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HARPER, J., dissenting. The majority concludes that the habeas court abused its discretion in denying the petition for certification to appeal from the judgment dismissing the petition for a writ of habeas corpus but that the habeas court properly rejected the claims of ineffective assistance of counsel made by the petitioner, Anthony Small. I disagree with the majority's conclusion that the habeas court properly determined that both trial and appellate counsel rendered effective assistance. I therefore respectfully dissent.

As the majority discussed, the petitioner claims that, because he was charged with felony murder on the basis of the predicate crime of attempt to commit robbery in the first degree, the court should have instructed the jury on the definition of attempt. He argues that his trial counsel and his appellate counsel both rendered ineffective assistance because they failed to challenge the absence of such an instruction.

At the outset, the majority concludes that the petitioner's statement of the issue is flawed because he was not formally charged with the crime of attempt to commit robbery in violation of General Statutes §§ 53a-134 (a) (2) and 53a-49 (a) (2). The majority emphasizes that, although the state could have charged the petitioner both with felony murder and attempt to commit robbery in the first degree, it did not do so. Instead, the majority notes that the petitioner was charged with felony murder and conspiracy to commit robbery.

Notwithstanding the fact that the petitioner was not charged with a separate count of attempt to commit robbery in the first degree, the trial court instructed the jury that, to convict the petitioner of felony murder, "the state must prove beyond a reasonable doubt each of these following elements: that the accused, acting alone or with one or more other persons, committed or attempted to commit the crime of robbery in the first degree . . . . Two, that the defendant or another participant in the crime of robbery in the first degree, [or] the attempt to commit the same, caused the death of another person. Three, that the defendant or another participant caused the death while in the course of and in the furtherance of the commission or attempted commission of attempted robbery in the first degree, or in the immediate flight therefrom, [a]nd that the victim[s] . . . were not participants in the crime." The trial court, therefore, clearly instructed the jury that the counts of felony murder were based on either the predicate crime of robbery in the first degree or the predicate crime of attempt to commit robbery in the first degree. The state prosecuted these charges solely under the theory that the petitioner committed felony murder during the commission of the crime of attempt

to commit robbery in the first degree.

Whether trial or appellate counsel was ineffective for failing to challenge the lack of an instruction on attempt in the court's charge depends, in the first instance, on the legal principles that apply to jury instructions. "[A]n accused has a fundamental right, protected by the due process clauses of the federal and Connecticut constitutions, to be acquitted unless proven guilty of each element of the charged offense beyond a reasonable doubt. . . . It is . . . constitutionally axiomatic that the jury be instructed on the essential elements of a crime charged. . . . [T]he failure to instruct a jury on an element of a crime deprives a defendant of the right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are." (Citation omitted; internal quotation marks omitted.) *State* v. *Barksdale*, 79 Conn. App. 126, 131, 829 A.2d 911 (2003).

"The standard of review for an improper instruction on an element of an offense is whether it is reasonably possible that the jury was misled. . . . In determining whether it was indeed reasonably possible that the jury was misled by the trial court's instructions, the charge to the jury is not to be critically dissected for the purpose of discovering possible inaccuracies of statement, but it is to be considered rather as to its probable effect upon the jury in guiding [it] to a correct verdict in the case. . . . The charge is to be read as a whole and individual instructions are not to be judged in artificial isolation from the overall charge. . . . The test to be applied to any part of a charge is whether the charge, considered as a whole, presents the case to the jury so that no injustice will result. . . . The charge must be considered from the standpoint of its effect on the jury in guiding [it] to a proper verdict." (Internal quotation marks omitted.) *State* v. *Cooke*, 89 Conn. App. 530, 539–40, 874 A.2d 805, cert. denied, 275 Conn. 911, 882 A.2d 677 (2005).

"[A] jury instruction that improperly omits an essential element from the charge constitutes harmless error if a reviewing court concludes beyond a reasonable doubt that the omitted element was *uncontested and supported by overwhelming evidence*, such that the jury verdict would have been the same absent the error . . . ." (Emphasis in original; internal quotation marks omitted.) *State* v. *Montgomery*, 254 Conn. 694, 738, 759 A.2d 995 (2000), quoting *Neder* v. *United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); see also *State* v. *Velasco*, 253 Conn. 210, 235, 751 A.2d 800 (2000).

"In order to obtain a conviction for felony murder the state must prove, beyond a reasonable doubt, all the elements of the statutorily designated underlying felony, and in addition, that a death was caused in the course of and in furtherance of that felony." (Internal

quotation marks omitted.) *State* v. *Cooke*, supra, 89 Conn. App. 535. I believe an instruction on attempt was required because it was an essential element of the underlying crime, namely, attempt to commit robbery in the first degree. See e.g., 2 D. Wright & D. Havanich, Connecticut Jury Instructions (2d Ed. 1975) § 694, p. 1086 (providing example of felony murder instruction on basis of attempt to commit robbery and including definition of attempt from § 53a-49). In this case, the trial court instructed the jury on the elements of robbery in the first degree and the elements of felony murder, but it never explained the concept of attempt as an element of the crime of attempt to commit robbery, nor did it provide the jury with the definition of attempt as provided in § 53a-49 (a) (2).

It is undisputed that the theory supporting the felony murder charges was that the deaths of the victims in this case occurred as a result of an attempted robbery by the petitioner and his coconspirators. Accordingly, to sustain a conviction for felony murder, the state had to prove that an attempted robbery had occurred. Absent *any* explanation regarding the legal definition of attempt, I fail to see how the trial court's instructions could have guided the jury to a proper verdict.[1]

Respectfully, I disagree with the majority's conclusion that the court did not need to instruct the jury on the definition of attempt because the term was used in its "ordinary definition." As compared to the statutory definition of attempt provided in § 53a-49 (a) (2), the most relevant dictionary definitions of attempt are "to make an effort at; try; undertake" or "an effort made to accomplish something." Random House Webster's Unabridged Dictionary (2d Ed. 2001). These dictionary definitions are far less specific than the statutory definition provided in § 53a-49 (a), which provides in relevant part that "[a] person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." The technical nature of this definition is underscored by the fact that "substantial step" is further defined by § 53a-49 (b). Consequently, I believe that the court should have instructed the jury on the relevant statutory definition. Compare *State* v. *Spillane*, 255 Conn. 746, 755–56, 770 A.2d 898 (2001) (dictionary definition of "appropriate" not as specific as statutory definition). I would conclude, therefore, that as a result of the trial court's failure to instruct the jury on the definition of attempt, it is reasonably possible that the jury was misled as to the essential elements of felony murder.

Moreover, I do not believe that the court's improper omission of an instruction on attempt may be described

as harmless in this case. As I already have noted, for an improper instruction to be harmless, the omitted element must be *both* uncontested and supported by overwhelming evidence. *State* v. *Montgomery*, supra, 254 Conn. 738; *State* v. *Velasco*, supra, 253 Conn. 235. Regardless of whether there was overwhelming evidence that the petitioner and his associates attempted to commit robbery in the first degree, the issue of attempt clearly was contested at trial. Although the majority focuses on the petitioner's asserted defense, which was that he merely was present at the scene of the crime, defense counsel repeatedly stated during closing argument that the events in question did not constitute an attempted robbery.[2] I am unable to conclude, therefore, that the omission of an instruction on the element of attempt was harmless.

Under these circumstances, I do not agree with the majority that the habeas court properly determined that trial and appellate counsel rendered effective assistance of counsel.[3] At the habeas proceeding, the petitioner's trial counsel acknowledged that the court instructed the jury that the basis for the felony murder charges was attempt to commit robbery. He testified, nonetheless, that he did not object to the court's failure to instruct the jury on the definition of attempt because the petitioner was not charged with attempt to commit robbery. The petitioner's appellate counsel also agreed that, despite the fact that the court referenced the attempt to commit robbery several times, it did not instruct the jury on the definition of attempt. She similarly testified that the petitioner was not charged with attempt to commit robbery.

Although there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, I am persuaded that trial and appellate counsel's failure to challenge the absence of an instruction on attempt in this case may not be considered sound trial strategy. See *Bova* v. *Commissioner of Correction*, 95 Conn. App. 129, 135, 894 A.2d 1067 (2006). More specifically, I would conclude that, in light of the evidence presented at trial and trial counsel's comments during closing argument that challenged whether an attempted robbery had occurred, it was objectively unreasonable for trial counsel not to object to the court's instruction. Furthermore, even though I acknowledge the sound policy of appellate counsel to limit the issues presented on appeal to those that are most persuasive, I would conclude that the court's failure to instruct the jury on the definition of attempt was such an issue.

Turning to the second part of the *Strickland* test, I would conclude that the failure of trial and appellate counsel to challenge the court's omission of an instruction defining attempt prejudiced the petitioner. As I already have discussed, to convict the petitioner of fel-

ony murder, the state was required to prove that he attempted to commit robbery in the first degree. Attempt was an essential element of the crime, and the court's failure to provide the jury with the appropriate definition was improper. Because I would conclude that the improper instruction was not harmless, trial and appellate counsel's failure to challenge the instruction necessarily was prejudicial to the petitioner. I would conclude, therefore, that trial and appellate counsel rendered ineffective assistance by not challenging the court's failure to instruct the jury on the definition of attempt and that the habeas court improperly denied the petition for a writ of habeas corpus.

I respectfully dissent.

[1] The absence of an instruction on attempt likely was compounded further by the court's misplaced reference to attempt in its instructions on the charge of conspiracy to commit robbery. The court instructed the jury: "To constitute the crime of conspiracy the state must prove the following elements beyond a reasonable doubt: that there was an agreement between the [petitioner and his coconspirators], any two or more of them to engage in conduct constituting the crime of *attempted* robbery in the first degree, that there was an overt act in [furtherance] of the subject of that agreement and there was an intent on the part of the accused . . . that conduct constituting the crime be performed." (Emphasis added.)

[2] At various times during closing argument, defense counsel made the following comments: "I submit again that this is another instance of [one conspirator] blame shifting to make it appear that a robbery was going on here when, in fact, it wasn't . . . . [Another conspirator is] yelling at the door, 'I want my stuff, I want my stuff,' like he had been doing for the last [twenty-three] hours. He's shooting into the apartment, nobody else shot or pointed a gun at anybody, leaving us with the quintessential obvious question, was this a robbery attempt or the act of one crazed and angry madman? . . . Because it sure doesn't look like a robbery is being attempted here based on the circumstances as we know them to be. . . . The incident doesn't look like a robbery attempt because it wasn't. It was a spontaneous double homicide committed by a frightened drug dealer who was afraid that he was going to be hurt, he was mad that he lost his drugs, and he lost his cool when he went up to that door and killed two people. But it wasn't a robbery attempt; again, it was a spontaneous—it was a double homicide, granted, but it was the act of a frightened lunatic."

[3] The majority notes that, in the absence of expert witness testimony at the habeas proceeding, the habeas court relied on its own expertise to conclude that neither trial nor appellate counsel was ineffective. My review of the habeas court's memorandum of decision, however, indicates that its analysis of this claim is wholly unsupported by the case on which it relied.

At the habeas proceeding, and again on appeal to this court, the respondent, the commissioner of correction, argued that because the trial court had instructed the jury on the definition of an overt act as part of its charge on conspiracy to commit robbery, the jury, in finding the petitioner guilty of conspiracy, necessarily found facts that were the functional equivalent of those required to find the petitioner guilty of attempt to commit robbery. In support of this argument, the respondent relied on a functional equivalency test proposed by Justice Scalia in a concurrence in *Carella* v. *California*, 491 U.S. 263, 271, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (Scalia, J., concurring). Such a test, however, never has been adopted by a majority of the United States Supreme Court or any appellate court of this state. Furthermore, upon reviewing the rationale supporting Justice Scalia's functional equivalency test, I would conclude that it is inapplicable to the facts of this case.

Notwithstanding the lack of support for such a test, the habeas court's analysis of this issue rests solely on *Carella*. In its memorandum of decision, the habeas court concluded that the petitioner had failed to prove that the omission of an instruction on attempt had prejudiced the defense because "[t]he charge was otherwise in order and the jury was told in the portions dealing with accessories and conspiracy that it must find that the petitioner acted with the mental state required for the commission of the crime. . . .

[T]his jury found facts so closely related to those required to find an attempt that the failure to charge on attempt was harmless." I find this analysis unpersuasive, and I am perplexed by the fact that the majority is not troubled by the habeas court's reliance on *Carella*.