence of the father's resistance to following the guidelines for services that were set for him, he was never fully able to comply with the court-ordered specific steps he had been given to facilitate reunification with R, and he did not make sufficient progress for a long enough period of time to assume that he had adequately treated his mental health difficulties, was free of illegal drugs and able to address his past trauma; moreover, despite the father's assertion that there was insufficient evidence to support the court's determination that he failed to rehabilitate sufficiently, the court made clear that it recognized he had made progress toward rehabilitation but that his efforts were too little and too late, as he was twice observed to be under the influence of a substance during visits with R, his positive tests for marijuana use reflected that he had not maintained sobriety or learned strategies to manage his life, he continued to struggle with behavioral issues, and the apartment lease he secured after having been itinerant throughout most of the underlying proceedings had been executed only six weeks before trial.

3. The trial court's determination that termination of the respondent father's parental rights was in R's best interest was legally sound and factually supported by the court's findings and conclusions with respect to the factors prescribed in § 17a-112 (k), as well as the court's conclusion regarding R's need for permanency and stability: the department made reasonable efforts to provide timely services to the father and to reunite him with R, but he was not in a position to safely care for R within a reasonable time, R, who was more than three years old at the time of trial, had developed significant emotional ties to his foster family, and the father's lack of progress toward mastering the essential requirements of parenthood and his own emotional stability left him unable to adjust his circumstances sufficiently to have R returned to him in the foreseeable future; moreover, notwithstanding the father's assertion that termination of his parental rights was not in R's best interest, the court found that, although a bond may exist between the father and R, it did not undercut the court's best interest determination in light of the myriad of other considerations the court took into account; furthermore, any continuing efforts the father made to advance his rehabilitation did not outweigh the other factors the court considered.

Argued January 18—officially released April 20, 2022**

** April 20, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights as to their minor child, brought to the Superior Court in the judicial district of Middlesex, Child Protection Session at Middletown, and tried to the court, *Hon. Barbara M. Quinn*, judge trial referee; judgment terminating the respondents parental rights, from which the respondent father appealed to this court. *Affirmed.*

David B. Rozwaski, assigned counsel, for the appellant (respondent father).

Jennifer C. Leavitt, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan M. O'Roark*, assistant attorney general, for the appellee (petitioner).

Opinion

MOLL, J. The respondent father, Phillip M., appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights as to his minor son, Ryder M., on the ground that he failed to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B) (i).[1] On appeal, the respondent claims that the court improperly determined that (1) the Department of Children and Families (department) made reasonable efforts to reunify him with Ryder, (2) he failed to rehabilitate sufficiently, and (3) termination of his parental rights was in Ryder's best interest. 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

[1] The trial court also rendered judgment terminating the parental rights of Ryder's mother, Caroline E. Caroline E. has not appealed from the judgment terminating her parental rights, and, therefore, we refer in this opinion to Phillip M. as the respondent.

this appeal. The respondent and Caroline E. began a relationship in early 2017. Ryder was born in early 2018. On March 18, 2018, the respondent was arrested for various motor vehicle violations and use of drug paraphernalia. At that time, Ryder was in the respondent's primary care. A few days later, the department received a report from one of the respondent's brothers and that brother's girlfriend that they had Ryder, then five weeks old, in their care, that they had no supplies with which to care for him, and that they did not know how long they could care for him. The respondent's brother also explained that the respondent was unable at that time to care for Ryder.

On March 23, 2018, the petitioner applied for and secured an order of temporary custody, which was sustained on March 27, 2018. Ryder was then placed in a nonrelative foster home. On May 23, 2018, Ryder was adjudicated neglected by the court, *Doherty*, *J.*, and was committed to the care and custody of the petitioner. The court also ordered specific steps for the respondent to take to facilitate his reunification with Ryder.

On November 15, 2019, the petitioner filed a motion to review and approve a permanency plan of termination of parental rights and adoption in the interest of Ryder. On December 11, 2019, following a hearing, the court granted the motion. On February 6, 2020, the petitioner filed a petition to terminate the parental rights of the respondent with respect to Ryder (petition).[2] In the petition, the petitioner alleged, as the ground for termination, that Ryder had been found in a prior proceeding to have been neglected, abused, or uncared for and the respondent had failed to achieve such a degree of personal rehabilitation as would

[2] The petitioner also sought to terminate the parental rights of Caroline E. The judgment terminating the parental rights of Caroline E. is not at issue in this appeal. See footnote 1 of this opinion.

encourage the belief that within a reasonable time, considering the age and needs of Ryder, he could assume a responsible position in Ryder's life. See General Statutes § 17a-112 (j) (3) (B) (i).

A trial on the petition occurred on April 12, April 13, and May 4, 2021. The respondent appeared and was represented by counsel. Numerous witnesses testified, including the respondent, and several exhibits were admitted into the record.

On May 14, 2021, the court, *Hon. Barbara M. Quinn*, judge trial referee, issued a memorandum of decision terminating the parental rights of the respondent. The court determined, by clear and convincing evidence, that Ryder had been adjudicated neglected on May 23, 2018, and that the respondent had failed to rehabilitate sufficiently to satisfy the requirements of § 17a-112 (j) (3) (B) (i). The court also determined that the department had made reasonable efforts to locate the respondent and to reunify him with Ryder.

The court made the following relevant findings concerning Ryder. "Ryder has been in his present foster home since he was an infant. He has thrived there and is bonded to his foster family, which includes one of [the respondent's] younger brothers who was adopted by this family. . . . [At the time of trial] Ryder [was] a few months older than three. He is an engaging, happy child and enjoys playing with his cars, watching cartoons and playing outside. He attends day care and preschool, and there are no developmental concerns about Ryder. He is learning and socializing in age appropriate ways. He is medically up to date and doing well."

In addition, the court made the following relevant findings regarding the respondent. "[The respondent] is one of seven children born to his parents. He has three older sisters and three younger brothers. His parents, he reported, were both alcoholics, and there were many

incidences of domestic violence between them in the home. He and his siblings were also involved with [the department] in their younger years. They were removed from their parents three separate times; once, for the first time, when [the respondent] was fifteen [years old] and twice more when he was sixteen years old. It appears that [the respondent's] parents were not successful in having all their children returned to their care . . . .

"[The respondent] . . . was never adopted and continued to make his way as best he was able outside of [the department's] care. He was a special education student and did not graduate from high school. Nonetheless, to his credit, he has subsequently earned his general equivalency diploma (GED). While not identified in the [department's] record as such, his background and experiences in his family of origin would be expected to have caused him to experience trauma from the chaos and domestic violence he observed. He reported to one of his therapists that he was aware his childhood had impacted his own parenting skills and the choices he has made as an adult. His various mental health diagnoses . . . also support the court's conclusion.

"[The respondent] has limited family support, mostly from his father, with whom he is close and with whom he has resided from time to time. Nonetheless, due to their [department] history, neither his mother nor his father are potential resources for him so that Ryder could have been placed with them after he was removed from his parents' care in 2018.

"As an adult, [the respondent] has had a sporadic work history, primarily employed in landscaping on a seasonal basis and often being paid in unofficial ways. He has been homeless or itinerant and [was] not able to be located at times in the early months after Ryder's

removal. More recently, since late 2019, [the respondent] has been employed by a landscaping and contracting business with a more official standing and payroll history. Unfortunately, his employment in landscaping means he has been unemployed during the winter months on a regular basis and secured unemployment compensation. To combat this difficulty, over this past winter, [the respondent] took as his primary job a position at Cumberland Farms and only works part-time in landscaping. As yet, [the respondent] has not provided [the department] a wage stub to demonstrate his legal employment, as required by the specific steps issued for him.

"His current landscaping employer testified that [the respondent] is a good worker with considerable skills. His employer stated that he has tried to accommodate his visits with Ryder and to assist him in his attendance at other required services. [The respondent] does not have his own transportation and often secures rides from others or walks to where he needs to be. His employers have at times provided him with that assistance." (Footnote omitted.)

The court further found that, in addition to the standard provisions of the specific steps, the respondent was directed to meet detailed, well-tailored goals relating to substance abuse treatment, mental health treatment, and parenting. The court explained, by way of summary, that "[t]he testimony at trial reviewed [the respondent's] lengthy involvement with many service providers, the rejection of most of the providers to which [the department] had referred him and his choice of his own selected providers. His conduct demonstrated his significant need and insistence on controlling the services he accepted. He rejected those services which required strict supervised, random drug testing and focused individual counseling during which he and his therapist would have worked together to address his past trauma and mental health. His insistence on

selecting his own services which did not comply with the [department's] directives of what was needed for him ultimately led to his failure to make any meaningful progress on the very detailed goals for rehabilitation set by the court for reunification with [Ryder]. Despite his belief that he has complied with such services and the great efforts he has made to attend and comply, he himself sadly sabotaged those efforts."

With respect to substance abuse and mental health treatment, the court found the following facts. At the start of the neglect proceedings, the department specifically referred the respondent for substance abuse assessment and treatment. It became known, and the respondent admitted at trial, that he had regularly used heroin in the past. Initially, he was referred to the McCall Foundation for combined substance abuse assessment and treatment (which included weekly urine screens), mental health services, and medication management. The respondent was not compliant with the program and was discharged in June, 2018. The respondent then was referred to a second provider, MCCA of Torrington,[3] but he did not comply with the requirements of the program, refused to submit to random urine screens, and was discharged for noncompliance in November, 2018. The department again referred the respondent to MCCA of Torrington, but he did not return there.

In January, 2019, the department referred the respondent to the Apt Foundation for treatment, after which, by his own choice, services were transferred to the Root Center[4] in February, 2019. He underwent a mental health evaluation, which diagnosed him with post-traumatic stress disorder and anxiety. He was prescribed medication

[3] Although not identified in the court's decision, the record indicates that MCCA of Torrington was the second provider to which the department referred the respondent.

[4] The record reflects that the Root Center was previously known as the Hartford Dispensary, a designation used in the record synonymously with the Root Center. For ease of reference, we refer to this entity as the Root Center.

to treat his anxiety. Upon successfully completing an intensive outpatient program, the respondent met with a clinician for weekly counseling.

Although services were provided to the respondent by the Root Center for the first few months in the manner that the department had directed, "soon, by his own choice and the program's needs, the services stopped providing the oversight and the mental health services required for him to rehabilitate." Initially, the Root Center provided weekly urine screens. In February, 2019, the respondent had five positive urine screens for marijuana. By April, 2019, the urine screens were provided every four to eight weeks in a manner that was predictable, in that "they only occurred when [the respondent] returned for his medications, clearly a time known to and chosen by him and the program," and unsupervised. The court continued: "The Root Center's failure to provide supervised, truly random drug screens had its negative consequences for [the respondent's] rehabilitation. In September of 2019, [the respondent] was arrested for possession of drug paraphernalia and marijuana. When [he] next spoke with [a department] social worker, he admitted to the facts of the arrest. While he complained that [the department] could have secured more frequent drug testing by payment to the Root Center, [which] had only limited funding for such screens, such payment would not have secured their actual randomness or their supervision by the Root Center. [The department] never followed up on the payment request."

The respondent tested positive for marijuana in 2018, 2019, and 2020, with the most recent positive test coming on December 20, 2020. As the court observed, the respondent's marijuana use, "when it has been discovered, reveals that [he] has not yet managed to maintain his sobriety or learned strategies to manage his life as the specific steps require. His obligation, among others, was

to learn alternative strategies to cope with the stresses of his life."

At the time he began receiving services at the Root Center, the respondent was taking Suboxone for his opiate dependence. At some point, "[the respondent] self-determined to stop his Suboxone use to stem his cravings for opiates. He then began methadone maintenance in 2019 with the Root Center and had further meetings with the condition that mental health treatment tapered off. That opiate use has presented a problem to him in his life became apparent as well during his own testimony about his methadone treatment by the substance abuse center. Over time, the Root Center had reduced his dosage to five [milligrams] daily. He testified that this level of support made him feel so sore and achy and unwell that he requested a significant increase in his dosage back to forty-eight [milligrams] a day, a dosage he continues to receive."

Additionally, the individual counseling that the respondent was receiving ceased at his request following a recommendation that he seek approval for and obtain a medical marijuana card, which he took no steps to acquire. The only mental health treatment that remained ongoing in 2019 was "the medication management regimen, palliative measures to keep him functioning." The court determined that, "[s]uch medication, however, cannot substitute for individual counseling to assist him in learning coping skills and help him to understand his past significant trauma and develop the necessary coping skills."

In September, 2020, the department made two final attempts to refer the respondent to more appropriate programs with consistent oversight regarding substance abuse and individual mental health treatment. First, the department referred the respondent to Stokes Counseling, which he refused, claiming that the Root

Center provided him with sufficient services. Thereafter, the department referred the respondent to the Watkins Network. On October 2, 2020, at an intake session, the respondent refused to submit to a drug screen, ranted and raved at the staff, and abruptly left, never to return. The court inferred from the respondent's refusal that a drug screen would have revealed illegal drug use. The court also found that his behavior "further demonstrated that he was unable to keep his conduct under control and to cooperate with his service providers, as required by the specific steps. Whatever he may have learned during [certain] domestic violence sessions mandated by the court in 2018 had not enabled him to more permanently control his temper and develop coping skills to manage his stress. In his own testimony, he also admitted to having a temper, which he found difficult to control at times. His conduct is further evidence of his significant need for individual mental health treatment to deal with his past history of trauma and ability to manage himself." In the months leading up to trial, the respondent began regularly attending group treatment at the Root Center to address his mental health; initially, however, his attendance at group treatment was sporadic as a result of a conflict that he had with another participant.

With respect to the parenting component of the respondent's rehabilitation obligations, the court made the following relevant findings. Although the respondent successfully completed a fatherhood program and had regular weekly visits with Ryder (which were provided physically and, after the COVID-19 pandemic began, virtually), it was apparent in those visits that he had not yet fully learned the required parenting skills. He did not regularly bring food or toys for Ryder or projects to undertake with Ryder. Often unable to engage Ryder, the respondent did not comprehend the effect of his mental health difficulties on Ryder and on

his ability to engage with Ryder. Ryder's foster mother offered for the respondent to have in-person visits with Ryder in her home, but after a few visits, the offer was withdrawn as a result of the respondent being belligerent. In addition, the respondent missed visits from time to time. With respect to missed virtual visits, the respondent accused the department of "sabotaging his virtual visits" and offered a variety of excuses; however, the court found the respondent's excuses "not fully credible" and "to be part of his excuse-prone behavior."

Further, there were two visits with Ryder during which the respondent was observed to be under the influence of some substance. The first occasion occurred during a supervised visit in 2018, and the respondent did not refute the claim when confronted by the department about his apparent drug use on that day. The respondent's visits were suspended for a period of time following that incident. The second occasion occurred in 2020 during a virtual visit. A department case aide reported that the respondent was unkempt and had pinpoint pupils, slurred speech, and a lack of energy. Subsequent to that visit, the respondent missed two visits in July, 2020, and five more visits between the end of August and early October, 2020. The court determined that the respondent's "drug use on these occasions . . . impact[ed] [Ryder] and, while he was often able to remain sober, there were times when he could not accomplish this important task."

Finally, with regard to the general requirements of the specific steps, the court focused on two areas where the respondent failed to comply, namely, the requirements (1) to maintain adequate housing and to keep the department informed of his whereabouts, and (2) to cooperate with service providers. The court found that, throughout most of the underlying proceedings, the respondent was unable to maintain adequate hous-

ing, which would have included "a living arrangement suitable for a child." (Internal quotation marks omitted.) The respondent was itinerant for much of that time, and there were many occasions when the department did not know where he was residing, "as he was quite secretive about the personal aspects of his life and also resided with his father for months at a time." The residence of the respondent's father was not deemed adequate housing because of the father's child protection history. The court further found that, six weeks before trial, the respondent had signed a lease for his own apartment, where he was residing at the time of trial. Although commending the respondent for securing his own housing, the court deemed his efforts to be "too little [and] too late." Additionally, the respondent failed to notify the department of the lease, such that the department was unable to inspect the apartment to determine whether it was suitable and adequate housing.

With respect to cooperating with service providers, the court found that the respondent's cooperation was "very low, as he blames [the department] for everything that has befallen him, including the enormous demands on his time to attend required services. It is certainly a daunting task to undertake all that is required of him, and he has made great efforts . . . but only on the terms he dictates. He has refused to undertake the hard personal work that is required for ongoing personal change and growth. His frustration and belligerence to [department] staff and service providers demonstrate his failure to master several important life tasks. He has been unable to admit fully and take responsibility for his own role in losing custody of [Ryder]. He has been unable to curb his frustration and anger. He has been unable to acknowledge his own past deficits, which prevent him from properly parenting [Ryder] and

making the necessary personal changes to demonstrate some significant rehabilitation. Projecting his own deficits on others does not help achieve the required understanding, nor can it lead to meaningful change."

In light of the foregoing findings, the court determined that there was clear and convincing evidence that (1) the department made reasonable efforts to reunify the respondent with Ryder, and (2) the respondent failed to rehabilitate sufficiently.[5] The court then determined that terminating the respondent's parental rights was in Ryder's best interest. Accordingly, the court rendered judgment terminating the parental rights of the respondent and appointing the petitioner as Ryder's statutory parent. This appeal followed.[6] Additional facts and procedural history will be set forth as necessary.

Before turning to the respondent's claims, we set forth the following relevant legal principles. "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 . . . 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. . . . Subdivision (3) of § 17a-112 (j) carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests suffi-

[5] The court also determined that the department made reasonable efforts to locate the respondent and that he "was able to meaningfully participate in these proceedings and receive services." The respondent does not contest that determination on appeal.

[6] The attorney for Ryder has adopted the petitioner's appellate brief.

ciently powerful to justify the termination of parental rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun." (Internal quotation marks omitted.) *In re Tresin J.*, 334 Conn. 314, 322–23, 222 A.3d 83 (2019).

Section 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding, or (ii) is found to be neglected, abused or uncared for and has been in the custody of the [Commissioner of Children and Families] for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and 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 . . . ."

I

The respondent first claims that the trial court improperly determined that the department made reasonable efforts to reunify him with Ryder. We disagree.[7]

The following legal principles and standard of review are relevant to our resolution of this claim. "Section 17a-112 (j) (1) requires that before terminating parental rights, the court must find by clear and convincing evidence that the department has made reasonable efforts to locate the parent and to reunify the child with the parent, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts provided such finding is not required if the court has determined at a hearing . . . that such efforts are not appropriate . . . . Thus, the department may meet its burden concerning reunification in one of three ways: (1) by showing that it made such efforts, (2) by showing that the parent was unable or unwilling to benefit from reunification efforts or (3) by a previous judicial determination that such efforts were not appropriate." (Internal quotation marks omitted.)

[7] The respondent also appears to claim that the court improperly determined that he was unable or unwilling to benefit from reunification efforts under § 17a-112 (j) (1). Pursuant to § 17a-112 (j) (1), the petitioner must prove *either* that the department "has made reasonable efforts to reunify *or*, *alternatively*, that the parent is unwilling or unable to benefit from reunification efforts." (Emphasis in original; internal quotation marks omitted.) *In re Paul O.*, 141 Conn. App. 477, 485, 62 A.3d 637, cert. denied, 308 Conn. 933, 64 A.3d 332 (2013). Section 17a-112 (j) clearly provides that the petitioner "is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element." (Internal quotation marks omitted.) Id. Thus, insofar as the respondent is raising this claim, we need not address it in light of our conclusion that the court did not commit error in determining that the department made reasonable efforts to reunify the respondent with Ryder. See id. ("[b]ecause we have concluded that the court properly found, on the basis of clear and convincing evidence, that the department had made reasonable efforts to reunify the respondent and [the respondent's child], we do not reach the respondent's claim that the court improperly concluded that he was unable or unwilling to benefit from reunification efforts").

In re Corey C., 198 Conn. App. 41, 58, 232 A.3d 1237, cert. denied, 335 Conn. 930, 236 A.3d 217 (2020). "[I]n determining whether the department has made reasonable efforts to reunify a parent and a child . . . the court is required in the adjudicatory phase to make its assessment on the basis of events preceding the date on which the termination petition was filed. . . . This court has consistently held that the court, [w]hen making its reasonable efforts determination . . . is limited to considering only those facts preceding the filing of the termination petition or the most recent amendment to the petition . . . ." (Emphasis omitted; internal quotation marks omitted.) *In re Cameron W.*, 194 Conn. App. 633, 660, 221 A.3d 885 (2019), cert. denied, 334 Conn. 918, 222 A.3d 103 (2020).

Our review of the court's reasonable efforts determination is subject to the evidentiary sufficiency standard of review. See *In re Corey C.*, supra, 198 Conn. App. 59. Under this standard, the inquiry 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." (Internal quotation marks omitted.) Id., 67. The court's subordinate findings made in support of its reasonable efforts determination are reviewed for clear error. Id.

In light of its detailed findings in its decision, which we summarized previously in this opinion, the court determined from clear and convincing evidence that the department had made reasonable efforts to reunify the respondent with Ryder. As the court found, "[the respondent] demonstrated substance abuse difficulties, lack of parenting skills and past trauma, which required

mental health treatment. There is no question that referrals were made to services reasonably tailored to address those problems and needs to be able for him to be reunified with Ryder."

The respondent does not contest the court's subordinate findings made in support of its reasonable efforts determination; rather, he claims that "not everything reasonable that could have been done was offered to [him]," maintaining that the department failed (1) to work with his therapist at the Root Center to address its issues and concerns about his behavior and (2) to "follow up with the [respondent] regarding assuring that he was engaged with proper services" by, for example, seeking a court-ordered evaluation.[8] We are not persuaded.

"[Section 17a-112] imposes on the department the duty, inter alia, to make reasonable efforts to reunite the child or children with the parents. The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged,

[8] The respondent also contends that it was unreasonable for the department to refer him to new service providers in September, 2020, to "restart services" rather than taking other measures, such as paying the Root Center to conduct more frequent urine screens or seeking a court order for a hair test. This argument is predicated on events that followed the petitioner's filing of the petition to terminate the respondent's parental rights on February 6, 2020, such that they are not proper to consider vis-à-vis the court's reasonable efforts determination. See *In re Cameron W.*, supra, 194 Conn. App. 660.

The record reflects that the court twice granted motions filed by the petitioner to make "technical correction[s]" to the petition, once on March 4, 2020 (correcting improperly checked boxes on the petition form) and once on March 30, 2021 (correcting the respondent's date of birth). In both motions, the petitioner incorporated by reference the summary of facts filed in support of the petition filed on February 6, 2020, and indicated that the adjudicatory date was not affected. We do not construe these technical corrections to be amendments permitting the consideration of events past the filing date of the petition with regard to whether the department made reasonable efforts to reunify the respondent with Ryder.

using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn." (Internal quotation marks omitted.) *In re Corey C.*, supra, 198 Conn. App. 59. "[R]easonableness is an objective standard . . . and whether reasonable efforts have been proven depends on the careful consideration of the circumstances of each individual case. . . . [R]easonable efforts means doing everything reasonable, not everything possible." (Citation omitted; internal quotation marks omitted.) *In re Unique R.*, 170 Conn. App. 833, 855, 156 A.3d 1 (2017). "[O]ur courts are instructed to look to the totality of the facts and circumstances presented in each individual case in deciding whether reasonable efforts have been made." (Internal quotation marks omitted.) *In re Corey C.*, supra, 65.

The court's uncontested findings establish that the department took various steps to facilitate the respondent's reunification with Ryder before the petitioner sought to terminate the respondent's parental rights. In 2018, the department referred the respondent to two different providers offering mental health and substance abuse services, but he was discharged from both as a result of his noncompliance. Once engaged with the Root Center in February, 2019, the respondent received access to mental health and substance abuse services; however, he elected to cease his individual counseling and continued to struggle with substance abuse, as evidenced by several positive marijuana tests and his admission to the facts of his arrest in September, 2019, for possession of drug paraphernalia and marijuana.[9]

[9] In a department social study dated February 3, 2020, which was admitted as a full exhibit at trial, there is an entry indicating that the respondent "recently admitted to using [m]arijuana, following his arrest for [p]ossession of [d]rugs, [m]arijuana on [September 26, 2019]."

In addition, the respondent was provided an opportunity to attend a fatherhood program and to have visitation with Ryder; however, he often struggled to engage with Ryder, missed scheduled visits, and had his visitation suspended temporarily after having been observed to be under the influence of a substance during a supervised visit in 2018.

Put simply, the court's uncontested cumulative findings amply support its reasonable efforts determination. Thus, even if the respondent would have benefited from the department's taking the additional actions he suggested to facilitate his reunification with Ryder, the department's failure to do so would not defeat the court's reasonable efforts determination. See *In re Melody L.*, 290 Conn. 131, 147, 962 A.2d 81 (2009) (assuming evidence existed that respondent would have benefited from additional family therapy, such evidence would not undermine court's reasonable efforts determination), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014); *In re Christopher L.*, 135 Conn. App. 232, 243, 41 A.3d 664 (2012) (assuming evidence existed that respondent would have benefited from additional services addressing respondent's trauma issues, such evidence would not undermine court's reasonable efforts determination).

In sum, we reject the respondent's claim that the court improperly determined that the department made reasonable efforts to reunify him with Ryder.

II

The respondent next claims that the trial court improperly determined that he had failed to rehabilitate sufficiently. We are not persuaded.

We begin by setting forth the following relevant legal principles and standard of review. "Pursuant to § 17a-112, [t]he trial court is required . . . to analyze the

[parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . Rehabilitate means to restore [a parent] to a useful and constructive place in society through social rehabilitation. . . . The statute does not require [a parent] to prove precisely when [he or she] will be able to assume a responsible position in [his or her] child's life. Nor does it require [him or her] to prove that [he or she] will be able to assume full responsibility for [his or her] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he or she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he or she] can assume a responsible position in [his or her] child's life. . . . In addition, [i]n determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department. . . .

"When a child is taken into the [petitioner's] custody, a trial court must issue specific steps to a parent as to what should be done to facilitate reunification and prevent termination of parental rights. . . . Specific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of [parental] rights. Their completion or noncompletion, however, does not guarantee any outcome. A parent may complete all of the specific steps and still be found to have failed to rehabilitate. . . . Conversely, a parent could fall somewhat short in completing the ordered steps, but still be found to have achieved sufficient progress so as to preclude a termination of his or her rights based on a failure to rehabilitate.

. . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his or her] ability to manage [his or her] own life, but rather whether [he or she] has gained the ability to care for the particular needs of the child at issue." (Internal quotation marks omitted.) *In re Omar I.*, 197 Conn. App. 499, 578–79, 231 A.3d 1196, cert. denied, 335 Conn. 924, 233 A.3d 1091, cert. denied sub nom. *Ammar I.* v. *Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020). The court's determination that the respondent failed to rehabilitate sufficiently is subject to the evidentiary sufficiency standard of review, and we will not disturb the court's subordinate findings vis-à-vis that determination unless they are clearly erroneous. Id., 579–80; see also part I of this opinion.

In determining that the respondent failed to rehabilitate sufficiently, the court found that the respondent had "consistently made considerable effort, [which is] to be applauded. But such effort as was made was always undermined by dictating his own terms as to what was needed. He did not recognize that he was not in a good position to independently determine those needs. [The respondent], the court finds from the clear and convincing evidence, has not been able to rehabilitate adequately to demonstrate reasonable parenting ability. He has not been able to demonstrate, given his resistance to following the guidelines for services set for him, that he could do so in the reasonable foreseeable future, given the age of [Ryder] and the time [Ryder] has already spent in care, almost his entire young life. The clear and convincing evidence, the court concludes, permits of no other conclusion." Additionally, the court found that "[the respondent] has never been fully able to comply with the steps ordered for him. The clear and convincing evidence demonstrates that he has not made sufficient progress for a long enough period of time to assume he is stable, has adequately treated his

mental health difficulties, including through medication, and is free of illegal drugs and has a safety plan prepared in case of any expected relapse. He has not been able to address his past trauma or learned strategies to cope with it and the stresses it causes in his life. The evidence demonstrates that this was so both on the adjudicatory date in 2020 and in the year that has elapsed since that time. While some evidence of changes in [the respondent's] behavior and outlook was shown, it was unfortunately too little and too late for him to assume Ryder's care. [The respondent] is still not in a position for the court to conclude, from the clear and convincing evidence, that he could reasonably be safely able to care for [Ryder], now or in the near future, given Ryder's need for stability and permanency."

The respondent maintains that there was insufficient evidence to support the court's determination that he had failed to rehabilitate sufficiently. To support that argument, he relies on evidence in the record reflecting that he (1) completed domestic violence and parenting programs, (2) had executed a lease for an apartment shortly before trial, (3) was working two separate jobs, and (4) was continuing to benefit from services that he was receiving at the Root Center. He also cites evidence indicating that he had productive visits with Ryder, who showed him affection during visitation.

The court's decision makes clear that the court recognized that the respondent had made some progress toward rehabilitation; however, the court deemed the respondent's efforts to be "too little and too late for him to assume Ryder's care." As the court found, the respondent's substance abuse problems remained unresolved, given that (1) twice he was observed to be under the influence of a substance during visits with Ryder, once in 2018 and again in 2020, and (2) he tested positive for marijuana in 2018, 2019, and as recently as late

December, 2020, reflecting that he had "not yet managed to maintain his sobriety or learned strategies to manage his life as the specific steps require[d]." The department referred him to two new providers in September, 2020, to supply him with more appropriate services, but he refused to attend them. Additionally, he continued to struggle with behavioral issues, as evidenced by his belligerent conduct toward department staff, Watkins Network staff during an intake session in October, 2020, and Ryder's foster mother during in-person visits. He began attending group treatment to address his mental health at the Root Center regularly only a few months before trial, and his initial attendance was sporadic as a result of a conflict with another participant. With respect to Ryder, although he expressed love for Ryder and wanted Ryder in his care, the respondent often struggled to engage with Ryder during visits, appeared to be under the influence of a substance on the two aforementioned occasions, and missed visits, including virtual visits for reasons the court found not fully credible. Moreover, although the respondent managed to secure a lease for an apartment after being itinerant throughout most of the underlying proceedings, the lease was executed only six weeks before trial.[10] The respondent does not challenge these subordinate findings.[11]

[10] The court also found that, as a result of the respondent's failure to notify the department of the lease, the department was unable to inspect the apartment to determine whether it was suitable and adequate housing. The respondent cites his own testimony at trial indicating that he informed the department of his lease, a copy of which was part of the record as a full exhibit. At trial, a department social worker testified that she was unaware that the respondent had a lease and that, notwithstanding having requested that he submit any housing lease that he executed to the department, he did not inform her of the lease or provide her with a copy of the lease. Thus, insofar as the respondent disputes the court's finding that he failed to inform the department of his lease, that finding is supported by the record.

[11] The respondent argues that, contrary to the court's reasoning that he "was selecting services that he wanted to engage in, [he] was able to engage in services when he was directed toward appropriate services." He seemingly

Collectively, the court's subordinate findings are sufficient to demonstrate that the respondent failed to rehabilitate sufficiently. The evidence of the respondent's progress, which the court acknowledged, does not undermine that determination. See *In re Sheila J.*, 62 Conn. App. 470, 481–82, 771 A.2d 244 (2001) (court's determination that respondent failed to rehabilitate sufficiently was proper notwithstanding respondent having demonstrated efforts and taken steps toward rehabilitation, which were "too little and too late").

In sum, we reject the respondent's claim that the court improperly determined that the respondent failed to rehabilitate sufficiently.

III

The respondent's final claim is that the trial court improperly determined that terminating his parental rights was in Ryder's best interest. We disagree.

"We first set forth the following applicable legal standards. In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the [respondent's] parental rights is not

disputes the court's finding that he elected to attend the Root Center voluntarily by asserting that the department referred him to the Root Center, where he remains engaged for treatment. He overlooks, however, that he was discharged from or declined to attend four different service providers to which the department had referred him. Regardless of whether he attended the Root Center of his own volition or because of a referral by the department, the record supports the court's observation that the respondent had an insistence on self-selecting his own services.

in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven statutory factors delineated in [§ 17a-112 (k)]. . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence. . . .

"[T]he fact that the legislature [had interpolated] objective guidelines into the open-ended fact-oriented statutes which govern [parental termination] disputes . . . should not be construed as a predetermined weighing of evidence . . . by the legislature. [If] . . . the record reveals that the trial court's ultimate conclusions [regarding termination of parental rights] are supported by clear and convincing evidence, we will not reach an opposite conclusion on the basis of any one segment of the many factors considered in a termination proceeding . . . . Indeed . . . [t]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . [A] trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Jacob M.*, 204 Conn. App. 763, 787–89, 255 A.3d 918, cert. denied, 337 Conn. 909, 253 A.3d 43 (2021), and cert. denied sub nom. *In re Natasha T.*, 337 Conn. 909, 253 A.3d 44 (2021).

The court addressed each of the § 17a-112 (k) factors[12] in the dispositional portion of its decision. The

[12] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent

court made the following relevant findings. First, the department made reasonable efforts to provide timely services to the respondent to facilitate a reunion with Ryder, in particular mental health, substance abuse, and parenting services, but the respondent continued to struggle with those services and "was not able to change his behavior and comprehend the true risk of drug use and untreated mental health issues to himself or to reunification with [Ryder]. He was also offered regular, supervised visitation and case management services."[13] Second, the department made reasonable efforts to reunite the respondent and Ryder in light of the services made available to the respondent, who "has had more than adequate time to demonstrate steps toward his rehabilitation," and the length of time Ryder had been in care. Third, the respondent failed to complete most of the specific steps ordered by the court

of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

[13] The court also found that the department provided services to support Ryder, although Ryder did not require any special services.

and "is not in a position to safely care for [Ryder] within a reasonable period of time, as he cannot yet conduct himself in the manner required to parent Ryder safely and provide for [Ryder's] emotional welfare." Fourth, although Ryder recognized the respondent and engaged with him during visits, Ryder had developed significant emotional ties to his foster family, with whom he has lived since being six weeks old and who has provided him with stability along with daily comfort and care. Fifth, Ryder was more than three years old at the time of trial. Sixth, although the respondent had attended most of his scheduled visits with Ryder, he was unable to adjust his circumstances sufficiently to have Ryder returned to him in the foreseeable future "given his . . . lack of progress toward mastering the essential requirements of parenthood as well as his own emotional stability."[14]

After discussing the § 17a-112 (k) factors, the court found that "[n]either of [Ryder's] parents is available to care for him . . . . [The respondent] is not yet ready to assume [Ryder's] proper care, nor can he, in the reasonably foreseeable future, given Ryder's young age and needs for permanency. Ryder needs adult caretakers who can provide the stability and consistency of care he requires." In light of "Ryder's age and the totality of the circumstances," the court determined, by clear and convincing evidence, that terminating the respondent's parental rights was in Ryder's best interest.

The respondent does not challenge any particular finding made by the court in support of its best interest determination. Instead, the respondent claims that termination of his parental rights was not in Ryder's best

[14] In addressing the seventh statutory factor, the court found that the respondent was not prevented from maintaining a meaningful relationship with Ryder by economic circumstances or by the acts of Caroline E. or any other person. See General Statutes § 17a-112 (k) (7).

interest on the basis of (1) the clear parent-child relationship that he shared with Ryder and (2) his continuing progress in rehabilitating himself.[15] We are not persuaded.

As to the respondent's contention that his parent-child relationship with Ryder militated against the court's best interest determination, the court found that the respondent has affection for Ryder, and that Ryder recognized the respondent and engaged with him during visits. Nevertheless, "[a]s this court has explained, the appellate courts of this state consistently have held that even when there is a finding of a bond between [a] parent and a child, it still may be in the child's best interest to terminate parental rights." (Internal quotation marks omitted.) *In re Phoenix A.*, 202 Conn. App. 827, 850, 246 A.3d 1096, cert. denied, 336 Conn. 932, 248 A.3d 1 (2021); see also *In re Sequoia G.*, 205 Conn. App. 222, 231, 256 A.3d 195 ("the existence of a bond between a parent and a child, while relevant, is not dispositive of a best interest determination" (internal quotation marks omitted)), cert. denied, 338 Conn. 904, 258 A.3d 675 (2021). That a bond may exist between the respondent and Ryder does not undercut the court's best interest determination in light of the myriad of other considerations taken into account by the court.

Turning to the respondent's assertion that he has been making progress in rehabilitating himself, although

[15] The respondent cites testimony that he offered at trial reflecting that "he would do everything that he could to maintain his parental rights and work toward reunification with [Ryder]." Insofar as the respondent is maintaining that he should have been afforded more time to rehabilitate himself before the court terminated his parental rights, "we recently have noted that such an argument is inconsistent with our Supreme Court's repeated recognition of the importance of permanency in children's lives. . . . *In re Ja'La L.*, 201 Conn. App. 586, 596, 243 A.3d 358 (2020), [cert. denied, 336 Conn. 909, 244 A.3d 148 (2021)], citing *In re Davonta V.*, 285 Conn. 483, 494–95, 940 A.2d 733 (2008)." (Internal quotation marks omitted.) *In re Phoenix A.*, 202 Conn. App. 827, 847 n.4, 246 A.3d 1096, cert. denied, 336 Conn. 932, 248 A.3d 1 (2021).

the court recognized that the respondent had made some recent strides in his life, the court also found that he continued to struggle with the mental health, substance abuse, and parenting services offered to him by the department, and that he was unable to alter his conduct or to understand the danger of drug use and untreated mental health issues to himself or to his reunification with Ryder. Although commendable, any continuing efforts made by the respondent to advance his rehabilitation do not outweigh the other factors considered by the court with respect to whether termination of the respondent's parental rights was in Ryder's best interest. See *In re Anaishaly C.*, 190 Conn. App. 667, 692, 213 A.3d 12 (2019) (trial court did not err in determining that termination of respondents' parental rights was in children's best interests when respondents "successfully complet[ed] some programs" but were "unsuccessful, or noncompliant, with others" (internal quotation marks omitted)); *In re Malachi E.*, 188 Conn. App. 426, 445–46, 204 A.3d 810 (2019) (trial court's finding that respondent was making progress in rehabilitating herself did not undermine court's determination that termination of respondent's parental rights was in child's best interest, which was supported by other findings that were undisputed); *In re Daniel A.*, 150 Conn. App. 78, 104, 89 A.3d 1040 (trial court's finding that respondent made efforts to rehabilitate himself did not undermine court's best interest determination), cert. denied, 312 Conn. 911, 93 A.3d 593 (2014).

"On appeal, our function is to determine whether the trial court's conclusion was factually supported and legally correct. . . . In doing so, however, [g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather]

every reasonable presumption is made in favor of the trial court's ruling." (Internal quotation marks omitted.) *In re Omar I.*, supra, 197 Conn. App. 584; see also *In re Jacob M.*, supra, 204 Conn. App. 790 ("[w]e will not scrutinize the record to look for reasons supporting a different conclusion than that reached by the trial court" (internal quotation marks omitted)). We conclude that the court's determination that termination of the respondent's parental rights was in Ryder's best interest was factually supported and legally sound.

The judgment is affirmed.

In this opinion the other judges concurred.

NABEEL KADDAH *v.* COMMISSIONER OF CORRECTION
(AC 42942)

Alvord, Elgo and Alexander, Js.

Syllabus

The petitioner, who had been convicted of the crimes of murder, attempt to commit murder and unlawful restraint in the first degree, appealed to this court from the judgment of the habeas court, which denied his third amended petition for a writ of habeas corpus. The petitioner claimed that his counsel in the two prior habeas actions rendered ineffective assistance by not pursuing a claim that his counsel at trial and on direct appeal were ineffective for having failed to challenge the trial court's jury instructions as to his affirmative defense of mental disease or defect and the element of intent required to find him guilty of the charges against him. The habeas court concluded that, although the trial court twice included the definition of general intent in its jury instructions, the jury was not misled into believing that it could find the petitioner guilty without also finding that he had the specific intent to kill. The habeas court also concluded that the petitioner failed to establish that he was prejudiced by prior habeas counsel's failures to pursue a claim that trial and appellate counsel rendered ineffective assistance in choosing not to challenge the trial court's failure to instruct the jury that it could find the petitioner not guilty if it determined that, due to mental disease or defect, he lacked substantial capacity to appreciate the wrongfulness of his conduct. The habeas court determined that the evidence the petitioner had offered as to the defense of

mental disease or defect was insufficient to overcome the overwhelming evidence of his guilt. *Held*:

1. The petitioner could not prevail on his claim that he was prejudiced by prior habeas counsel's failures to argue that trial and appellate counsel rendered ineffective assistance in deciding not to challenge the jury instructions on the element of intent in the crimes of which he was convicted; the petitioner's claim had no reasonable probability of success on appeal, as any possible risk that the jury was misled as to that element was eliminated by the court's numerous other proper instructions as to that element.

2. The habeas court properly concluded that the petitioner failed to establish that he was prejudiced by prior habeas counsel's failures to challenge the choice by his trial and appellate counsel not to dispute the jury instruction as to the defense of mental disease or defect: the habeas court reasonably determined that the jury likely did not credit the testimony of the petitioner's expert witness, M, a psychiatrist and neurologist, that the petitioner's medical conditions made it impossible for him to plan, deliberate and act rationally, as M's testimony was contradicted by the state's witness, B, a psychiatrist, and the court's finding that the state thoroughly discredited M's testimony on cross-examination was not clearly erroneous; moreover, although the habeas court did not have the opportunity to evaluate the demeanor of M or B during their testimony at the petitioner's criminal trial, it was the habeas court's exclusive province to weigh all the evidence before it, which included the transcripts of that trial, and, given the substantial evidence in support of the petitioner's guilt, there was no reasonable probability that, but for the absence of an instruction as to whether he lacked substantial capacity to appreciate the wrongfulness of his conduct, the result of his criminal trial would have been different.

Argued February 17, 2021—officially released April 26, 2022

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, *Sferrazza*, *J.*; judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed; thereafter, the Supreme Court reversed the habeas court's judgment in part and remanded the case to that court for further proceedings; subsequently, the court, *Newson*, *J.*, rendered 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).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Craig P. Nowak*, senior assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, Nabeel Kaddah,[1] appeals from the judgment of the habeas court denying his third petition for a writ of habeas corpus, which alleged that his first and second habeas counsel rendered ineffective assistance. On appeal, the petitioner claims that the court erred in rejecting his claim that his prior habeas attorneys were ineffective in not pursuing the claim that his trial and appellate counsel were ineffective for their failure to challenge the trial court's jury instructions as to (1) the element of intent required for the specific offenses alleged against him and (2) his affirmative defense of mental disease or defect. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts, as set forth by our Supreme Court in the petitioner's direct appeal, and procedural history are relevant to our resolution of the petitioner's claims. "Between 3 and 3:30 a.m. on August 27, 1994, the [petitioner], while driving his gray Pontiac Grand Prix, approached Leanne Kollar on Middle Street in Bridgeport. Kollar, who was working as a prostitute, entered

[1] We note that the petitioner's first name has been spelled "Nabil" in other appellate decisions. See *Kaddah* v. *Commissioner of Correction*, 299 Conn. 129, 130, 7 A.3d 911 (2010); *State* v. *Kaddah*, 250 Conn. 563, 564, 736 A.2d 902 (1999); *Kaddah* v. *Commissioner of Correction*, 105 Conn. App. 430, 431, 939 A.2d 1185, cert. denied, 286 Conn. 903, 943 A.2d 1101 (2008). In the present case, we use the spelling "Nabeel" for consistency with the pleadings. See *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 551 n.1, 153 A.3d 1233 (2017).

the [petitioner's] car in anticipation of engaging in sex for money. The [petitioner] drove around Bridgeport, eventually stopping on Salem Street. He turned off the engine and locked the doors to the vehicle. The [petitioner] then began to choke Kollar, telling her that, if she removed her clothes, he would not hurt her. Kollar began to undress, and the [petitioner] reclined her seat back and started to choke her again. Kollar managed to open the car door in an attempt to escape, and the [petitioner] began hitting and punching her. They both rolled out of the car together, after which the [petitioner] kneeled over Kollar and continued strangling her. After hitting the [petitioner] and knocking [the petitioner's] eyeglasses off his face, Kollar was able to flee to a nearby house. The [petitioner] then drove away.

"When the police arrived, Kollar gave them a description of the [petitioner] and told the officers where the [petitioner] lived, as she had been to his apartment on prior occasions. The police went to the [petitioner's] apartment and waited for him to return. Meanwhile, the [petitioner] returned to Middle Street and picked up Jennifer Williamson, another prostitute. The [petitioner] drove to the corner of Maplewood and Laurel Avenues, where he and Williamson engaged in a physical struggle. The [petitioner] hit Williamson, bit her on the back and strangled her. During the struggle, Williamson stopped moving and the [petitioner] pushed her out of the car and drove away.

"Sara Iza, a resident of Laurel Avenue, saw the [petitioner's] car on Maplewood Avenue at approximately 5:30 a.m. on August 27, 1994. When her husband, Luis Iza, went outside to start his car at approximately 6 a.m., he saw Williamson's naked body lying in the street, in the same spot where Sara Iza had seen the [petitioner's] car stop earlier. Malka Shah of the [O]ffice of the [C]hief [M]edical [E]xaminer testified that Williamson

died from asphyxia, which had been caused by strangulation.

"At his trial, the [petitioner] raised the defenses of mental disease or defect and, alternatively, extreme emotional disturbance. The jury rejected these defenses and found the [petitioner] guilty of the murder of Williamson and the attempted murder and unlawful restraint of Kollar."[2] (Footnotes omitted.) *State* v. *Kaddah (Kaddah I)*, 250 Conn. 563, 565–66, 736 A.2d 902 (1999). Our Supreme Court subsequently affirmed the petitioner's conviction on direct appeal. See id., 581.

"In 2001, the petitioner, represented by [A]ttorney Salvatore Adamo, filed his first petition for a writ of habeas corpus, alleging that his appellate counsel, [A]ttorney Glenn Falk, had rendered ineffective assistance in the direct appeal of the underlying criminal case because he had failed to argue the existence of a conflict between the petitioner and his trial attorney, James Ruane, and had failed to raise a Connecticut constitutional claim. The petitioner further alleged that Ruane had rendered ineffective assistance in the underlying criminal case. The petitioner alleged, among other things, that Ruane had asserted the defense of mental disease or defect against the petitioner's wishes, did not permit the petitioner to testify on his behalf and failed to argue effectively against the sparse medical evidence used to convict the petitioner. The court, *White*, *J.*, denied the habeas petition. The petitioner appealed from the judgment of the habeas court but withdrew the appeal before this court rendered judgment." *Kaddah* v. *Commissioner of Correction*, 105 Conn. App. 430, 433–34, 939 A.2d 1185, cert. denied, 286 Conn. 903, 943 A.2d 1101 (2008).

[2] The petitioner was convicted of murder in violation of General Statutes § 53a-54a, attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a, and unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a). *State* v. *Kaddah*, supra, 250 Conn. 564.

In 2004, the petitioner, represented by Attorney Joseph Visone, filed a second habeas petition alleging ineffective assistance of counsel by Adamo in the first habeas proceeding.[3] Id., 434. The habeas court, *Fuger*, *J.*, denied that petition, along with the petitioner's petition for certification to appeal. Id. This court subsequently dismissed the petitioner's appeal from the denial of the second habeas petition, concluding that Judge Fuger had not abused his discretion in denying the petition for certification to appeal. See id., 446.

The petitioner filed the third and present habeas petition on September 28, 2012, alleging, inter alia,[4] that Visone rendered ineffective assistance while representing the petitioner in the second habeas petition by failing to raise certain claims regarding the jury instructions at his criminal trial. See *Kaddah* v. *Commissioner of Correction (Kaddah III)*, 324 Conn. 548, 553, 153 A.3d 1233 (2017). More specifically, the petitioner argued that the trial court improperly instructed the jury as to (1) the element of intent required to prove the specific crimes charged by the state and (2) his affirmative defense of mental disease or defect. The

[3] The petitioner also filed a series of unsuccessful habeas petitions in federal court; see *Kaddah* v. *Brighthaupt*, United States District Court, Docket No. 3:11-cv-1809 (SRU) (D. Conn. August 6, 2013); *Kaddah* v. *Lee*, United States District Court, Docket No. 3:08cv519 (SRU) (D. Conn. October 7, 2008); *Kaddah* v. *Strange*, United States District Court, Docket No. 3:00CV1642 (CFD) (D. Conn. January 18, 2001); which do not affect our analysis in this appeal.

[4] We note that the operative pleading with respect to the third habeas petition includes six counts claiming ineffective assistance of counsel in connection with the criminal trial, the direct appeal, and the two prior habeas petitions. On the first day of trial, the habeas court, acting sua sponte, dismissed counts one, two, four, and five of the amended petition, which alleged ineffective assistance of counsel in connection with the criminal trial and the direct appeal but did not pertain to prior habeas counsel. See *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 551–52 n.4, 153 A.3d 1233 (2017). The petitioner does not challenge the propriety of this decision on appeal to this court.

habeas court initially dismissed the petition on September 29, 2014, concluding that it was "not cognizable as a matter of law." Id., 551. Our Supreme Court subsequently reversed in part the judgment of the habeas court and remanded the case to that court for further proceedings. See id., 571.

On remand, the habeas court conducted a trial on the present petition on October 2, 2018. The parties waived their right to present additional evidence and stipulated to the claims being resolved based on the record of the prior habeas trial, of which the court took judicial notice. On March 13, 2019, the court issued a memorandum of decision in which it denied the petitioner's habeas petition. The court granted the petitioner's request for certification to appeal, and this appeal followed. Additional facts will be set forth as necessary.

Before considering the petitioner's claims, we note the well established precepts that govern our review. "The [ultimate] conclusions reached by the [habeas] court in its decision [on a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous. . . . [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 a definite and firm conviction that a mistake has been committed. . . . A reviewing court ordinarily will afford deference to those credibility determinations made by the habeas court on the basis of [the] firsthand observation of [a witness'] conduct, demeanor and attitude." (Internal quotation marks

omitted.) *Noze* v. *Commissioner of Correction*, 177 Conn. App. 874, 885–86, 173 A.3d 525 (2017).

"In *Lozada* [v. *Warden*, 223 Conn. 834, 842–43, 613 A.2d 818 (1992)], our Supreme Court established that habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing what is commonly known as a habeas on a habeas, namely, 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 a herculean task . . . ." (Internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, 204 Conn. App. 44, 50, 250 A.3d 44, cert. denied, 336 Conn. 948, 250 A.3d 695 (2021). "To prevail on an ineffective assistance of habeas counsel claim . . . the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . . As to each of these inquiries, the petitioner is required to satisfy the familiar two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy *Strickland* twice . . . ." (Internal quotation marks omitted.) *Crawley* v. *Commissioner*

of Correction, 194 Conn. App. 574, 581–82, 221 A.3d 849 (2019), cert. denied, 334 Conn. 916, 222 A.3d 104 (2020).

"To satisfy the *performance* prong of the *Strickland* test, the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . .

"With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Emphasis added; internal quotation marks omitted.) *Wargo* v. *Commissioner of Correction*, 144 Conn. App. 695, 701–702, 73 A.3d 821 (2013), appeal dismissed, 316 Conn. 180, 112 A.3d 777 (2015).

I

The petitioner first claims that he was prejudiced by Adamo's and Visone's failures to argue that Ruane's and Falk's decisions not to challenge the instruction provided to the jury at his criminal trial on the intent element of the charged offenses constituted ineffective assistance of counsel. We disagree.

The following additional facts are relevant to this claim. While instructing the jury on intent, the trial court

twice included the definition of general intent, stating that "a person acts intentionally with reference or respect to a result or to conduct described by the statute defining the offense when the person's conscious objective is to cause such result *or to engage in such conduct*"; (emphasis added); but thereafter specified that, to find the petitioner guilty of murder, it must find beyond a reasonable doubt that he killed Williamson "and that he did so with the specific intention of doing so."[5] Immediately preceding this comment, while instruct-

[5] The court's instruction to the jury was as follows: "I am now going to define for you under Connecticut law what intent is. I am going to read this definition only one time to you, although it will apply many times during the balance of this charge because at least five of these crimes or lesser included offenses require an intent element, and therefore this definition that I am going to give you will apply whenever you hear the word 'intent' or whenever you hear an element of a specific intent to do something.

"This is the definition we are talking about. . . . Our statute provides that a person acts intentionally with reference or respect to a result or to conduct described by the statute defining the offense when the person's conscious objective is to cause such result *or to engage in such conduct*. Intentional conduct is purposeful conduct rather than conduct that is accidental or inadvertent.

"Now intent is a mental process. Intention can only in most cases be proven by the actions and statements of the person whose acts are being examined. No one can be expected to come into court and testify that he looked into another person's mind and saw therein a certain intention. It is often impossible and never necessary to prove criminal intent by direct evidence.

"Intent may be and usually is proven by the circumstantial evidence as I have explained that term to you. Therefore, one way in which the jury can determine what a person's intention was at any given time is first by determining what the person's conduct was, including any statements he or she made and what circumstances were surrounding that conduct, and then from that conduct and those circumstances inferring what his or her intention was.

"In other words, a person's intention may be inferred from his conduct. You may infer from the fact that the [petitioner] engaged in conduct, that he intended *to engage in that conduct*. You should infer such conduct only if you are satisfied of it beyond a reasonable doubt.

"This inference is not a necessary one. That is, you are not required to infer intent from the accused's conduct, but it is an inference that you may draw if it is reasonable and a logical inference. I remind you that the burden of proving intent beyond a reasonable doubt is always upon the state.

ing the jury as to murder, the court explained that the state was required to prove that, in causing Williamson's death, "he did so with the intent to cause her death. In other words, is that what he intended to do, to cause her death?"

After it concluded its instruction on intent, the court instructed the jury, with respect to the crime of attempt to commit murder, that the petitioner "must have acted here with the intent to commit the crime of murder, and specific intent is the intent to kill." The court continued: "It is not enough to show that the [petitioner] acted intending to do some other unspecified criminal act. He must have acted with the same intent, the same state of mind required for the crime of murder which I have just explained to you. I refer you again to my earlier charge on intent and what it means and how it is to be proven and what the intent is that is required for the crime of murder." During its deliberations, the jury sent a note asking the court: "What is intent?" In response, the trial court restated its prior instruction to the jury, which included the definitions of both specific intent and general intent. However, the court finished the instruction by reminding the jury: "Intent can be formed in an instant, but to convict anyone of murder *the intent must be to cause death* . . . ." (Emphasis added.)

The petitioner's trial counsel, appellate counsel, and two previous habeas attorneys did not object to or raise any challenge concerning the court's instructions on intent. In the present case, the habeas court concluded that, although the trial court included the definition

"Do not be confused by the word 'intent.' It does not require any specific length of time to form an intent. Intent can be formed in an instant, but *to convict anyone of murder the intent must be to cause death,* and in summary in order for the accused to be found guilty of murder, you must find proven beyond a reasonable doubt that the [petitioner] killed Jennifer Williamson and that *he did so with the specific intention of doing so*." (Emphasis added.)

of general intent on two occasions in its initial and supplemental intent instructions, the overall instruction did not mislead the jury into believing that it could find the petitioner guilty without finding that he had the specific intent to kill. We agree.

We begin by noting that "[t]he specific intent to kill is an essential element of the crime of murder [and attempt to commit murder]"; *State* v. *DeBarros*, 58 Conn. App. 673, 680, 755 A.2d 303, cert. denied, 254 Conn. 931, 761 A.2d 756 (2000); and that "unlawful restraint in the first degree requires that the defendant had the specific intent to restrain the victim." *State* v. *Williams*, 172 Conn. App. 820, 828, 162 A.3d 84, cert. denied, 326 Conn. 913, 173 A.3d 389 (2017).

General Statutes § 53a-3 (11) provides: "A person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ." As this court has observed, "[t]he definition of intent as provided in § 53a-3 (11) embraces both the specific intent to cause a result and the general intent to engage in proscribed conduct. . . . [I]t is improper for a court to refer in its instruction to the entire definitional language of § 53a-3 (11), including the intent to engage in conduct, when the charge relates to a crime requiring only the intent to cause a specific result. . . . This court has further noted, however, that in cases in which the entire definition of intent was improperly read to the jury, the conviction of the crime requiring specific intent almost always has been upheld because a proper intent instruction was also given." (Internal quotation marks omitted.) *State* v. *Tok*, 107 Conn. App. 241, 269–70, 945 A.2d 558, cert. denied, 287 Conn. 919, 951 A.2d 571 (2008), and cert. denied sub nom. *State* v. *Jourdain*, 287 Conn. 920, 951 A.2d 570 (2008).

Moody v. *Commissioner of Correction*, 127 Conn. App. 293, 14 A.3d 408, cert. denied, 300 Conn. 943, 17

A.3d 478 (2011), is instructive in this regard. In *Moody*, the petitioner claimed that his trial counsel rendered ineffective assistance in failing to object to the trial court's decision to instruct the jury on the entire statutory definition of intent, rather than on specific intent only. Id., 303. The petitioner contended that the allegedly improper instruction regarding intent "allowed the jury to find him guilty without finding that he intended to cause the specific result" and asserted that the jury's notes demonstrated this prejudicial impact. Id., 304. While we acknowledged that it is improper for a court to refer in its instruction to the entire definitional language of § 53a-3 (11) for a specific intent crime, we emphasized that reversal of the trial court's judgment is not required when a proper instruction on intent is provided. Id., 305.

In *Moody*, this court noted that the trial court had provided the entire statutory definition of intent to the jury only once in a preliminary and general instruction. See id., 306. As we explained: "Although the court referred back to this instruction three times, it did not repeat the statutory language. Thereafter, the court expressly stated the specific intent element of murder eleven times and assault three times. It also expressly pointed out that specific intent was an element of murder but not of manslaughter in the first degree. Reading the charge as a whole, we do not find it reasonably possible that the jury was misled. Nor, contrary to the petitioner's assertion, do we conclude that the jury notes demonstrate that the jury was misled. The notes refer to the notion of transferred intent, not the requisite mental state required for culpability." Id. The court concluded that, because the petitioner's claim had no reasonable probability of success on direct appeal, he was not prejudiced by his appellate counsel's failure to raise it. See id.

Although the court in the present case referenced general intent twice in its initial and supplemental

charges, those references were followed by correct instructions concerning the specific intent necessary to commit murder. See, e.g., *State* v. *Austin*, 244 Conn. 226, 236, 710 A.2d 732 (1998) (no reversible error when improper intent instruction was followed by numerous proper instructions on elements of murder); cf. *State* v. *Lopes*, 78 Conn. App. 264, 271–72, 826 A.2d 1238 (reversible error when improper intent instruction was given directly in regard to elements of murder and not followed by numerous proper instructions), cert. denied, 266 Conn. 902, 832 A.2d 66 (2003), and cert. denied, 266 Conn. 902, 832 A.2d 66 (2003); *State* v. *DeBarros*, supra, 58 Conn. App. 683–84 (reversible error when improper intent instruction not only was given in initial and two supplemental charges but also was referred to seven additional times).

Our careful review of the court's entire charge persuades us that, as in *Moody*, any possible risk that the jury was misled about the element of intent was eliminated by the trial court's numerous proper instructions on the element of intent in the crimes of murder, attempt to commit murder, and unlawful restraint. Specifically, the court stated to the jury both in its murder and attempt to commit murder charges that, to find the petitioner guilty of these charges, the state must prove beyond a reasonable doubt that he intended to cause the death of Williamson and Kollar. Under the circumstances, we conclude that "[i]t strains reason to believe that the jury could have [understood] the challenged instruction as not requiring that the state prove beyond a reasonable doubt that the [petitioner] intended to kill [the victims]." (Internal quotation marks omitted.) *State* v. *Austin*, supra, 244 Conn. 237. With respect to the unlawful restraint charge, the court also stated during its charge that the state was required to prove beyond a reasonable doubt that the petitioner specifically intended to restrain Kollar. Furthermore, while later

instructing the jury as to the petitioner's intoxication defense, the court associated the specific intent required to prove murder and attempt to commit murder with unlawful restraint, stating: "Certainly the crime of murder, attempted murder and unlawful restraint all have a specific intent requirement . . . ." The court added that, if the jury concluded that the petitioner was intoxicated at the time of the offenses, it could take that fact into consideration in determining whether he was "incapable of forming the required *specific intent*, which is a necessary element for the commission of the various crimes which I have defined for you." (Emphasis added.) Because the petitioner's claim had no reasonable probability of success on appeal, we conclude that the petitioner was not prejudiced by any failure of Adamo and Visone to allege that Ruane and Falk rendered ineffective assistance with respect to that claim in the petitioner's prior proceedings.

II

The petitioner's second claim is that Adamo and Visone rendered ineffective assistance by failing to challenge Ruane's and Falk's choices not to dispute the trial court's instruction on the affirmative defense of mental disease or defect. The respondent, the Commissioner of Correction, argues that, because no prejudice resulted from the failure to challenge the instruction, the petitioner cannot establish the second prong of *Strickland*. We agree with the respondent.

The following additional facts are relevant to the petitioner's claim. At his criminal trial, the petitioner raised the affirmative defense of mental disease or defect. As our Supreme Court noted in *Kaddah I*, "[the petitioner] adduced testimony establishing that, three months prior to the assaults, his wife had been shot in the chest during a robbery at a convenience store and she had remained hospitalized with serious injuries. He

also presented evidence that, one week prior to his arrest, he had been attacked by an unknown individual and that the resulting injury required fifty-two stitches in his back. There was testimony that, on the night in question, the [petitioner] had been drinking heavily and was very upset about the recent loss of his passport." *Kaddah I*, supra, 250 Conn. 577. James Merikangas, a psychiatrist and neurologist called by the petitioner, testified that the petitioner "suffered from brain damage, hypoglycemia, and epilepsy. Merikangas further testified that alcohol interferes with an epileptic's ability to modulate behavior, and that the combination of low blood sugar and alcohol could inhibit the nervous system to the extent that a person 'would not know what he was doing.' " Id. Merikangas further opined that the petitioner's medical conditions "ma[de] it impossible for him to plan, deliberate and act rationally"; and, in his opinion, the petitioner was "literally out of his mind," "was not able to control his conduct," and "did not have an appreciation for what was going on."

During its charge to the jury, the court gave the following instruction on the mental disease or defect defense: "In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked the substantial capacity as the result of mental disease or defect to conform his conduct within the requirements of the law." (Internal quotation marks omitted.) The court continued: "There are basically two elements of this affirmative defense: 1. That at the time the [petitioner] was committing the proscribed act he had a mental disease or defect and, 2., that as a result of that mental disease or defect he lacked the substantial capacity to control his conduct within the requirements of the law." The court did not instruct the jury that it also could acquit the petitioner if it determined that, due to mental disease or defect, he lacked substantial

capacity "to appreciate the wrongfulness of his conduct." Although the court did not charge the jury with respect to the cognitive prong, the petitioner's trial counsel neither requested such an instruction nor objected to the charge provided by the court at trial, and the petitioner's appellate counsel and two prior habeas attorneys did not raise any claim with respect thereto.[6]

In its memorandum of decision, the habeas court concluded that the evidence of guilt was "overwhelming and uncontroverted, and the evidence the petitioner offered in the way of [his] affirmative defense was insufficient to overcome it." Therefore, the petitioner failed to establish the requisite prejudice from "[a]ny error" in the court's instruction on the mental disease or defect defense. The petitioner now challenges the propriety of that determination.

Our analysis begins with the relevant statute that governs the mental disease or defect defense. General Statutes § 53a-13 (a) provides that, "[i]n any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time the defendant committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate

[6] We note that the petitioner acknowledges in the present petition that the two prongs of the mental disease or defect defense are disjunctive but alleges deficient performance because, if counsel had requested a charge on the cognitive prong, the trial court would have been required to give that instruction based on the evidence. Although the petitioner does not claim that trial counsel was deficient in pursuing the defense based on the volitional prong, the petitioner nevertheless argues that there was no strategic reason for failing to seek an instruction on the cognitive prong. Because the habeas court did not make any factual findings as to the petitioner's claim of deficient performance, we do not address the question of whether the decision not to challenge Ruane's and Falk's actions with respect to the trial court's instructions constituted deficient performance on the part of Adamo or Visone. See, e.g., *Small* v. *Commissioner of Correction*, 286 Conn. 707, 716, 946 A.2d 1203 ("[w]hen the record on appeal is devoid of factual findings by the habeas court as to the performance of counsel, it is improper for an appellate court to make its own factual findings"), cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

the wrongfulness of his conduct or to control his conduct within the requirements of the law." As this court has observed, "the affirmative defense of mental disease and defect pursuant to [§] 53a-13 (a), otherwise known as the insanity defense . . . has both a cognitive and a volitional prong. . . . Under the cognitive prong [of the insanity defense], a person is considered legally insane if, as a result of mental disease or defect, he lacks substantial capacity . . . to appreciate the [wrongfulness] of his conduct. . . . Under the volitional prong, a person also would be considered legally insane if he lacks the substantial capacity . . . to [control] his conduct to the requirements of the law." (Internal quotation marks omitted.) *State* v. *Weathers*, 188 Conn. App. 600, 607, 205 A.3d 614 (2019), aff'd, 339 Conn. 187, 260 A.3d 440 (2021).

On our careful review of the record, we conclude that there was not a reasonable probability that, but for the absence of an instruction on the cognitive prong in the petitioner's affirmative defense of mental disease and defect, the result of the proceeding would have been different. Cf. *Wargo* v. *Commissioner of Correction*, supra, 144 Conn. App. 702. In its memorandum of decision, the habeas court specifically found that Merikangas' testimony was "entirely discredited during the state's [cross-examination]."[7]

Our own review of the state's cross-examination supports the habeas court's conclusion. First, Merikangas admitted that, before he met or evaluated the petitioner,

[7] The petitioner contends that this was an improper credibility determination on the part of the habeas court because Merikangas did not testify during the habeas trial and, as a result, the habeas court was not able to evaluate Merikangas' demeanor. Because it is undisputed that the parties had stipulated to the use of transcripts and exhibits, which constituted the entirety of the evidence before the court, it is self-evident that the court could not make a credibility determination. Thus, although the habeas court used the term "discredited" in discussing the state's cross-examination, we construe this statement more appropriately as reflecting the court's finding as to the value of that testimony after considering and weighing Merikangas' testimony in the context of the court's review of the record, which finding

he authored a letter to the petitioner's counsel, stating that, after listening to the petitioner's police interrogation, he believed that the petitioner had been " 'coached' " in advance by the police. Merikangas also admitted that, when he interviewed the petitioner, he met with him for only ninety minutes and never asked the petitioner: (1) for a mental health or medical history, (2) what, if anything, he remembered about the events of August 27, 1994, or (3) if he had, in fact, been coached by the police, as Merikangas initially believed. Moreover, Merikangas conceded that the petitioner was "an overachieving student and athlete through high school," had obtained college credits, and always held regular employment, despite his brain damage. Most tellingly, Merikangas was unable to identify any medical evidence that either hypoglycemia or an epileptic seizure was connected to homicidal behavior.[8] Thereafter, the state

is subject to the clearly erroneous standard of review. See, e.g., *Noze* v. *Commissioner of Correction*, supra, 177 Conn. App. 885–86.

[8] We additionally note that, during the prosecutor's cross-examination of Merikangas, the following colloquy occurred:

"[The Prosecutor]: [Quoting the petitioner's testimony from the taped interview with the inspector] 'We start to talk before she took her clothes off. Then, I don't know. I was driving. I stop. I park my car. I don't know where, and remove to the back seat with her. She took off her clothes. I don't know. I tried to kiss her or something. Also, she ask me about money, and I told her the same thing. I don't—I—I don't pay money for sex. Maybe I told her. I don't know exactly, but because I know I don't pay money for sex. I try to make sex with her. She doesn't want. Then I don't know how she hit me in my eyes, and this moment I feel pain in my eyes. I don't remember. I hit her, and she bite me.' Are you suggesting that that short area is something that [the petitioner] would have memorized based upon what police officers had told him before they turned the tape on?

"[Merikangas]: No. . . .

"[The Prosecutor]: You have testified, Doctor, that having heard the audiotape, it was in fact played to the jury earlier, that in your opinion the [petitioner] was on that day actually unable to tell the police what had happened?

"[Merikangas]: The part you read to me had a dozen 'I don't know's' in it, and that is my opinion, that he was not able to give an accurate description of what happened.

"[The Prosecutor]: You would consider anything he might have to say reliable if it could be . . . verified by independently acquired information?

"[Merikangas]: I wouldn't consider it reliable as an index of his actual thought processes and memory. There may be parts of it that are corroborated. . . .

offered Karen Brody, a psychiatrist, as a rebuttal witness, who contradicted Merikangas' opinion. See *Kaddah I*, supra, 250 Conn. 577–78. The jury thus was left to determine which of the two experts it believed—a proverbial battle of the experts.

Although the habeas court did not have the opportunity to evaluate the demeanor of either Merikangas or Brody on the witness stand, it remains the exclusive

"[The Prosecutor]: For instance, Doctor, [the petitioner] on the tape tells the police that both victims left his car naked leaving their clothing in his car.

"[Merikangas]: Well, I think that there was clothing in his car. . . .

"[The Prosecutor]: It turns out that their clothing was found in his car.

"[Merikangas]: Well, that's how he knew the clothing was in his car. They found the clothing in his car.

"[The Prosecutor]: That would not—that would indicate to you, Doctor, would it not, that he could recall that fact they left his car naked; they left their clothes in his car?

"[Merikangas]: No, I wouldn't draw that conclusion.

"[The Prosecutor]: Doctor, [the petitioner] on that tape told the police that he had been drinking two different brands of beer—

"[Merikangas]: Right.

"[The Prosecutor]: —Budweiser and Miller?

"[Merikangas]: Right.

"[The Prosecutor]: When the police officers actually removed the Budweiser and Miller from that car just in March of this year, it turns out it is Budweiser and Miller. Would that not indicate to you when he spoke to the police on that tape he was able to recall the brands of beer he was drinking?

"[Merikangas]: That's possible.

"[The Prosecutor]: [The petitioner], Doctor, on the tape told the police that he bit the homicide victim, and he pointed out the location on her body where he bit her. It turns out, when her body is found lying on the street by the police officers, that she has bite marks right just about right where [the petitioner] said you could find them. Wouldn't that indicate that when he was speaking to the police he could recall that segment of what he had done?

"[Merikangas]: I don't recall the interaction around that particular segment. . . . I don't see that kind of thing on the tape. I think the jury has heard this tape if you say they heard it. . . .

"[The Prosecutor]: . . . Would that not indicate that he could in fact recall where he bit her?

"[Merikangas]: It could indicate that.

"[The Prosecutor]: The [petitioner] told the police when he departed the first crime scene where there was a surviving victim, and describing it he said there were some bushes up in the vicinity of the car. That's on the tape. It turns out that when the [petitioner's] car is seized, some of those bushes are hanging on the car. Would that not indicate he could recall at least that much of what had occurred?

"[Merikangas]: Apparently it would, yes."

province "of the habeas court, as the trier of fact, to consider, sift, and weigh all the evidence" before it. (Internal quotation marks omitted.) *Houghtaling* v. *Commissioner of Correction*, 203 Conn. App. 246, 279, 248 A.3d 4 (2021). It is axiomatic that the habeas court's proper review of the evidence necessarily includes its review of the transcripts of a petitioner's criminal trial. See, e.g., *Chase* v. *Commissioner of Correction*, 210 Conn. App. 492, 500, 270 A.3d 199 (2022) (court relied in part on petitioner's criminal trial transcripts to assess trial counsel's performance and strategic choices). In its review of the record, which included the challenges to Merikangas' credibility and the ultimate outcome reached by the jury, the court reasonably determined that Merikangas' opinion was likely not perceived as credible to the jury. Accordingly, the court's finding that Merikangas' testimony was "thoroughly discredited" on cross-examination is not clearly erroneous.

Moreover, we reiterate that, as this court has held, "[i]n making [the] determination [of whether counsel's performance resulted in prejudice at a petitioner's criminal trial], a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or the jury. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . . [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. . . . The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (Internal quotation marks omitted.) *Antwon*

W. v. *Commissioner of Correction*, 172 Conn. App. 843, 870–71, 163 A.3d 1223, cert. denied, 326 Conn. 909, 164 A.3d 680 (2017); see also *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 688, 51 A.3d 948 (2012) ("In order to prevail on a claim of ineffectiveness of counsel, the 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. . . . [T]he question is whether there is a reasonable probability that, absent the [alleged] errors, the [fact finder] would have had a reasonable doubt respecting guilt." (Citation omitted; internal quotation marks omitted.)).

Given the substantial evidence in support of the petitioner's guilt and the aforementioned challenges to the petitioner's expert witness' credibility, we cannot conclude that, but for trial counsel's failure to request the petitioner's preferred instruction, there is a reasonable probability that the petitioner would not have been convicted. See *Anton W.* v. *Commissioner of Correction*, supra, 172 Conn. App. 872 (in light of "totality of the evidence admitted in the petitioner's criminal trial," possible instructional error "had no effect on the jury's decision to credit" relevant testimony).

Accordingly, the habeas court properly determined that, regardless of trial counsel's actions with respect to the language omitted in the instruction on the affirmative defense of mental disease or defect, the outcome of the petitioner's criminal trial would not have differed in any way. For that reason, the habeas court properly concluded that the petitioner failed to meet his burden with respect to the prejudice prong of *Strickland*.

The judgment is affirmed.

In this opinion the other judges concurred.

O'NEIL O'REAGAN *v.* COMMISSIONER OF CORRECTION (AC 44390)

Moll, Alexander and Bear, Js.

Syllabus

The petitioner, who had been convicted on guilty pleas, of the crimes of burglary in the second degree, conspiracy to commit robbery in the second degree and sale of a narcotic substance, sought a writ of habeas corpus, claiming, inter alia, ineffective assistance and deficient performance of his trial counsel. Following his pleas, the trial court sentenced the petitioner to a ten year term of incarceration, execution suspended after four years, followed by five years of probation for the burglary conviction, three years of incarceration for the robbery conviction, and one year of incarceration for the narcotics conviction, to be served concurrently. Several years later, the petitioner, who was born in Jamaica, was taken into federal immigration custody and removal proceedings were initiated. At the time he was taken into custody, the sentences for his robbery and narcotics convictions had fully expired, but he was still serving his sentence for burglary due to the pendency of a violation of probation, which interrupted the period of the sentence. Before the habeas court, the respondent Commissioner of Correction alleged that the court lacked jurisdiction over the habeas petition because the petitioner was not in custody as a result of the convictions and sentences he challenged, and, after a hearing, the court determined that, at the time the petitioner filed his habeas petition, he was not in custody on the robbery and narcotics convictions and dismissed the claims related to those convictions. Following a trial on the remaining claims, the court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly determined that the petitioner was not in custody on the convictions of conspiracy to commit robbery and sale of a narcotic substance at the time he filed the habeas action and it did not have jurisdiction over those two convictions: it was undisputed that the petitioner was sentenced to concurrent sentences of incarceration of three years for the robbery conviction and one year for the narcotics conviction, and, because the sentences for those two convictions fully expired before the petitioner filed his habeas petition, the petitioner was no longer in custody on those two convictions; moreover, the petitioner's claim that, if the habeas court did not have jurisdiction over all three convictions, it would be unable to fashion an appropriate remedy with respect to his ineffective assistance claims, misinterpreted the aggregate package theory of sentencing as expanding the habeas court's ability to decide claims regarding convictions that fully expired prior to the

filing of the habeas petition, as the aggregate package theory does not expand the jurisdiction of the habeas court to decide claims regarding convictions that have fully expired prior to the filing of the habeas petition.

2. The habeas court did not err in denying the habeas petition with respect to the petitioner's claim that his trial counsel provided ineffective assistance with respect to the petitioner's guilty plea to the charge of burglary in the second degree:

a. The petitioner could not prevail on his claim that his trial counsel failed to investigate and to advise him adequately regarding the strengths and weaknesses of the state's case, the record having revealed that the habeas court credited trial counsel's testimony and found that trial counsel had reviewed the discovery provided to him and determined that no further investigation was necessary, and the petitioner did not provide trial counsel with any potential witnesses to investigate in support of a defense, did not provide any additional favorable evidence that would have supported his defense at trial, and failed to show that further investigation by trial counsel would have yielded any evidence that would have aided in his defense at trial or that would have altered trial counsel's advice regarding the strengths and weaknesses of the state's case against the petitioner.

b. The petitioner could not prevail on his claim that his trial counsel rendered deficient performance by failing to advise him adequately regarding the immigration consequences of his guilty plea; the decision in *Padilla* v. *Kentucky* (559 U.S. 356), requiring defense counsel to advise a noncitizen client of the immigration consequences of a guilty plea, does not apply retroactively under federal law pursuant to *Chaidez* v. *United States* (568 U.S. 342) or under Connecticut law pursuant to *Thiersaint* v. *Commissioner of Correction* (316 Conn. 89), and, as such, the rule announced in *Padilla* did not apply to the petitioner's case because such advice was not constitutionally required under either the United States or the Connecticut constitution at the time the petitioner entered his guilty plea.

Submitted on briefs January 4—officially released April 26, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, dismissed in part the habeas petition; thereafter, the remaining claims were tried to the court, *Bhatt*, *J.*, who denied the habeas petition as to the remaining claims; judgment dismissing

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

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

Sarah Hanna, senior assistant state's attorney, *Margaret E. Kelley*, state's attorney, and *Amy L. Bepko-Mazzocchi*, supervisory assistant state's attorney, filed a brief for the appellee (respondent).

Opinion

ALEXANDER, J. The petitioner, O'Neil O'Reagan, appeals from the judgment of the habeas court dismissing in part and denying his petition for a writ of habeas corpus. The petitioner claims that the court erred (1) in dismissing in part his habeas petition after finding that he was not in custody on two of his challenged convictions, and (2) in denying his habeas petition after concluding that his trial counsel had not provided ineffective assistance. We disagree with both of the petitioner's claims and, therefore, affirm the judgment of the habeas court.

The habeas court's memorandum of decision sets forth the following facts and procedural history. The petitioner's convictions for burglary and conspiracy to commit robbery "stemmed from two incidents that took place in close temporal proximity on November 5, 2007. On that date . . . several unknown males entered the apartment of David Gunnison in Shelton . . . . The males who broke into the apartment demanded to know where drugs were hidden in the apartment. One male was armed with what appeared to be a small silver handgun, another with a baseball bat and the third with a small shovel. . . . A small amount of marijuana was taken from the apartment, as well as cell phones, cash

and personal possessions of the other individuals present in the apartment."

Gunnison called the police to report the burglary and admitted to selling drugs. He called his stolen cell phone pretending to be a customer seeking to buy drugs and set up a purchase. Police officers set up surveillance at the agreed upon location for the transaction and observed a vehicle drive past Gunnison. Gunnison told officers that the vehicle "was occupied by several black males and one Hispanic male. Three males exited the vehicle and called to Gunnison to approach them. At this point, officers began to approach the area and the three males fled the scene. Two of the individuals were apprehended after a chase and identified as Shawn Troupe and Anthony Martino. The third individual escaped. Shortly thereafter, the police stopped the [vehicle] and arrested the occupants: Ashley Doy and Joseph Pellechio." The four individuals apprehended by the police first denied involvement in the residential burglary but eventually made statements indicating their involvement in the burglary and a plan "to arrange the sale of the [stolen] drugs as a pretense to rob whoever the caller was." The individuals identified the petitioner as a participant in both the burglary and the conspiracy to rob Gunnison.

"Based on this information, a search warrant for [the petitioner's] residence was approved. A cell phone from the residential burglary was found inside his residence. [The petitioner] agreed to speak with officers and stated that he, along with Troupe, Pellechio, Doy and Martino did go to Gunnison's residence to buy marijuana, but [claimed that] there was no burglary. They all returned to his house and then the other four left for a while without him, returning with cell phones and marijuana. They did not explain the source of either and then left again to sell marijuana to an unknown individual. According to [the petitioner], Pellechio called him the

next day to say that the others had been arrested. [The petitioner] then disposed of the cell phones left behind in the garbage can outside his house. Police recovered four cell phones and three iPods from a black plastic bag in the garbage." The petitioner was arrested and charged in connection with these incidents as a result of the police investigation.

On July 21, 2008, the petitioner entered guilty pleas to burglary in the second degree in violation of General Statutes (Rev. to 2007) § 53a-102, conspiracy to commit robbery in the second degree in violation of General Statutes § 53a-48 and General Statutes (Rev. to 2007) § 53a-135, and sale of a narcotic substance in violation of General Statutes (Rev. to 2007) § 21a-277 (a).[1] The plea agreement called for a maximum sentence of ten years of incarceration, execution suspended after five years, followed by five years of probation, with the right to argue for a lesser sentence. On November 14, 2008, the trial court sentenced the petitioner to serve a ten year term of incarceration, execution suspended after four years, followed by five years of probation for the burglary conviction, three years of incarceration for the conspiracy to commit robbery conviction, and one year of incarceration for the sale of a narcotic substance conviction. Each sentence imposed was ordered to be served concurrently.

In 2017, the petitioner was taken into federal immigration custody and removal proceedings were initiated.[2] At the time he was taken into custody, the sentences for his convictions of conspiracy to commit robbery in the second degree and sale of a narcotic substance had fully expired. The petitioner was still serving his

[1] The petitioner's conviction for violating General Statutes (Rev. to 2007) § 21a-277 (a) was related to an incident that had occurred on December 17, 2007.

[2] At the habeas trial, the petitioner testified that he was born in Jamaica.

sentence for the burglary in the second degree conviction due to the pendency of a violation of probation, which interrupted the period of the sentence. See General Statutes § 53a-31 (b).

In December, 2017, the petitioner initiated this habeas action and, on August 15, 2018, he filed an amended habeas petition, which contained three counts. In count one, the petitioner alleged a due process violation pursuant to the United States and Connecticut constitutions and claimed that his guilty pleas were "not made knowingly, intelligently and voluntarily because he did not know or understand the probability of deportation/removal from the United States under the terms of the plea agreement." The petitioner alleged that, if he had known the immigration consequences, he would not have entered guilty pleas. In count two, the petitioner alleged ineffective assistance of his trial counsel, Attorney Mark Solak, pursuant to both the United States and Connecticut constitutions, as a result of Solak's (1) failure to investigate adequately and advise him regarding his plea and likelihood of success at trial, (2) failure to adequately make his immigration status and the probability of deportation/removal part of the plea bargaining process, and (3) "affirmative misadvice about the probability of [his] deportation/removal from the United States . . . ." Similarly, in count three, the petitioner alleged that, under the Connecticut constitution, Solak had rendered deficient performance for failing to "adequately make [his] immigration status and the probability of deportation/removal from the United States part of the plea bargaining process" and failing to advise him adequately regarding the probability of deportation/removal under the terms of the plea. Only counts two and three of the amended habeas petition are relevant to this appeal.

In his return, the respondent, the Commissioner of Correction, alleged, inter alia, that the court lacked

jurisdiction over the habeas petition because "the petitioner was not 'in custody' as a result of the convictions and sentence that he challenges." After a hearing, the court, *Newson, J.*, on July 15, 2019, issued an oral decision in which it concluded that, at the time the petitioner filed his habeas petition, he was not in custody on the conspiracy to commit robbery in the second degree and sale of a narcotic substance convictions. It concluded, however, that the petitioner was in custody with respect to his burglary conviction. Accordingly, the court dismissed in part the petitioner's habeas claims related to the conspiracy to commit robbery and narcotics convictions.

A trial on the remaining claims was held on August 28, October 15, and December 17, 2019. On September 1, 2020, the habeas court, *Bhatt, J.*, denied the petition for a writ of habeas corpus. The court declined to revisit Judge Newson's dismissal of the petitioner's challenges to the conspiracy to commit robbery and narcotics convictions, concluding that this earlier dismissal was the law of the case.[3] With regard to the petitioner's claims of ineffective assistance of counsel, the court concluded that Solak had not rendered deficient performance in his investigation and advice to the petitioner. It further concluded that Solak was not constitutionally required to advise the petitioner of the immigration consequences of his guilty plea. After denying the habeas petition, the court granted the petition for certification to appeal.

On appeal, the petitioner challenges (1) the dismissal in part of his habeas petition by Judge Newson for lack of subject matter jurisdiction and Judge Bhatt's refusal to revisit the dismissal, and (2) Judge Bhatt's denial of

[3] The petitioner had renewed his arguments regarding Judge Newson's dismissal of his challenges to the conspiracy to commit robbery and sale of narcotic substance convictions after the close of evidence and in his posttrial brief.

his habeas petition as to the remaining allegations after concluding that his trial counsel had not provided ineffective assistance. We address each claim in turn.

I

The petitioner first claims that the habeas court erred in dismissing in part his habeas petition for lack of subject matter jurisdiction after concluding that, at the time he filed the present habeas action, he was not in custody on the conspiracy to commit robbery and sale of a narcotic substance convictions. We conclude that the habeas court properly determined that the petitioner was not in custody on those two convictions and, therefore, we affirm the dismissal.

The following additional facts and procedural history are relevant to our resolution of this claim. On June 20, 2019, the court, *Newson*, *J.*, issued an order and scheduled a hearing, pursuant to Practice Book § 23-29,[4] to determine whether the petition should be dismissed because the court lacked jurisdiction. After argument, the court issued an oral decision in which it dismissed the claims in the petition regarding the conspiracy to commit robbery and sale of a narcotic substance convictions.

The court stated: "In 2008, the petitioner received a one year and a three year concurrent sentence to [the sentence for his burglary in the second degree conviction]. . . . [For] consecutive sentences, our law specifically allows a quote unquote technically expired consecutive sentence to be challenged. That is because the resolution of one consecutive sentence will actually have a significant and direct impact on the other sentence since those are essentially considered one continuing stream of incarceration. However here . . . the

[4] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction . . . ."

claim is simply that the petitioner received two relatively minimal concurrent sentences to the current sentence [for burglary in the second degree] that he is serving. Those sentences would've expired at the latest some time in 2009 as to the one year concurrent sentence and sometime in 2011 as to the three year concurrent sentence, which was some six years before this petition was filed. Given the current status of our case law that those periods of incarceration had fully expired prior to the time the petition was filed . . . [and] [t]o the extent that the petition makes allegations related to those two convictions, the court dismisses those claims pursuant to [Practice Book § 23-29], because the habeas court lacks jurisdiction because the petitioner was not in custody as defined under habeas law at the time the petition was received."

In its decision after the habeas trial, the court, *Bhatt*, *J.*, declined to revisit the earlier decision in which the court, *Newson*, *J.*, dismissed the petitioner's challenges to his conspiracy to commit robbery and sale of a narcotic substance convictions. With regard to this claim, the court stated that, "[i]n order for this court to have jurisdiction, [the petitioner] needed to be in custody as a result of those convictions. The convictions for conspiracy to commit robbery and sale of narcotics expired long before the filing of the instant petition. Judge Newson's dismissal of those allegations is the law of the case and this court sees no reason to revisit it."[5]

[5] We note that the law of the case doctrine does not restrict the court's ability to review a claim relating to the court's subject matter jurisdiction. See *Lewis* v. *Gaming Policy Board*, 224 Conn. 693, 697–99, 620 A.2d 780 (1993). "The law of the case doctrine provides that [w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. . . . A judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision. . . . [O]ne judge may, in a proper case, vacate, modify, or depart from an interlocutory order

On appeal, the petitioner claims that the court erred in concluding that he was not in custody on all three convictions and, consequently, in dismissing in part his habeas petition for lack of subject matter jurisdiction. Specifically, he argues that "because the convictions were interdependent parts of a global disposition, once the jurisdictional prerequisite was met by his custody on one of the convictions, the habeas court had jurisdiction to reach all of the convictions covered by the global disposition." He further contends that the aggregate package theory applies and gives the court authority to reach all of the convictions and sentences in the package and that the "habeas court would be unable to fashion a remedy for ineffectiveness in connection with [his] guilty plea to burglary if the court could neither restructure the sentences on the other charges to reflect the original intent of the parties nor nullify the entire plea agreement, vacating all of [his] guilty pleas." We disagree.

We begin our analysis by setting forth the applicable standard of review. "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. . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Richardson* v. *Commissioner of Correction*, 298 Conn. 690, 696, 6 A.3d 52 (2010).

We next set forth the relevant legal principles that govern our review of this claim. "It is well established that, for a court to have jurisdiction to entertain a habeas petition seeking to challenge the legality of a

or ruling of another judge in the same case, upon a question of law." (Internal quotation marks omitted.) *Stones Trail, LLC* v. *Weston*, 174 Conn. App. 715, 738, 166 A.3d 832, cert. denied, 327 Conn. 926, 171 A.3d 60 (2017), and cert. dismissed, 327 Conn. 926, 171 A.3d 59 (2017).

criminal conviction, the petitioner must be in the custody of the respondent *as the result of that conviction* at the time that the petition is filed." (Emphasis in original.) *Goguen* v. *Commissioner of Correction*, 341 Conn. 508, 528, 267 A.3d 831 (2021).

General Statutes § 52-466 (a) (1) provides in relevant part that "[a]n application for a writ of habeas corpus . . . shall be made to the superior court, or to a judge thereof, for the judicial district in which the person whose custody is in question is claimed to be illegally confined or deprived of such person's liberty." Our courts have explained that "the custody requirement in § 52-466 is jurisdictional in nature because the history and purpose of the writ of habeas corpus establish that the habeas court lacks the power to act on a habeas petition absent the petitioner's allegedly unlawful custody." (Internal quotation marks omitted.) *Vitale* v. *Commissioner of Correction*, 178 Conn. App. 844, 852, 178 A.3d 418 (2017), cert. denied, 328 Conn. 923, 181 A.3d 566 (2018). "[A] petitioner whose conviction has expired fully prior to the filing of a habeas petition is not in 'custody' on that conviction within the meaning of § 52-466, despite the alleged existence of collateral consequences flowing from that conviction." *Lebron* v. *Commissioner of Correction*, 274 Conn. 507, 530, 876 A.2d 1178 (2004), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014).

Our courts, however, have recognized an exception to the custody requirement. "A habeas petitioner who is serving consecutive sentences may challenge a future sentence even though he is not serving that sentence at the time his petition is filed . . . and he may challenge a consecutive sentence served prior to his current conviction if success could advance his release date. . . . In other words, the . . . courts view prior and future consecutive sentences as a continuous stream of custody for purposes of the habeas court's subject

matter jurisdiction. . . . Our courts have not extended this exception to concurrent sentences, which do not create a continuous stream of custody because they do not, by their nature, extend the term of incarceration." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Foote* v. *Commissioner of Correction*, 170 Conn. App. 747, 752?53, 155 A.3d 823, cert. denied, 325 Conn. 902, 155 A.3d 1271 (2017); see also *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 574 n.9, 877 A.2d 761 (2005).

In the present case, the parties dispute whether the habeas court had jurisdiction over two of the petitioner's convictions: the conspiracy to commit robbery conviction and the sale of a narcotic substance conviction. It is undisputed, however, that on November 14, 2008, the petitioner was sentenced to concurrent sentences of incarceration of three years for the conspiracy to commit robbery conviction and one year for the sale of a narcotic substance conviction. Because the sentences for those two convictions fully expired well before the petitioner filed his habeas petition in December, 2017, the petitioner was no longer in custody on those two convictions. Furthermore, the exception to the custody requirement discussed in *Foote* v. *Commissioner of Correction*, supra, 170 Conn. App. 752–53, does not apply because the petitioner's sentences for those convictions were concurrent to the sentence for burglary. Therefore, the habeas court correctly concluded that it did not have jurisdiction over those two convictions.

The petitioner acknowledges that the exception to the custody requirement that applies to consecutive sentences does not apply in his case, but nonetheless argues that the aggregate package theory of sentencing allows the habeas court to exercise jurisdiction over all three of his convictions because they were part of a global plea agreement. The petitioner, however, misinterprets the aggregate package theory of sentencing as

expanding the habeas court's ability to decide claims regarding convictions that fully expired prior to the filing of the habeas petition.

"The purpose of the aggregate package theory of sentencing is to ensure that, notwithstanding the judgment of the reviewing court, the original sentencing intent of the trial court is effectuated." *State* v. *Johnson*, 316 Conn. 34, 40, 111 A.3d 447 (2015). Our Supreme Court has held that "when a case involving multiple convictions is remanded for resentencing, the trial court is limited by the confines of the original sentence in accordance with the aggregate package theory set forth in *State* v. *Raucci*, [21 Conn. App. 557, 563, 575 A.2d 234 (1990)] and later adopted by [our Supreme Court] in *State* v. *Miranda*, [260 Conn. 93, 129–30, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002)].

"In *Miranda*, [our Supreme Court] recognized that the defendant, in appealing his conviction and punishment, has voluntarily called into play the validity of the entire sentencing package, and, thus, the proper remedy is to vacate it in its entirety. More significantly, the original sentencing court is viewed as having imposed individual sentences merely as component parts or building blocks of a larger total punishment for the aggregate convictions and, thus, to invalidate any part of that package without allowing the court thereafter to review and revise the remaining valid convictions would frustrate the court's sentencing intent. . . . Accordingly, the [resentencing] court's power under these circumstances is limited by its original sentencing intent as expressed by the original total effective sentence . . . . It may, therefore, simply eliminate the sentence previously imposed for the vacated conviction, and leave the other sentences intact; or it may reconstruct the sentencing package so as to reach a total effective sentence that is less than the original

sentence but more than that effected by the simple elimination of the sentence for the vacated conviction. The guiding principle is that the court may resentence the defendant to achieve a rational, coherent [sentence] in light of the remaining convictions, as long as the revised total effective sentence does not exceed the original." (Citation omitted; internal quotation marks omitted.) *State* v. *Tabone*, 292 Conn. 417, 427–28, 973 A.2d 74 (2009).

The petitioner asserts that if the habeas court does not have jurisdiction over all three convictions, it will be unable to fashion an appropriate remedy with respect to his ineffective assistance of counsel claims. The aggregate package theory, however, merely provides a remedy: after the court invalidates a conviction that is part of an aggregate package, the court must vacate the entire sentence and, upon remand, the resentencing court may reconstruct the sentencing package or, alternatively, leave the sentence for the remaining valid conviction or convictions intact. See *State* v. *Miranda*, 274 Conn. 727, 735 n.5, 878 A.2d 1118 (2005). This remedy does not expand the jurisdiction of the habeas court to decide claims regarding convictions that have fully expired prior to the filing of the habeas petition. The aggregate package theory of sentencing does not apply to the petitioner's claim that he was "in custody" on the conspiracy to commit robbery and narcotics convictions and, therefore, his claim must fail. Consequently, the petitioner also failed to establish his claim that Judge Bhatt erred in declining to revisit the decision of Judge Newson dismissing in part the habeas petition.

II

The petitioner next claims on appeal that the court erred in denying his petition after concluding that Solak had not provided ineffective assistance in connection with Solak's advice regarding the petitioner's guilty

plea. Specifically, the petitioner argues that Solak failed to investigate and to advise him adequately regarding the strengths and weaknesses of the state's case and the immigration consequences of a guilty plea. We disagree with both of these arguments.

A

The petitioner contends that Solak failed to investigate and to advise him adequately regarding the strengths and weaknesses of the state's case, including possible defenses that could be pursued at trial and the sentence that he would likely receive if he were convicted after a trial. We disagree.

The following additional facts, as found by the habeas court, are relevant to our resolution of this claim. At the habeas trial, the petitioner claimed that Solak was "ineffective in failing to investigate a potential defense and in failing to advise him of the likelihood of success at trial. [The petitioner] identifies this defense as a 'lack of objective evidence against [him] and the obvious motive to curry favor with the state possessed by the [codefendants].' " The court found that Solak "did not conduct any independent investigation into the matter but did review all the discovery provided to him and made the assessment that no further investigation was necessary. [Solak] noted that the petitioner did not provide him with any potential witnesses to investigate in support of a defense. He testified that he viewed the case against [the petitioner] as strong and the likelihood of success at trial was slim. He conveyed this information to [the petitioner]. It is unclear what [the petitioner] seeks to have investigated. The information that would support his defense—the lack of identification of [the petitioner] by any of the individuals present inside the residence, the numerous inconsistent statements given by the codefendants and the number of perpetrators of the burglary—were all contained within the police

reports and statements that were available to, and reviewed by, [Solak]. Based on his analysis of the case, faced with statements by all four codefendants that [the petitioner] was involved in the residential burglary and the attempted robbery thereafter, [Solak] made the determination that a trial where the defense was that [the petitioner] was either simply 'along for the ride' or not present at either incident would not be successful and counseled [the petitioner] that if he wished to follow that path, he would likely be convicted and face a sentence of at least ten years."

The court further found that Solak "did not tell [the petitioner] what he should do; rather he advised him of the possible outcomes and their likelihood. . . . [Solak] did not recollect whether he had given [the petitioner] an estimate of the sentence he should expect after trial if convicted but surmised that based on his analysis of the case he would have advised [the petitioner] to expect a sentence of greater than ten years' incarceration."

The court reasoned that, even if the codefendants could be cross-examined at a trial regarding "a concerted plan to point the finger at [the petitioner] and their desire to receive favorable treatment by cooperating with the state, it does not then follow that the evidence to be provided by the codefendants was unsubstantial or unreliable and would be dismissed by a jury. None of these codefendants testified at the habeas trial; thus, this court's assessment of their potential testimony is premised on the same statements and information available to [Solak]. Certainly, [Solak] was correct in advising [the petitioner] that if the jury believed one of the codefendants that he was at or involved in the planning of either of the incidents, he would be found guilty. In addition, there was physical evidence—one or more items that were reportedly taken during the

residential burglary—that was recovered at [the petitioner's] residence. . . .

"[T]he court credits [Solak's] testimony that he reviewed the discovery provided to him, discussed the state's evidence with [the petitioner] and advised [the petitioner] of his alternatives, including how he viewed the evidence and the likely outcome at trial. There is no deficient performance. This claim must be denied."

We begin by setting forth the applicable standard of review. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Humble* v. *Commissioner of Correction*, 180 Conn. App. 697, 703–704, 184 A.3d 804, cert. denied, 330 Conn. 939, 195 A.3d 692 (2018).

We next set forth the legal principles relevant to a claim of ineffective assistance of counsel in connection with a guilty plea. "The [long-standing] test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. . . . Where . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." (Internal quotation marks omitted.) *Freitag* v. *Commissioner of Correction*, 208 Conn. App. 635, 642, 265 A.3d 928 (2021).

"[I]n order to determine whether the petitioner has demonstrated ineffective assistance of counsel [when

the conviction resulted from a guilty plea], we apply the two part test enunciated by the United States Supreme Court in *Strickland* [v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] and *Hill* [v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)]. . . . In *Strickland*, which applies to claims of ineffective assistance during criminal proceedings generally, the United States Supreme Court determined that the claim must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . .

"To satisfy the performance prong under *Strickland-Hill*, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . A petitioner who accepts counsel's advice to plead guilty has the burden of demonstrating on habeas appeal that the advice was not within the range of competence demanded of attorneys in criminal cases. . . . The range of competence demanded is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . Reasonably competent attorneys may advise their clients to plead guilty even if defenses may exist. . . . A reviewing court must view counsel's conduct with a strong presumption that it falls within the wide range of reasonable professional assistance. . . .

"To satisfy the prejudice prong [under *Strickland-Hill*], the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Humble* v. *Commissioner of Correction*, supra, 180 Conn. App. 704–705.

"Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 201 Conn. App. 1, 12, 242 A.3d 107, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020).

After our review of the record and based on the underlying facts found by the habeas court, we agree with the court's conclusion that Solak provided the petitioner with reasonably competent advice regarding his guilty plea. The habeas court credited Solak's testimony and found that he had reviewed the discovery provided to him and determined that no further investigation was necessary. The petitioner did not provide Solak with any potential witnesses to investigate in support of a defense, and, at the habeas trial, the petitioner did not provide any additional favorable evidence that would have supported his defense at trial.[6] We agree with the habeas court's conclusion that the petitioner failed to show that further investigation by Solak would have yielded any evidence that would have aided in the petitioner's defense at trial or that would have altered Solak's advice regarding the strengths and weaknesses of the state's case against the petitioner. See *Clinton S.* v. *Commissioner of Correction*, 174 Conn. App. 821, 836, 167 A.3d 389 ("[t]he burden to demonstrate what benefit additional investigation would have revealed is on the petitioner" (internal quotation marks omitted)), cert. denied, 327 Conn. 927, 171 A.3d 59 (2017).

Although the petitioner points to weaknesses in the state's case against him,[7] Solak reasonably advised the

[6] At the habeas trial, the petitioner presented Lindsay Brunswick as a witness. Brunswick was one of the individuals present in Gunnison's residence at the time of the burglary. She testified that she remembered three people with three different weapons, but could not identify any suspect.

[7] In his brief, the petitioner discusses weaknesses in the state's case against him relating to each of the three convictions and claims that Solak could have used these weaknesses as part of his defense at trial. He points to the

petitioner that he viewed the case against the petitioner as strong and that the likelihood of success at trial was slim despite such possible weaknesses. See *Humble* v. *Commissioner of Correction*, supra, 180 Conn. App. 704 ("[r]easonably competent attorneys may advise their clients to plead guilty even if defenses may exist" (internal quotation marks omitted)). As the habeas court noted, although the codefendants could be cross-examined at trial and their credibility undermined, the jury could have found at least some of their testimony to be reliable and returned a guilty verdict. In addition to the statements made by the codefendants inculpating the petitioner, physical evidence of items taken during the burglary were seized at the petitioner's home. Solak advised the petitioner that if he were convicted after trial, he would likely receive a sentence of at least ten years of imprisonment. Moreover, Solak did not tell the petitioner what he should do with respect to the state's plea offer; instead, Solak advised him regarding the possible outcomes and their likelihood, leaving the ultimate choice up to the petitioner. The record reveals that the petitioner failed to meet his burden to overcome the presumption that Solak provided competent advice with regard to his guilty plea.

B

Next, the petitioner contends that Solak rendered deficient performance by failing to advise him adequately regarding the immigration consequences of his guilty plea. We disagree.

fact that none of the victims identified the petitioner and that one of the victims testified at the habeas trial that she believed there were three individuals who committed the burglary, which would account for the three codefendants who had confessed to being present, but not the petitioner. The petitioner also points to his own testimony to show that the physical evidence of the burglary found at his residence, including cell phones and iPods, "were simply left behind by the others" and do not directly tie him to the burglary or the conspiracy to commit robbery. With regard to the narcotics conviction, he argues that "the state would have had to rely on the testimony of an informant whose motivation and credibility would be an issue" and that the state may not have even presented the confidential informant at trial.

The following additional facts, as found by the habeas court, are relevant to our resolution of this claim. "While immigration consequences can be taken into account in fashioning an appropriate sentence, both [Solak] and [Supervisory Assistant State's Attorney Charles Stango], the trial prosecutor, were of the opinion that this was not such a case, given the seriousness of the allegations and the potential punishment faced by [the petitioner]. . . . According to [Solak], at no time did [the petitioner] indicate that he wished to go to trial for immigration reasons. Had he so insisted, [Solak] was prepared to go to trial. . . . [D]uring the [petitioner's] plea, [Solak] stated for the record that [the petitioner] was not a citizen and that they had discussed the possibility of deportation. He testified that it was practice at the time of [the petitioner's] plea to advise clients with immigration issues to consult with an immigration attorney."

The court rejected the petitioner's claim that Solak rendered deficient performance in failing to advise him of the immigration consequences of his guilty plea. It concluded that there was no difference in the standard for ineffective assistance of counsel pursuant to the state and federal constitutions. Therefore, because the federal constitution at that time did not require Solak to advise the petitioner about immigration consequences of a plea, the state constitution likewise did not require such action.

As we set forth in part II A of this opinion, our standard of review of a habeas court's judgment on claims of ineffective assistance of counsel is well settled. "[T]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Humble* v. *Commissioner of Correction*, supra, 180 Conn. App. 703–704.

We next set forth the legal principles applicable to a claim that counsel rendered deficient performance by failing to advise the petitioner of the immigration consequences of a guilty plea. In *Padilla* v. *Kentucky*, 559 U.S. 356, 360, 366, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), the United States Supreme Court held that the federal constitution's guarantee of effective assistance of counsel requires defense counsel to accurately advise a noncitizen client of the immigration consequences of a guilty plea.

Subsequently, the United States Supreme Court addressed the question of whether its decision in *Padilla* applied retroactively in *Chaidez* v. *United States*, 568 U.S. 342, 344, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013). The court concluded that the decision in *Padilla* announced a "new rule" and, therefore, it did not apply retroactively. Id., 344, 347, 349. In making that determination, the court stated: "*Padilla* would not have created a new rule had it only applied *Strickland*'s general standard to yet another factual situation—that is, had *Padilla* merely made clear that a lawyer who neglects to inform a client about the risk of deportation is professionally incompetent.

"But *Padilla* did something more. Before deciding if failing to provide such advice fell below an objective standard of reasonableness, *Padilla* considered a threshold question: Was advice about deportation categorically removed from the scope of the [s]ixth [a]mendment right to counsel because it involved only a collateral consequence of a conviction, rather than a component of the criminal sentence? . . . In other words, prior to asking *how* the *Strickland* test applied (Did this attorney act unreasonably?), *Padilla* asked *whether the Strickland* test applied (Should we even evaluate if this attorney acted unreasonably?). And as we will describe, that preliminary question about

Strickland's ambit came to the *Padilla* [c]ourt unsettled—so that the [c]ourt's answer (Yes, *Strickland* governs here) required a new rule." (Citation omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) Id., 348–49.

Our Supreme Court, in *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 93, 117, 111 A.3d 829 (2015), held that the decision in *Padilla* did not apply retroactively under Connecticut law. Our Supreme Court rejected the petitioner's contention that the rule announced in *Padilla* was required by prevailing professional norms in Connecticut at the time of the petitioner's trial and, therefore, it was not a new rule. Id., 113–14. The court concluded that, "even if professional norms at the time the petitioner entered his guilty plea required that trial counsel inform a noncitizen criminal defendant of a plea's virtually mandatory deportation consequences, the rule announced in *Padilla* was a new rule under Connecticut law because more than one Connecticut court had noted several years before the petitioner's plea that such advice was not constitutionally required." Id., 116–17.

We agree with the habeas court's conclusion that the rule announced in *Padilla* requiring defense counsel to advise a noncitizen client of the immigration consequences of a guilty plea does not apply to the petitioner's case because such advice was not constitutionally required—under either the United States or the Connecticut constitution—at the time the petitioner entered his guilty plea. See id., 93. Therefore, the petitioner's claim that Solak rendered deficient performance by failing to advise him of the immigration consequences of his guilty plea must fail.

The judgment is affirmed.

In this opinion the other judges concurred.