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DRANGINIS, J., dissenting. I disagree with the majority that the trial court had jurisdiction, pursuant to a motion to correct an illegal sentence, to consider the claim by the defendant, Tarrance Lawrence, that he was improperly convicted under the wrong statute. I therefore respectfully dissent.

The majority correctly sets forth some of the case law interpreting Practice Book § 43-22, which provides procedural authority by which a court may correct an illegal sentence. I agree with the majority that it is pursuant to this rule of practice that a defendant may attack the legality of his sentence or the legality of the manner in which the court imposed his sentence. I disagree, however, with the majority's apparent next step—that Practice Book § 43-22 is an appropriate procedural device by which a defendant may attack the substance of his conviction and that this rule of practice confers jurisdiction on the court where none previously existed.

As my view of this case hinges on the question of jurisdiction, a brief explanation of the court's jurisdiction and the sources from which it derives this jurisdiction is required. "Jurisdiction involves the power in a court to hear and determine the cause of action presented to it and its source is the constitutional and statutory provisions by which it is created." *Connecticut State Employees Assn., Inc. v. Connecticut Personnel Policy Board*, 165 Conn. 448, 456, 334 A.2d 909 (1973); see *Andrew Ansaldi Co. v. Planning & Zoning Commission*, 207 Conn. 67, 73, 540 A.2d 59 (1988) (*Shea, J.*, concurring). "Article fifth, § 1 of the Connecticut constitution proclaims that [t]he powers and jurisdiction of the courts shall be defined by law, and General Statutes § 51-164s provides that [t]he superior court shall be the sole court of original jurisdiction for all causes of action, except such actions over which the courts of probate have original jurisdiction, as provided by statute." (Internal quotation marks omitted.) *State v. Carey*, 222 Conn. 299, 305, 610 A.2d 1147 (1992), on appeal after remand, 228 Conn. 487, 636 A.2d 840 (1994). "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.) *State v. Luzietti*, 230 Conn. 427, 431, 646 A.2d 85 (1994).<sup>1</sup>

"It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence." (Citations omitted.)

Id., 431–32. There are a limited number of circumstances in which the legislature has conferred on the trial courts “continuing jurisdiction to act on their judgments after the commencement of sentence . . . . See, e.g., General Statutes §§ 53a-29 through 53a-34 (permitting the trial court to modify terms of probation after sentence is imposed); General Statutes § 52-270 (granting jurisdiction to trial court to hear a petition for a new trial after execution of original sentence has commenced); General Statutes § 53a-39 (allowing the trial court to modify sentences of less than three years provided a hearing is held and good cause shown).” (Internal quotation marks omitted.) *State v. Boulter*, 49 Conn. App. 702, 705, 716 A.2d 134 (1998).

It also is well established, pursuant to the common law, that the court has continuing jurisdiction to correct an illegal sentence. See, e.g., *Bozza v. United States*, 330 U.S. 160, 166, 67 S. Ct. 645, 91 L. Ed. 818 (1947) (“[a]n excessive sentence should be corrected . . . by an appropriate amendment of the invalid sentence by the court of original jurisdiction”); *Murphy v. Massachusetts*, 177 U.S. 155, 157, 20 S. Ct. 639, 44 L. Ed. 711 (1900) (“in many jurisdictions it has been held that the appellate court has the power, when there has been an erroneous sentence, to remand the case to the trial court for sentence according to law”); *In re Bonner*, 151 U.S. 242, 259–60, 14 S. Ct. 323, 38 L. Ed. 149 (1894) (“[w]here the conviction is correct . . . there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be corrected”).

That common-law grant of jurisdiction has been codified for the federal courts in rule 35 of the Federal Rules of Criminal Procedure.<sup>2</sup> *Hill v. United States*, 368 U.S. 424, 430 n.8, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962). That grant of jurisdiction is recognized and the procedure by which it may be invoked is regulated in Connecticut by Practice Book § 43-22.<sup>3</sup> See *State v. Daniels*, 207 Conn. 374, 387, 542 A.2d 306, after remand for articulation, 209 Conn. 225, 550 A.2d 885 (1988), cert. denied, 489 U.S. 1069, 109 S. Ct. 1349, 103 L. Ed. 2d 817 (1989). I stress, however, that the rule of practice merely regulates the procedure by which the court’s jurisdiction may be invoked; it does not and cannot confer jurisdiction on the court to consider matters otherwise outside the court’s jurisdiction. “Practice Book rules do not ordinarily define subject matter jurisdiction. General Statutes § 51-14 (a) authorizes the judges of the Superior Court to promulgate rules regulating pleading, practice and procedure in judicial proceedings . . . . *Such rules shall not abridge, enlarge or modify any substantive right nor the jurisdiction of any of the courts.*” (Emphasis added; internal quotation marks omitted.) *State v. Carey*, supra, 222 Conn. 307. For the court to have jurisdiction to consider the defendant’s claim of

an illegal sentence, the claim must fall into the same categories as those claims that, under the common law, the court had jurisdiction to review.

As noted by the majority, Connecticut has recognized two types of circumstances in which the court has jurisdiction to review a claimed illegal sentence. The first of those is when the sentence itself is illegal, when the sentence “either exceeds the relevant statutory maximum limits, violates a defendant’s right against double jeopardy, is ambiguous, or is internally contradictory.” *State v. McNellis*, 15 Conn. App. 416, 443–44, 546 A.2d 292, cert. denied, 209 Conn. 809, 548 A.2d 441 (1988); see also *United States v. Pavlico*, 961 F.2d 440, 443 (4th Cir. 1992). The other circumstance in which a claimed illegal sentence may be reviewed is that in which the sentence is within the relevant statutory limits, but was “imposed in a way which violates defendant’s right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . .” (Internal quotation marks omitted.) *State v. McNellis*, supra, 444; see also *United States v. Guevremont*, 829 F.2d 423, 427 (3d Cir. 1987).<sup>4</sup> Both types of illegal sentence claims share the requirement that the sentencing proceeding, and not the trial leading to conviction, be the subject of the attack. Such has been the understanding of the federal courts since the matter first was discussed by the United States Supreme Court in *Hill v. United States*, supra, 368 U.S. 424, in which Justice Black, in dissent, recognized that extending rule 35 to cover sentences imposed in an illegal manner “does not of course mean that Rule 35 permits attack upon a sentence based upon mere trial errors. Rule 35 applies to any ‘illegal sentence,’ *not to any illegal conviction*, and thus by its terms the Rule protects only those rights which a defendant retains even if the judgment of guilt against him is proper.” (Emphasis added.) *Id.*, 432 n.2 (Black, J., dissenting). This court adopted that same understanding of the common-law right to challenge an illegal sentence in *State v. Mollo*, 63 Conn. App. 487, 491, 776 A.2d 1176, cert. denied, 257 Conn. 904, 777 A.2d 194 (2001), in which this court recognized that “the relief allowed by Practice Book § 43-22 require[s], as a precondition, a valid conviction.”

By this analysis, in no way am I suggesting that the defendant’s conviction was valid, nor am I suggesting that it was invalid; rather, I do not believe that we need to reach the defendant’s claim that he was convicted of the wrong crime, for his claim is an attack on the underlying conviction, on an improper jury instruction, and not an attack on the sentence he received or the manner in which the court imposed the sentence. Because the defendant’s claim does not fall into the limited category of claims over which the court has

continuing jurisdiction, I believe the court properly dismissed the defendant's motion for lack of subject matter jurisdiction. The claim the defendant raises could have been disposed of properly on direct appeal and, as the defendant recognized in his brief, could be raised properly in a petition for a writ of habeas corpus.<sup>5</sup>

The essence of the defendant's claim is that he was convicted of the wrong crime. He does not claim, nor could he, that the sentence he received did not fit within the statutory limits of the crime of which he was convicted.<sup>6</sup> He does not claim that the crime of which he was convicted does not correspond to the charges against him in the information. The defendant also does not claim that he was denied due process at his sentencing hearing or that he is confused about the terms of his sentence. If the defendant's claim were to fall into any of those categories, Practice Book § 43-22 would be the proper vehicle for the defendant to bring his concerns before the court. Because the defendant's claim falls outside those narrow circumstances in which the court retains jurisdiction over a defendant once that defendant has been transferred into the custody of the commissioner of correction to begin serving his sentence, the claim cannot be considered pursuant to a motion to correct an illegal sentence under Practice Book § 43-22.

For those reasons, I respectfully dissent.

<sup>1</sup> The majority suggests in footnote 3 of its opinion that there exists a difference between conferring original subject matter jurisdiction on a court and providing for continuing jurisdiction in certain circumstances. That was the precise question our Supreme Court resolved in *Luzietti*, in which it concluded that "the trial court lacks jurisdiction to modify its judgment in the absence of a *legislative or constitutional grant* of continuing jurisdiction." (Emphasis added.) *State v. Luzietti*, supra, 230 Conn. 431; see also *State v. Jones-Richards*, 271 Conn. 115, 123, 855 A.2d 979 (2004). No such grant of jurisdiction exists here.

<sup>2</sup> Connecticut law most closely resembles the version of rule 35 (a) of the Federal Rules of Criminal Procedure that was in existence between 1966 and 1984. That rule provided: "Correction of sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." Fed. R. Crim. P. 35 (a) (1984). That rule was amended in 1984 to limit to seven days the time in which a federal court may refashion a sentence, and the court may do so only when there is arithmetical, technical or other clear error. Any other sentence that might have been considered illegal and reparable under the previous rule may be remedied only through a direct appeal or a collateral attack. See National Institute for Trial Advocacy, commentary on rule 35 of the Federal Rules of Criminal Procedure (2004).

<sup>3</sup> Unlike the federal rules, which have been amended pursuant to congressional action; see *United States v. Cook*, 890 F.2d 672, 674–75 (4th Cir. 1989); our rules of practice are promulgated by the Superior Court of this state and, as such, cannot abridge, enlarge or modify any substantive right. General Statutes § 51-14 (a).

<sup>4</sup> The original language of rule 35 of the Federal Rules of Criminal Procedure, enacted in 1943, referred only to illegal sentences, not sentences imposed in an illegal manner. The United States Supreme Court interpreted that rule in *Hill v. United States*, supra, 368 U.S. 424, and foreclosed relief for claims of sentences imposed in an illegal manner. The rule then was amended in 1966 to provide that relief, at least for a specified period of time. Connecticut law can be understood to follow either the version of rule 35 as it existed between 1966 and 1984 or the position of the dissent in *Hill*, which stated: "I would have thought that a sentence imposed in an illegal manner—whether the amount or form of the punishment meted out

constitutes an additional violation of law or not—would be recognized as an illegal sentence under any normal reading of the English Language. And precisely this sort of common-sense understanding of the language of Rule 35 has prevailed generally among the lower federal courts that deal with questions of the proper interpretation and application of these Rules as an everyday matter. Those courts have expressed their belief that, even where the punishment imposed upon a defendant is entirely within the limits prescribed for the crime of which he was convicted, a sentence imposed in a prohibited manner . . . is an illegal sentence subject to correction under Rule 35.” (Internal quotation marks omitted.) *Id.*, 432 (Black, J., dissenting).

Regardless of which, if either, of those sources gave rise to Connecticut’s interpretation of an “illegal sentence,” the cases interpreting rule 35 as it existed between 1966 and 1984, when the rule most closely corresponded to our current law, are instructive on the circumstances that would give rise to an illegal sentence or sentence imposed in an illegal manner under Connecticut law. All federal cases addressing the issue of whether a defendant can attack his underlying conviction through a claim of an illegal sentence have responded in the negative. See, e.g., *United States v. Lika*, 344 F.3d 150, 152–53 (2d Cir. 2003) (“[i]t is well established that a motion under Rule 35 can only be used to correct an illegal sentence, and not to correct trial errors or errors in other presentencing proceedings. . . . Rule 35 presupposes a valid conviction. . . . Sentences subject to correction as illegal . . . are those that the judgment of conviction did not authorize.” [Citations omitted; internal quotation marks omitted.]); *United States v. Rourke*, 984 F.2d 1063, 1067 (10th Cir. 1992) (“[r]ule 35 (a) allows correction of a sentence and does not provide for an attack on the validity of the underlying conviction”).

<sup>5</sup> The majority cites *Cobham v. Commissioner*, 258 Conn. 30, 779 A.2d 80 (2001), as requiring the defendant to raise his claim of an illegal sentence prior to raising his claim in a petition for a writ of habeas corpus. The majority correctly states that *Cobham* requires a defendant to “file a motion in the trial court to correct an illegal sentence under Practice Book § 43-22” prior to challenging the legality of that sentence in a petition for a writ of habeas corpus. The defendant here, however, is not challenging the legality of his sentence, but rather the legality of his conviction and, therefore, *Cobham* and its requirements do not apply.

<sup>6</sup> The majority determines that this case presents a claim similar to that presented in *State v. Barksdale*, 79 Conn. App. 126, 829 A.2d 911 (2003), and bases its conclusion that the court has jurisdiction to hear this defendant’s claim of an illegal sentence in part on that determination. As the majority noted, the statute, as it read prior to its amendment in 2002, was the legally operative statute in *Barksdale* and, pursuant to that statute, the defendant could be sentenced only to ten years incarceration. The court, however, had sentenced the defendant to twenty years, in excess of the statutory maximum. *Barksdale*, therefore, presented a case of a classic illegal sentence that exceeded the maximum sentence permitted by the statutory scheme and, unlike the sentence here, which the defendant concedes falls within the statutory limits for the crime of which he was convicted, could not be considered valid facially or in fact. See *State v. McNellis*, supra, 15 Conn. App. 443–44 (“[a]n illegal sentence is essentially one which . . . exceeds the relevant statutory maximum limits”).

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