CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ULISES ROBLES
(SC 20452)

McDonald, D'Auria, Mullins, Ecker and Seeley, Js.

Syllabus

Convicted, after a jury trial, of manslaughter in the first degree with a firearm and, after a trial to the court, of criminal possession of a firearm and illegal possession of a weapon in a motor vehicle, the defendant appealed to this court. The defendant had walked over to a parked car in which the victim was sitting in the driver's seat. While the driver's side window was down, the defendant began speaking to the victim and pulled out a handgun. The defendant then leaned into the car and fired a gunshot. The victim ultimately died from injuries she sustained as a result of a gunshot wound to her chest. During the defendant's trial, the prosecutor and defense counsel submitted a stipulation to the trial court, which indicated that the defendant previously had been convicted of two felonies unrelated to the charges in the present case. The court acknowledged that the stipulation was being admitted only for purposes of "count two," namely, the charge of criminal possession of a firearm. The court admitted the stipulation into evidence, stating that it would be a full exhibit "for purposes of the court trial," which pertained to both of the weapons charges. In addition, the state's chief medical examiner, G, testified about photographs from the victim's autopsy, which G had not performed, and about an autopsy report that G had reviewed before trial but that previously had been prepared by a former assistant medical examiner. On appeal from the judgment of conviction, *held*:

1. The defendant could not prevail on his unpreserved claim that the trial court had violated his constitutional right to confrontation by allowing G to testify about the autopsy photographs and autopsy report:

G testified, on the basis of his personal knowledge and experience, that the autopsy photographs indicated that the victim had been shot at close range, and, because this portion of G's testimony was based solely on his examination of the photographs rather than the autopsy report, and because defense counsel was afforded the opportunity to cross-examine G regarding this testimony, the admission of G's testimony relating to the autopsy photographs did not violate the defendant's right to confrontation, and, accordingly, the defendant could not establish a constitutional violation for purposes of the third prong of *State* v. *Golding* (213 Conn. 233).

Moreover, G's testimony regarding the autopsy report, in which G stated that the report specified the injuries that resulted from the path that the bullet took once it had entered the victim's body, and that the report indicated that those injuries were the sole cause of the victim's death, was harmless insofar as G's testimony regarding the cause of the victim's death had minimal impact on the jury's verdict, and, accordingly, the defendant's claim regarding G's testimony about the autopsy report failed under the fourth prong of *Golding*.

Specifically, other evidence admitted at the defendant's trial independently established that the victim had died of a gunshot wound inflicted by the defendant, including G's testimony based on the autopsy photographs and the testimony of multiple eyewitnesses who had seen the defendant, while in possession of a handgun, lean into the driver's side window of the vehicle in which the victim was sitting, heard a gunshot, and viewed the gravely wounded victim.

Furthermore, defense counsel acknowledged during closing argument that G's testimony regarding the cause of the victim's death was not particularly important and even conceded that the victim died from injuries that the defendant had inflicted, as counsel's theory of defense was that the defendant had been too intoxicated to form the intent to kill the victim and that the jury, therefore, should have found him guilty only of criminally negligent homicide.

2. The evidence was insufficient to support the defendant's conviction of illegal possession of a weapon in a motor vehicle, and, accordingly, this court reversed the defendant's conviction on that charge and remanded the case with direction to render a judgment of acquittal on that charge and for resentencing on the remaining counts:

To prove that an individual is guilty of illegal possession of a weapon in a motor vehicle, the state must prove beyond a reasonable doubt, among other elements, that he had no proper permit for the weapon that he was charged with possessing.

The stipulation that the prosecutor and defense counsel submitted to the court indicated that the defendant previously had been convicted of

two felonies, and the defendant's prior felony convictions likely would have rendered him ineligible, pursuant to statute (§§ 29-28 (b) (2) (A) and 29-30 (b)), to receive a permit or permit renewal at or around the time of the incident that formed the basis of the charges in the present case.

Nevertheless, the prosecutor presented no other proof during the presentation of evidence that the defendant did not have a proper permit when he was in possession of the weapon with which he shot the victim.

Because the prosecutor and the trial court stated during the trial that the stipulation was being admitted only for purposes of the count of the information charging the defendant with criminal possession of a firearm, and because evidence that is offered and admitted for a limited purpose cannot be used for another and totally different purpose, the trial court improperly relied on the stipulation to support its determination that the defendant could not have had a proper permit in connection with its finding of guilt on the count of the information charging the defendant with illegal possession of a weapon in a motor vehicle.

Moreover, because the stipulation was the only evidence that the defendant previously had been convicted of a felony, which was critical to the trial court's determination that the defendant had lacked a proper permit, the evidence presented was insufficient to support the defendant's conviction of illegal possession of a weapon in a motor vehicle.

Even though defense counsel stated that the stipulation was limited to the "court trial," which involved both of the weapons charges, and the trial court acknowledged, when the stipulation was admitted, that it was "going to be a full exhibit for purposes of the court trial," the foregoing references to "court trial," when viewed in context, were merely confirming the prosecutor's prior statement that the stipulation was being admitted only as to the count charging the defendant with criminal possession of a firearm, which crime specifically includes an element that the defendant have a prior felony conviction, and that the stipulation needed to be marked as a court exhibit to ensure that it was not provided to the jury, which was tasked with considering only the homicide charge.

Furthermore, the trial court's remark after the close of evidence that the stipulation was "the only evidence that was received solely for the second and third count," which pertained to both weapons charges, was not an evidentiary ruling, as the stipulation had been admitted two weeks beforehand, during the presentation of evidence, and there was no merit to the state's claim that defense counsel's failure to object when the prosecutor argued that the stipulation was relevant to the count charging the defendant with illegal possession of a weapon in a motor vehicle or when the trial court relied on the stipulation to support its finding that the defendant was guilty of that crime demonstrated that counsel intended that the stipulation would be admitted for purposes of the

count charging the defendant with illegal possession of a weapon in a motor vehicle.

In addition, when, as in the present case, a fact finder relies on evidence that was admitted, but for a purpose other than the limited purpose for which the evidence was properly introduced, a reviewing court cannot consider that evidence in determining whether the evidence was insufficient to support the defendant's conviction and must direct a judgment of acquittal if it concludes that other admitted evidence was insufficient to support the conviction.

(*Two justices concurring in part and dissenting in part in two opinions*)

Argued October 18, 2022—officially released September 19, 2023

Procedural History

Substitute information charging the defendant with the crimes of murder, criminal possession of a firearm and illegal possession of a weapon in a motor vehicle, brought to the Superior Court in the judicial district of Hartford, where the charge of murder was tried to the jury before *Graham*, *J.*; verdict of guilty of the lesser included offense of manslaughter in the first degree with a firearm; thereafter, the charges of criminal possession of a firearm and illegal possession of a weapon in a motor vehicle were tried to the court, *Graham*, *J.*; finding of guilty; judgment of guilty in accordance with the jury's verdict and the court's finding, from which the defendant appealed to this court. *Reversed in part*; *judgment directed in part*; *further proceedings*.

Julia K. Conlin, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Anthony Bochicchio*, supervisory assistant state's attorney, for the appellee (state).

Opinion

SEELEY, J. In the early morning hours of New Year's Day, 2017, the defendant, Ulises Robles, shot the victim,

Luz Rosado, from close range while she sat in her vehicle. The state charged the defendant with murder in violation of General Statutes § 53a-54a (a), criminal possession of a firearm in violation of General Statutes (Rev. to 2017) § 53a-217 (a) (1),[1] and illegal possession of a weapon in a motor vehicle in violation of General Statutes (Rev. to 2017) § 29-38 (a).[2] The defendant elected a jury trial on the murder charge and a bench trial on the charges of criminal possession of a firearm and possessing a weapon in a motor vehicle. The jury found the defendant not guilty of murder but guilty of the lesser included offense of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a. After the bench trial, the court found the defendant guilty of both criminal possession of a firearm and possessing a weapon in a motor vehicle.

The defendant appealed from the judgment of the trial court to this court pursuant to General Statutes § 51-199 (b) (3).[3] On appeal, the defendant claims that (1) the trial court violated his right to confront the witnesses against him under the sixth amendment to the United States constitution[4] by allowing Chief Medical Examiner James Gill to testify about the results of the victim's autopsy, which he had not performed himself, and (2) the evidence was insufficient to support his conviction of possessing a weapon in a motor vehicle. We disagree with the defendant's first claim and affirm

[1] Hereinafter, all references to § 53a-217 in this opinion are to the 2017 revision of the statute.

[2] Hereinafter, all references to § 29-38 in this opinion are to the 2017 revision of the statute.

[3] General Statutes § 51-199 (b) provides in relevant part: "The following matters shall be taken directly to the Supreme Court . . . (3) an appeal in any criminal action involving a conviction for a . . . felony . . . for which the maximum sentence which may be imposed exceeds twenty years . . . ."

[4] The right to confrontation guaranteed by the sixth amendment is made applicable to the states through the due process clause of the fourteenth amendment. See, e.g., *Pointer* v. *Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

the trial court's judgment as to the conviction of manslaughter in the first degree with a firearm. With respect to the defendant's second claim, we agree that the evidence was insufficient to support his conviction of possessing a weapon in a motor vehicle and, therefore, reverse the trial court's judgment as to that conviction.

The jury reasonably could have found the following relevant facts. On the evening of December 31, 2016, the defendant and two friends, Richard Colon and Jose Restrepo, were celebrating New Year's Eve. After having a few drinks at another friend's home, Colon drove the defendant and Restrepo to Lambada, a night club in Hartford. Colon drove a black Nissan Maxima. Once they arrived outside of Lambada, they stayed in the vehicle and continued drinking for a period of time. After midnight, they entered Lambada. Inside the club, the friends continued drinking, and the defendant appeared to others to be intoxicated. They stayed at the club until it closed at 3 a.m.

Colon then drove the defendant to Park Street, intending to drop him off there. When they arrived at Park Street, Colon saw a friend and pulled over to wish the friend a happy birthday. After speaking with his friend, he noticed the victim, sitting in the driver's seat of a silver Honda Accord across the street. In the passenger seat of the victim's vehicle was Nelson Ortiz. Colon walked over to the vehicle, briefly spoke to the victim, kissed her on the cheek, wished her a happy new year and told her to call him. Colon then walked away from the vehicle.

The defendant also had approached the driver's side of the vehicle and began speaking with the victim. He remained there after Colon left. While speaking to the victim, the defendant pulled out a black semiautomatic handgun and "racked" it, meaning he loaded a new

round into the chamber. Ortiz thought that the defendant was simply showing off the gun in a bragging manner.

Meanwhile, Scott Parker, a Hartford police officer on patrol in the area, was driving toward the victim's vehicle. As he approached the vehicle, he saw the defendant standing along the driver's side. Parker observed that the defendant was "animated in his gestures," but Parker could not hear what he was saying. Parker saw the defendant lean into the victim's vehicle and then heard a gunshot. At that point, Parker saw the defendant back away from the driver's side window of the vehicle holding a handgun.

Parker stopped his vehicle and ordered the defendant to drop the handgun, but the defendant continued walking toward the Nissan Maxima, which was parked in front of the victim's vehicle. The defendant entered the passenger side of the Nissan Maxima with the handgun. The defendant called to Colon, asking for the keys. When Colon refused, the defendant exited the Nissan Maxima and ran westbound on Park Street. Parker chased and ultimately apprehended the defendant a short distance away from the shooting.

After handcuffing the defendant and placing him in the custody of another police officer, Parker returned to the scene of the shooting. When he looked inside of the victim's vehicle, he saw that the victim had a gunshot wound to her chest. She was unresponsive. It was later determined that the bullet had perforated the victim's aorta, trachea and esophagus, which resulted in her death.

The defendant was charged in a substitute information with murder in violation of § 53a-54a (a) (count one), criminal possession of a firearm in violation of § 53a-217 (a) (1) (count two), and possessing a firearm in a vehicle in violation of § 29-38 (a) (count three). The murder count was tried to a jury, and the two firearm counts were tried to the court. The jury found

the defendant not guilty of murder but guilty of the lesser included offense of manslaughter in the first degree with a firearm. The trial court found the defendant guilty of both firearm counts. The court sentenced the defendant to a total effective sentence of twenty-six years of imprisonment. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that he was deprived of his sixth amendment right to confront witnesses against him when the trial court allowed Gill to testify regarding the victim's autopsy, which Gill had not performed himself but was instead performed by former assistant medical examiner Susan Williams. He contends that Gill's testimony concerning Williams' autopsy report constituted testimonial hearsay because the report was created in anticipation of trial. Accordingly, he contends, Gill's testimony was inadmissible. See *Crawford* v. *Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) ("[when] testimonial [hearsay] evidence is at issue . . . the [s]ixth [a]mendment demands what the common law required: unavailability and a prior opportunity for cross-examination"); *State* v. *Walker*, 332 Conn. 678, 689, 212 A.3d 1244 (2019) ("testimonial hearsay is admissible against a criminal defendant at trial only if the defendant had a prior opportunity for cross-examination and the witness is unavailable to testify at trial" (internal quotation marks omitted)).

The state responds that, because the defense made a tactical decision not to raise this claim at trial, the claim fails under the third prong of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). See *State* v. *Holness*, 289 Conn. 535, 543–44, 958 A.2d 754 (2008) (defendant cannot prevail under third prong of *Golding* "when . . . counsel has waived a

potential constitutional claim in the exercise of his or her professional judgment''). In the alternative, the state claims that the admission of Gill's testimony about the autopsy report was harmless beyond a reasonable doubt because it established only the cause of the victim's death, including that she was shot at close range, which was consistent with the defendant's theory that the gun accidentally discharged when he was intoxicated and showing it off to the victim. In addition, the state contends that Gill's testimony about the autopsy report was cumulative of other testimony because (1) Gill independently testified that the autopsy photographs had shown that the victim was shot at close range, and the admission of this testimony did not violate the confrontation clause; and (2) the testimony of eyewitnesses overwhelmingly corroborated Gill's testimony based on the autopsy report that the victim was shot at close range and that she died from the gunshot.[5] We agree with the state that the admission of Gill's testimony was harmless beyond a reasonable doubt, and, therefore, we need not address the state's contention that the defendant waived this claim.

The following additional facts are relevant to this claim. Before trial, the prosecutor filed a pretrial witness list that included both Gill and Williams as potential witnesses. At trial, the prosecutor called only Gill as a witness. Gill testified that Williams had performed the autopsy on the victim but that she no longer worked in his office. Gill also testified that he had reviewed Williams' autopsy report before trial.

Gill further testified that Williams' report indicated that the victim had died by a gunshot wound to her upper chest. He testified that the report indicated that

[5] The state also notes that it does not concede that an autopsy report constitutes testimonial hearsay for confrontation clause purposes under *Crawford* v. *Washington*, supra, 541 U.S. 36, but contends that we need not address this issue if it prevails on either of its other claims. We agree.

the bullet perforated the victim's aorta, trachea, and esophagus before becoming lodged in a bone in her spinal column, and that bleeding from the aorta caused cardiac tamponade, which prevented the heart from pumping and caused the victim's death. Gill explained that the injuries from the gunshot were the sole cause of the victim's death. Defense counsel did not object to any of this testimony, and neither the prosecutor nor defense counsel sought to have the autopsy report itself admitted into evidence at trial.

During Gill's testimony, the prosecutor introduced into evidence several photographs from the autopsy, with no objection by defense counsel. Gill testified that the photographs showed the presence of "stippling" on the skin around the entry wound. He explained that stippling consists of visible bumps on exposed skin caused by partially burned gunpowder grains discharged from a firearm at close range. He further testified that the stippling visible in the autopsy photographs suggested that the gun that inflicted the fatal gunshot wound was "within about six inches or so" of the victim when it was fired.

Defense counsel cross-examined Gill, utilizing and highlighting parts of the autopsy report indicating that the victim had alcohol, marijuana and phencyclidine (PCP) in her system at the time of her death, as well as questioning him with respect to the caliber of bullet that was recovered from the victim's body. There was no cross-examination about the autopsy report as it related to the cause of death or any other issues.

During closing argument, defense counsel acknowledged that the defendant had shot and killed the victim but claimed that the defendant neither had intended to cause the victim's death nor had acted recklessly in doing so. Defense counsel argued that the defendant

was, therefore, guilty only of criminally negligent homicide, not murder or manslaughter.

We conclude that (1) to the extent that the defendant challenges the admission of Gill's testimony concerning the autopsy photographs, the admission of that testimony did not violate the confrontation clause, and (2) because Gill's testimony based on the autopsy photographs, as well as other eyewitness testimony, independently established that the victim died after she was shot at close range, the admission of Gill's testimony concerning Williams' autopsy report was harmless.

With respect to the autopsy photographs, Gill testified, on the basis of his personal knowledge and expertise, that they showed stippling, which indicated that the victim had been shot at a range of approximately six inches. This portion of his testimony was based solely on his examination of the autopsy photographs, not on the autopsy report.[6] Because defense counsel could have subjected Gill's testimony about the photographs to cross-examination, we conclude that the admission of the testimony did not violate the confrontation clause.[7] See *State* v. *Lebrick*, 334 Conn. 492, 528,

[6] Specifically, Gill testified:

"[The Prosecutor]: And, showing you state's [exhibit] 32, [a photograph of the victim's wound], doctor, there's the picture of what we've just described as stippling, and would this be what you called the stippling?

"[Gill]: Correct. It extends on the neck and the chest.

"[The Prosecutor]: And what would a sample of stippling of that size tell you in [relation] to the injury?

"[Gill]: Well, the presence of the stippling and/or fouling can you give you an indication of the range of fire; how far the muzzle was from the target.

"[The Prosecutor]: And would it indicate it was close for a stippling?

"[Gill]: Yes. We would call this . . . a close range gunshot wound. When you see both the stippling and that—that sootlike fouling material, we call that close range, which means within about six inches or so from the . . . target."

[7] The defendant contends that "there is no support in the record for the notion that Gill made his own independent findings regarding the photographs." We disagree. The defendant does not claim that, as chief medical examiner, Gill did not possess the personal knowledge and expertise to interpret photographs of a gunshot wound, and our review of the transcript

223 A.3d 333 (2020) ("[when] . . . expert witnesses present their own independent judgments, rather than merely transmitting testimonial hearsay, and are then subject to cross-examination, there is no [c]onfrontation [c]lause violation" (internal quotation marks omitted)). We conclude, therefore, that this claim fails under the third prong of *Golding*.

With respect to the defendant's claim that the admission of Gill's testimony based on Williams' autopsy report violated the confrontation clause, we conclude that, even if the testimony had been improperly admitted, because Gill's testimony about the photographs constituted admissible, independent and compelling evidence that the victim died of the gunshot wound that the defendant had inflicted—and because the defense conceded as much at trial—the state has sustained its burden of demonstrating that any claimed error was harmless beyond a reasonable doubt. See, e.g., *State* v. *Campbell*, 328 Conn. 444, 512, 180 A.3d 882 (2018) ("[i]t is well established that a violation of the defendant's right to confront witnesses is subject to harmless error analysis" (internal quotation marks omitted)).[8] Moreover, multiple eyewitnesses saw the defendant lean into the driver's side window of the victim's vehicle, heard a

of the trial court proceedings satisfies us that there simply was no other basis for Gill's testimony.

[8] "When an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt. . . . [W]e must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]. . . . Whether the error was harmless depends on a number of factors, such as the importance of the evidence to the state's case, whether the evidence was cumulative of properly admitted evidence, the presence or absence of corroborating evidence, and, of course, the overall strength of the state's case." (Citation omitted; internal quotation marks omitted.) *State* v. *Culbreath*, 340 Conn. 167, 191–92, 263 A.3d 350 (2021).

gunshot and saw the gravely wounded victim. Most significant, the prosecutor introduced into evidence a written statement from Ortiz, who was sitting in the passenger side of the vehicle at the time the victim was shot. In his statement, which was read into evidence, Ortiz averred that, on the night of the shooting, he and the victim went to get gas and then for a ride. As they were driving around, they saw a couple of men near the corner of Park Street and Broad Street. The victim parked the vehicle and the two men, whom Ortiz had never seen before, approached the driver's side of the vehicle and began talking to the victim. Ortiz did not understand the entirety of the conversation because the victim and the men were speaking in English, which Ortiz did not speak. One of the men left after a minute, but the other man remained next to the vehicle. The man who remained next to the vehicle then took out a semiautomatic handgun and "racked" it. Ortiz stated that the man was not acting in a threatening manner but seemed to be bragging and showing off the handgun. After producing the gun, the man stepped in front of the vehicle for a moment and then returned to the driver's side window. At that point, Ortiz heard a gunshot and looked at the victim. He saw blood and noticed that the victim was having a hard time breathing.

In addition to Ortiz' statement, Parker, who was on patrol in the area of Park Street on the night of the shooting, testified that he saw the defendant talking with the victim and leaning into the driver's side window of her vehicle. Parker was not able to hear the conversation but thought the defendant seemed animated, as if he was arguing. As the defendant was leaning into the window, Parker heard a "bang" and stopped his cruiser. At that point, Parker saw the defendant lean back out of the window of the vehicle and noticed a black semiautomatic handgun in the defendant's hand. After apprehending the defendant, Parker returned to the vehicle

and saw that the victim had a gunshot wound to her chest and was unresponsive.

Finally, as we noted, defense counsel acknowledged during his closing argument that Gill's testimony on the cause of the victim's death was not particularly important, and he conceded that the victim died from the wound that the defendant had inflicted.[9] He argued only that the defendant was too intoxicated to form the intent to kill and that the jury should, therefore, find him guilty only of criminally negligent homicide. This argument is entirely consistent with Gill's testimony that (1) according to the autopsy report, the victim died from a single gunshot wound, and (2) based on the stippling present in the autopsy photographs, the defendant shot her at close range.

We therefore conclude that Gill's testimony that the cause of the victim's death was the gunshot had minimal impact on the jury's verdict. There simply was no genuine issue at trial concerning the cause of the victim's death or whether the defendant had shot her from close range. Instead, the primary issue that the jury had to determine, as the court indicated in its jury charge, was whether the defendant acted intentionally, with extreme indifference to human life, recklessly or with criminal negligence, an issue on which Gill's testimony was, at best, only minimally probative. Accordingly, we conclude that, even if the trial court had improperly admitted Gill's testimony based on the autopsy report, the state has met its burden of demonstrating that any error in that regard was harmless beyond a reasonable doubt and the claim, therefore, fails under the fourth prong of *Golding*.

[9] Defense counsel argued: "The seventh witness that I'm saying is not something I think you're [going to] debate much is . . . Gill. We agree that a death was caused by [a] gunshot. The state has to put on proof of death, or it wouldn't be a murder or a homicide trial, so it's necessary, but I don't find it particularly critical to your decision."

The defendant contends that, to the contrary, the issue of his proximity to the victim at the time of the shooting was in dispute and was critical to establishing his intent. He further suggests that, in the absence of Gill's testimony, the jury reasonably could have credited Colon's testimony that the defendant was across the street from the vehicle in which the victim was sitting when the gun went off. We are not persuaded. Colon did not testify that the defendant was across the street but, rather, that he was uncertain as to the defendant's precise location at the time of the shooting.[10] In contrast, Ortiz, who had no apparent motive to lie, and who defense

[10] The following colloquy occurred between the prosecutor and Colon:

"[The Prosecutor]: [I] [w]ant to clarify a few things. Let's go to when you're standing over by the twenty-four hour store, and, at that point, when you're on the same side of the street as the store, which would be on the right side of this picture.

"[Colon]: Um-hum.

"[The Prosecutor]: While you're standing there . . . before you walk across the street, do you know where the defendant was . . . ?

"[Colon]: Believe on the same side as me.

"[The Prosecutor]: Now, I'm asking if you—do you know exactly? Did you remember where he was, or [are] you guessing where he was?

"[Colon]: I'm just . . . guessing [because] that's where everybody was—went towards the store.

"[The Prosecutor]: So, when you start walking across the street, do you know where he was, or—or—

"[Colon]: I just knew . . . I left everybody behind, and I just proceeded to walk across the street.

"[The Prosecutor]: And, as you're walking across the street, is there any point where you're turning around to look if anybody's following you?

"[Colon]: No.

"[The Prosecutor]: You say you're—you went over to talk to [the victim], who you knew, right?

"[Colon]: Correct.

"[The Prosecutor]: And, while you're talking to her, are you looking around to see where—at any point to see where the defendant or [Restrepo] are?

"[Colon]: No. The only thing I looked at was to the left of me, [because] I seen the—the cop cruiser coming down.

* * *

"[The Prosecutor]: And, while you were talking to [the victim] at the car, do you have any idea where the defendant is at that point?

"[Colon]: I just knew everybody was behind me.

counsel singled out as "the most important [witness] in this case," stated unequivocally that he saw the defendant standing next to the driver's side window of the victim's vehicle when the gun went off. Parker also testified unequivocally that the defendant was leaning into the window when the gun went off. We conclude, therefore, that it is not reasonably possible that Gill's testimony about the autopsy report could have influenced the judgment of the jury as to any disputed issue bearing on any element of the crime.

II

The defendant next claims that the evidence was insufficient to support his conviction of possessing a weapon in a motor vehicle in violation of § 29-38 (a)[11] (count three). Specifically, the defendant contends that there was insufficient evidence to support the trial court's finding that he did not possess a proper permit for the gun on the following two grounds: (1) the trial court could not rely on the parties' stipulation that the defendant had been convicted of a felony to support its finding that he could not have had a proper permit for purposes of count three, charging him with violating § 29-38, because the stipulation was admitted exclusively for purposes of count two, charging him with criminal possession of a firearm in violation of § 53a-

"[The Prosecutor]: You knew they were behind you, but do you know where he went?

"[Colon]: No, I wasn't looking behind me."

[11] General Statutes (Rev. to 2017) § 29-38 (a) provides in relevant part: "Any person who knowingly has, in any vehicle owned, operated or occupied by such person, any weapon, any pistol or revolver for which a proper permit has not been issued as provided in section 29-28 or any machine gun which has not been registered as required by section 53-202, shall be guilty of a class D felony, and the presence of any such weapon, pistol or revolver, or machine gun in any vehicle shall be prima facie evidence of a violation of this section by the owner, operator and each occupant thereof. . . ."

217 (a) (1),[12] and (2) even if the trial court properly relied on the stipulation, it improperly took judicial notice of General Statutes §§ 29-28 and 29-30[13] to support its determination that the defendant could not have had a proper permit for the gun because the prosecutor did not ask the court to take judicial notice of those statutes during its presentation of evidence.[14] We agree with the defendant that the trial court improperly relied on the stipulation for purposes of count three. Because the stipulation was the only evidence that the defendant had been convicted of a felony, which was critical to the trial court's determination that the defendant lacked a proper permit for the gun, which, in turn, was an element of § 29-38, we conclude that there was insuffi-

[12] General Statutes (Rev. to 2017) § 53a-217 (a) provides in relevant part: "A person is guilty of criminal possession of a firearm . . . when such person possesses a firearm . . . and (1) has been convicted of (A) a felony committed prior to, on or after October 1, 2013 . . . ."

[13] General Statutes § 29-30 provides in relevant part: "(b) A local permit originally issued before October 1, 2001, whether for the sale at retail of pistols and revolvers or for the carrying of pistols and revolvers, shall expire five years after the date it becomes effective and each renewal of such permit shall expire five years after the expiration date of the permit being renewed. On and after October 1, 2001, no local permit for the carrying of pistols and revolvers shall be renewed. . . .

"(c) A state permit originally issued under the provisions of section 29-28 for the carrying of pistols and revolvers shall expire five years after the date such permit becomes effective and each renewal of such permit shall expire five years after the expiration date of the state permit being renewed and such renewal shall not be contingent on the renewal or issuance of a local permit. A temporary state permit issued for the carrying of pistols and revolvers shall expire sixty days after the date it becomes effective, and may not be renewed. . . ."

Although § 29-30 has been amended since the events underlying the present case; see, e.g., Public Acts 2023, No. 23-73, § 1; Public Acts 2022, No. 22-102, § 5; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 29-30.

[14] The defendant concedes that he did not preserve this claim at trial and seeks review under *Golding*. See, e.g., *State* v. *Padua*, 273 Conn. 138, 177 n.44, 869 A.2d 192 (2005) ("any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of *Golding*" (internal quotation marks omitted)). The state makes no claim that the issue is unreviewable.

cient evidence to support the defendant's conviction under that statute.

The following facts are relevant to our resolution of this claim. As we previously indicated, the defendant elected a bench trial on count two, charging him with criminal possession of a firearm in violation of § 53a-217 (a) (1), and count three, possessing a weapon in a motor vehicle in violation of § 29-38 (a). The parties submitted a stipulation to the trial court, stating: "The [s]tate and [d]efense stipulate to the fact that prior to January 1, 2017, the [d]efendant had been convicted of a felony, to wit: (1) On January 4, 2006, in the Superior Court, [g]eographical [a]rea [number fourteen], [the defendant] was convicted of [illegal possession of a] [w]eapon in a [m]otor [v]ehicle, in violation of . . . § 29-38. (2) On December 5, 2006, in the Superior Court, [g]eographical [a]rea [number fourteen], [the defendant] was convicted of [b]urglary in the [t]hird [d]egree, in violation of [General Statutes §] 53a-103." At the time the stipulation was submitted to the court at trial, the prosecutor stated that the stipulation was being admitted only for purposes of the second count. Defense counsel then remarked that "this stipulation is limited to the court trial," and the parties agreed that it should be marked as a court exhibit and should not be submitted to the jury. The trial court acknowledged twice that the stipulation was being admitted only for purposes of count two and admitted it into evidence, stating that "[i]t's going to be a full exhibit for purposes of the court trial . . . ."[15] The state presented no other evidence at

[15] The following colloquy occurred at trial:

"[The Prosecutor]: The state prepared, and both the state and defense signed, a stipulation regarding the prior felony *as it applies to the second count* that will go to the court, and we'd have—I guess I would prefer that be a court exhibit. [T]his way, we know it won't end up with the jury.

"The Court: Yeah, but some court exhibits do go to the jury, so—

"[Defense Counsel]: Well, it's—this stipulation is limited to the court trial.

"The Court: *Stipulation is limited to count two*, which is not being submitted to the jury. Yeah, so—and that's—do you have it? Has it been filed yet?

trial that would support a finding that the defendant lacked a proper permit for a firearm.

Two weeks after the stipulation was submitted as an exhibit, one day after the close of evidence and immediately before the prosecutor's closing argument, the trial court stated: "[T]he only evidence that was received solely for the second *and third count* was the stipulation. There was no testimony taken outside of the jury's presence. So, with that in mind, I'm going to have the state go ahead and make argument with regard to [count] two and count three to the court." (Emphasis added.)

With respect to count three, the prosecutor argued: "As far as the [charge of possessing a] weapon in a motor vehicle, I would note that [the defendant] mentioned having the gun at the club. He had to make it from the club to Park Street in a motor vehicle. He then jumps into another motor vehicle, potentially still with that gun, or still with that gun according to Officer Parker. So, I think, really, we don't know if either count is necessarily in question. I will also note that there's no limitation as to barrel length of the gun, [as] charged in the second count, nor, do I believe, in the third count."

The court then engaged in the following colloquy with the prosecutor:

"The Court: All right. Let me make inquiry with regard to the carrying the weapon in the motor vehicle

"[The Prosecutor]: I just—it's on the clerk's desk, Your Honor.

"The Court: All right. And it's signed by both counsel, I take it?

"[The Prosecutor]: Yes.

"[Defense Counsel]: Yes.

"The Court: All right. So, that'll *be admitted as evidence . . . as to count two*, which is being submitted to the [court] only, and I think you may want to put two stickers on, Madame Clerk. One marking it as a court [exhibit]. It's going to be a full exhibit for purposes of the court trial . . . ." (Emphasis added.)

[charge]. There is a fourth . . . element that the defendant had no permit for the pistol.

"[The Prosecutor]: Sure, Your Honor. He's a convicted felon, and he's not capable of holding a permit.

"The Court: And you're referring to state statute?

"[The Prosecutor]: I thank Your Honor for taking judicial notice of that.

"The Court: Yeah, I—and I don't think I actually need to take judicial notice of the statute, which—

"[The Prosecutor]: No—no.

"The Court: —[T]he evidence is closed already, so it might be a little late for that, but yes, sir . . . ."

The next day, after the jury returned its verdict of guilty on the charge of manslaughter in the first degree with a firearm, the trial court found the defendant guilty on counts two and three. The trial court explained: "As to count three, [possessing a] weapon in a motor vehicle, the court finds that the state has proven the elements of that offense beyond a reasonable doubt. The defendant was at the place, date, and time alleged in count three of the information, occupying a Nissan Maxima, and, at that time, he had in his possession a pistol. He knew he had the pistol while he was in the vehicle. As a convicted felon since 2006, he had no permit for the pistol. [He was] ineligible for such under . . . [§ 29-28 (b) (2) (A)], and any permit he might have held before 2006 would have expired by the passage of time under . . . [§ 29-30 (b) and (c)]. Therefore, at the time the defendant possessed the weapon in the vehicle, he had no permit.

"I further find that, at the time the defendant possessed the weapon in the vehicle, which was shortly after the shot was fired, he was then the sole occupant

of the vehicle. Therefore, I find the defendant guilty as to count three."

The standard of review we apply to a claim of insufficient evidence is well established. Our analysis proceeds in two parts: "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether [on] the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"[The finder of fact] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the [finder of fact] to conclude that a basic fact or an inferred fact is true, the [finder of fact] is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Campbell*, supra, 328 Conn. 503–504.

In addition, and of particular relevance to the present case, we repeatedly have emphasized that "[e]vidence [that] is offered and admitted for a limited purpose only . . . cannot be used for another and totally different purpose." (Emphasis omitted; internal quotation marks omitted.) *Curran* v. *Kroll*, 303 Conn. 845, 864, 37 A.3d 700 (2012); see *Smith* v. *Greenwich*, 278 Conn. 428, 451, 899 A.2d 563 (2006) ("Evidence admissible for one purpose but not for another may nevertheless be admitted. . . . The court should, however, caution the jury . . . about the limited purpose of the exhibit." (Internal

quotation marks omitted.)); *Fair Haven & Westville Railroad Co.* v. *New Haven*, 77 Conn. 667, 674, 60 A. 651 (1905) (taking note of evidentiary principle that "forbids evidence offered and admitted . . . for a limited purpose, and facts found [in light of] such evidence, to be used for another and totally different purpose"), aff'd, 203 U.S. 379, 27 S. Ct. 74, 51 L. Ed. 237 (1906); *State* v. *Knox*, 201 Conn. App. 457, 472, 242 A.3d 1039 (2020) (when evidence was admitted exclusively for purposes of one particular count, jury could not rely on evidence to support finding that state had established element of crime charged in another count), cert. denied, 336 Conn. 905, 244 A.3d 146 (2021), and cert. denied, 336 Conn. 906, 243 A.3d 1180 (2021); see also Conn. Code Evid. § 1-4 ("[e]vidence that is admissible . . . for one purpose but not for another, is admissible . . . *for that purpose*" (emphasis added)); 1 R. Mosteller et al., McCormick on Evidence (8th Ed. 2020) § 59, pp. 481–83 (when evidence is admitted for limited purposes, trial court must instruct jury that it can consider evidence only for allowable purpose); Connecticut Criminal Jury Instructions 2.6-8, available at http://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited September 8, 2023) ("[a]ny testimony or evidence which [the trial court] identified as being limited to a purpose or a defendant, [the jury] will consider only as it relates to the limits for which it was allowed, and [the jury] shall not consider such testimony and evidence in finding any other facts as to any other issue or defendant").

Section 29-38 (a) provides in relevant part: "Any person who knowingly has, in any vehicle owned, operated or occupied by such person, any weapon, any pistol or revolver for which a proper permit has not been issued as provided in section 29-28 . . . shall be guilty of a class D felony . . . ." To prove a violation of § 29-38 (a), "the state must prove the following elements: (1) that the defendant owned, operated or occupied the

vehicle; (2) that he had a weapon in the vehicle; (3) that he knew the weapon was in the vehicle; and (4) that he had no [proper] permit or registration for the weapon." *State* v. *Delossantos*, 211 Conn. 258, 273, 559 A.2d 164, cert denied, 493 U.S. 866, 110 S. Ct. 188, 107 L. Ed. 2d 142 (1989).

We agree with the defendant that the evidence in the present case was insufficient to support a finding that he had no proper permit for the gun. As we previously indicated, the prosecutor and the trial court stated that the stipulation that the defendant had been convicted of two felonies in 2006 was being admitted only for purposes of count two, charging the defendant with criminal possession of a firearm, and, therefore, the stipulation was not before the court for purposes of count three, charging the defendant with possessing a weapon in a motor vehicle.[16] As we also have previously indicated, "[e]vidence [that] is offered and admitted for a limited purpose only . . . cannot be used for another and totally different purpose." (Emphasis omitted; internal quotation marks omitted.) *Curran* v. *Kroll*, supra, 303 Conn. 864. Accordingly, we conclude that the trial court improperly relied on the stipulation—which was the *only* evidence that would support a finding that the defendant had been convicted of a felony—to support its finding that the defendant could not have had a proper permit for the gun, which is a required element of § 29-38 (a).[17]

[16] We note, in this regard, that § 53a-217 (a) provides in relevant part: "A person is guilty of criminal possession of a firearm . . . when such person possesses a firearm . . . and (1) has been convicted of (A) a felony committed prior to, on or after October 1, 2013 . . . ."

Thus, a felony conviction is an *element* of the offense of criminal possession of a firearm, unlike the offense of possessing a weapon in a vehicle in violation of § 29-38 (a), to which the existence of a felony conviction has a far less obvious and direct connection. This might explain why the parties chose to limit the use of the stipulation that the defendant had committed two felonies to establishing the elements of § 53a-217 (a) (1) (A).

[17] In light of this conclusion, we need not address the defendant's claim that the trial court improperly took judicial notice of §§ 29-28 (b) (2) (A)

In support of its argument to the contrary, the state notes that, although the prosecutor stated that "both the state and [the] defense signed a stipulation regarding the prior felony as it applies to the second count," and although the trial court also acknowledged twice that the stipulation was being admitted only for purposes of count two, defense counsel stated that "this stipulation is limited *to the court trial*," which included both counts two and three. (Emphasis added.) The state further points out that the trial court stated at the time that the stipulation was admitted that it was "going to be a full exhibit for purposes of the court trial" and, two weeks later, after the close of evidence, that "the only evidence that was received solely for the second *and third count* was the stipulation." (Emphasis added.) The state contends that these remarks establish that the parties intended, and that the trial court found, that the stipulation was being admitted for purposes of both count two and count three. The state further contends that the court's finding is reviewable only for clear error. See, e.g., *WiFiLand, LLP* v. *Hudson*, 153 Conn. App. 87, 99–100, 100 A.3d 450 (2014) ("We review the court's determination of the parties' intent, when the language

and 29-30 (b) to support its finding that he violated § 29-38 (a) because the state did not refer to the former two statutes during its presentation of evidence. We take this opportunity, however, to caution the state that it would have been the better practice to stipulate that the defendant did not have a permit for the gun when the shooting occurred or to present direct evidence to that effect, rather than to rely on the following chain of inferences: (1) the defendant was convicted of felonies in 2006; (2) therefore, he could not have obtained a proper permit for a gun thereafter under § 29-28 (b) (2) (A); (3) therefore, any proper permit that he had would have expired by 2017, when the shooting occurred, under § 29-30 (b); and (4) therefore, he had no proper permit and violated § 29-38 (a). Although it seems highly unlikely that the defendant could have had a proper permit for the gun in 2017 under these circumstances, it is not entirely clear to us that it was theoretically *impossible* for him to have possessed such a permit. For example, the parties did not stipulate that the defendant had not received pardons from the Board of Pardons and Parole for his 2006 felony convictions.

of the stipulation is ambiguous, as we would review a factual conclusion. . . . We will uphold the court's factual findings unless those findings are clearly erroneous." (Internal quotation marks omitted.)).

We are not persuaded by the state's argument. Rather, we conclude that, when the crucial, initial references to the "court trial" are considered in context, it is clear that the comments made by defense counsel and the court were confirming the prosecutor's statement that the stipulation was being admitted only as to count two, to establish the fact that the defendant had a prior felony conviction to establish that element of the criminal possession count and, therefore, needed to be marked as a court exhibit to ensure that it was not provided to the jury. With respect to the court's remark after the close of evidence that the stipulation was "the only evidence that was received solely for the second *and third* count," that remark manifestly was not an evidentiary ruling, as the evidence had been admitted two weeks earlier. (Emphasis added.) Rather, it appears to be an imprecise way to state that the stipulation was the only evidence presented exclusively to the trial court. Alternatively, this statement may have been the first indication that the trial court was laboring under the misapprehension that the stipulation had been admitted for purposes of count three, in which case the court's understanding was clearly erroneous because there is nothing in the record to support it.[18] See, e.g., *O'Connor* v. *Larocque*, 302 Conn. 562, 574–75, 31 A.3d 1 (2011) ("[a] finding of fact is clearly erroneous when there is no evidence in the record to support it" (internal quotation marks omitted)).

[18] We assume, without deciding, for purposes of this conclusion, that the state is correct that the *purpose* for which the stipulation was introduced, that is, whether it was introduced only for purposes of count two, or for purposes of both count two and count three, as distinct from the *substantive meaning* of the stipulation, is a question of fact subject to clearly erroneous review.

The state also contends that the fact that defense counsel did not object when the prosecutor argued that the stipulation was relevant to count three or when the trial court relied on the stipulation to support its ruling that the defendant had violated § 29-38 (a) shows that defense counsel intended that the stipulation would be admitted for purposes of both count two and count three. We are not persuaded. As the trial court itself observed, the evidentiary record was closed when the prosecutor first relied on the stipulation with respect to count three. Defense counsel did not correct the prosecutor's misstatement of the record—perhaps due to oversight, perhaps because a misstatement by opposing counsel regarding the state of the record required no response, perhaps for another reason—but counsel certainly did not express agreement, and we are aware of no principle of law permitting an alteration of the evidentiary record, on the basis of the failure to object to an opposing lawyer's misstatement during closing argument. The stipulation had been admitted into evidence only as to count two during the evidentiary phase of the trial, and nothing that occurred during closing arguments changed that fact.[19] In any event, we cannot conclude that this conduct nullifies the clearly stated intent of the parties at the time of the admission of the stipulation that it was being admitted only for purposes of count two.

Justice Mullins contends, in his concurring and dissenting opinion,[20] that, properly understood, the defen-

[19] Justice Mullins, in his concurring and dissenting opinion, states that "it is lost on [him] how, on direct appeal, this purported oversight is or should somehow be treated differently from any other unpreserved evidentiary claim." As we explain subsequently in this opinion, the defendant has raised an insufficiency claim, not, as Justice Mullins contends, an evidentiary claim. As we previously explained, unpreserved insufficiency of the evidence claims are reviewable under *Golding*. See footnote 14 of this opinion. Thus, the fact that defense counsel's failure to object to the trial court's reliance on evidence that had not been admitted during trial for that particular purpose may have been the result of an oversight does not preclude review of the defendant's claim.

[20] Hereinafter, we refer to Justice Mullins as the concurring and dis-

dant's claim that the trial court could not consider the stipulation for purposes of count three constitutes an unpreserved claim of evidentiary error, not an insufficiency of the evidence claim. Accordingly, he contends that, even if the trial court improperly considered the stipulation for purposes of count three, any such error would require a new trial and would not necessitate an acquittal.[21] This argument misunderstands the nature of the claim of error. Contrary to the concurring and dissenting justice's contention, the issue is not whether the trial court *improperly admitted* the stipulation for purposes of count three. The issue, rather, is whether the court *improperly used* evidence that was properly admitted in order to support a different purpose for which the evidence was not admitted. The trial court did not admit the stipulation for purposes of count three *at all* because it was never asked to do so.

Far from a "meaningless distinction," as characterized by the concurring and dissenting justice, there is a world of difference between a claim that a trial court erroneously admitted evidence and a claim that the decision maker misused evidence, i.e., that there was insufficient evidence to sustain a conviction except by the decision maker's use of evidence that was off limits for that purpose. If evidence offered by the state is admitted over an objection and is sufficient to establish the point for which it was admitted, the state is entitled to rely on the ruling and has no obligation to present additional, cumulative evidence on that point. See, e.g., *State* v. *Gray*, 200 Conn. 523, 538, 512 A.2d 217, cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986). If the trial court's evidentiary ruling is overturned on appeal, it would be unfair not to allow the

senting justice.

[21] The state has made no such claim but implicitly concedes that, if the stipulation was not admitted for purposes of count three, the evidence would be insufficient to support the defendant's conviction under that count.

state an opportunity to present other evidence in support of the disputed point. No such considerations of reliance and fairness justify a second bite at the apple when, as in the present case, the state simply failed to present sufficient evidence in support of a required element of an offense at trial. See *State* v. *Kareski*, 137 Ohio St. 3d 92, 98, 998 N.E.2d 410 (2013) (court considered "unavailing any claim by the state that it relied on the trial court's taking of judicial notice [of fact establishing element of offense, and any] concern about forcing the state to offer cumulative evidence on every element rings hollow when the state offered" no evidence in support of element).

Moreover, to conclude that the state is entitled to a second bite at the apple when it had failed to present sufficient evidence in support of a required element at trial but when the fact finder has nevertheless found that the element was satisfied by using evidence that was not admitted or was not admitted for the purpose for which it was used, would almost certainly violate the double jeopardy clause of the fifth amendment to the United States constitution. See, e.g., *State* v. *Colton*, 234 Conn. 683, 691–92, 663 A.2d 339 (1995) ("[o]rdinarily, the [d]ouble [j]eopardy [c]lause imposes no limitation [on] the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of insufficiency of the evidence" (internal quotation marks omitted)), cert. denied, 516 U.S. 1140, 116 S. Ct. 972, 133 L. Ed. 2d 892 (1996). The state's failure to present sufficient evidence at trial, unlike the trial court's improper admission of evidence at trial, is not a trial error for double jeopardy purposes, and, therefore, the double jeopardy clause bars retrial. See *Burks* v. *United States*, 437 U.S. 1, 15, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) (for double jeopardy purposes, "reversal for trial error, as distinguished from eviden-

tiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case''); see also, e.g., *State* v. *Kareski*, supra, 137 Ohio St. 3d 98–99 (when state presented no evidence to support required element of offense at trial but trial court improperly took judicial notice of fact that supported required element, evidence was insufficient, trial court's improper taking of judicial notice did not convert state's failure to prove case into trial error and double jeopardy clause barred retrial).[22] Accordingly, in determining whether a remand for a new trial would result in a double jeopardy violation, the focus should be on the sufficiency of the evidence *presented by the state*, including any evidence that the trial court erroneously admitted under the rules of evidence, not on the sufficiency of the evidence *used by the fact finder*, including evidence that was not admitted at all or that was not admitted for the purpose for which it was used.[23]

[22] The court in *Kareski* expressly distinguished evidence that was improperly admitted at trial, which the reviewing court may consider when determining the sufficiency of the evidence, and evidence that was not admitted at trial but was nevertheless used by the trial court, which the reviewing court cannot consider. *State* v. *Kareski*, supra, 137 Ohio St. 3d 98–99.

[23] The concurring and dissenting justice states that we have made ''a meaningless distinction between the admission of the stipulation into evidence for count three and the trial court's consideration of the stipulation for purposes of count three. Such a distinction is irrelevant. Whether we call it improper admission or improper use or consideration, the error is an evidentiary or trial error, not unlike any other claim that a fact finder considered evidence for one count that it should not have.'' (Footnote omitted.) The logical extension of this argument is that, whenever a trial court has used information that was not admitted as evidence at trial to reach its decision—for example, when a trial court conducts its own independent investigation of the facts after the close of evidence—the information was, for all intents and purposes, admitted as evidence, albeit improperly. Thus, according to the concurring and dissenting justice, if the evidence presented by the state was insufficient without the supplemental information obtained by the trial court after the close of evidence, the remedy would be a remand for a new trial, whereas, if the court had *not* conducted an improper investigation, the remedy would be an acquittal. We cannot agree with such an untenable proposition. A factual investigation that is beyond the scope of

Thus, when a trial court improperly considers evidence that was not admitted at trial for the relevant purpose, or that was not admitted at all, the reviewing court applies an insufficiency analysis based only on the evidence that was actually admitted and directs a judgment of acquittal if it concludes that the evidence was insufficient. See, e.g., *State* v. *Knox*, supra, 201 Conn. App. 473–74 ("Given the state's agreement to use the defendant's prior felony conviction only for a limited purpose, we reject its efforts to now apply that evidence to the tampering with physical evidence charge. We conclude, therefore, that the state presented insufficient evidence regarding the defendant's intent when he departed from the scene of the shooting. The evidence regarding his prior felony conviction could not be used to establish the element of intent in [connection with] the tampering with physical evidence charge. For these reasons, we conclude that no reasonable trier of fact could have found the defendant guilty of this charge, and the trial court properly granted the defendant's motion for judgment of acquittal as to the charge of tampering with physical evidence." (Footnote omitted.)); *Olivier* v. *Fraenkel Co.*, Docket No. 2006 CA 1501, 2007 WL 1300930, *2 (La. App. May 4, 2007) (trial court should not have considered documents that were not introduced into evidence at trial, and reviewing court could not consider them on appeal); *Hawes* v. *Downing Health Technologies, LLC*, Docket No. CV-16-857599, 2022 WL 1573737, *6 (Ohio App. May 19, 2022) ("[Certain documents] were not admitted, or even offered, at trial and should not have been considered by the trial court in rendering its decision. Consequently, in evaluating any of [the] assignments of error that [require] us to examine the evidence presented with regard to a claim, we must consider only whether the

the trial court's powers cannot convert the state's failure to prove its case into a trial error for double jeopardy purposes.

actual admitted evidence was sufficient to meet [the plaintiff's] burden of proof without relying [on] the [unadmitted evidence] cited by the trial court. If the trial court considered evidence not admitted at trial, we must determine whether the trial court could have made the same decision without the evidence not admitted at trial."), appeal denied, 169 Ohio St. 3d 1502, 207 N.E.3d 839 (2023); *State* v. *Kareski*, supra, 137 Ohio St. 3d 98–99 (when state presented no evidence to support required element of offense at trial but trial court improperly took judicial notice of fact that would support required element, reviewing court could not consider that fact when conducting sufficiency analysis, and acquittal was required because evidence was insufficient); see also *McDaniel* v. *Brown*, 558 U.S. 120, 131, 130 S. Ct. 665, 175 L. Ed. 2d 582 (2010) (when determining whether evidence was sufficient to sustain conviction, "a reviewing court must consider all of the evidence *admitted by the trial court*, regardless of whether that evidence was admitted erroneously" (emphasis added; internal quotation marks omitted)); *Dixon* v. *von Blanckensee*, 994 F.3d 95, 103 (2d Cir. 2021) ("federal appellate courts will not consider . . . evidence [that is] not part of the trial record" (internal quotation marks omitted)); *State* v. *Edwards*, 314 Conn. 465, 478, 102 A.3d 52 (2014) ("we cannot consider evidence not available to the trial court to find adjudicative facts for the first time on appeal"); *State* v. *Morelli*, 293 Conn. 147, 153, 976 A.2d 678 (2009) ("a claim of insufficiency of the evidence must be tested by reviewing no less than, *and no more than, the evidence introduced at trial*" (emphasis added; internal quotation marks omitted)).[24] Indeed, the concurring and dis-

[24] We agree, of course, with the concurring and dissenting justice that a determination that the fact finder has improperly considered evidence that was not admitted at trial for the purpose for which the fact finder used it is subject to harmless error analysis. See, e.g., *Access Agency, Inc.* v. *Second Consolidated Blimpie Connecticut Realty, Inc.*, 174 Conn. App. 218, 229, 165 A.3d 174 (2017) (although trial court improperly considered evidence

senting justice has not cited, and our research has not revealed, a single case in which a reviewing court conducting an insufficiency analysis has considered evidence that was not admitted at trial or that was admitted only for a purpose other than the purpose for which it was used.

To the extent that the concurring and dissenting justice contends that, whenever a trial court in a bench trial uses evidence that was clearly admitted for a limited, different purpose, it is implied that the trial court admitted the evidence for that purpose, albeit improperly, we disagree. First, we are aware of no authority for the proposition that a trial court can, sua sponte, admit evidence, or expand the limited purpose for which evidence was admitted, after the close of evidence.[25] Sec-

for purpose for which it was not admitted, error was harmless because other evidence was sufficient to support court's factual finding); *Stohlts* v. *Gilkinson*, 87 Conn. App. 634, 650, 867 A.2d 860 ("error was harmless because, even without [the evidence that was considered for a different purpose than the limited purpose for which it was admitted], there was sufficient evidence for the court to find for the plaintiffs"), cert. denied, 273 Conn. 930, 873 A.2d 1000 (2005). Thus, in the present case, if there had been evidence other than the stipulation that would have adequately supported a finding that the defendant previously had been convicted of the two felonies, the trial court's use of the stipulation to support that finding would have been harmless. This is because it is *the state's failure to prove its case* that bars retrial under the double jeopardy clause, not the fact finder's improper use of evidence for a purpose other than the one for which it was admitted. It is lost on us why the concurring and dissenting justice believes that these cases support his view that a reviewing court should consider evidence that was improperly used for a purpose for which it was not admitted in determining whether the evidence was sufficient and, if the court concludes that the evidence was insufficient without the improperly used evidence, should remand the case to the trial court for a new trial.

[25] Presumably, the concurring and dissenting justice will respond to this observation by agreeing that the trial court has no such power and arguing that this is why the trial court's admission of evidence, or its expansion of the limited purpose for which evidence has been admitted, after the evidence has closed, constitutes an *improper evidentiary ruling*. Unlike the issuance of evidentiary rulings during trial, however, which is in the trial court's authority, even when the court improperly exercises that authority, the sua sponte issuance of evidentiary rulings after the close of evidence is simply

ond, as we previously explained, the constitutionality of allowing a retrial when the state has failed to present adequate evidence at trial to support a required element of an offense but when the trial court has incorrectly concluded, sua sponte, that evidence that was admitted exclusively for another purpose may be admitted to support that element, would be highly questionable under the double jeopardy clause.

Thus, we are not persuaded by the concurring and dissenting justice's attempt to distinguish *State* v. *Knox*, supra, 201 Conn. App. 457, on the ground that the trial court in that case instructed the jury that it could not use certain evidence that was admitted for a limited purpose for any other purpose; id., 472; whereas, in the present case, the trial court actually used the stipulation to support its finding of guilt on count three. If evidence was not admitted at trial, or if evidence was used for a purpose other than the limited purpose for which it was admitted, a reviewing court cannot consider the evidence as part its insufficiency analysis, regardless of whether the fact finder used it.

In reaching this conclusion, we recognize that, if a trial court failed to instruct the jury that evidence that has been admitted for a limited purpose can be used only for that purpose, that would be the effective equivalent of improperly admitting the evidence for any purpose on which it is probative. In that case, a reviewing court could consider the improperly admitted evidence as part of its sufficiency analysis. In the present case, however, we presume that the trial court knew that evidence admitted for a limited purpose is not admitted for a different purpose. See, e.g., *State* v. *Reynolds*, 264 Conn. 1, 29 n.21, 836 A.2d 224 (2003) ("[j]udges are presumed to know the law" (internal quotation marks

beyond the trial court's powers. At the very least, we have found no authority to suggest otherwise.

omitted)), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). The record also clearly establishes that the prosecutor presented the stipulation, and the trial court admitted it, only for purposes of count two. Thus, the fact that the court relied on the stipulation for purposes of count three does not mean that it improperly *admitted* the stipulation for that purpose but, rather, that it improperly *used* the stipulation for that purpose. Accordingly, we conclude that the evidence was insufficient to support the defendant's conviction of possessing a weapon in a vehicle in violation of § 29-38 (a), and the defendant, therefore, must be acquitted on that charge.

The judgment is reversed with respect to the defendant's conviction of possessing a weapon in a vehicle in violation of § 29-38 (a) and the case is remanded to the trial court with direction to render a judgment of acquittal on that charge only and to resentence the defendant on the remaining charges; the judgment is affirmed in all other respects.

In this opinion McDONALD and ECKER, Js., concurred.

D'AURIA, J., concurring in part and dissenting in part. I agree with part I of the majority opinion but respectfully dissent from part II. My dissent from part II of the majority opinion is based on my agreement with two parts of Justice Mullins' concurring and dissenting opinion. First, I agree with Justice Mullins that the record fairly reflects the parties' intent to submit the stipulation in relation to both counts two and three and that the trial court in fact admitted it for those purposes. Second, I agree with Justice Mullins that the trial court properly took judicial notice of General Statutes §§ 29-28 and 29-30 to support its determination that, in light of the parties' stipulation that the defendant, Ulises Robles,

had been convicted of two felonies in 2006, he could not have had a proper permit for the gun that the trial court found he possessed while occupying a motor vehicle during the incident that led to his conviction. I therefore conclude that there was sufficient evidence to support the defendant's conviction of possession of a weapon in a motor vehicle in violation of General Statutes (Rev. to 2017) § 29-38 (a). I would affirm the trial court's judgment in all respects and not reach the other issues discussed in part II of both the majority opinion and Justice Mullins' concurring and dissenting opinion.

MULLINS, J., concurring in part and dissenting in part. I agree with part I of the majority opinion, but I respectfully disagree with part II. As the United States Supreme Court has explained, a trial court commits a " 'trial error' " when it "err[s] in admitting a particular piece of evidence, and without it there was insufficient evidence to support a judgment of conviction. But clearly with that evidence, there was enough to support the . . . [the finding or] verdict . . . ." (Emphasis omitted.) *Lockhart* v. *Nelson*, 488 U.S. 33, 40, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). Under those circumstances, double jeopardy does not bar retrial because there is, in fact, sufficient evidence to support the finding or verdict, but the defendant has been convicted in a judicial process that was defective. See id., 34, 40–41. Consistent therewith, a trial error is subject to harmless error review, pursuant to which the reviewing court assesses how the error affected the finding or verdict. See, e.g., *United States* v. *Quinn*, 901 F.2d 522, 526, 528–29, 531 (6th Cir. 1990) (applying harmless error review to claim that trial court improperly admitted testimony of witness from suppression hearing but considering that same improperly admitted testimony in sufficiency of evidence analysis).

On the other hand, in deciding a sufficiency of the evidence claim, the reviewing court does not assess

how the error affected the finding or verdict but, rather, considers all of the evidence that was considered by the fact finder, both properly and improperly admitted evidence, and determines whether there was sufficient evidence to support the finding or verdict. See, e.g., *State* v. *Gray*, 200 Conn. 523, 538–40, 512 A.2d 217, cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986). If the evidence was not sufficient, retrial is barred by double jeopardy, and an acquittal is required. See, e.g., id., 535–36. These two types of claims are distinct. See, e.g., *State* v. *Carey*, 228 Conn. 487, 496, 636 A.2d 840 (1994) ("[c]laims of evidentiary insufficiency in criminal cases are always addressed independently of claims of evidentiary error").

The majority's resolution of this case is flawed because, by failing to consider evidence that was expressly considered by the fact finder in arriving at its finding, it merges these two distinct claims, only one of which was raised by the defendant, Ulises Robles—the sufficiency of the evidence. In considering that claim, this court must review the same quantum of evidence that the trial court reviewed and determine whether that evidence was sufficient to support the trial court's finding. See, e.g., id. ("appellate review of the sufficiency of the evidence . . . properly includes [improperly admitted] evidence even if such evidence was admitted despite a purportedly valid objection" (citation omitted)).

Instead of addressing the defendant's sufficiency claim independently of evidentiary or trial error—which means that we should consider the stipulation in our review of the sufficiency of the evidence—the majority concludes that the trial court improperly relied on the stipulation for purposes of count three, which charged the defendant with illegal possession of a weapon in a motor vehicle, because the parties intended it to be admitted only for the limited purpose of count two, which charged the defendant with criminal possession of a firearm,

and that, without this stipulation, there was insufficient evidence presented on count three. See part II of the majority opinion. Accordingly, the majority reverses the judgment of the trial court as to count three and remands the case to the trial court with direction to render a judgment of acquittal on that count. I disagree because, in considering a sufficiency of the evidence claim, we review all of the evidence the fact finder considered in arriving at its finding or verdict. Doing so in this case leads me to conclude that the stipulation that the defendant was a convicted felon constituted sufficient evidence to support the element of count three that he did not possess a proper permit for a firearm. See, e.g., *State* v. *Davis*, 324 Conn. 782, 794–95, 801, 155 A.3d 221 (2017); see also General Statutes (Rev. to 2017) § 29-38 (a).[1]

I

In the present case, it is undisputed that the prosecutor expressly relied on the stipulation for purposes of count three in his closing argument without any objection from defense counsel, and the trial court expressly considered it for purposes of count three as evidence supporting its finding.[2] Therefore, if the parties did intend

[1] All references to § 29-38 in this opinion are to the 2017 revision of the statute.

[2] I agree with the majority's recitation of the facts but take this opportunity to point out that the parties and the trial court appeared to treat the stipulation as if it applied to count three. I acknowledge that, in relaying the agreement of the parties to the court, the prosecutor initially stated that the stipulation applies to count two. I also note, however, that defense counsel told the trial court that the stipulation applies to the court trial. The majority contends that the only way to read the parties' statements is that defense counsel was only following the state's lead, and the real agreement was that the stipulation was limited to count two. See part II of the majority opinion. Another way to read defense counsel's statement is that he was clarifying or providing the full and accurate agreement of the parties from his own perspective as a party to the agreement, which was that the stipulation was limited to the court trial, as he said. Indeed, ultimately, when the stipulation was admitted into evidence, the trial court stated, "[i]t's going to be a full exhibit for purposes of the court trial . . . ."

The majority also discounts the trial court's statement at the close of

for the stipulation to be used only for purposes of count two, and the trial court considered it beyond its limited purpose, I would conclude that such an error is an evidentiary or " 'trial error,' " as described by the United States Supreme Court in *Lockhart* v. *Nelson*, supra, 488 U.S. 40. However, that claim is not before us.

The sufficiency claim that is before us requires that we consider all of the evidence the trial court reviewed in arriving at its finding. This is the way in which this court has always addressed sufficiency of the evidence claims. For example, in *State* v. *Gray*, supra, 200 Conn. 523, when addressing a sufficiency of the evidence claim, this court considered the defendant's statement obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), which was improperly admitted. See *State* v. *Gray*, supra, 534–36. This court concluded that the evidence, including the improperly admitted statement, was sufficient on some counts and not sufficient on others. Id., 537–38. However, because this court concluded that the statement was improperly admitted, it remanded the case for a new trial on those counts for which there was sufficient evidence notwithstanding the evidentiary

evidence regarding the stipulation that it was "the only evidence that was received solely for the second *and third* count"; (emphasis added); as "imprecise" and defense counsel's failure to object to the prosecutor's and the trial court's reliance on the stipulation as an "oversight . . . ." Part II of the majority opinion. I disagree. I would consider the prosecutor's express reliance on the stipulation for purposes of count three, the trial court's repeated references to and reliance on it, defense counsel's statement that the stipulation was for the court trial, and defense counsel's failure to object as strong evidence that the parties and the trial court understood and intended for the stipulation to be admitted for purposes of the court trial, which involved a determination of guilt as to counts two and three. In the final analysis, at best, there is more ambiguity on this point than the majority admits. Consequently, contrary to the majority, I would read any ambiguity in the record surrounding the initial submission of the stipulation into evidence and how that evidence ultimately was used to support the trial court's finding rather than in the strictest light possible to overturn the finding.

error. See id., 538–39; see also id., 539 ("[when] a reversal of a conviction is not a result of insufficiency of evidence but is predicated on, for example, as here, the reception of inadmissible evidence . . . a remand for a new trial is proper and an appellate court should not review the remaining evidence to determine whether it is sufficient to sustain the conviction").

Here, the trial court's use of the stipulation beyond its limited purpose is properly understood as a trial error, which, if harmful, would result in a reversal of the conviction and a new trial. This is consistent with how similar claims have been treated in the past. For instance, in *State* v. *Heinz*, 1 Conn. App. 540, 473 A.2d 1242, cert. denied, 194 Conn. 801, 477 A.2d 1021 (1984), the Appellate Court addressed a claim that the jury had improperly considered an exhibit for a purpose other than the limited one for which it was admitted. See id., 545–47. The court explained that "[i]t is error to admit an exhibit, particularly a key exhibit . . . for one purpose and then to charge the jury that it may be considered for another purpose." Id., 546–47. The Appellate Court then considered the claim as an evidentiary claim subject to harmless error analysis. See id., 547; see also *Access Agency, Inc.* v. *Second Consolidated Blimpie Connecticut Realty, Inc.*, 174 Conn. App. 218, 229, 165 A.3d 174 (2017) ("Evidence [that] is offered and admitted for a limited purpose only, and the facts found from such evidence, cannot be used for another and totally different purpose. . . . It was improper for the [trial] court to use the [disputed evidence] for substantive purposes when it was admitted for the limited purpose of testing [a witness'] credibility. *Such error, however, is subject to a harmless error analysis.*" (Citation omitted; emphasis added; internal quotation marks omitted.)); *Stohlts* v. *Gilkinson*, 87 Conn. App. 634, 650, 867 A.2d 860 (applying harmless error analysis to claim that trial court had considered evidence for purpose other

than limited one for which it was admitted), cert. denied, 273 Conn. 930, 873 A.2d 1000 (2005).[3]

The United States Supreme Court has explained the importance of respecting the distinction between trial errors and sufficiency of the evidence claims. In *Lockhart* v. *Nelson*, supra, 488 U.S. 33, the court reasoned that, in its previous decision, *Burks* v. *United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), the court "was careful to point out that a reversal based solely on evidentiary insufficiency has fundamentally different implications, for double jeopardy purposes, than a reversal based on such ordinary 'trial errors' as

[3] The majority appears to acknowledge that a claim that a jury considered improper evidence would be an evidentiary or trial error subject to harmless error analysis but then states that the error here would be harmful because, without the stipulation, there was insufficient evidence to support the trial court's finding on count three. See footnote 24 of the majority opinion; see also part II of the majority opinion. That entirely misses the point. Harmless error analysis is not used in analyzing a sufficiency of the evidence claim. See, e.g., *United States* v. *Lane*, 474 U.S. 438, 449, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986) (harmless error inquiry does not focus on sufficiency of evidence); *Kotteakos* v. *United States*, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946) (distinguishing between harmless error analysis and sufficiency of evidence analysis and holding that "[a harmless error] inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error"). The application of harmless error in these cases demonstrates that the claim was deemed an evidentiary or trial error, not a sufficiency of the evidence claim. Moreover, if the error is determined to be harmful, the remedy in those cases is not acquittal but, rather, a new trial.

In addition, the majority attempts to distinguish the cases in which this court and others have treated a claim that a jury considered evidence for an improper purpose as an evidentiary or trial error on the ground that the present case is different because the trial court was the fact finder. I disagree that the fact that the trial court was the fact finder in this case somehow transforms a claim of an evidentiary or trial error into a sufficiency of the evidence claim. That is not consistent with this court's position in *State* v. *Taupier*, 330 Conn. 149, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019), in which this court explained that a claim that a trial court improperly considered certain evidence when acting as the fact finder was an evidentiary claim, even though the defendant attempted to cast it as a sufficiency of the evidence claim. See id., 180–81.

the 'incorrect receipt or rejection of evidence.' . . . [Although] the former is in effect a finding 'that the government has failed to prove its case' against the defendant, the latter 'implies nothing with respect to the guilt or innocence of the defendant,' but is simply 'a determination that [he] has been convicted through a judicial process [that] is defective in some fundamental respect.' " (Citation omitted; emphasis omitted.) *Lockhart* v. *Nelson*, supra, 40, quoting *Burks* v. *United States*, supra, 15.

On the basis of this distinction, the court further explained that "[p]ermitting retrial [when there has been a trial error] is not the sort of governmental oppression at which the [d]ouble [j]eopardy [c]lause is aimed; rather, it serves the interest of the defendant by affording him an opportunity to 'obtai[n] a fair readjudication of his guilt free from error.' " *Lockhart* v. *Nelson*, supra, 488 U.S. 42, quoting *Burks* v. *United States*, supra, 437 U.S. 15. Accordingly, the United States Supreme Court in *Lockhart* concluded that a new trial was the appropriate remedy in a case in which the trier of fact had considered improper evidence in reaching its verdict, but in which, without that evidence, there would have been insufficient evidence to sustain the respondent's conviction. See *Lockhart* v. *Nelson*, supra, 34, 40–41.[4]

Courts in other jurisdictions have also remanded cases for a new trial in which a trial court improperly

[4] The majority does not even mention *Lockhart* and, instead, places great emphasis on *State* v. *Kareski*, 137 Ohio St. 3d 92, 98, 998 N.E.2d 410 (2013), from the Supreme Court of Ohio. See part II of the majority opinion. I would agree with the dissent in that case that the majority's holding in *Kareski* is "a departure from settled [double jeopardy] principles recognized by the United States Supreme Court . . . [and that, by] equating a reversal for evidentiary trial error with an acquittal for constitutionally insufficient evidence, the majority's holding runs headlong into a thicket of state and federal constitutional problems and will undoubtedly cause uncertainty and confusion for appellate courts." *State* v. *Kareski*, supra, 100 (French, J., dissenting).

had admitted evidence, even when, without the improperly admitted evidence, there would have been insufficient evidence to support the finding or verdict. For instance, in *State* v. *Gibson*, 219 N.J. 227, 98 A.3d 519 (2014), the New Jersey Supreme Court concluded that the trial court erred by admitting video evidence and the testimony of a police officer from the pretrial suppression hearing, and that, "[w]ithout that evidence, the [s]tate could not meet its burden of proof." Id., 246. Relying on *Lockhart*, the court concluded that, because this improperly admitted evidence had been before the fact finder, there was sufficient evidence. See id. The court further concluded that a remand for a new trial was the appropriate remedy and "emphasize[d] the importance of distinguishing between those errors that are procedural in nature, and those errors that affect the sufficiency of the evidence. . . . [I]t would be a high price indeed for society to pay were every [defendant] granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." (Internal quotation marks omitted.) Id., 246–47.

In the present case, the majority asserts that, "[c]ontrary to [my] contention [in this opinion], the issue is not whether the trial court *improperly admitted* the stipulation for purposes of count three. The issue, rather, is whether the court *improperly used* evidence that was properly admitted in order to support a different purpose for which the evidence was not admitted. The trial court did not admit the stipulation for purposes of count three *at all* because it was never asked to do so." (Emphasis in original.) Part II of the majority opinion. Setting aside the fact that defense counsel did say that the stipulation was for the court trial, which included count three, it is undisputed that the stipulation was admitted into evidence, that the state relied on it in support of count three, and that the trial court consid-

ered the stipulation for purposes of count three. The majority makes a meaningless distinction between the admission of the stipulation into evidence for count three and the trial court's consideration of the stipulation for purposes of count three.[5] Such a distinction is irrelevant. Whether we call it improper admission or improper use or consideration, the error is an evidentiary or trial error, not unlike any other claim that a fact finder considered evidence for one count that it should not have. Therefore, because the trial court considered the stipulation for count three without objec-

[5] The majority asserts that "[t]he logical extension of this argument is that, whenever a trial court has used information that was not admitted as evidence at trial to reach its decision—for example, when a trial court conducts its own independent investigation of the facts after the close of evidence—the information was, for all intents and purposes, admitted as evidence, albeit improperly. . . . We cannot agree with such an untenable proposition." Footnote 23 of the majority opinion. The majority's attempt to recast my position is itself untenable. My position is that, *in our review of a sufficiency of the evidence claim*, there is no meaningful distinction between evidence that was improperly admitted and evidence that was admitted but considered by the fact finder beyond the purpose for which it was admitted. For purposes of a sufficiency of the evidence claim, a reviewing court must consider the full quantum of evidence considered by the trial court, even if some of the evidence was improperly considered.

That is not to say that a fact finder's improper consideration of facts not in evidence cannot be addressed. For instance, in *State* v. *Newsome*, 238 Conn. 588, 682 A.2d 972 (1996), this court considered a claim that the defendant's right to a fair trial had been violated because one of the jurors allegedly drove past the crime scene to investigate. See id., 626. In considering that claim, this court explained that "not every incident of juror misconduct requires a new trial"; id., 627; and that "[t]he question is whether . . . the misconduct has prejudiced the defendant to the extent that he has not received a fair trial." (Internal quotation marks omitted.) Id., 628. This court explained that, "in cases [in which] the trial court is directly implicated in juror misconduct, the state bears the burden of proving that [the] misconduct was harmless error." (Internal quotation marks omitted.) Id. A trial court conducting its own investigation is simply a different type of error. I am in no way suggesting that this error cannot be addressed. Instead, I would follow the lead of the United States Supreme Court and conclude that such an error would be a trial error because the defendant "has been convicted through a judicial process [that] is defective in some fundamental respect." (Emphasis omitted; internal quotation marks omitted.) *Lockhart* v. *Nelson*, supra, 488 U.S. 40.

tion, we must also consider the stipulation in connection with this sufficiency of the evidence claim. As we explained in the context of a jury trial in *Riley* v. *Travelers Home & Marine Ins. Co.*, 333 Conn. 60, 214 A.3d 345 (2019), "a court reviewing the sufficiency of the evidence to support a jury's verdict must consider all of the evidence considered by the jury returning the verdict . . . ." (Emphasis omitted.) Id., 64.

The majority relies on *State* v. *Knox*, 201 Conn. App. 457, 472–74, 242 A.3d 1039 (2020), cert. denied, 336 Conn. 905, 244 A.3d 146 (2021), and cert. denied, 336 Conn. 906, 243 A.3d 1180 (2021), in support of its position that an acquittal due to evidentiary insufficiency is required here. See part II of the majority opinion. *Knox*, however, cannot support the weight the majority places on it.

The majority provides the following explanation for *Knox*: "[W]hen evidence was admitted exclusively for purposes of one particular count, [the] jury could not rely on [that] evidence to support [a] finding that [the] state had established [an] element of crime charged in another count . . . ." (Citations omitted.) Id.; see also *State* v. *Knox*, supra, 201 Conn. App. 472. I have no quarrel with that general proposition. It's the other distinguishing features of *Knox* that make the comparison between this case and that one problematic. For instance, unlike in the present case, in *Knox*, it was undisputed that the defendant's prior felony conviction was admitted for a limited purpose—namely, for the criminal possession of a firearm charge and for no other purpose. *State* v. *Knox*, supra, 464–65. Indeed, in *Knox*, "[w]hen the parties' stipulation regarding the defendant's prior felony conviction was admitted into evidence and read to the jury, the [trial] court limited its use to the charge of criminal possession of a firearm. The court repeated that limitation during its charge to the jury. At no point did the [prosecutor] object to the

limited purpose for which the evidence of the defendant's prior felony conviction could be used." Id., 472. Therefore, the fact finder did not consider the felony conviction for any other purpose, including the defendant's charge of tampering with physical evidence. See id., 472–73.

Accordingly, because the fact finder was expressly instructed not to consider the prior felony conviction for any count other than the criminal possession of a firearm charge, the Appellate Court concluded in *Knox* that, on appeal, it could not consider the felony conviction when determining whether there was sufficient evidence to support the jury's verdict on the tampering with physical evidence charge. See id., 473–74. In other words, the Appellate Court understood that the sufficiency of the evidence claim had to be viewed in light of the same evidence that the jury considered in deciding the tampering charge. Therefore, I would conclude that *Knox* is consistent with my position that, in resolving a sufficiency of the evidence claim, all evidence considered by the fact finder is considered by the reviewing court.

In the present case, the prosecutor argued that the stipulation applied to count three during his closing argument, the trial court expressly applied the stipulation to count three in its decision, and defense counsel at no point challenged the court's consideration of the stipulation for purposes of count three. Thus, unlike in *Knox*, the record in the present case demonstrates that the fact finder itself considered the stipulation for purposes of count three. Therefore, unlike in *Knox*, in which the fact finder did not consider the stipulation and, accordingly, the reviewing court could not, in the present case, the fact finder did consider the stipulation, and this court should also do so.

I also disagree with the majority's characterization of defense counsel's failure to object to the trial court's

explicit reliance on the stipulation for purposes of count three prior to, during, or after closing arguments as a "result of an oversight . . . ." Footnote 19 of the majority opinion; see also part II of the majority opinion. That characterization is remarkable.

First, the record on why defense counsel failed to object is silent, and, therefore, I do not think we can surmise counsel's motive. Assessing counsel's motives on direct appeal without input from counsel is something we typically do not do. See, e.g., *State* v. *Leecan*, 198 Conn. 517, 541, 504 A.2d 480 ("[t]he trial transcript seldom discloses all of the considerations of strategy that may have induced counsel to follow a particular course of action"), cert. denied, 476 U.S. 1184, 106 S. Ct. 2922, 91 L. Ed. 2d 550 (1986). Normally, a hearing would be required, such as a habeas proceeding or a hearing on a petition for a new trial, at which counsel can explain his or her reasons for not objecting to certain evidence before we deem the absence of an objection an oversight.

Second, the majority's characterization of defense counsel's actions as an "oversight" suggests that counsel was not competent and that the failure to object was a mistake. The failure to object could just as easily suggest that defense counsel did not view the stipulation as limited to count two, given the fact that the stipulation itself did not expressly provide that it was limited to count two, the fact that defense counsel told the trial court that the stipulation applied to the court trial, and the fact that he did not include such a claim in a motion for a judgment of acquittal following the court trial. Of course, counsel is not required to object to every impropriety during a trial. Indeed, in the habeas context, when we review an attorney's actions taken during the criminal trial, we presume that his or her actions were the result of sound trial strategy, unless proven otherwise. See, e.g., *Strickland* v. *Washington*,

466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy" (internal quotation marks omitted)).

Finally, it is lost on me how, on direct appeal, this purported oversight is or should somehow be treated differently from any other unpreserved evidentiary claim. Indeed, the majority excuses defense counsel's failure to object to the trial court's express reliance on the stipulation in a timely manner as "an oversight," yet concludes that the defendant is entitled to an acquittal on count three because of the trial court's use of the stipulation. Part II of the majority opinion. The majority runs afoul of our well established rule that parties must preserve their claims for appeal, in the absence of very limited circumstances, such as when a defendant is entitled to have his claim reviewed under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), for constitutional claims or under the plain error doctrine for obvious error that results in manifest injustice. See, e.g., *State* v. *Bermudez*, 274 Conn. 581, 586, 876 A.2d 1162 (2005). See generally *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 149–61, 84 A.3d 840 (2014) (discussing circumstances under which reviewing court may consider party's unpreserved claims). Is there now an "oversight" exception for unpreserved evidentiary claims? Rather than go down this new road on which the majority is traveling with respect to evidentiary claims raised in conjunction with, or masquerading as, sufficiency claims, I would treat this evidentiary claim like every other unpreserved evidentiary claim and not review it. Therefore, I would conclude that any evidentiary based claim that the trial court improperly considered a stipulation beyond the

purpose for which it was admitted was not preserved and is not before us. This appeal raises only a sufficiency claim, which, as I explained, requires that we consider the improperly considered evidence that was considered by the fact finder.

Accordingly, I would conclude that our review of the sufficiency claim must involve a review of all of the evidence that the trial court considered, including the stipulation, and the reasonable inferences drawable therefrom.

II

Having concluded that the stipulation should be considered when reviewing the sufficiency of the evidence claim, I now consider whether the evidence was sufficient to support the defendant's conviction of illegal possession of a weapon in a motor vehicle.

The weapon in a motor vehicle statute, General Statutes (Rev. to 2017) § 29-38, provides in relevant part: "(a) Any person who knowingly has, in any vehicle owned, operated or occupied by such person, any weapon, any pistol or revolver for which a proper permit has not been issued as provided in section 29-28 . . . shall be guilty of a class D felony . . . ." The defendant challenges the sufficiency of the evidence with respect to the fourth element, namely, that he had no proper permit. See, e.g., *State* v. *Davis*, supra, 324 Conn. 794–95, 801.

As this court previously has explained, "the lack of a proper permit is an essential element of the crime charged and . . . the state ha[s] the burden of proving beyond a reasonable doubt that a proper permit for the weapon had not been issued as provided in [General Statutes] § 29-28." *State* v. *Beauton*, 170 Conn. 234, 240, 365 A.2d 1105 (1976). General Statutes (Rev. to 2017)

§ 29-28,[6] which is expressly referenced in § 29-38 (a), provides in relevant part: "(b) . . . . No state or temporary state permit to carry a pistol or revolver shall be issued under this subsection if the applicant . . . (2) has been convicted of (A) a felony . . . ." The evidence here, through the stipulation, established that the defendant had been convicted of two felonies in 2006, one of which was illegal possession of a weapon in a motor vehicle.

Given that the parties stipulated that the defendant had those two prior felony convictions, it was reasonable for the trial court to infer that the defendant did not possess a "proper permit . . . ." General Statutes (Rev. to 2017) § 29-38 (a). Indeed, by operation of law, the defendant could not possess a "proper permit . . . as provided in section 29-28 . . . ." General Statutes (Rev. to 2017) § 29-38 (a). In my view, the fact that the defendant was a convicted felon was sufficient proof beyond a *reasonable* doubt that he did not possess a *proper* permit.

The state was not required to eliminate every theoretically possible scenario under which the defendant might have had a permit despite being a convicted felon.

The state was required to prove that the defendant did not possess a proper permit beyond a reasonable doubt, not to a mathematical certainty, or beyond all possible doubt. See, e.g., Connecticut Criminal Jury Instructions 2.2-3, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited September 8, 2023) ("[p]roof beyond a reasonable doubt does not mean proof beyond all doubt . . . [as] the law does not require absolute certainty on the part of the jury before it returns a verdict of guilty"). Certainly, the state's burden is not the "theoretically *impossible*" stan-

[6] Hereinafter, all references to § 29-28 in this opinion are to the 2017 revision of the statute.

dard to which the majority now holds the state. (Emphasis in original.) Footnote 17 of the majority opinion.

Consistent therewith, it is important to keep in mind that, in a sufficiency of the evidence appeal, "we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [trier of fact's finding or] verdict of guilty." (Internal quotation marks omitted.) *State* v. *McMahon*, 257 Conn. 544, 567, 778 A.2d 847 (2001), cert. denied, 534 U.S. 1130, 122 S. Ct. 1069, 151 L. Ed. 2d 972 (2002). Consequently, I would conclude that the trial court correctly determined that the state proved beyond a reasonable doubt that the defendant had a weapon "for which a *proper* permit ha[d] not been issued as provided in section 29-28 . . . ." (Emphasis added.) General Statutes (Rev. to 2017) § 29-38 (a).[7]

With respect to the defendant's contention that the trial court improperly took judicial notice of § 29-28, I disagree. In fact, the court was obligated to consider the provisions of § 29-28 in determining whether the defendant had violated § 29-38. Indeed, § 29-38 (a) directs the court to look to and apply § 29-28. See General Statutes (Rev. to 2017) § 29-38 (a) (proscribing having weapon in vehicle "for which a proper permit has not been issued as provided in section 29-28").

Therefore, the trial court's application of § 29-28 to the facts of the present case was no more than the court's application of its knowledge of the law to the case in the same way that a jury would have done once

[7] My conclusion that affirmance is the appropriate outcome here does not mean that I disagree with the majority's reflection that the best practices were not followed in this case. The stipulation could have been explicit as to the purpose for which it was to be used, and the prosecutor could have made his reliance on the stipulation for count three more transparent during the course of the trial, rather than after the close of evidence.

it was instructed on the applicable law. See, e.g., *State* v. *Reynolds*, 264 Conn. 1, 29 n.21, 836 A.2d 224 (2003) ("[i]n the absence of any evidence to the contrary, [j]udges are presumed to know the law . . . and to apply it correctly" (internal quotation marks omitted)), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004); see also, e.g., 23 C.J.S., Criminal Procedure and Rights of Accused § 986 (2023) ("[t]rial courts and trial judges are presumed to know the law, and their rulings come to [an] appellate court with a presumption of correctness" (footnotes omitted)); cf. *State* v. *Baltas*, 311 Conn. 786, 810, 91 A.3d 384 (2014) (it is well established that "[a] request to charge [that] is relevant to the issues of [a] case and [that] is an accurate statement of the law must be given" (internal quotation marks omitted)). The trial court acted properly in its role as fact finder by relying on its knowledge of the law, namely, that the defendant, as a felon, was not able to possess a proper permit for a weapon pursuant to the provisions of § 29-28 at the time of the charged crime. Therefore, I would conclude that there was sufficient evidence to support the defendant's conviction of illegal possession of a weapon in a motor vehicle.

Accordingly, I respectfully dissent from part II of the majority opinion.

STATE OF CONNECTICUT *v.* CARLTON BUTLER (SC 20702)

Robinson, C. J., and McDonald, D'Auria, Mullins and Moll, Js.

Syllabus

The defendant appealed to the Appellate Court, challenging the trial court's decision to grant the state's motion to open the judgment dismissing certain criminal charges, including risk of injury to a child, that had been filed against the defendant. The charges stemmed from an incident in which the defendant allegedly had inappropriate contact with a twelve year old child. After the charges were filed, the defendant applied for

and was granted admission to a statutory (§ 54-56*l*) two year, supervised diversionary program for individuals with psychiatric disabilities, which would lead to dismissal of the charges following his successful completion thereof. As a condition to being admitted to the program, the defendant agreed that he would have no contact with minors, including in a volunteer or work capacity, and that he would not be present at any locations frequented by minors. Thereafter, the trial court received a report noting that the defendant had successfully completed the program, and it held a hearing to address the possible dismissal of the charges under § 54-56*l* (i). At that hearing, the prosecutor argued that the court should not grant a dismissal in light of a final progress report, issued by the Court Support Services Division, that indicated that the defendant had not satisfactorily completed the program, and in light of a letter from the defendant's probation officer that indicated that he received information from an anonymous source that the defendant had recently volunteered for an excursion sponsored by a local YMCA that involved minors. That letter also indicated that the defendant was not allowed to enter two local YMCAs due to certain undisclosed incidents and that he had unsuccessfully applied for employment positions as a camp counselor at a third local YMCA while he was participating in the program. That letter further indicated that the defendant had failed to report to his probation officer for a scheduled appointment. In response, defense counsel argued that, although the defendant did not appear for his most recent probation appointment, the allegations contained in the letter regarding volunteering at a YMCA and submitting YMCA employment applications had not been substantiated. Defense counsel also represented to the court that the defendant's father had informed him that the defendant, who did not have a license to operate a motor vehicle, relied on his father to drive him everywhere, that the defendant did not participate in a YMCA excursion as a volunteer, and that he had never driven the defendant to a YMCA to apply for employment. The trial court ultimately dismissed the charges against the defendant. The following day, the state filed its motion to open, claiming that it obtained new information and evidence demonstrating that the defendant had not successfully completed the diversionary program, including footage of the defendant working at a summer camp, and that the trial court, in dismissing the case, relied on representations made by defense counsel that had proven to be false. During the hearing on the motion, defense counsel stressed the court's lack of jurisdiction over the case following a dismissal under § 54-56*l* (i). The trial court granted the state's motion, concluding that it had erroneously dismissed the charges because its dismissal was based on false information. On appeal, the Appellate Court reversed the trial court's decision to grant the motion to open, concluding that the trial court improperly had granted the motion insofar as the trial court lost jurisdiction when it rendered its judgment of dismissal. The Appellate Court also concluded that it did not need to decide

whether the civil rule that a trial court has intrinsic power to open a judgment obtained by fraud applies in the criminal context because, even if it did, the record did not support a finding that fraud was perpetrated on the trial court. On the granting of certification, the state appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the trial court had lost jurisdiction when it dismissed the defendant's criminal charges and was therefore without jurisdiction to rule on the state's motion to open the judgment of dismissal:

This court determined, after reviewing the record and the parties' briefs, and after considering oral argument, that the Appellate Court's reasoning and analysis were sound, and agreed with the Appellate Court's conclusion that the trial court was divested of jurisdiction when it rendered a final and unconditional judgment of dismissal.

This court clarified that the statutory (§ 52-212a) "four month rule," which permits a trial court to retain jurisdiction over a civil judgment for a period of four months after the notice of judgment has been sent and to open that judgment during that four month period, is inapplicable in criminal cases.

This clarification was based on this court's consideration of legislation passed in 1977, which served to modify a trial court's common-law authority to revise its judgments, the fact that § 52-212a pertains to "civil" judgments and the fact that the legislature had not enacted any similar provision authorizing a trial court to retain jurisdiction over a criminal judgment for a designated period of time following its rendering, and on this court's recognition that, in *State* v. *McCoy* (331 Conn. 561), it had determined that the common-law rule that a trial court's jurisdiction is lost upon the execution of a defendant's sentence remained viable law.

Moreover, this court concluded that *State* v. *Wilson* (199 Conn. 417), in which the court held that the four month rule of § 52-212a applied to criminal judgments, was wrongly decided, and that particular holding in *Wilson* was overruled.

In concluding that the trial court's judgment dismissing the defendant's criminal charges served to divest that court of jurisdiction to decide the state's motion to open, this court reasoned that a trial court's authority over a criminal case derives from the presentment of an information, that § 54-56*l* (i) ensures that a defendant's pending criminal charges will be dismissed upon his or her successful completion of the diversionary program authorized by § 54-56*l*, and that, when an information, which contains the charges and establishes the trial court's jurisdiction, is dismissed, the court's jurisdiction is extinguished because there exists no valid charging document to confer jurisdiction.

Furthermore, this court observed that other jurisdictions have similarly concluded that a trial court is divested of jurisdiction and authority upon the dismissal of all criminal charges.

2. This court did not need to decide whether the civil rule permitting a trial court to open a judgment obtained by fraud applies in the criminal context insofar as the Appellate Court correctly concluded that the record in the present case did not support a finding of fraud or intentional misrepresentation.

(*One justice concurring separately*)

Argued February 23—officially released September 19, 2023

Procedural History

Information charging the defendant with the crimes of risk of injury to a child and breach of the peace in the second degree, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number five, where the court, *Brown*, *J.*, granted the defendant's application to participate in a statutorily authorized diversionary program; thereafter, the court, *McShane*, *J.*, rendered judgment dismissing the information; subsequently, the court, *McShane*, *J.*, granted the state's motion to open the judgment of dismissal, and the defendant appealed to the Appellate Court, *Prescott* and *Alexander*, *Js.*, with *Bishop*, *J.*, dissenting, which reversed the trial court's judgment and remanded the case with direction to dismiss the state's motion to open, and the state, on the granting of certification, appealed to this court. *Affirmed.*

Rocco A. Chiarenza, senior assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, *Rebecca A. Barry*, supervisory assistant state's attorney, and *Mary A. SanAngelo*, senior assistant state's attorney, for the appellant (state).

Emily H. Wagner, assistant public defender, for the appellee (defendant).

Opinion

McDONALD, J. This certified appeal requires us to decide, as a matter of first impression, whether a crimi-

nal court has inherent common-law jurisdiction to open a judgment of dismissal following the defendant's completion of a supervised diversionary program within four months of the date it was rendered. We are also asked to decide whether the trial court has the authority to open the same judgment of dismissal if that judgment was the result of purported misrepresentations to the court. We conclude that criminal courts do not have jurisdiction to open a judgment following a dismissal. We also decline to reach the second certified question because the trial court made no findings of misrepresentations in the present case.

The defendant, Carlton Butler, was arrested in 2017 on charges of risk of injury to a child and breach of the peace in the second degree. The charges arose from an incident at a McDonald's restaurant in Derby involving inappropriate conduct between the defendant and a twelve year old child. In August, 2017, the defendant filed an application to participate in a supervised diversionary program for individuals with psychiatric disabilities. The trial court canvassed the defendant on the conditions imposed on him while participating in the diversionary program, which included that he have no contact with minors, including in a volunteer or work capacity, and that he not go to any areas frequented by minors. The defendant indicated that he was willing to abide by all of the conditions. The court subsequently granted the application.

In the early stages of the two year supervised diversionary program, the defendant struggled with the program's mental health and counseling requirements, which became the subject of several court hearings. Due to the defendant's failure to regularly attend the court-mandated counseling sessions, the defendant was enrolled in an alternative program with the Sterling Center, which the trial court described as more rigorous than the initially designated program. In June, 2019, the

court indicated that it received a report noting that the defendant successfully completed his sessions at the Sterling Center. The court congratulated the defendant on his success and the "great letter" it received, and continued the case to October 2, 2019, for possible dismissal under General Statutes § 54-56*l* (i), which provides for the dismissal of pending charges following the successful completion of a pretrial supervised diversionary program.

On September 25, 2019, the Judicial Branch Court Support Services Division issued a final progress report, which indicated that the defendant had not satisfactorily completed the assigned diversionary program. Attached to the report was a letter from the defendant's probation officer. The attached letter stated that the probation officer received information from an anonymous source that, in August, 2019, the defendant volunteered for a YMCA trip involving minors. The letter indicated that the Office of Adult Probation was unable to verify the accuracy of the information provided by the anonymous source. The letter further indicated that the probation officer found that the defendant was not allowed to enter the Waterbury and Torrington YMCAs due to "separate, undisclosed incidents" and that the Plainville YMCA director informed the officer that the defendant "unsuccessfully applied for three separate employment positions as a 'camp counselor' on [March 15, 2019]." Lastly, the letter noted that the defendant failed to report to his probation officer on September 18, 2019. There was nothing appended to the letter to substantiate these allegations.

From September 25, 2019, until the defendant's October 2, 2019 hearing, the Office of Adult Probation did not provide any further support or details regarding the information in the letter. On October 2, 2019, the trial court held a hearing to determine whether it would dismiss the charges against the defendant. The prosecu-

tor argued that the court should not grant a dismissal because of the statements and allegations contained in the September 25 letter attached to the final progress report. In response, defense counsel argued that the allegations contained in the letter regarding volunteering at a local YMCA and submitting YMCA job applications had not been substantiated.

Defense counsel also argued that "[the defendant] does not [have] a driver's license. He does not own a car. His father drives him everywhere. His father is present here in the courtroom and is willing to come up and talk to Your Honor. Your Honor, I talked to [the defendant's] father, who stated that [the defendant] has never gone on a YMCA trip as a volunteer. He's also indicated to me that he's never—they live in Waterbury. He's also indicated to me that he's never driven [the defendant] to the Plainville YMCA to apply for a job.

"Secondly, Your Honor, the reason why [the defendant] is not allowed at the YMCAs is because, prior to this case—prior to the supervised diversionary program being granted, he was going to the YMCA. While the case was pending, he was going to the YMCA. At that point, someone notified the YMCA of his arrest. They told him he was no longer allowed back. So, I found it concerning . . . that some of this information [in the September 25, 2019 letter] is very dated. Okay? And, secondly, based on his father's own representation to me, false.

"It's true, [the defendant] will admit that he did not go to his last probation meeting on September [18, 2019]. [The defendant] forgot about it. After two years, it's the one and only one he's ever missed. [The defendant] is attending Goodwin College; however, I know [the defendant] likes to tell people he's living in East Hartford, but, after speaking with his father, he still lives at home with his father. His father drives him to

Goodwin College. I know, in chambers, Your Honor, I had indicated that [the defendant] did apply for an adult counselor position, but that was through Easterseals; that was not through the YMCA. So, we don't even know if this YMCA application is [the defendant] himself. [The defendant's] father would probably tell Your Honor, because he's told me, that he's never driven [the defendant] to the Plainville YMCA. To [the father's] knowledge, [the defendant] has never applied to . . . the YMCA for anything. He's never, to his knowledge, ever went on a trip with minors. [The defendant's] only mode of transportation is through his father. He's never taken his father's car without permission. [The defendant] doesn't own a car. He doesn't have a driver's license. . . . Your Honor, so, essentially, the only thing that is a fact and is true is that [the defendant] missed his last probation meeting on [September 18, 2019]; however, the probation officer left a card for [the defendant] to go on [October 1, 2019]. . . .

"I think, up to [this] point, Your Honor, [the defendant] has fulfilled everything on the supervised diversionary program. He paid for the Sterling Center out of pocket. He's on disability. It was a financial hardship for him and his father. The allegations of [his] going to the YMCA during the pendency of [his] being [in] the supervised diversionary program is unfounded . . . and refuted by the only person he can get a ride from. For those reasons, Your Honor, I think [the defendant] should have a successful dismissal on this program."

After hearing arguments from both parties, the trial court proceeded to articulate its ruling dismissing the charges against the defendant: "[W]hat the court has before it is an individual who missed his last appointment, and the fact that this case has been pending since [June, 2017], with no arrests certainly speaks in the defendant's behalf. I certainly understand the state's concern with [regard] to the defendant working as a

camp counselor, but I am concerned [with] the fact that this was an anonymous tip that was not looked into by the Office of Adult Probation, other than just to receive it without making phone calls. It doesn't appear as though any of it is, in fact, true. The defendant had numerous appointments during the way, he had his bumps along the way and ended up making those. You know, it's something that he applied for back on [October 2, 2017], with the understanding that, if he did what he was supposed to do, [the case] would be dismissed. He did what he was supposed to do. The case is therefore dismissed."

The next day, the state filed a motion to open the judgment of dismissal, claiming that information had come to the state's attention following the judgment of dismissal that demonstrated that the defendant did not successfully complete the supervised diversionary program. It argued that the trial court relied on representations made by defense counsel that had proven to be false. The state also asserted that there was footage of the defendant working at a summer camp in Massachusetts that was taken during the summer of 2019. The state indicated that the Office of Adult Probation would provide a more detailed report as to the noncompliance. As to the trial court's authority to open the case, the state argued that the court had jurisdiction under *State* v. *Johnson*, 301 Conn. 630, 643, 26 A.3d 59 (2011), *Tyson* v. *Commissioner of Correction*, 155 Conn. App. 96, 105, 109 A.3d 510, cert. denied, 315 Conn. 931, 110 A.3d 432 (2015), and *State* v. *O'Bright*, 13 Conn. App. 732, 733, 539 A.2d 161 (1988).[1]

[1] Although the state cited these cases in its initial motion to open, it did not reference these cases on appeal to this court. The trial court noted in its oral ruling that none of the cases was on point. The Appellate Court further concluded that "the record contains no argument by the state regarding how these cases are instructive, and, without the benefit of such input, we are left to agree with the assessment of the trial court and the defendant that these cases are inapposite to the issue before us." *State* v. *Butler*, 209 Conn. App. 63, 87, 267 A.3d 256 (2021). We agree that the cases are not

The defendant objected to the motion, arguing that the cases relied on by the state were not pertinent to the trial court's consideration of whether it could open the dismissal of the criminal charges. He also argued that granting the motion to open would be against public policy and would set a dangerous precedent that is particularly troublesome under these circumstances because a defendant who is enrolled in a diversionary program must agree to the tolling of the statute of limitations with respect to his underlying crimes in order to participate. Therefore, the defendant argued, granting the motion to open would endanger all current and past defendants who used a diversionary program and whose crimes are within the statute of limitations.

The trial court held a hearing on the state's motion to open on October 15, 2019, at which the court entered as court exhibits (1) an "addendum" to the September 25, 2019 letter,[2] and (2) a five page report from the defendant's probation officer dated October 4, 2019, which detailed the officer's supervision of the defendant during the diversionary program and noted the officer's concern that the defendant "continues to seek contact with minors and actively engages in deceptive behavior to conceal such contact." The letter further stated that, "[u]nfortunately, this officer was unable to communicate this information to the [c]ourt prior to the dismissal of the [s]upervised [d]iversionary [p]rogram due to the [time frame] of the information being confirmed."

instructive, and they were not raised in this appeal, and, therefore, we do not address them further.

[2] The addendum confirmed the representations that defense counsel made at the October 2, 2019 hearing regarding the defendant's failure to appear for his probation appointment. Specifically, the addendum provided that the defendant met with the probation officer on October 1, explained that he had forgotten about the last appointment, and reported that he was living in East Hartford and was attending Goodwin College. The addendum also indicated that the defendant had become "agitated and refused to have a civil conversation about the negative report submitted to the [c]ourt." Accordingly, the probation officer asked the defendant to leave the office.

At the hearing, the trial court noted that it "based its decision to dismiss this [case] on information that was incorrect, was totally contradictory . . . and I would assert . . . that I did it under false pretenses. I dismissed this under false pretenses that the defendant was in compliance when . . . not only was he not in compliance, he couldn't have been any further away from compliance." It also indicated to defense counsel that it was "a little angered" by the representations made to the court but that it did not fault counsel because counsel "went with the information [he] had . . . at the time" and that the information later proved to be inaccurate.

Both parties then presented argument on the issue of opening the judgment. The prosecutor focused her argument on the "material misrepresentation[s]" made to the trial court that concerned the specific conditions of the defendant's program compliance. Defense counsel's argument in objection stressed the lack of the court's jurisdiction over the case following a dismissal under § 54-56*l* (i). Defense counsel also argued that he represented to the court only the information he knew and that the allegations he refuted were a YMCA trip and applying to the Plainville YMCA and that those allegations were never substantiated. Lastly, defense counsel reiterated how harmful this precedent would be to other defendants who engage in diversionary programs and that this situation is "bigger than [the defendant]" and "endangers any and all participants in [a diversionary program]."

The trial court proceeded to grant the state's motion to open the judgment of dismissal, noting that the dismissal was "erroneous" and stating on the record: "I don't know a lot about subject matter jurisdiction. I know I looked at the cases that the state has provided [the court] with, and none of them seem[s] to be quite on point. But I also know what the right thing to do is.

And the right thing to do in this particular case is to [open] this case and have the defendant . . . face the charges. I say that because this dismissal was granted [on] erroneous grounds. The dismissal was false, with false information. And, counsel, nobody has put any [aspersions on] you . . . and I'm not going to ask for—elicit a response, but it is wrong. It is wrong [that] the defendant received a dismissal. Just as if it was a clerical error, I will say this was an error, in that I had none of this information before me." The court did not make any express finding that the state had established, by clear and convincing evidence, intentional misrepresentations by defense counsel to the court.

The defendant appealed to the Appellate Court from the trial court's decision to open the judgment, claiming that the trial court lacked jurisdiction to open and set aside the unconditional dismissal of his charges following his completion of the supervised diversionary program and that, in doing so, it deprived him of liberty and finality of judgment interests. See *State* v. *Butler*, 209 Conn. App. 63, 79, 267 A.3d 256 (2021). The state argued in response that the trial court possessed subject matter jurisdiction to open a case following a dismissal. Id. The Appellate Court agreed with the defendant and concluded that the trial court lost jurisdiction over the matter when it rendered the judgment of dismissal. Id., 79–80. Therefore, the Appellate Court concluded that the trial court improperly granted the state's motion to open. Id., 80.

The Appellate Court began its analysis by reviewing the original common-law rules regarding jurisdiction, under which "a trial court possesses the inherent power to modify its own judgments during the term at which they were rendered"; (internal quotation marks omitted) id., 81; and that "a trial court has the discretionary power to modify or vacate a criminal judgment *before the sentence has been executed.*" (Emphasis in original;

internal quotation marks omitted.) Id., 83. Additionally, it noted that "[n]o statutory provisions exist . . . that expand the existing common-law jurisdiction of our criminal courts or expressly permit a court to reinstate criminal charges after it has dismissed them." Id.

The Appellate Court surveyed a line of cases from this court dealing with the "four month rule" set forth in General Statutes § 52-212a,[3] which permits a trial court to retain jurisdiction over a civil judgment for a period of four months after the notice of the judgment was sent. Id., 84–94. The Appellate Court acknowledged this court's decision in *State* v. *Wilson*, 199 Conn. 417, 513 A.2d 620 (1986), in which this court concluded that the four month rule applied to criminal matters, as well as civil. See *State* v. *Butler*, supra, 209 Conn. App. 89–90; see also *State* v. *Wilson*, supra, 437. It also reviewed our subsequent decision in *State* v. *Myers*, 242 Conn. 125, 698 A.2d 823 (1997), in which this court cited *Wilson* as support for its observation that a criminal trial court retained jurisdiction to entertain a motion for a new trial, even after sentencing. See *State* v. *Butler*, supra, 90; see also *State* v. *Myers*, supra, 136 and n.16. The Appellate Court then explained that a more recent decision by this court, *State* v. *McCoy*, 331 Conn. 561, 206 A.3d 725 (2019), "fully abrogated in the context of final criminal judgments any application of the four month rule, which applies only in civil matters." *State* v. *Butler*, supra, 94; see *State* v. *McCoy*, supra, 586–87. Thus, the Appellate Court concluded that, "once the criminal court rendered a final judgment dismissing all charges in the present case, it lost jurisdiction over the matter and could not properly entertain, let alone grant, a motion to open and restore the matter to the criminal docket." *State* v. *Butler*, supra, 103–104.

[3] Although § 52-212a has been amended since the events at issue in this appeal; see Public Acts 2021, No. 21-104, § 44; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

The Appellate Court also considered whether a criminal court has inherent jurisdiction to modify a judgment obtained by fraud. The court acknowledged the existing civil rule that a trial court has intrinsic power to open a judgment obtained by fraud. Id., 94; see also, e.g., *Billington* v. *Billington*, 220 Conn. 212, 218, 595 A.2d 1377 (1991). It concluded, however, that "[i]t [was] unnecessary to decide at this juncture . . . whether this particular civil rule applies equally in the criminal context because, even [if it assumed], without deciding, that it does, [it was] unconvinced that the record in the present case would support a finding that a fraud, as opposed to a negligent misrepresentation, was perpetrated on the [trial] court."[4] (Footnote omitted.) *State* v. *Butler*, supra, 209 Conn. App. 94–95. The Appellate Court noted that, although the trial court likened its decision to dismiss the case to a "clerical error," it cannot be properly classified as one. Id., 104. "The [trial] court made a reasoned determination on the facts presented that, contrary to the opinion of the Court Support Services Division and the state, the defendant had completed satisfactorily the diversionary program. It did so on the basis of the evidence before it and the arguments presented by the parties, including the representations made by defense counsel that went unchallenged despite later proving to be, at least in part, untrue. . . . The fact that the state later came into possession of better or more convincing evidence that, if presented to the [trial] court at the October 2, 2019 hearing, likely would have changed the court's calculus and, therefore, its decision did not confer power on the court to entertain a motion to open the judgment of dismissal." Id., 104–105.

[4] The Appellate Court noted that, to open and vacate a civil judgment on the basis of fraud, a party must show that he was "diligent during trial in trying to discover and expose the fraud, and that there is clear proof of that fraud." (Internal quotation marks omitted.) *State* v. *Butler*, supra, 209 Conn. App. 95; see also, e.g., *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 107, 952 A.2d 1 (2008).

Lastly, the Appellate Court noted the policy considerations served by its conclusion, including the "significant liberty and finality of judgment interests" that attach by virtue of the trial court's granting of an unconditional judgment of dismissal and the fact that the defendant, in agreeing to participate in the supervised diversionary program, "gave up his right to defend against the allegation leveled by the state and agreed to be subject to numerous conditions in excess of those imposed by the [trial] court as conditions of his release." Id., 102. The Appellate Court acknowledged the state's "valid and weighty interest in convicting the guilty"; (internal quotation marks omitted) id., 103; but also emphasized that "the unique situation that the [trial] court found itself in . . . was largely the result of the state's handling of the initial October 2, 2019 hearing. . . . [T]he state, in opposing the dismissal of the defendant's charges, chose to rely solely on the negative final report and the letter appended thereto, which contained only unsubstantiated allegations of potential contacts with minors and one admitted failure to report as the sole basis to support the contention that the defendant unsatisfactorily completed the diversionary program. The state did not provide affidavits from the various YMCA employees who had provided information to the probation officer. It did not obtain or submit copies of the employment applications allegedly executed by the defendant or other corroborating evidence. It did not request the opportunity to question under oath the witness . . . on [whom] defense counsel [relied] in his argument and who was present in the courtroom during the October 2, 2019 hearing. Moreover, the state has not lost its ability to prosecute the defendant with respect to any actions that he took while participating in the program that may constitute violations of his terms of release or new crimes." Id.

The dissenting Appellate Court judge disagreed with the majority's characterization of the state of the law

following *McCoy* and concluded that *Wilson* was, at least in part, still applicable law. See id., 110–11 (*Bishop*, *J.*, dissenting). In concluding that, when "no sentence has been imposed, a criminal court's jurisdiction to modify its judgment ends after a period of four months following judgment," the dissent implied that the trial court retained jurisdiction to modify its judgment notwithstanding the dismissal. Id., 110 (*Bishop*, *J.*, dissenting). Furthermore, although it agreed with the majority's conclusion that the trial court made no explicit findings of fraud, it characterized the court's comments as a reflection of the court's belief that it was "grossly misled"; id., 114 (*Bishop*, *J.*, dissenting); and "induced into an erroneous decision . . . ." Id., 115 (*Bishop*, *J.*, dissenting).

The state filed a petition for certification to appeal to this court, which we granted, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the trial court lacked inherent common-law authority to modify its judgment of dismissal within four months of the date on which it was rendered?" And (2) "[d]id the Appellate Court properly reverse the trial court's decision to open its judgment despite the fact that the judgment of dismissal was predicated on a material misrepresentation made to the trial court?" *State* v. *Butler*, 343 Conn. 904, 272 A.3d 1126 (2022).

After reviewing the parties' briefs, the record, and the oral argument, we conclude that the Appellate Court's reasoning and analysis were sound and its conclusion was correct on both issues. Specifically, we conclude that the trial court lost jurisdiction upon rendering a final and unconditional judgment of dismissal; therefore, it lacked jurisdiction to entertain or grant the state's motion to open. Second, we agree that the record does not support any finding by the trial court of intentional or material misrepresentations; accordingly, we need not address the question of whether intentional

misrepresentations provided the court with a basis to claim jurisdiction to open its judgment of dismissal. Nevertheless, we clarify two points in support of the Appellate Court's conclusion that the trial court lost jurisdiction upon rendering its judgment of dismissal. First, we make explicit what we implied in *State* v. *McCoy*, supra, 331 Conn. 561, that the four month rule permitted by statute in the context of civil cases is inapplicable to criminal cases. See id., 574–75, 580–87. Second, we explain that the unconditional dismissal of all charges is a final disposition of the case that deprives the trial court of any further jurisdiction over the matter.

We begin by addressing the "four month rule" and its purported applicability to criminal cases. As the Appellate Court extensively discussed, our trial courts are courts of general jurisdiction. See *State* v. *Butler*, supra, 209 Conn. App. 81; see also, e.g., *State* v. *Ramos*, 306 Conn. 125, 133, 49 A.3d 197 (2012). "In the absence of statutory or constitutional provisions, the limits of [their] jurisdiction are delineated by the common law." (Internal quotation marks omitted.) *State* v. *Ramos*, supra, 133–34. At common law, the Superior Court sat in sessions; see General Statutes (Rev. to 1977) § 51-181; and possessed inherent power to modify its judgments during the term during which they were rendered.[5] "During the continuance of a term of court the judge holding it ha[d], in a sense, absolute control over judgments rendered; that is, he [could] declare and subsequently modify or annul them." *Sturdevant* v. *Stanton*, 47 Conn. 579, 580 (1880). The common law has long recognized that, "during the term [in which] any judicial act is done, the record remaineth in the breast of the judges of the court, and in their remembrance, and

[5] This court has interpreted the word "term," as used in the common-law rule, to refer to "sessions" of the Superior Court, as it was defined in early enactments of General Statutes § 51-181. See, e.g., *Snow* v. *Calise*, 174 Conn. 567, 571–72, 392 A.2d 440 (1978).

therefore the roll is alterable during that term . . . .'' (Internal quotation marks omitted.) *Commonwealth* v. *Weymouth*, 84 Mass. (2 Allen) 144, 145 (1861). ''The authority thus exercised is probably founded on the practice by which the record is not finally made up until the end of the term or session of the court, when 'the roll,' as it is called, is signed and returned.[6] Until then, it remains in the control of the court, and no entry therein is deemed to be final, or beyond the power of the court to amend or alter it, either for error or other sufficient cause.'' (Footnote added.) Id. Additionally, in the criminal context, a trial court was also divested of jurisdiction upon any action in execution of a defendant's sentence. See, e.g., *State* v. *Pallotti*, 119 Conn. 70, 74, 174 A. 74 (1934). ''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.'' (Internal quotation marks omitted.) *State* v. *McCoy*, supra, 331 Conn. 581–82.

The legislature modified the structure of our court system in 1977 when it revised General Statutes (Rev. to 1977) § 51-181 to remove any reference to the ''sessions'' of court and, rather, provided in relevant part that the Superior Court ''shall sit continuously throughout the year, at such times and places and for such duration of time as is fixed and determined by the chief court administrator . . . .'' Public Acts 1977, No. 77-576, § 27. In amending the statute to remove any reference to sessions or terms of the court, the legislature rendered the previous rule regarding continuing jurisdiction during the term inoperable. We recognized this

[6] It is notable that the rationale for permitting continuing jurisdiction until the end of the term—that the ''roll'' remained in the hands of the judges and was not signed until the end of the term—is no longer relevant in our present court operations because orders become finalized at the time they are issued. See *Commonwealth* v. *Weymouth*, supra, 84 Mass. (2 Allen) 145.

change in *State* v. *Luzietti*, 230 Conn. 427, 646 A.2d 85 (1994), in which we noted that the rule "no longer has vitality in this state." Id., 432 n.6. This modification did not, however, impact the existing common-law rule that "a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed." (Internal quotation marks omitted.) *State* v. *McCoy*, supra, 331 Conn. 581.

Since the revision to General Statutes (Rev. to 1977) § 51-181, the legislature has granted continuing jurisdiction to the Superior Court in particular circumstances. For example, the legislature has authorized the court to modify the terms of probation, even after a sentence is imposed; see General Statutes §§ 53a-29 (c), 53a-30 (c) and 53a-32 (d); and to hear a petition for a new trial filed following sentencing. See General Statutes § 52-270 (a). Significantly, the legislature enacted § 52-212a, which provides in relevant part that, "[u]nless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, *a civil judgment or decree* rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which the notice of judgment or decree was sent. . . ."[7] (Emphasis added.) The legislature has not, however, enacted any similar statutory provisions permitting a trial court to retain general jurisdiction over criminal judgments for a designated period of time following a final disposition.

We recognize that, notwithstanding the legislature's action in the civil context, this court, in *State* v. *Wilson*, supra, 199 Conn. 417, concluded that the four month rule in § 52-212a extended to criminal judgments. See id., 437. Specifically, this court, without any analysis,

[7] Practice Book § 17-43 (a), which sets forth the procedures for *civil matters*, contains similar language.

concluded: "We see no reason to distinguish between civil and criminal judgments in this respect, and we therefore hold that, for purposes of the [common-law] rule, a criminal judgment may not be modified in matters of substance beyond a period of four months after the judgment has become final." Id. This court, however, did not ultimately utilize the four month rule to confer jurisdiction on the Superior Court in that case. See id., 438.

Following *Wilson*, this court, in *State* v. *McCoy*, supra, 331 Conn. 561, clarified that *Wilson* cannot be read as expanding the jurisdiction of the trial courts, and any reliance on the decision for that purpose is misplaced. See id., 581–82, 586–87. We explained that the common-law rule that jurisdiction is lost upon execution of the defendant's sentence remains viable and controlling, and we overruled *Wilson*[8] to the extent that it reached a conclusion that was inconsistent with that proposition.[9] Id., 586–87.

Although *McCoy* did not address the general applicability of the four month rule in criminal cases prior to the execution of a sentence, we take the opportunity to do so now. Our review of the common law and subsequent statutory provisions leads us to conclude that *Wilson* was wrongly decided, and we overrule it to the extent that it concluded that the four month rule applies in the criminal context. The court in *Wilson* failed to consider the differences between the civil and

[8] *McCoy* also overruled in part *State* v. *Myers*, supra, 242 Conn. 136. See *State* v. *McCoy*, supra, 331 Conn. 586–87. *Myers* disregarded the established principle that a trial court loses jurisdiction upon execution of the sentence and instead cited to *Wilson* in concluding that the court retained jurisdiction to entertain a motion for a new trial, even after execution of a sentence, because it was within the four month period. See id., 583–87; see also *State* v. *Myers*, supra, 136.

[9] The Appellate Court's opinion in the present case provides a thorough overview of this lineage of cases. See *State* v. *Butler*, supra, 209 Conn. App. 88–94.

criminal contexts. Moreover, its conclusion that there was "no reason" *not* to apply the civil rule to the criminal context is analytically backward. *State* v. *Wilson*, supra, 199 Conn. 437. The proper inquiry is whether there was specific statutory authority *to* apply the civil rule in the criminal context, not whether there was a prohibition to extending it beyond what was legislatively authorized. The conclusion in *Wilson* usurped the proper role of the legislature and ignored the limitations that it inserted in § 52-212a, which applied the four month rule only in the civil context. We agree with the Appellate Court in the present case that "the court in *Wilson* provided absolutely no rationale for extending the four month rule to criminal judgments . . . ." *State* v. *Butler*, supra, 209 Conn. App. 94.

As the Appellate Court stated, "the four month time period is not itself a creature of the common law; indeed, no such rule existed. Rather, it is the result of legislation and court rule, both of which expressly limit its application to a 'civil judgment or decree . . . .' " Id., 93–94. Neither of those enactments contemplates application in the criminal context. It is well established that "[w]e are not permitted to supply statutory language that the legislature may have chosen to omit." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *State Board of Labor Relations*, 296 Conn. 594, 605, 996 A.2d 729 (2010). Therefore, it is not appropriately within our purview to infer jurisdiction when no statutory provision exists to grant it.

Having concluded that the four month rule does not apply in the criminal context and that a trial court loses jurisdiction over a criminal matter once a sentence has been executed, the question that remains is whether the dismissal of criminal charges also divests the trial court of jurisdiction. We agree with the Appellate Court's conclusion that the dismissal in the present case was a complete and final resolution of all pending

charges, and, therefore, the trial court lost jurisdiction following that action. See *State* v. *Butler*, supra, 209 Conn. App. 80–81, 103–104. We find it useful, however, to expand on the Appellate Court's rationale.

There is no case law or statutory authority directly addressing the effect of a complete dismissal of criminal charges on a trial court's jurisdiction. Existing authority in the criminal context generally, however, is instructive on this question. It is well established that the authority of the Superior Court over criminal cases derives from the presentment of an information, which is "essential to initiate a criminal proceeding." *Reed* v. *Reincke*, 155 Conn. 591, 598, 236 A.2d 909 (1967). Here, to resolve the charges against him, the defendant applied for and was accepted into a pretrial supervised diversionary program for persons with psychiatric disabilities. Upon the successful completion of the program and application for dismissal, § 54-56*l* (i) promises dismissal of the charges. Furthermore, the statute also provides for erasure of any record of the charges under General Statutes § 54-142a upon successful completion of the program. General Statutes § 54-56*l* (i). When the information, which contains the charges and establishes the jurisdiction of the trial court, is dismissed, the court's jurisdiction is extinguished because there is then no valid charging document pending before the court to confer jurisdiction on it.

One example illustrating this principle is the trial court's loss of jurisdiction upon entry of a nolle prosequi. "The effect of a nolle is to terminate the particular prosecution of the defendant without an acquittal and without placing him in jeopardy. . . . Therefore, the nolle places the criminal matter in the same position it held prior to the filing of the information. Indeed, no criminal matter exists until, and if, the prosecution issues a new information against the defendant. As our rules explain, [t]he entry of a nolle prosequi terminates

the prosecution and the defendant shall be released from custody. If subsequently the prosecuting authority decides to proceed against the defendant, a new prosecution must be initiated. . . . The defendant is accused of no crime, is released from custody unconditionally and is no longer under the authority of the [trial] court. It follows that, generally, *a court does not have jurisdiction over the case after the entry of a nolle.* . . . Although this court has recognized a narrow exception to this general rule, that exception is not applicable in [this] case."[10] (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *State* v. *Richardson*, 291 Conn. 426, 430, 969 A.2d 166 (2009). The dismissal following completion of a diversionary program similarly places the case in a state in which "no criminal matter exists . . . ." (Internal quotation marks omitted.) Id. Therefore, without pending charges, the trial court does not possess jurisdiction over the case.

Other jurisdictions have similarly concluded that a trial court is divested of jurisdiction and authority upon the dismissal of all criminal charges. For example, the Appellate Court highlighted *Smith* v. *Superior Court*, 115 Cal. App. 3d 285, 171 Cal. Rptr. 387 (1981), in which the California Court of Appeal concluded that, "at least [when] no actual fraud has been perpetrated [on] the court, a criminal court has no authority to vacate a dismissal entered deliberately but [on] an erroneous factual basis." Id., 287; see also *State* v. *Butler*, supra, 209 Conn. App. 99. Similarly, the Washington Court

[10] The narrow exception mentioned in *Richardson* is from *State* v. *Lloyd*, 185 Conn. 199, 205–206, 440 A.2d 867 (1981), in which we concluded that "the trial court retains jurisdiction after the entry of a nolle prosequi over the defendant's objection when the defendant has a motion to dismiss on other grounds pending before the court prior to the entry of the nolle." *State* v. *Richardson*, 291 Conn. 426, 430 n.5, 969 A.2d 166 (2009). We need not address the continued viability of this rule because it is not at issue in this case.

of Appeals has concluded that "[a] criminal action is commenced by the filing of an indictment or information. . . . Thus, a [trial] court acquires subject matter jurisdiction over a criminal action only at such time as an indictment or information is filed . . . [and] loses subject matter jurisdiction when the indictment or information is dismissed." (Citations omitted.) *State* v. *Corrado*, 78 Wn. App. 612, 615, 898 P.2d 860 (1995). The Missouri Court of Appeals has also concluded that, "[o]nce a nolle prosequi has been entered, the trial court loses jurisdiction to proceed with the case." *Kilgore* v. *State*, 70 S.W.3d 621, 623 (Mo. App. 2002). Lastly, the Texas Court of Criminal Appeals has explained: "It is well settled that when a trial court empowered with jurisdiction over a criminal case sustains a motion to dismiss the indictment or information, the person accused thereunder is, in law, discharged from the accusation against him; there is, concomitant to such dismissal, no case pending against the accused and, accordingly, no jurisdiction remaining in the dismissing court." *State ex rel. Holmes* v. *Denson*, 671 S.W.2d 896, 898–99 (Tex. Crim. App. 1984).

CONCLUSION

The Appellate Court correctly concluded that the trial court lost jurisdiction when it dismissed the defendant's pending charges and, therefore, was without jurisdiction to entertain the state's motion to open the judgment and reinstate the charges. We also agree with the Appellate Court's conclusion that we need not decide whether the civil rule permitting a trial court to open a judgment obtained by fraud applies in the criminal context because the record before us does not support a finding of fraud or intentional misrepresentation.

The judgment of the Appellate Court is affirmed.

In this opinion ROBINSON, C. J., and MULLINS and MOLL, Js., concurred.

D'AURIA, J., concurring in part and concurring in the judgment. In this certified appeal, the majority once again holds that the legislature has stripped the courts of this state of their inherent common-law authority to open, correct, or modify a judgment, today, a judgment of dismissal following a defendant's completion of a diversionary program. I disagree that our courts have been legislatively dispossessed of this inherent authority, but, because I agree that the trial court should have denied the state's motion to open in this particular case, I concur in the judgment.

We have long recognized that, at common law, courts of general jurisdiction in this state had inherent power to open, correct, or modify judgments. See, e.g., *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 469, 239 A.3d 272 (2020); *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 106, 952 A.2d 1 (2008). This principle is deeply rooted in our common law and reflects the beneficent policy that courts should be able to admit and correct mistakes, whether their own mistakes or those of the parties, to do justice. See *State* v. *Luzietti*, 230 Conn. 427, 440, 646 A.2d 85 (1994) (*Katz, J.*, dissenting) ("we should recognize the trial court's inherent power to correct errors of substance within a reasonable time in order to do justice"). Historically, this included the authority to grant a motion for a new trial, which is a "[common-law] power [that] the courts . . . have the right to exercise in such a manner as shall best promote justice." *Zaleski* v. *Clark*, 45 Conn. 397, 404 (1877).

It has never been questioned—and neither the parties nor the majority in the present case questions—whether the general common-law rule that courts have inherent authority to open, correct, or modify judgments applied equally to all courts of general jurisdiction, which, in Connecticut, include criminal courts. See *State* v. *Ramos*,

306 Conn. 125, 133–34, 49 A.3d 197 (2012) ("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." (Internal quotation marks omitted.)). For purposes of my discussion here, I will assume the same. The majority assumes, too—or does not challenge—that this common-law authority, as late as 1978, extended to the authority of courts to open, correct, or modify judgments dismissing criminal charges.

Because the policy favoring the finality of judgments competes with the beneficent policy permitting courts to rectify their mistakes, litigation has usually centered on how long and under what circumstances courts should be able to exercise their inherent power to open, correct, or modify their judgments. See, e.g., *People* v. *Karaman*, 4 Cal. 4th 335, 348, 842 P.2d 100, 14 Cal. Rptr. 2d 801 (1992) (recognizing that common-law rule "that the trial court may change its judgment only during the term in which the judgment was rendered, but not thereafter . . . was established in order to provide litigants with some finality to legal proceedings" (citations omitted; footnote omitted)). The present case is only the most recent example of this court's often tortured attempts to accommodate these competing public policies, which sometimes results in manufactured rules; see *State* v. *Wilson*, 199 Conn. 417, 437, 513 A.2d 620 (1986) (borrowing civil rule of practice providing for four months to open judgments); exceptions to exceptions to those rules; see *State* v. *Myers*, 242 Conn. 125, 131, 136, 698 A.2d 823 (1997) (court had jurisdiction to rule on motion for new trial based on juror bias five months after defendant had been sentenced); and, most recently, in the present case and in *State* v. *McCoy*, 331 Conn. 561, 586–87, 206 A.3d 725 (2019), in the overruling of the exceptions to the exceptions (i.e., *Wilson* and

Myers) in an attempt to clean up our case law and make the lines brighter.

McCoy involved the question of whether there was, or ought to be, an exception to the common-law, temporal limitation on the court's inherent authority to correct its mistakes—that is, that the trial court loses jurisdiction over the case when the convicted defendant is committed to the custody of the Commissioner of Correction and begins serving his sentence—that would permit the trial court to rule on a timely filed motion before the court had sentenced the defendant. Id., 574–75. The majority in *McCoy* answered this question in the negative: i.e., our law could not abide such an exception and, to the extent that we had permitted such an exception in the past, threw shade on our precedent. See id., 588–89; see also id., 583 (expressing "serious concerns" about *Myers'* "rationale and the implications . . . were we to follow it without question"). As I explained in my concurrence and dissent in *State* v. *McCoy*, supra, 331 Conn. 600 (*D'Auria*, *J.*, *Palmer* and *McDonald*, *Js.*, concurring in part and dissenting in part), I believe the majority's holding in that case created an illogical result and was avoidable if we had acted like the common-law court we are and found exceptions to a rule—or relied on existing exceptions—when good sense calls for it. As in *McCoy*, the rule at issue in the present case is "a common-law rule borne out of experience and sensibility"; O. Holmes, The Common Law (P. Pereira & D. Beltran eds., 2011) p. 5; and "this court has the inherent power to define its contours to ensure that its application does not lead to unsensible and unjust results . . . ." *State* v. *McCoy*, supra, 614 (*D'Auria*, *J.*, concurring in part and dissenting in part). I will not repeat the entirety of that analysis here.

In the present case, I believe that the majority repeats the error of *McCoy* and earlier cases by assuming—indeed, holding—that the legislature in 1977 abrogated

the authority of our courts to open, correct, or modify judgments and that it did so by eliminating the word "sessions" from General Statutes (Rev. to 1977) § 51-181. See Public Acts 1977, No. 77-576, § 27 (P.A. 77-576). I agree with the majority that the common-law rule, as measured by sessions of the court, is now obsolete. But, in my view, the notion that this legislative change abrogated our trial courts' inherent authority to open, correct, or modify judgments is not an inescapable conclusion. Rather, I would conclude that courts of this state still have this authority, even though fashioning a rule in the context of this case—the unappealed judgment dismissing a criminal case—might present challenges that cannot be overcome.

It is necessary first to review some of the history of General Statutes § 51-181 and, in doing so, to bear in mind our general rule of construction that, when a statute seeks to limit a court's common-law jurisdiction, we strictly construe that statute so as to limit any incursion on our authority only to the extent expressly and explicitly stated by the legislature. See, e.g., *Sastrom* v. *Psychiatric Security Review Board*, 291 Conn. 307, 324–25, 968 A.2d 396 (2009) (explaining that legislature knows how to expressly limit scope of court's jurisdiction, and, if no intent to limit is expressed, then statute does not divest court of jurisdiction). This rule of construction is consistent with the even more general rule that the court's common-law general jurisdiction is broad and that "there is a strong presumption in favor of jurisdiction"; *State* v. *Ramos*, supra, 306 Conn. 134; and is a concrete application of the well established maxim that we must strictly construe statutes in derogation of the common law. See, e.g., *Fennelly* v. *Norton*, 294 Conn. 484, 505, 985 A.2d 1026 (2010). We must also keep in mind that the Superior Court is a court of general jurisdiction, and, therefore, "[i]n the absence of statutory or constitutional provisions, the limits of its

jurisdiction are delineated by the common law." (Internal quotation marks omitted.) *State* v. *Ramos*, supra, 133–34.[1]

As the majority correctly notes, at common law, courts had the inherent power to open, correct, or modify their own judgments. This authority was limited in duration, however. Nearly 150 years ago, we described that limitation as follows: "During the continuance of a term of court the judge holding it has, in a sense, absolute control over judgments rendered; that is, he can declare and subsequently modify or annul them." *Sturdevant* v. *Stanton*, 47 Conn. 579, 580 (1880). Over 100 years later, and since then, we have indicated that, at common law, "a trial court possesses the inherent power to modify its own judgments during the term at which they were rendered." *State* v. *Wilson*, supra, 199 Conn. 436; see also *Snow* v. *Calise*, 174 Conn. 567, 571–72, 392 A.2d 440 (1978).[2] At common law, even when the term had not yet ended, a trial court did not have jurisdiction to modify its judgment after a person had begun to serve his or her sentence. See *State* v. *Henkel*, 23 Conn. Supp. 135, 138, 177 A.2d 684 (Conn. Cir. 1961) ("[w]hile the established rule is that [a] sentence in a criminal case may be modified at any time during the term of court at which it was imposed, such modification cannot be made after an act has been done in execution of it" (internal quotation marks omitted)). There are, however, common-law exceptions to this

[1] The majority confuses this maxim and insists that "it is not appropriately within our purview to infer jurisdiction when no statutory provision exists to grant it."

[2] The majority correctly observes that this court has interpreted the word "term" to refer to "sessions" of the court, "as it was defined in early enactments of § 51-181." The word "term," as used in the common-law rule that a judgment may not be opened after the term during which it was rendered, has been interpreted to mean "sessions" of court, as defined in § 51-181, and not the statutory annual term provided for in General Statutes § 51-179. *Cichy* v. *Kostyk*, 143 Conn. 688, 695–96, 125 A.2d 483 (1956).

general rule, one being that trial courts retain jurisdiction after sentencing to correct an illegal sentence. See, e.g., *State* v. *Parker*, 295 Conn. 825, 835–36, 992 A.2d 1103 (2010). There is also a common-law exception recognizing that trial courts have "inherent" power, "independent of [any] statutory provisions," to open a civil judgment "obtained by fraud" "in the actual absence of consent, or because of mutual mistake" at any time. *Kenworthy* v. *Kenworthy*, 180 Conn. 129, 131, 429 A.2d 837 (1980).[3]

Prior to 1965, § 51-181 provided that there "shall be such sessions of the superior court . . . held annually . . . at such times and such places and for such duration of time as is fixed and determined by the chief judge of the superior court . . . ." General Statutes (Cum. Supp. 1963) § 51-181. Therefore, the duration of time in which courts had the jurisdiction to open, correct, or modify their judgments was limited by the chief judge's decision regarding how long the sessions were to be held. In 1965, the legislature amended § 51-181 to specify that the court "shall be deemed continuously in session with four quarterly sessions . . . held on the second Tuesday of September, December, March and June annually . . . at such times and places and for such duration of time as is fixed . . . by the chief judge of the superior court . . . ." Public Acts, Spec. Sess., February, 1965, No. 331, § 21, codified at General Statutes (Cum. Supp. 1965) § 51-181. This further limited the duration in which courts could open their judgments because, although the chief judge still retained authority to set the duration of the sessions, each session had to begin on a particular day and end by the next specified start date.

In 1977, the statute was modified to remove any reference to sessions, providing that "[t]he superior court

[3] As the majority notes, it is not clear whether this particular rule applies in the criminal context, and we need not reach that issue in this case.

shall sit continuously throughout the year, at such times and places and for such duration of time as is fixed and determined by the chief court administrator . . . .'' P.A. 77-576, § 27 (effective July 1, 1978). This statutory change was accomplished alongside numerous other statutory changes—including the reorganization of judicial districts and the increase of salaries of judges. See generally P.A. 77-576. This modification to § 51-181 was one section of a sixty-five section bill the purpose of which was to ensure an efficient transition to the reorganized, one tier court system that the legislature established the previous year; see Public Acts 1976, No. 76-436; which merged the Court of Common Pleas and the Juvenile Court with the Superior Court. When testifying in favor of the bill before the Judiciary Committee, a representative from the Office of the Executive Secretary of the State Judicial Department[4] noted that, since the merger of the courts in 1976, there was confusion regarding the use of the words ''term'' and ''session.'' See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 4, 1977 Sess., p. 1360, remarks of Harriett Rosen. This bill clarified that confusion in part by keeping language that was already present in the statute—that the court was ''continuously'' in session—but removing the reference to ''sessions.'' P.A. 77-576, § 27. Thus, the legislature removed the time frame for when a trial court could exercise its inherent authority to open, correct, or modify judgments. There is nothing in the alterations to the statutes governing the court system, however, that explicitly divests the courts of their inherent authority to open, correct, or modify judgments.

[4] Although this position no longer exists, at the time, the Office of the Executive Secretary of the State Judicial Department was a position appointed by the Chief Court Administrator, and the individual appointed to that position handled the administration of the nonjudicial business of the Judicial Department. See General Statutes (Rev. to 1977) § 51-8.

Concurrently with this change, in § 28 of P.A. 77-576, which was codified at General Statutes (Rev. to 1979) § 52-212a, the legislature established what is now referred to as the "four month" rule. General Statutes (Rev. to 2019) § 52-212a provided that, "in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed." In other words, having explicitly removed the time frame for when the court may exercise its inherent authority to open, correct, or modify judgments, the legislature filled in the gap by creating the four month rule, explicitly divesting the court of its common-law authority to open, correct, or modify judgments in civil cases. See General Statutes (Rev. to 2019) § 52-212 (a). No similar statute was enacted for criminal judgments. However, just because the legislature provided a specific rule for civil judgments does not necessarily mean it intended to eviscerate a court's jurisdiction in criminal cases to open, correct, or modify. This begs the question: assuming that jurisdiction previously existed, what happened to the court's inherent common-law authority to open, correct, or modify a judgment in the criminal context?

The majority infers from the legislature's removal of the reference to court "sessions" in § 51-181, a small part of a bill intended to implement an omnibus court reorganization bill, that, at the same time the legislature explicitly removed the timing of the court's sittings, it implicitly also took away the courts' common-law authority to open, correct, or modify criminal judgments. That is to say, the legislature not only removed the time frame during which the courts could exercise their inherent authority but also divested the courts of that authority entirely.

The majority reasons that "it is not appropriately within our purview to infer jurisdiction when no statutory provision exists to grant it." This is unquestionably true when we had no common-law jurisdiction in the area. But we have also said that "[t]he 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." (Internal quotation marks omitted.) *State* v. *Ramos*, supra, 306 Conn. 133–34.

It is well established that, at common law, a trial court had the discretionary power to open, correct, or modify its judgment. Id., 134. This court has identified two common-law, temporal limitations on this power. The first is not at issue: that a court loses jurisdiction after a defendant's sentence has been executed. See, e.g., *State* v. *Pallotti*, 119 Conn. 70, 74, 174 A. 74 (1934). The second was that the court's jurisdiction to open, correct, or modify a judgment is limited to the term or session in which the judgment was rendered. See *Sturdevant* v. *Stanton*, supra, 47 Conn. 580. Now that the Superior Court—by legislative action—no longer sits in terms or sessions, a court term or session cannot constitute the measure of the temporal limit of the courts' jurisdiction. But I do not agree that it is ineluctable that this means the courts now lack this authority entirely. Indeed, nothing in the amendments passed in 1977 explicitly divested or limited the courts' authority to open, correct, or modify criminal judgments.

As this court must strictly construe statutes that seek to limit the courts' common-law authority, looking to the explicit language removed from § 51-181 by the 1977 amendment, why is it not as reasonable a conclusion that the legislature intended to *extend* the courts' authority to open, correct, or modify judgments by removing any temporal limitation? I disagree with the majority that the statutory changes altering the Superior Court's

structure fully divested our courts of their common-law authority to open, correct, or modify criminal judgments. In my view, this reasoning too easily cedes inherent judicial authority to the legislature in a context in which I find no evidence that the legislature has sought to annex this authority for its own. In my view, upon the modest change in the statute, the judiciary retains its common-law authority to develop and adapt the common law in light of the fact that courts no longer sit in sessions. See *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 436, 54 A.3d 1005 (2012) (acknowledging that this court has "authority to adapt the common law to the changing needs of society," although not in sovereign immunity cases); see also *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U.S. 92, 102, 21 S. Ct. 561, 45 L. Ed. 765 (1901) ("the common law comprises the body of those principles and rules of action . . . which derive their authority . . . from the judgments and decrees of the courts" (internal quotation marks omitted)); *State* v. *McCoy*, supra, 331 Conn. 608 (*D'Auria, J.*, concurring in part and dissenting in part) ("[a]ccordingly, because the rule at issue is a common-law rule, this court has the authority to clarify, develop, and adapt the rule").

II

That begs the question of what is the proper rule to apply to the opening or modification of criminal judgments under our common law. I note initially that it is unclear if the court's pre-1977 common-law authority to open, correct, or modify a judgment before the end of the session applied to the dismissal of criminal cases at all. As I will discuss, there are sound reasons why the authority to open, correct, or modify a judgment should not extend to judgments of dismissal. If this authority did not exist before 1977, then the courts do not have this authority now, and this court may not extend its jurisdiction beyond the bounds that existed

at common law. See *State* v. *Ramos*, supra, 306 Conn. 133–34 ("[i]n the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law" (internal quotation marks omitted)). I am unaware of, and the parties have not cited, any case law regarding whether the common-law rule governing the opening and modification of judgments extended to criminal judgments. This might be the answer.

Absent conclusive evidence that this common-law rule did not apply to criminal judgments of dismissal, I will assume that it did. In making this assumption, I am mindful of the fact that our state courts are common-law courts; see *State* v. *Luzietti*, supra, 230 Conn. 431 ("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." (Citation omitted; footnote omitted.)); and this court is the ultimate arbiter of the scope of our courts' common-law jurisdiction. See, e.g., *Stuart* v. *Stuart*, 297 Conn. 26, 45, 996 A.2d 259 (2010) ("it is manifest to our hierarchical judicial system that this court has the final say on matters of Connecticut law"). Thus, once the legislature amended § 51-181 to eliminate the word "sessions," it was for this court to then decide the impact of this change on the common-law authority to open, correct, or modify criminal judgments.

Common-law judging often involves the search for a sensible rule that accommodates the interests implicated, and, in this case, any new common-law rule would have to be limited in a way that does not enhance our common-law jurisdiction. The rule the majority announces today as a matter of first impression—that, by legislative action in 1977, courts lost their inherent authority to open, correct, or modify criminal judgments of dismissal immediately—is actually an exception to the general rule that I have already referred to twice: that

courts have inherent authority to do so. But as I explained, because the legislature has not explicitly abrogated the courts' common-law authority to open, correct, or modify criminal judgments, I disagree with the exception the majority adopts. Rather, assuming that the common-law rule historically applied to criminal judgments, a review of our relevant case law regarding jurisdiction in criminal cases provides guidance for the rule that I suggest this court could consider adopting in light of the legislature's elimination of the word "sessions" in § 51-181: that courts retain jurisdiction to open, correct, or modify a criminal judgment during the twenty day appeal period if the state places the defendant on notice at the time of judgment that it may seek to appeal.

As the majority correctly notes, the dismissal of criminal charges is a complete and final resolution of all pending charges, and, under the reasoning in *McCoy*, a trial court would lose jurisdiction following that action, similar to an acquittal. The state does have the statutory right to seek permission to appeal from any dismissal of charges pursuant to General Statutes § 54-96. This court has held that, "[u]nder § 54-96 . . . permission to appeal [is] jurisdictional because, at common law, the state had no right to appeal in criminal cases." *Simms* v. *Warden*, 230 Conn. 608, 614, 646 A.2d 126 (1994). One important limit to the state's ability to appeal is that, "to protect the rights of both the [s]tate and the accused and to have an orderly procedure, it was essential that the practice under the statute of 1886 [the original statute giving the state the right to appeal in a criminal case] should require the [s]tate's [a]ttorney or prosecutor to secure from the presiding judge permission to appeal *at the time the judgment of acquittal* [*or dismissal*] *was rendered*." (Emphasis added.) *State* v. *Carabetta*, 106 Conn. 114, 117, 137 A. 394 (1927). In recognizing this restriction, this court in *Carabetta* acknowledged that "[t]he instances [in which a prosecu-

tor] will not know at the time of the judgment whether or not he should appeal will be few. The consequences to [the] [s]tate and [to the] accused compel this practice, and the incidental occasional inconvenience to the prosecutor must be accepted for the larger public interests involved—the just interests of the accused and of the [s]tate and of the orderly procedure which alone can make this statute effective and serviceable. . . . It is not necessary that the prosecutor shall at the moment of judgment reach a final determination that he will prosecute the appeal. It is necessary that he determine at the time of the judgment that he ought to ask the court for permission to take such appeal, so that the accused shall not be forthwith discharged . . . .'' (Citations omitted.) Id., 118–19.

This rule has been affirmed multiple times, including in *State* v. *Ross*, 189 Conn. 42, 46–47, 454 A.2d 266 (1983). The defendant in *Ross* claimed that the state's appeal should be dismissed because of the five day delay by the state in filing its written request for permission to appeal. Id., 46. On appeal, this court noted that ''[t]he evil perceived in granting a tardy request of the state to appeal was the injustice of dragging back into court a defendant who had reasonably assumed that his discharge meant that he was a free man no longer charged with a crime. *State* v. *Carabetta*, supra, [106 Conn.] 117. No such expectation could reasonably have been entertained by [the] defendants, however, because the state did express its intention to appeal at the time of judgment and the court refused to discharge the defendants when such a request was made during the proceeding. . . . The defendants were fully aware that the state intended to appeal.'' (Citation omitted.) *State* v. *Ross*, supra, 46. This has also become the expected course of action when the state intends to appeal from a dismissal of charges. See, e.g., *State* v. *Tucker*, 219 Conn. 752, 755–56, 595 A.2d 832 (1991); *State* v. *Rios*,

110 Conn. App. 442, 448 n.6, 954 A.2d 901 (2008); *State* v. *Tyler*, 6 Conn. App. 505, 507, 506 A.2d 562 (1986).

Because of the requirement, this court has explained that the trial court loses jurisdiction absent notice at the time of judgment that the state intends to appeal. See *State* v. *Avcollie*, 174 Conn. 100, 109, 384 A.2d 315 (1977) (holding that court retained in personam jurisdiction over defendant because state expressed intent to seek permission to appeal). When the state does provide this notice, however, the court maintains continuing jurisdiction over the case. Id. In my view, it would be a reasonable rule for this court to adopt—in the absence of court "sessions" to measure the courts' continuing jurisdiction to open, correct, or modify—that, once the state provides notice of its intent to appeal from a dismissal, the trial court retains jurisdiction to decide any motion, including a motion to open, filed within the twenty day appeal period. There is logic to this rule in that it "imposes reasonable demands on the trial attorneys to discover and disclose problems they perceive with the judgment." *State* v. *Luzietti*, supra, 230 Conn. 440 (*Katz*, *J.*, dissenting). It also provides the defendant with adequate notice that he may not ultimately remain a free man. See *State* v. *Middleton*, 20 Conn. App. 321, 326–27, 566 A.2d 1363 (1989) (court held that, although state did not explicitly express intention to appeal, because state took formal exception to court's ruling, defendant was on notice of possibility of appeal).

Nevertheless, even if the majority were to adopt this rule, I would have to conclude that the majority reaches the right conclusion in this particular case. Although the state could not have announced its intent to appeal at the time the charges against the defendant were dismissed, as it could not have known the information it would receive the next day, the prevailing notion that a defendant is entitled to notice that his charges may

be reinstated governs here as well. See *State* v. *Tucker*, supra, 219 Conn. 755. The state did not announce its intent to appeal from the dismissal of the criminal case or otherwise do anything to put the defendant on notice that the charges against him could be reinstated after the dismissal. Thus, at the time of judgment—the dismissal of the charges—because the state stated no intention to challenge the judgment, the trial court lost its jurisdiction. As a result, the trial court should have denied the state's motion to open because the defendant in this case would not have been on notice that the charges against him could have been reinstated. This result, however, does not necessitate the holding that the trial court does not have the inherent authority to open, correct, or modify its judgments in criminal cases because of an action taken by the legislature.

Finally, this court could decide that, without trial courts sitting in "sessions" any longer, there is no longer any sensible rule we can fashion that would appropriately cabin the trial courts' authority to open, correct, or modify criminal judgments of dismissal. We could conclude that the rule should be that courts no longer have any such authority. This would be a decision by this court, however, and would be a very different thing than concluding that the legislature removed from § 51-181 in the 1977 amendment a portion of the inherent common-law authority of our trial courts by eliminating any reference to "sessions."

Accordingly, I respectfully concur in part.