NONHUMAN RIGHTS PROJECT, INC. *v.* R.W. COMMERFORD & SONS, INC., ET AL.
(AC 42795)

Alvord, Bright and Beach, Js.

Syllabus

The petitioner, N Co., sought a writ of habeas corpus on behalf of three elephants that it alleged were being illegally confined by the named respondents, C Co., a zoo, and C Co.'s president, W. N Co. challenged the detention of the elephants, sought recognition of the elephants as "persons" recognized by the common law, and requested that the elephants be released. The habeas court dismissed the petition as successive in light of N Co.'s first petition against C Co. and W, which alleged essentially the same facts and sought the same relief. On appeal to this court, at which time only one of the three elephants remained alive, the petitioner claimed that the habeas court erred in dismissing its second petition as successive and that this court's decision on the first petition, which affirmed the habeas court's decision to decline to issue the writ, was incorrect. *Held* that the habeas court properly dismissed the present petition for a writ of habeas corpus, as the elephant, and consequently, N Co., lacked standing to file a petition for a writ of habeas corpus because the elephant had no legally protected interest that possibly could be adversely affected; the reasoning and the holding in the appellate decision on the first petition were clearly applicable to the present petition and controlled the resolution of this appeal, N Co. failed to present any material distinctions between the first appeal and the present appeal, our habeas corpus jurisprudence contained no indication that habeas corpus relief was ever intended to apply to a nonhuman animal, our common law revealed no instances of a nonhuman animal permitted to bring an action to vindicate its purported rights, only a person, not an animal, whose custody is in question is authorized to file an application for a writ of habeas corpus, the term "person" in our General Statutes has never been defined as a nonhuman animal, and recent legislative activity regarding habeas corpus lacked any indication that the legislature intended habeas corpus relief to apply to nonhuman animals.

Argued January 8—officially released May 19, 2020

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the matter was transferred to the judicial district of Litchfield at Torrington and tried to the court, *Shaban*,

J.; judgment dismissing the petition, from which the petitioner appealed to this court. *Affirmed.*

Steven M. Wise, pro hac vice, with whom were *Barbara M. Schellenberg* and, on the brief, *David B. Zabel*, for the appellant (petitioner).

Opinion

ALVORD, J. The petitioner, Nonhuman Rights Project, Inc., appeals from the judgment of the habeas court dismissing its petition for a writ of habeas corpus that it sought on behalf of an elephant, Minnie,[1] who is alleged to be owned by the named respondents, R.W. Commerford & Sons, Inc. (also known as the Commerford Zoo), and its president, William R. Commerford.[2] The petitioner argues that the court improperly dismissed its petition for a writ of habeas corpus. We conclude that the court properly dismissed the petition on the alternative ground that the petitioner lacked standing.[3]

On November 13, 2017, the petitioner filed its first verified petition for a common-law writ of habeas corpus on behalf of three elephants; see footnote 1 of this opinion; pursuant to General Statutes § 52-466 et seq. and Practice Book § 23-21 et seq. (first petition). See *Nonhuman Rights Project, Inc.* v. *R.W. Commerford &*

[1] The petition originally was filed on behalf of three elephants: Beulah, who was in her "mid-forties"; Minnie, who has been owned by the named respondents since at least 1989; and Karen, who was in her "mid-thirties." The petitioner represented during oral argument before this court that Beulah and Karen have since died. Counsel for the petitioner stated that, although he believes that Karen died in March, 2019, he did not learn of her death at the time because he does not have access to the elephants.

[2] The named respondents are not parties to the action or to this appeal.

[3] Given our conclusion that the petitioner lacked standing, we need not address the petitioner's claims that the habeas court improperly (1) dismissed its petition for a writ of habeas corpus on the ground that it was successive pursuant to Practice Book § 23-29 (3) and (2) concluded that, even if it were not successive, it would be subject to dismissal pursuant to Practice Book § 23-29 (5).

Sons, *Inc.*, 192 Conn. App. 36, 38, 216 A.3d 839 (*Commerford I*), cert. denied, 333 Conn. 920, 217 A.3d 635 (2019). "The petitioner alleged that it is a not-for-profit corporation with a mission of changing the common-law status of at least some nonhuman animals from mere things, which lack the capacity to possess any legal rights, to persons, who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them. . . . The petitioner alleged that the named respondents are illegally confining the elephants.

"The petition [made] clear that it challenge[d] neither the conditions of [the elephants'] confinement nor [the] respondents' treatment of the elephants, but rather the fact of their detention itself . . . . It [was] not seeking any right other than the common-law right to bodily liberty for the elephants. The petition state[d] that determining [who] is a person is the most important individual question that can come before a court, as the term person identifies those entities capable of possessing one or more legal rights. Only a person may invoke a common-law writ of habeas corpus, and the inclusion of elephants as persons for that purpose [was] for this court to decide. The petition further allege[d] that [the] expert affidavits submitted in support of [the] petition set forth the facts that demonstrate that elephants . . . are autonomous beings who live extraordinarily complex emotional, social, and intellectual lives, and who possess those complex cognitive abilities sufficient for common-law personhood and the common-law right to bodily liberty protected by the common law of habeas corpus, as a matter of common-law liberty, equality, or both." (Internal quotation marks omitted.) Id., 38–39.

On December 26, 2017, the habeas court, *Bentivegna*, *J.*, declined to issue a writ of habeas corpus pursuant

to Practice Book § 23-24 (a) (1) and (2)[4] on the basis that the petitioner lacked standing to bring the petition on behalf of the elephants and that the petition was wholly frivolous on its face. Id., 39–40. The petitioner appealed to this court. *While the appeal to this court from the order of the habeas court declining to issue the writ with respect to its first petition was pending*, the petitioner filed the present petition for a writ of habeas corpus on June 11, 2018.[5] The petition again

[4] Practice Book § 23-24 provides: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that:

"(1) the court lacks jurisdiction;

"(2) the petition is wholly frivolous on its face; or

"(3) the relief sought is not available.

"(b) The judicial authority shall notify the petitioner if it declines to issue the writ pursuant to this rule."

[5] Despite alleging that the elephants were being detained by the named respondents in Goshen, which is located in the judicial district of Litchfield where the petitioner filed its first petition, the petitioner filed the present petition in the judicial district of Tolland. It was transferred by the court, sua sponte, to the judicial district of Litchfield.

When asked during oral argument before this court why the petition was filed in Tolland, the petitioner's counsel, who appeared pro hac vice, represented that he believed that the judges in Tolland would have a greater understanding of habeas corpus. The petitioner's counsel conceded that this constituted "judge shopping." He later stated that he was not looking for a judge that would rule in his favor but, rather, one that "worked in the area of habeas corpus day in and day out." Local counsel for the petitioner, Barbara M. Schellenberg, was asked during oral argument whether she was cognizant of the "judge shopping" occurring in the case, and she stated that she personally was not involved in the matter before the trial court.

Following oral argument, David B. Zabel, also local counsel for the petitioner, filed with this court a letter stating that pro hac vice counsel for the petitioner believed, at the time of the filing of the petition, that it would not be improper to file the petition in the judicial district of Tolland. Zabel agreed with that position, likening the filing of the petition in Tolland to "seeking to have a complex civil case transferred to the complex litigation docket in Connecticut to have it heard before a judge experienced in complex cases."

We strongly disagree that counsels' filing of the habeas petition in Tolland was proper. See General Statutes § 52-466 (a) (1) ("[a]n application for a writ of habeas corpus, other than an application pursuant to subdivision (2) of this subsection, 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").

Furthermore, we are extremely troubled by counsels' implication that filing a second action that is virtually identical to the first action, which the

sought recognition of the elephants as "persons," within the meaning of the common law, in order to secure the elephants' common-law right to bodily liberty protected by habeas corpus. The petition requested release of the elephants from the alleged illegal confinement.

On February 13, 2019, the habeas court, *Shaban*, *J.*, issued a memorandum of decision dismissing the petition as successive under Practice Book § 23-29 (3), concluding that the petitioner, the named respondents, the subjects of the petition, the grounds asserted in the petition, and the relief sought by the petition were all the same as in the first petition.[6] It further concluded that, even if the petition were not successive, it would be subject to dismissal pursuant to Practice Book § 23-29 (5).[7] This appeal followed.[8]

On appeal, the petitioner claims that the habeas court erred in dismissing its petition.[9] After the petitioner filed its appellate brief in this appeal, this court released its decision in *Commerford I*, supra, 192 Conn. App. 36, which affirmed the habeas court's decision to decline to issue the writ with respect to the petitioner's first

petitioner lost, was justified because Judge Bentivegna did not have sufficient knowledge of or experience in habeas corpus matters when he ruled against the petitioner. Not only does such a suggestion unfairly impugn an experienced and capable judge, our system does not work that way. A litigant may not file a repetitive action just because it is unhappy with the ruling of the first judge. A disappointed litigant's remedy after losing in the trial court is to appeal to this court or to our Supreme Court, not to file a second action essentially asking one Superior Court judge to overrule another. This is not a novel concept.

[6] In dismissing the petition, the habeas court considered a motion filed by the petitioner seeking that the court rule promptly on its petition for a writ of habeas corpus and for oral argument to be held thereon.

[7] Practice Book § 23-29 (5) provides: "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 . . . any other legally sufficient ground for dismissal of the petition exists."

[8] The petitioner filed a motion to reargue, which was denied.

[9] "Whether a habeas court properly dismissed a petition for a writ of habeas corpus presents a question of law over which our review is plenary." *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 553, 223 A.3d 368 (2020).

petition. This court concluded in *Commerford I* that the petitioner could not satisfy the prerequisites for establishing next friend standing because the elephants lacked standing in the first instance. Id., 41. The elephants lacked standing to file a petition for a writ of habeas corpus because they lacked a legally protected interest that possibly could be adversely affected and, therefore, the habeas court properly declined to issue the writ on standing grounds. Id., 48. Following this court's decision in *Commerford I*, the petitioner filed a motion for reconsideration en banc,[10] which this court denied, and a petition for certification to appeal to our Supreme Court,[11] which also was denied.

[10] Therein, the petitioner argued that the decision conflicted with appellate precedent in four ways. "First, under *Jackson* v. *Bulloch*, [12 Conn. 38 (1837)], the [petitioner's] standing did not depend upon the elephants having standing. Second, under *Connecticut Assn. of Boards of Education, Inc.* v. *Shedd*, [197 Conn. 554, 557 n.1, 499 A.2d 797 (1985)], and other controlling authorities, this court improperly resolved the question of standing by determining the merits of the case. Third, under *Johnson* v. *Commissioner of Correction*, [168 Conn. App. 294, 308 n.8, 145 A.3d 416, cert. denied, 323 Conn. 937, 151 A.3d 385 (2016)], the [petitioner] was prejudiced by its lack of opportunity to adequately address the merits of the case both in the lower court and this court. Fourth, Beulah, Minnie, and Karen are already legal persons whose status as beneficiaries of an inter vivos trust created pursuant to [General Statutes §] 45a-489a does not turn on their capacity to bear duties and social responsibilities; neither should their right to bodily liberty so turn under *Jackson* v. *Bulloch*."

[11] In its petition for certification to appeal to our Supreme Court, the petitioner presented the following questions for review: "A. Did the Appellate Court err in holding that the real party in interest, Minnie—an Asian elephant unlawfully detained by [the named respondents]—must have standing in the first instance in order for [the petitioner] to have next friend standing to pursue a habeas corpus action on her behalf, where the action seeks a good faith extension or modification of the Connecticut common law of habeas corpus?

"B. Did the Appellate Court err when it resolved the question of Minnie's standing by determining the merits of the case?

"C. Did the Appellate Court err in determining that personhood requires the ability to bear duties and social responsibilities, an issue which neither the trial court nor the

Appellate Court provided [the petitioner] with an adequate opportunity to present, brief, and argue?" (Footnote omitted.)

The petitioner thereafter was granted permission to file a supplemental brief in this appeal. In its supplemental brief, the petitioner argued that "this court should disregard [*Commerford I*] as it is 'clearly wrong,' " presenting nine arguments in support of this claim.[12] "[A]s we often have stated, this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.) *AFSCME, Council 4, Local 1303-385* v. *Westport Dept. of Public Works*, 151 Conn. App. 477, 484 n.7, 95 A.3d 1178, cert. denied, 314 Conn. 930, 101 A.3d 274 (2014); see *State* v. *Joseph B.*, 187 Conn. App. 106, 125 n.14, 201 A.3d 1108, cert. denied, 331 Conn. 908, 202 A.3d 1023 (2019); see also Practice Book § 70-7.[13] At oral argument before this court, the peti-

[12] In its supplemental brief, the petitioner raised the following arguments: "this court erroneously conflated the question of [the petitioner's] standing with the merits when it determined that Minnie was not a 'person' for standing purposes"; "in conflict with *Jackson* v. *Bulloch*, [12 Conn. 38 (1837)] this court erroneously concluded that [the petitioner's] standing depended on Minnie having 'standing in the first instance' "; "the English and American common law of habeas corpus have long granted third parties standing to challenge a stranger's private detention"; "in conflict with *Jackson* [v. *Bulloch*, supra, 38] and Anglo-American jurisprudence, this court erroneously concluded that Minnie is not a 'person' because she is 'incapable of bearing duties and social responsibilities required by [the] social compact' "; "Minnie is already a 'person' as she has the right of a trust beneficiary under General Statutes § 45a-489a (a)"; (emphasis in original); "by asserting that the undefined term 'person' in General Statutes § 52-466 (a) (1) cannot apply to an animal . . . this court erroneously conflated 'person' with 'human being,' which are not synonymous"; "§ 52-466 and Practice Book § 23-21 et seq. are purely procedural and cannot determine the substantive scope of habeas corpus . . . [t]hus, it is irrelevant that judges or legislators may not have had elephants in mind when determining who was entitled to habeas corpus relief"; "Connecticut courts are 'charged with the ongoing responsibility to revisit our common-law doctrines when the need arises' "; and "allowing Minnie to seek habeas corpus relief would not 'require [this court] to upend this state's legal system to allow highly intelligent, if not all, nonhuman animals the right to bring suit in a court of law.' " (Emphasis in original.)

[13] Practice Book § 70-7 provides: "(a) Before a case is assigned for oral argument, the chief judge may order, on the motion of a party or sua sponte, that a case be heard en banc.

tioner's counsel recognized both that this court cannot overrule a decision of a prior panel and that it had not filed a request to have the present appeal heard en banc.[14] Accordingly, we decline the petitioner's request to revisit our precedent.

In accordance with our decision in *Commerford I*, we conclude that Minnie and, consequently, the petitioner, lack standing. "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless [one] has, in an individual or representative capacity, some real interest in the cause of action . . . . Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all the members of the community as a whole. Second, the party claiming aggrievement must successfully establish that the specific personal and legal interest has been specially and injuriously affected by the decision. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Stec* v.

"(b) After argument but before decision, the entire court may order that the case be considered en banc with or without further oral argument or with or without supplemental briefs. The judges who did not hear oral argument shall have available to them the electronic recording or a transcript of the oral argument before participating in the decision.

"(c) After decision, the entire court may order, on the motion of a party pursuant to Section 71-5 or sua sponte, that reargument be heard en banc."

[14] Instead, when asked during oral argument before this court whether he was waiting to seek consideration en banc until after this court issued its decision stating that it could not reverse the ruling of the prior panel, the petitioner's counsel represented that he intended to file a motion for reconsideration en banc after this court issues its decision in this appeal.

Raymark Industries, Inc., 299 Conn. 346, 373–74, 10 A.3d 1 (2010).

In *Commerford I*, this court first examined our habeas corpus jurisprudence, which revealed "no indication that habeas corpus relief was ever intended to apply to a nonhuman animal," and our common law, which revealed no instances of nonhuman animals being permitted to bring a cause of action to "vindicate the animal's own purported rights." *Commerford I*, supra, 192 Conn. App. 45. It then discussed the social compact theory, pursuant to which "all individuals are born with certain natural rights and that people, in freely consenting to be governed, enter a social compact with their government by virtue of which they relinquish certain individual liberties in exchange for the mutual preservation of their lives, liberties, and estates." (Internal quotation marks omitted.) Id., 45–46. It explained that elephants and other nonhuman animals are "incapable of bearing duties and social responsibilities required by such social compact." Id., 46.

Next, this court turned to our statutes, particularly § 52-466,[15] which shapes the use of a writ of habeas corpus. The court noted that "§ 52-466 (a) (1) unequivocally authorizes a *person*, not an animal, to file an application for a writ of habeas corpus in the judicial district in which that *person* whose custody is in question is claimed to be illegally confined." (Emphasis in original.) Id., 47. It further stated that it "found no place in our General Statutes where the term 'person' has ever been defined as a nonhuman animal." Id. Noting recent legislative activity regarding habeas corpus, which lacked any indication that the legislature intended habeas corpus relief to apply to nonhuman animals, and the lack of case law holding that animals can possess their own legal rights, this court declined to disturb who can seek

[15] See footnote 5 of this opinion.

habeas corpus relief. It concluded that "the elephants —who are incapable of bearing legal duties, submitting to societal responsibilities, or being held legally accountable for failing to uphold those duties and responsibilities—do not have standing to file a petition for a writ of habeas corpus because they have no legally protected interest that possibly can be adversely affected." Id., 48.

The petitioner has failed entirely to present any material distinctions between *Commerford I* and the present case. The reasoning and the holding in *Commerford I* are clearly applicable to the present case, and control the resolution of this appeal. We therefore conclude that Minnie and, consequently, the petitioner, lacked standing to file a petition for a writ of habeas corpus.[16]

[16] Following oral argument before this court, the petitioner submitted a notice of supplemental authority citing *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 223 A.3d 368 (2020), stating that it is significant because the habeas court dismissed the present petition pursuant to Practice Book § 23-29 (3) prior to issuing the writ.

In *Gilchrist*, our Supreme Court clarified the proper procedure to be used by the habeas court in its preliminary consideration of a petition for a writ of habeas corpus under Practice Book §§ 23-24 and 23-29. Id., 550. It summarized: "[W]hen a petition for a writ of habeas corpus alleging a claim of illegal confinement is submitted to the court, the following procedures should be followed. First, upon receipt of a habeas petition that is submitted under oath and is compliant with the requirements of Practice Book § 23-22; see Practice Book §§ 23-22 and 23-23; the judicial authority must review the petition to determine if it is patently defective because the court lacks jurisdiction, the petition is wholly frivolous on its face, or the relief sought is unavailable. Practice Book § 23-24 (a). If it is clear that any of those defects are present, then the judicial authority should issue an order declining to issue the writ, and the office of the clerk should return the petition to the petitioner explaining that the judicial authority has declined to issue the writ pursuant to § 23-24. Practice Book § 23-24 (a) and (b). If the judicial authority does not decline to issue the writ, then it must issue the writ, the effect of which will be to require the respondent to enter an appearance in the case and to proceed in accordance with applicable law. At the time the writ is issued, the court should also take action on any request for the appointment of counsel and any application for the waiver of filing fees and costs of service. See Practice Book §§ 23-25 and 23-26. After the writ has issued, all further proceedings should continue in accordance with the procedures set forth in our rules of practice, including Practice Book § 23-29." *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 562–63.

Because of the highly unique and unusual procedural history of the present case, we decline to assign error in the procedure followed by the court. First, we note that the petitioner improperly filed its petition in the judicial

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOHN VIVO III
(AC 42909)

Bright, Moll and Bear, Js.

Syllabus

The defendant, who had been previously convicted of the crimes of murder and assault in the first degree and whose sentence was enhanced pursuant to statute (§ 53-202k) for the commission of class A and B felonies with a firearm, appealed to this court from the judgment of the trial court dismissing his motion to correct an illegal sentence. On appeal, the defendant claimed that the trial court improperly concluded that it lacked jurisdiction to consider his motion because there was evidence that, in the course of the underlying shootings, he had used a weapon that was specifically exempted from the ambit of § 53-202k, and, therefore, his sentence enhancement pursuant to that statute was illegal. *Held* that the trial court properly dismissed the defendant's motion to correct an illegal sentence; for that court to have jurisdiction over that motion after the sentence had been executed, the sentencing proceeding, and not the proceedings leading to the conviction, had to be the subject of the attack, and the defendant's claim here, in essence, that the state did not present sufficient evidence to prove that § 53-202k was applicable, did not challenge the legality of his sentence or the sentence proceeding but, rather, the evidence that underpinned his conviction, and,

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district of Tolland. The action was assigned a civil docket number in Tolland before being transferred to the appropriate judicial district. Once properly in the judicial district of Litchfield, the court held status conferences and received and heard oral argument on the petitioner's motion for order. Although that motion sought to have the court issue the writ; see Practice Book § 23-24; the court raised during oral argument the present petition's duplicity with the first petition. The petitioner's counsel did not object on the basis that consideration of that issue was improper because the court had not yet issued the writ pursuant to Practice Book § 23-24. Moreover, the record contains a status conference memorandum dated November 27, 2018, in which the petitioner argued that the present petition should not be dismissed under Practice Book § 23-29 (3).

Finally, even if we were to assign error in the procedural handling of the present action and to conclude that the court failed to issue the writ prior to its dismissal of the petition pursuant to Practice Book § 23-29, we note that the only remedy available to the petitioner, given the petitioner's lack of standing, would be for this court to remand the matter to the habeas court with direction to decline to issue the writ under Practice Book § 23-24 (a) (1) on the basis that the court lacked jurisdiction. See *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 563.

therefore, a motion to correct an illegal sentence was not the proper procedural path for the defendant to raise such a claim, as it challenged his underlying conviction.

Argued January 21—officially released May 19, 2020

Procedural History

Substitute information charging the defendant with the crimes of murder and assault in the first degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Gormley*, *J.*; verdict and judgment of guilty, and sentence enhanced for the commission of a class A, B or C felony with a firearm, from which the defendant appealed to the Supreme Court, which affirmed the judgment of the trial court; thereafter, the court, *Devlin*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

John Vivo III, self-represented, the appellant (defendant).

C. Robert Satti, Jr., supervisory assistant state's attorney, with whom, on the brief, was *John C. Smriga*, state's attorney, for the appellee (state).

Opinion

BEAR, J. The defendant, John Vivo III, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence. On appeal, the defendant claims that the court improperly concluded that it lacked jurisdiction to consider that motion. The defendant's claims in support of his position, however, challenge the validity of his conviction rather than any defect in his sentence or the sentencing proceeding. Therefore, we conclude that the court properly determined that it lacked subject matter jurisdiction to consider the defendant's motion. Accordingly, we affirm the judgment of the court.

The following facts and procedural history are relevant to this appeal. In *State* v. *Vivo*, 147 Conn. App.

414, 81 A.3d 1241 (2013), cert. denied, 314 Conn. 901, 99 A.3d 1170 (2014), cert. denied, U.S. , 135 S. Ct. 1164, 190 L. Ed. 2d 920 (2015), this court set forth some of the background relevant to the defendant's claims in this appeal. "In 1995, the defendant was found guilty by a jury of murder in violation of General Statutes § 53a-54a (a), assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and commission of a class A and class B felony with a firearm in violation of General Statutes § 53-202k.[1] The court, *Gormley*, *J.*, sentenced him to sixty years imprisonment on the murder conviction, ten years on the assault conviction, and five years on the violation of § 53-202k, all the sentences to run consecutively to each other, for a total effective sentence of seventy-five years imprisonment. [Our] Supreme Court affirmed the judgment of conviction. See *State* v. *Vivo*, 241 Conn. 665, 697 A.2d 1130 (1997).[2]

[1] General Statutes § 53-202k provides: "Any person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm, as defined in section 53a-3, except an assault weapon, as defined in section 53-202a, shall be imprisoned for a term of five years, which shall not be suspended or reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony."

General Statutes § 53-202a provides in relevant part: "As used in this section and sections 53-202b to 53-202k, inclusive: (1) 'Assault weapon' means:

"(A) (i) Any selective-fire firearm capable of fully automatic, semiautomatic or burst fire at the option of the user or any of the following specified semiautomatic firearms . . . MAC-10, MAC-11 and MAC-11 Carbine type . . . ."

We note that although the legislature has made amendments to § 53-202a since the events underlying the present appeal; see Public Acts 2013, No. 13-220, §§ 3, 4 and 21; Public Acts 2013, No. 13-3, § 25; Public Acts 2001, No. 01-130, § 1; Public Acts 1993, No. 93-306, § 1; those amendments have no bearing on this appeal.

[2] Our Supreme Court set forth the following facts underlying the defendant's conviction. "On February 23, 1994, at approximately 7:15 p.m., Yolanda Martinez and William Terron were crossing a courtyard at the Evergreen Apartments in Bridgeport when the defendant and two other persons, armed with semiautomatic weapons, ran up to them. Martinez identified the two others as Joel Rodriguez and Eric Floyd. The defendant pulled Terron near a fence where he shot Terron ten times, killing him. At the same time, Rodriguez shot Martinez in the hand and in the upper right arm, before he and

"Thereafter, the defendant filed a petition for a writ of habeas corpus alleging ineffectiveness of both his trial and appellate counsel. The habeas court, *Hon. Richard M. Rittenband*, judge trial referee, denied the habeas petition and granted certification to appeal. This court reversed the habeas judgment as to the defendant's conviction under § 53-202k, noting that § 53-202k is a sentence enhancement provision, not a separate offense. See *Vivo* v. *Commissioner of Correction*, 90 Conn. App. 167, 177, 876 A.2d 1216, cert. denied, 275 Conn. 925, 883 A.2d 1253 (2005). Accordingly, we concluded that [a]lthough the [defendant's] total effective sentence was proper, the judgment must be modified to reflect the fact that § 53-202k does not constitute a separate offense and we remanded the case with direction to vacate that conviction and to resentence the [defendant] to a total effective term of seventy-five years incarceration. . . .

"Thereafter, the self-represented defendant filed [an] amended motion to correct an illegal sentence raising three claims: (1) the seventy-five year sentence is contrary to the initial remand order of this court; (2) he is entitled to a new trial and a jury determination regarding the applicability of the § 53-202k enhancement provision; and (3) he was never resentenced as required by the remand order of this court. The trial court, *Devlin, J.*, denied the first two claims. As to the third, Judge Devlin noted that, following this court's remand in the

Floyd ran to a nearby car. The defendant then ran over to where Martinez lay on the ground and shot her in the legs three times. . . . [When the] police responded to a report of gunshots at the Evergreen Apartments . . . they found Terron, who had suffered multiple gunshot wounds to the head, chest and back and . . . pronounced [him] dead at the scene. The police also found Martinez, who had suffered multiple gunshot wounds to the lower part of her body. Martinez told Detective Donald Jacques that she and Terron had been shot by the defendant, that the defendant had an Uzi type weapon and that two other persons had been involved in the shootings. Other witnesses had heard rapid-fire gun shots during this episode. The police also found numerous nine millimeter bullet fragments at the scene." *State* v. *Vivo*, supra, 241 Conn. 667–71.

habeas action, the habeas file indicated that the habeas court, *Bryant*, *J.*, had filed its own Motion for Judgment and resentenced the defendant to a total effective sentence of seventy-five years imprisonment without, however, the defendant's presence and without anything being placed on the record. In addition, the judgment mittimus was never modified to reflect the vacated conviction under § 53-202k. Accordingly, Judge Devlin vacated the conviction under § 53-202k and resentenced the defendant as follows: sixty years imprisonment on the murder conviction, and ten years on the assault conviction enhanced to fifteen years pursuant to § 53-202k, to run consecutively to the sentence on the murder conviction, for a total effective sentence of seventy-five years imprisonment. Judge Devlin also amended the mittimus to reflect the vacated conviction." (Citation omitted; footnotes added and omitted; internal quotation marks omitted.) *State* v. *Vivo*, supra, 147 Conn. App. 416–17.

Thereafter, the defendant appealed to this court claiming that "(1) Judge Devlin abused his discretion in denying the defendant appointed counsel to pursue his motion to correct an illegal sentence; (2) Judge Devlin improperly denied the defendant's motion to correct an illegal sentence; (3) Judge Devlin abused his discretion in determining that the defendant was not entitled to a new trial and jury determination as to the applicability of § 53-202k; (4) his sentence is unconstitutional and, therefore, his incarceration is illegal; (5) his resentencing by Judge Bryant was imposed in an illegal manner; (6) his sentence under § 53-202k constituted double jeopardy; (7) Judge Devlin abused his discretion when he vacated the conviction under § 53-202k on the mittimus and sentence[d] the defendant . . . on the assault charge and imposed [five] years without due process of law; and (8) the denial of his request for appellate counsel violated his constitutional rights under the federal and state constitutions, and his rights under General Statutes § 51-296." (Internal quotation marks omit-

ted.) Id., 417–18. We concluded that the defendant's claims were without merit, and we, therefore, affirmed the court's judgment. Id., 418.

On February 10, 2015, the defendant filed another motion to correct an illegal sentence. After a hearing, the court, *Devlin*, *J.*, dismissed the motion. The defendant appealed to this court, and we affirmed the court's judgment. See *State* v. *Vivo*, 179 Conn. App. 906, 176 A.3d 1261, cert. denied, 328 Conn. 939, 184 A.3d 759, cert. denied, U.S. , 139 S. Ct. 349, 202 L. Ed. 2d 246 (2018).

On October 22, 2018, the defendant filed another motion to correct an illegal sentence claiming that he was sentenced illegally pursuant to § 53-202k. After a hearing, the court, *Devlin*, *J.*, on January 15, 2019, dismissed the motion on the ground that it lacked jurisdiction. This appeal followed.

On appeal, the defendant advances numerous claims, including that the trial court improperly concluded that it lacked jurisdiction and the alleged defect in the defendant's sentence enhancement related to his underlying conviction, and that the firearm he used is exempt from § 53-202k, making his sentence enhancement under § 53-202k illegal. The state counters, inter alia, that the defendant's claims relate to his underlying conviction, and, therefore, the court properly dismissed the motion to correct because it lacked jurisdiction. We agree with the state.

Initially, we set forth our standard of review. "The issue of whether a defendant's claim may be brought by way of a motion to correct an illegal sentence, pursuant to Practice Book § 43-22,[3] involves a determination of the trial court's subject matter jurisdiction and, as

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

such, presents a question of law over which our review is plenary." (Footnote added.) *State* v. *Abraham*, 152 Conn. App. 709, 716, 99 A.3d 1258 (2014).

"The Superior Court is a constitutional court of general jurisdiction. In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving the sentence. . . . Because it is well established that the jurisdiction of the trial court terminates once a defendant has been sentenced, a trial court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act." (Internal quotation marks omitted.) *State* v. *Robles*, 169 Conn. App. 127, 132, 150 A.3d 687 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017).

"Although the [trial] court loses jurisdiction over [a] case when [a] defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving [his] sentence . . . [Practice Book] § 43-22 embodies a common-law exception that permits the trial court to correct an illegal sentence or other illegal disposition. . . . Thus, if the defendant cannot demonstrate that his motion to correct falls within the purview of § 43-22, the court lacks jurisdiction to entertain it. . . . [I]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack. . . . [T]o invoke successfully the court's jurisdiction with respect to a claim of an illegal sentence, the focus cannot be on what occurred during the underlying conviction. . . .

"Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable. . . . [I]f a defendant's claim falls within one of these four categories the trial court has jurisdiction to modify a sentence after it has commenced. . . . If the claim is not within one of these categories, then the court must dismiss the claim for a lack of jurisdiction and not consider its merits." (Citations omitted; internal quotation marks omitted.) *State* v. *St. Louis*, 146 Conn. App. 461, 466–67, 76 A.3d 753, cert. denied, 310 Conn. 961, 82 A.3d 628 (2013).

We turn now to the defendant's claims, which can be distilled into a single claim, namely, that the court improperly concluded that it lacked jurisdiction because there was evidence that in the course of the shootings he had used a MAC-11,[4] a weapon specifically exempted from the ambit of § 53-202k, and, instead, subject to the provisions of General Statutes § 53-202j. He argues that his sentence enhancement pursuant to § 53-202k is illegal because he used a MAC-11 assault weapon in the perpetration of the crimes. We conclude that this claim challenges the correctness of the defendant's underlying criminal conviction and that it, therefore, does not fall within any of the four categories that

[4] During the defendant's underlying criminal trial, Edward Jachimowicz, a forensic scientist for the forensic science laboratory of what is now the Department of Emergency Services and Public Protection, testified that a MAC-11 is a semi-automatic firearm resembling an Uzi, chambered in nine millimeter, originally manufactured by Military Armaments Corporation but now manufactured by S.W. Daniel, Inc.

are a prerequisite for relief pursuant to Practice Book § 43-22.[5] "In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the trial leading to the conviction, must be the subject of the attack." *State* v. *Lawrence*, 281 Conn. 147, 158, 913 A.2d 428 (2007).

In reviewing the defendant's claim on appeal, our decision in *State* v. *Thompson*, 190 Conn. App. 660, 212 A.3d 263, cert. denied, 333 Conn. 906, 214 A.3d 382 (2019), serves as a useful guide. Although we note that the underlying conviction in *Thompson* was for conspiracy to commit robbery in the first degree, robbery in the first degree, and kidnapping in the first degree, and did not involve a sentence enhancement pursuant to § 53-202k as in the present case, the defendants in both cases failed to challenge their sentences or the relevant sentencing proceedings in their motions to correct an illegal sentence. Accordingly, *Thompson* is helpful in the resolution of this appeal.

In *Thompson*, the defendant, following his conviction, filed a motion to correct an illegal sentence, claiming that his sentence should be vacated because there existed no evidence to show there was a plan between him and a codefendant to support his conviction for conspiracy to commit robbery in the first degree. Id., 663. We affirmed the judgment of the trial court to dismiss the motion to correct for lack of subject matter jurisdiction. Id., 667. Specifically, we stated: "[T]he only claim before the court was whether the state had produced sufficient evidence to support the defendant's conviction for conspiracy to commit robbery in the first degree. . . . [We have] held that a claim of insufficient evidence do[es] not concern the legality of [a defendant's sentence] or the manner in which it was imposed

[5] We note that the defendant's criminal conviction pursuant to § 53-202k was reversed by this court in *Vivo* v. *Commissioner of Correction*, supra, 90 Conn. App. 177.

and therefore lies outside the court's jurisdiction in regard to a motion to correct an illegal sentence. Put differently, the defendant's motion constituted a collateral attack on his conviction and, thus, was not within the court's jurisdiction." (Citation omitted; internal quotation marks omitted.) Id., 666; see also *State* v. *Starks*, 121 Conn. App. 581, 590, 997 A.2d 546 (2010).

In the present case, the defendant essentially claims that the state did not disprove his claim, based on eyewitness testimony, that, during the shootings, he used only a MAC-11 firearm, which, pursuant to General Statutes § 53-202a, is defined as an assault weapon, and is, thereby, exempted from the ambit of § 53-202k. Similar to *Thompson*, in which the defendant did not challenge the legality of his sentence or the sentencing proceeding, the defendant's appeal in the present case attacks the evidence underpinning his conviction by claiming that the state did not offer evidence sufficient to prove that the sentence enhancement statute should apply. Thus, as the court noted in its ruling, the problem with the defendant's claim is not the potential merit of the claim but that a motion to correct an illegal sentence is not the proper procedural path for the defendant to raise such a claim because it challenges his underlying conviction. The court, therefore, properly concluded that it lacked jurisdiction to consider the defendant's motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other judges concurred.