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DUPONT, J. dissenting. I respectfully dissent. The majority construes the motion to correct an illegal sentence filed by the defendant, Tarrance Lawrence, and brought pursuant to Practice Book § 43-22, as an attempt to attack the validity of his underlying conviction, rather than the legality of his sentence, and concludes that the court lacked subject matter jurisdiction for such an attack. I believe the defendant *is* attacking the legality of his sentence, which rests on his claim that his underlying conviction was illegal. The question is whether the court had subject matter jurisdiction to review the defendant's claim, brought pursuant to Practice Book § 43-22, namely, that his conviction rested on a legally inoperative statute, which, if the defendant is correct, would render his sentence illegal and in need of correction. My view is that the majority holding is inconsistent with the Supreme Court's and this court's interpretation and application of Practice Book § 43-22.

In my opinion, subject matter jurisdiction to review the merits of the defendant's motion exists pursuant to Practice Book § 43-22 because he has asserted a *claim* or a colorable claim that he was sentenced pursuant to a statute that could not, as a matter of law, be legally operative. Jurisdiction does not rest on a resolution of the merits in favor of the defendant to order the relief of a corrected sentence. Jurisdiction rests instead on the claim of the defendant that a legally incorrect statute was used to convict him, which then led to an illegal sentence. On the basis of the facts of this case, I conclude that there is jurisdiction to review the claims of the defendant. I would, accordingly, do so, but would deny the motion on its merits.

The principal issues of this appeal concern subject matter jurisdiction and the scope of Practice Book § 43-22. The Supreme Court has long held that "because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *State v. Alexander*, 269 Conn. 107, 112, 847 A.2d 970 (2004). "Subject matter jurisdiction does not rest on the viability of the claims that a court is asked to adjudicate. Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . It is well established that, in determining whether a court has subject matter jurisdiction, *every*

presumption favoring jurisdiction should be indulged." (Emphasis added; internal quotation marks omitted.) *Olympus Healthcare Group, Inc. v. Muller*, 88 Conn. App. 296, 300, 870 A.2d 1091 (2005). "Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure." (Internal quotation marks omitted.) *Coppola v. Coppola*, 243 Conn. 657, 665, 707 A.2d 281 (1998).

The defendant claims in his motion that once he was found not guilty of murder because he was found to be under the influence of extreme emotional disturbance, he could not be convicted, legally, of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a (a), but could be convicted only of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (2). He claims that the latter is the legally operative statute and that his sentence therefore was legally defective although it conformed to the jury's finding. He seeks a correction of his sentence to the maximum sentence of twenty years incarceration allowable under § 53a-55 (a) (2), instead of the sentence he had received of thirty-five years. He does not claim that any error was made during the course of the trial, but that he was convicted and sentenced pursuant to the wrong statute.

The only issue presented by this appeal is whether, indulging every presumption in favor of jurisdiction, the court had jurisdiction or authority, pursuant to Practice Book § 43-22, to correct an illegal sentence, even after the sentence had commenced. The Supreme Court has held that "the jurisdiction of the sentencing court terminates once a defendant's sentence has begun, and, therefore, that court may no longer take any action affecting a defendant's sentence *unless it expressly has been authorized to act*. . . . Practice Book § 43-22, which provides the trial court with such authority, provides that [t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner. An illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory." (Citations omitted; emphasis added; internal quotation marks omitted.) *Cobham v. Commissioner of Correction*, 258 Conn. 30, 37-38, 779 A.2d 80 (2001). In this case, the defendant is claiming that the illegality of his sentence lies in the fact that the sentence exceeded the *relevant* statutory maximum limit. The defendant's *claim* should not be confused with the merits of that claim.

A purely conceptual beginning is that "[i]t is axiomatic that, in a criminal case, the sentence imposed by

the court constitutes the judgment of conviction.” *State v. Waterman*, 264 Conn. 484, 489 n.6, 825 A.2d 63 (2003). It follows, as a matter of logical necessity, that *every* motion claiming relief pursuant to Practice Book § 43-22 that challenges the legality of a sentence *is also an attack on the legality or validity of the conviction*. The sentence and the conviction are one and the same. *State v. Waterman*, supra, 489 n.6. One cannot, therefore, attack the legality of the sentence without also attacking the legality of the conviction. The Supreme Court and this court have held that Practice Book § 43-22 is the proper procedural vehicle through which to challenge the validity of an underlying conviction when the sentence allegedly rests on a conviction based on a legally inoperative statute.

In *State v. Cator*, 256 Conn. 785, 781 A.2d 285 (2001), the Supreme Court addressed the scope of Practice Book § 43-22 and the question of the trial court’s subject matter jurisdiction over a sentence once the sentence has commenced. In that case, the jury had found the defendant guilty of murder and felony murder, and the court had initially sentenced him “to a total of fifty-five years imprisonment, suspended after fifty years, with five years of probation to follow.” *State v. Cator*, supra, 788. Later, after the defendant had begun serving his sentence, the state moved to correct the sentence because the imposition of probation was illegal and because the two sentences should be merged. “[T]he trial court merged the defendant’s convictions for murder, and felony murder and imposed a total effective sentence of fifty years without a period of probation. . . . The defendant . . . claim[ed] that the trial court did not have the authority to correct a defendant’s sentence once that defendant has begun serving the sentence.” *Id.*, 803.

Rejecting the defendant’s argument, the court noted that “[o]f course, a defendant cannot be punished twice for the same crime. When the trial court has imposed two sentences for the same offense, *the appropriate action is to merge the two convictions and to vacate one of the sentences*.” (Emphasis added.) *Id.* The Supreme Court concluded that “the trial court had jurisdiction to correct the defendant’s sentences pursuant to Practice Book § 43-22, which provides that [t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner. Both the trial court and [the Supreme Court], on appeal, have the power, at any time, to correct a sentence that is illegal.” (Internal quotation marks omitted.) *State v. Cator*, supra, 256 Conn. 803–804. Concluding that the original sentence imposed by the trial court was illegal, the court held that the trial court had jurisdiction to correct the sentences pursuant to Practice Book § 43-22. *State v. Cator*, supra, 804. Thus, even though the defendant was charged with both mur-

der and felony murder, and the jury found him guilty of both crimes and the court initially sentenced him for both crimes, the court still retained jurisdiction, after the defendant's sentence had begun, pursuant to Practice Book § 43-22, to resentence him for only one crime. Thus, the court concluded that one of the convictions was illegal as a matter of law. As in *Cator*, the defendant's claim in this case is that his sentence is illegal because it is based on a void conviction for a statutory offense, which on the facts prevailing in the case, could not legally be the operative statute for his conviction.

It is noteworthy that in *Cator*, the Supreme Court rejected the defendant's reliance on *State v. Luzietti*, 230 Conn. 427, 431–34, 646 A.2d 85 (1994), for the proposition that the court was without jurisdiction to correct his sentence because at “common law, once a defendant has begun serving his sentence, the trial court no longer has jurisdiction to alter its judgment in the absence of a legislative or constitutional grant of continuing jurisdiction. *Id.*, 431.” (Internal quotation marks omitted.) *State v. Cator*, supra, 256 Conn. 804. The court expressly held that “the trial court had jurisdiction to alter the sentence *pursuant to Practice Book § 43-22*” (Emphasis added.) *State v. Cator*, supra, 804–805.

In *State v. Raucci*, 21 Conn. App. 557, 575 A.2d 234, cert. denied, 215 Conn. 817, 576 A.2d 546 (1990), the defendant filed a motion to correct an illegal sentence pursuant to Practice Book § 935, now § 43-22, and moved the court to vacate one count of the conviction. In *Raucci*, “[t]he defendant was originally convicted on four counts: larceny in the first degree; conspiracy to commit larceny in the first degree; burglary in the third degree; and conspiracy to commit burglary in the third degree. In November, 1983, the court imposed sentence as follows. On the convictions of larceny in the first degree and conspiracy to commit larceny in the first degree, the court imposed concurrent sentences of not less than ten nor more than twenty years. On the convictions of burglary in the third degree and conspiracy to commit burglary in the third degree, the court sentenced the defendant to not less than two and one-half nor more than five years, to run consecutively, both as to each other and as to the first two sentences. The total effective sentence, therefore, was not less than fifteen nor more than thirty years.” *State v. Raucci*, supra, 558.

“In April, 1987, subsequent to the defendant's sentencing, [this court] held in *State v. Stellato*, 10 Conn. App. 447, 456–57, 523 A.2d 1345 (1987), that where a defendant is tried on multiple conspiracy counts arising out of a single agreement, the *trial court must render judgment and sentence the defendant* on only that conspiracy to commit the most serious offense. . . . On the basis of *Stellato*, the defendant moved, pursuant to Practice Book § [43-22], to vacate the conviction for

conspiracy to commit burglary in the third degree. The court granted the defendant's motion, and vacated that conviction." (Citation omitted; emphasis added.) *State v. Raucci*, supra, 21 Conn. App. 559.

"The defendant also moved that the total effective sentence be reduced to not less than twelve and one-half or more than twenty-five years, by eliminating the term originally imposed on the vacated conviction, namely, not less than two and one-half nor more than five years, and leaving intact the sentences imposed for the three remaining convictions." *Id.* Declining the defendant's invitation, the court "resentenced the defendant on the three remaining counts so as to reflect its original sentencing intent, and reimposed a total effective sentence of not less than fifteen nor more than thirty years." *Id.* The defendant appealed, claiming that "the trial court had no authority to increase a valid sentence once its execution had commenced" *Id.*, 560.

The principal issue facing this court in *Raucci* concerned the court's power to resentence a defendant on the granting of a motion to correct an illegal sentence pursuant to Practice Book § 43-22. There is, however, a preliminary issue that is assumed in *Raucci*, namely, the scope of Practice Book § 43-22 and whether that section is the proper procedural device with which to attack the validity of the conviction. There can be no question that in *Raucci* the defendant was convicted of four counts and that, as to each count, the sentence imposed was within the maximum allowable sentence under the operative statutes. Facially, therefore, the sentence imposed on each count was within the statutory limits of each count. This court recognized, however, that the defendant's sentence was nevertheless illegal, *as a matter of law*, because pursuant to *State v. Stellato*, supra, 10 Conn. App. 456-57, when a "defendant is tried on multiple conspiracy counts arising out of a single agreement, *the trial court must render judgment and sentence* the defendant on only that conspiracy to commit the most serious offense." (Emphasis added.) *State v. Raucci*, supra, 21 Conn. App. 559.

In *State v. Barksdale*, 79 Conn. App. 126, 829 A.2d 911 (2003), this court recognized that Practice Book § 43-22 is the proper procedural vehicle through which to assert a claim that a sentence imposed is illegal because it did not conform to the legally operative statute as of the date of the crime. *Id.*, 138-39. In *Barksdale*, the defendant claimed that he was sentenced illegally under General Statutes § 53a-71 (a) (1) because at the time he committed the assault, the violation of § 53a-71 (a) (1) was a class C felony for which the maximum period of incarceration was ten years. "Subsequent to the verdict, the court . . . sentenced the defendant. As to the defendant's conviction of three counts of having violated § 53a-71 (a) (1), the court sentenced him to

twenty years in the custody of the commissioner of correction, execution suspended after four years, with twenty years of probation on each of the three counts of sexual assault in the second degree. The sentences were to be served concurrently.” *State v. Barksdale*, supra, 138. This court concluded that the defendant had in fact been sentenced under the wrong statute and ordered that the defendant be resentenced according to the law. *Id.*, 138–39.

Barksdale stands for the seemingly obvious and uncontroversial proposition that a sentence is illegal within the meaning of Practice Book § 43-22 if it is not in accord with the legally operative statute at the time the crime is committed. There are a number of possible ways in which a sentence could be illegal. One could be sentenced to a term of incarceration in excess of the applicable statutory maximum. One could also, for example, due to a scrivener’s error in drafting the charge to the jury, be found guilty of a crime under a statute that is different from the one cited in the information and under which the trial proceeded. One could also be found guilty by a jury of a crime that mirrored the charge and followed the instructions, but of which the defendant could not be found guilty because it was legally inapplicable.

That latter scenario is precisely the type of claim that the defendant asserts. The defendant claims only that the court could not, as a matter of law, accept a verdict of guilty of manslaughter in the first degree with a firearm in violation of § 53a-55a (a) and impose a sentence of incarceration in accord with such a verdict if the legally operative statutory scheme was followed, which he claims was that for the crime of manslaughter in the first degree in violation of § 53a-55 (a) (2). The sentence imposed after accepting the guilty verdict, on the basis of the legally inoperative statute, according to the defendant, is necessarily illegal. The only question this court must determine is whether such a claim belongs to *the class of cases* for which the court has authority or competence to decide because of the jurisdiction granted by Practice Book § 43-22. On its face, it would appear that the defendant’s motion in the present case satisfies this very low threshold inquiry.

It is worth stressing that *Cator* and *Raucci* can be construed as attempts to use Practice Book § 43-22 to “attack the validity of the underlying conviction,” which would, according to the reasoning of the majority, deprive the court of jurisdiction over the motion. Those courts, however, did not agree with the majority. In *Cator*, the defendant was convicted of both murder and felony murder, and he was sentenced, within the prevailing statutory limits, for each crime. There was no claim in *Cator* that the sentence the defendant received exceeded the maximum allowable sentence under the statutory offenses of which he was found guilty. The

Supreme Court held that the sentence was illegal even though the claim of an illegal sentence was dependent on the claim of a wrongful conviction.

The case of *State v. Raucci*, supra, 21 Conn. App. 557, is an example of the use of Practice Book § 43-22 (formerly § 935) to challenge the validity of an underlying conviction. The defendant was convicted of four crimes, larceny in the first degree, conspiracy to commit larceny in the first degree, burglary in the third degree and conspiracy to commit burglary in the third degree. The trial court imposed a sentence as to each conviction, and each sentence conformed to the relevant statutory framework. There was no claim that a sentence imposed, on its face, exceeded the maximum allowable sentence. Nevertheless, this court concluded that the sentence imposed was illegal because “where a defendant is tried on multiple conspiracy counts arising out of a single agreement, *the trial court must render judgment and sentence* the defendant on only that conspiracy to commit the most serious offense charged.” *State v. Raucci*, supra, 559. The court acknowledged that a motion to correct an illegal sentence was the proper procedural vehicle to remedy that illegality, which included the vacation of the judgment of conviction. *Id.*

In this case, unlike *State v. Mollo*, 63 Conn. App. 487, 776 A.2d 1176, cert. denied, 257 Conn. 904, 777 A.2d 194 (2001), on which the majority relies, the defendant takes no issue with the underlying factual basis that resulted in the conviction against him. Rather, he asserts that, as a matter of law, the only crime for which a judgment of conviction and sentence could stand, in light of a finding of not guilty of murder by reason of extreme emotional disturbance, is manslaughter in the first degree, which carries a maximum twenty year sentence. If the defendant is correct, he has been sentenced to fifteen years more than he should serve if the legally operative statute had been used to convict and sentence him.

In *Cobham v. Commissioner of Correction*, supra, 258 Conn. 37, the petitioner, in a habeas corpus petition, stated that he had entered pleas in accordance with a plea agreement and that his mittimus varied from the sentence of the court. The petitioner contended that he was incarcerated in accordance with an illegal sentence and requested the habeas court to correct his sentence to eliminate the disparity, although he did not seek to vacate his plea or reverse his conviction. *Id.*, 35–36. The court held that before seeking to correct an illegal sentence in the habeas court, a defendant must raise the issue on direct appeal or in a motion under Practice Book § 43-22. *Cobham v. Commissioner of Correction*, supra, 38. The court noted that Practice Book § 43-22 applies to a “purportedly illegal sentence” *Cobham v. Commissioner of Correction*, supra, 38. In the present case, the defendant does not seek a reversal

of his conviction, but seeks to raise the claim that a legally inoperative statute was used in his conviction and sentencing. For almost four years, ever since the release of *Cobham*, defendants have been well-advised to seek relief pursuant to Practice Book § 43-22, rather than habeas petitions, for purportedly illegal sentences. After the majority opinion in the present case, such defendants will not know whether to “zig” to the trial court where such claims will be dismissed for lack of jurisdiction, or “zag” to the habeas court, where their claims, as in *Cobham*, will also be dismissed.

The only question to be resolved by the majority in this case is whether the court had the authority to adjudicate the type of controversy presented by the motion before it. The ultimate viability of the defendant’s claim is irrelevant to the issue of whether the court has subject matter jurisdiction.¹ “Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . It is well established that, in determining whether a court has subject matter jurisdiction, *every presumption favoring jurisdiction should be indulged.*” (Internal quotation marks omitted.) *Olympus Healthcare Group, Inc. v. Muller*, supra, 88 Conn. App. 300. In this case, especially in light of *Cator*, *Raucci* and *Barksdale*, the defendant has raised a claim that belongs to the class of cases over which the court has jurisdiction.

For all of the foregoing reasons, I respectfully dissent.

¹ If, as I conclude, the court had jurisdiction to entertain the claims of the defendant, the next question would be whether the defendant was entitled to the relief of a corrected sentence. I note briefly that I do not agree with the defendant that his sentence is illegal. General Statutes § 53a-54 (a) provides that the affirmative defense of extreme emotional disturbance shall not constitute a defense to, or preclude a conviction of, manslaughter in the first degree *or any other crime*. In this case, the defendant was also found guilty of carrying a pistol without a permit in violation of General Statutes § 29-35 and was charged with the “intent to cause the death of another person . . . by use of a firearm.” *State v. Lawrence*, 86 Conn. App. 784, 794, 863 A.2d 235 (2004). On the facts of this case, the defendant properly was found guilty of manslaughter in the first degree with a firearm once the jury had determined that the defendant committed the proscribed act, namely, murder with a firearm, under the influence of extreme emotional disturbance. Nothing in § 53a-54 (a) prohibits such a result. Indeed, that statutory subsection clearly states that the affirmative defense shall not prevent a conviction for any crime other than murder. See *State v. Lawrence*, supra, 794.
