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SULLIVAN, C. J., dissenting. The majority in the case presently before us concludes that, because reasonable jurists could not conclude that the defendant was in custody at the time of his interrogation, the failure of his attorney to apprise him of the opportunity to appeal if he entered a conditional plea of nolo contendere does not give rise to a claim of ineffective assistance of counsel. I first conclude that the majority adopts an inappropriate standard for the evaluation of frivolous appeals. In addition, I believe that, even utilizing the standard that the majority adopts, reasonable jurists could disagree about the outcome of the forgone appeal. Accordingly, I respectfully dissent.

In the present case, the defendant, Garrick Turner, was an eighteen year old high school student who had been living in the United States for only two years and had never been arrested before his arrest in connection with this case. While investigating a complaint of sexual assault, a police detective called the father of the defendant and asked to speak with the defendant. The defendant testified that the police detective told him that he should come to the police station in order to avoid the embarrassment of the police coming to his school. The next day, the defendant, along with his father and his aunt, went to the police station. At the station, the defendant was taken to an interrogation room. There, he was interrogated by a single police officer. Although the defendant was told that he was free to leave, he was also asked questions implicating him in a crime and was told that the police were gathering evidence with respect to the crime. It is undisputed that the defendant was never told that he had a right to remain silent and a right to counsel and that his statements could be used against him.

The majority first sets forth a review of the law governing pleas of nolo contendere conditional on the right to appeal that applied at the time the defendant attempted to withdraw his appeal. The majority correctly notes that, at the time of the trial court proceedings in the present case, in order for the trial court to accept the defendant's plea of nolo contendere conditional on the right to appeal, that court would have had to find that its ruling on the defendant's motion to suppress would have had a significant impact on the disposition of the case at trial. See footnote 4 of the majority opinion. The rules of practice also required the trial court to find, before accepting the plea, that the record was adequate for appellate review. Practice Book § 61-6 (a) (2) (i). Although the majority acknowledges that the trial court's ruling denying the defendant's motion to suppress need not be fully dispositive of the case, but only have a significant impact on the

outcome, the majority also concludes that in order to find that the trial court would have accepted a plea of nolo contendere conditional on the right to appeal, it would have required the defendant ''to establish that: (1) the victim would not have testified against him; and (2) the denial of his motion to suppress would have had a significant impact on the case.''[1]

Subsequently, assuming without deciding that the defendant made the requisite showings to the trial court so that it would have accepted the plea, the majority properly sets forth our review of claims of ineffective assistance of counsel.[2] Specifically, the majority notes this court's decision in *Ghant* v. *Commissioner of Correction*, 255 Conn. 1, 9, 761 A.2d 740 (2000), in which we concluded that ''counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.'' (Internal quotation marks omitted.) From this, the majority concludes that, in order to prevail on appeal on his claim of ineffective assistance of counsel, the defendant must establish that there were nonfrivolous grounds for an appeal from the trial court's denial of his motion to suppress.

As a result of this conclusion, the majority sets forth two tests that this court has utilized to define the frivolousness of an appeal. The first, taken from the commentary to rule 3.1 of the Rules of Professional Conduct, states that an action is frivolous ''if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.'' See *Texaco, Inc.* v. *Golart*, 206 Conn. 454, 464 n.7, 538 A.2d 1017 (1988). The second definition of frivolousness, and the one the majority ultimately adopts, requires the person moving for an appeal to demonstrate that ''the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.'' (Internal quotation marks omitted.) This language is taken from the United States Supreme Court's per curiam decision in *Lozada* v. *Deeds*, 498 U.S. 430, 432, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), which concluded that the United States Court of Appeals for the Ninth Circuit improperly denied the issuance of a certificate of probable cause required for an appeal from the denial of federal habeas corpus relief.

As the majority explains, this court has utilized the *Lozada* test in prior cases involving the frivolousness

of appeals. For example, in *State* v. *James*, 261 Conn. 395, 409, 802 A.2d 820 (2002), this court adopted the *Lozada* test in order to provide a framework within which to determine whether a trial court abused its discretion when it denied the state's request to appeal pursuant to General Statutes § 54-96. In *James*, we noted that "[t]he *Lozada* inquiry already provides us with well marked guideposts for the exercise of trial court discretion in two other *areas of appeals requiring permission or certification to appeal*." (Emphasis added.) Id., 404. In those prior cases, the *Lozada* test again provided a framework within which to review a claim that was subject to an abuse of discretion standard. For instance, in *Simms* v. *Warden*, 230 Conn. 608, 616, 646 A.2d 126 (1994), we concluded that the *Lozada* test applied to the denial of a request for certification to appeal from an adverse habeas corpus determination pursuant to General Statutes § 52-470 (b). In addition, we have concluded that the *Lozada* test applied to the review of the denial of petitions for certification to appeal the denial of a request for a new trial. *Seebeck* v. *State*, 246 Conn. 514, 534, 717 A.2d 1161 (1998).

In all of those cases, however, the right to appeal was subject to the permission of the trial court. Thus, our review centered around whether the trial court abused its discretion when it denied the party the right to appeal. In the present case, however, once the trial court has accepted a plea of nolo contendere, the trial court's permission was not required in order to appeal. Instead, the defendant who pleads nolo contendere conditional on the right to appeal may appeal to challenge the denial of a motion to suppress *as a matter of statutory right*. See General Statutes (Rev. to 1999) § 54-94a ("[w]hen a defendant . . . enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress . . . the *defendant after the imposition of sentence may file an appeal within the time prescribed by law*" [emphasis added]). Put differently, although the decision whether to *accept the plea* is subject to the trial court's discretion, the actual appeal that results from that decision is a matter of statutory right. Accordingly, it is simply not appropriate to utilize the *Lozada* test when evaluating the frivolousness of an appeal that the defendant would be entitled to file as a result of the acceptance of a plea of nolo contendere conditioned on a right to appeal.

Instead, I would adopt the standard this court adopted in *Texaco, Inc.* v. *Golart*, supra, 206 Conn. 464. Thus, the appeal in the present case would have been frivolous if "the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer [was] unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or rever-

sal of existing law.'' (Internal quotation marks omitted.) Id., 463–64 n.7.[3] Indeed, this court reaffirmed the use of this standard recently in *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 254–55, 828 A.2d 64 (2003), in which we concluded that the standard explicated in *Texaco, Inc,*. was the standard by which this court reviews a claim that a prevailing party was entitled to attorney's fees as a result of another party's bringing a frivolous action.

My conclusion that the less stringent standard of frivolousness should apply also finds support within the context of the defendant's claim. The definition employed by the Rules of Professional Conduct exists in order to evaluate attorney conduct and to provide a basis for sanctions for bringing a frivolous appeal. Consequently, it is entirely reasonable that the question of whether attorneys have engaged in ineffective assistance of counsel because they failed to notify their clients of nonfrivolous grounds for appeal should be answered by resort to the rules detailing the attorneys' conduct. Put another way, because in this case we are looking to the attorney's conduct, namely, whether the attorney engaged in ineffective assistance of counsel, the standards governing our review should be the rules prescribing that conduct. Additionally, the rules prescribing the attorney's conduct define what constitutes a frivolous appeal, specifically, as it applies to this case, one that is not grounded in a good faith argument. The standard of frivolousness, then, should originate within the context of the attorney's conduct and what they could be sanctioned for, rather than within the context of a review of the trial court's discretion in allowing an appeal to go forward.

Because I would have concluded that good faith grounds for an appeal existed in the present case, I believe that counsel for the defendant engaged in ineffective assistance of counsel by failing to inform the defendant of his right to appeal if he had pleaded nolo contendere subject to a right to appeal. Specifically, the defendant's challenge to the trial court's finding of no custody with respect to his *Miranda* claim constituted a good faith basis for an appeal, and, therefore, the defendant's prior counsel should have informed him of that ground for appeal before the defendant pleaded guilty to the crimes with which he was charged.

Even under the standard that the majority adopts, however—namely, whether the issues are debatable among jurists of reason, or a court could resolve the issues in a different manner, or the questions deserve encouragement to proceed further—I would conclude that the determination of whether the defendant was in custody for *Miranda* purposes would not have constituted a frivolous appeal. The majority properly sets forth the standard that we utilize when determining whether a person is in custody for *Miranda* purposes.

Specially, as the majority states: " 'A person is in custody only if, in view of all the surrounding circumstances, a reasonable person would have believed [that] he was not free to leave.' (Internal quotation marks omitted.) *State* v. *Pinder*, [250 Conn. 385, 409, 736 A.2d 857 (1999)] . . . ." (Citation omitted.) The majority also properly explains that " 'the only relevant inquiry is whether a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal arrest.' " I, however, disagree that the reasonable and objective test cannot take into account the defendant's status as an eighteen year old high school student who had recently immigrated to this country and had no prior experience with our legal system.[4]

Numerous cases conclude that the age of the defendant should be taken into account when determining whether a juvenile would reasonably believe he was not free to leave a police interrogation. Specifically, the United States Court of Appeals for the Ninth Circuit recently concluded that the determination of "custody" for *Miranda* purposes can take into account the defendant's status as a juvenile. In *Alvarado* v. *Hickman*, 316 F.3d 841, 844 (9th Cir. 2002), cert. granted sub nom. *Yarborough* v. *Alvarado*, U.S. , 124 S. Ct. 45, 156 L. Ed. 2d 703 (2003), the habeas petitioner, who was seventeen years old at the time of the crime, had been convicted of second degree murder and attempt to commit robbery. The conviction was based primarily on a statement the petitioner gave to the police while being interviewed with respect to the crime. Id.

In *Alvarado*, while investigating a murder, the police contacted the petitioner's mother at work and informed her that they needed to speak with her son. Id. The petitioner's mother told the police that she and the petitioner's father would bring the petitioner to the police station. Id. While at the police station, the petitioner's parents were denied permission to be present during the interview. Id. The court also pointed out that the petitioner had never been questioned by the police before and had no prior criminal history. Id. The interview with the petitioner lasted approximately two hours, during which the petitioner was never given and did not waive his *Miranda* rights. Id. The petitioner first denied involvement in the murder. The detective then informed him that she did not believe his statements and that she had witnesses who said " 'quite the opposite.' " Id. The petitioner thereafter began to divulge details of the murder and his role in hiding the murder weapon. Id. During the interview, the detective hinted to the petitioner that he would be going home after the interview. Id. The petitioner's statement to the police was introduced as evidence at his trial. Id.

The District Court denied the habeas petition, and on appeal, the state relied on *Oregon* v. *Mathiason*, 429

U.S. 492, 493–95, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977), to claim that, because the petitioner was not under arrest, voluntarily went to the police station and was allowed to leave after the interview, he was not in custody and, therefore, his *Miranda* rights did not attach. *Alvarado* v. *Hickman*, supra, 316 F.3d 846–47. The Circuit Court distinguished *Mathiason* on several grounds. First, the court noted, the defendant in *Mathiason* went to the police station voluntarily and was told immediately that he was not under arrest. Id., 847. In *Alvarado*, the court determined, arrangements for the police interview were made by the petitioner's parents, and the petitioner was never told that he was not under arrest. Id. Second, while the interview in *Mathiason* lasted only thirty minutes, the interview in *Alvarado* lasted two hours, and the petitioner repeatedly had denied his involvement. Id. Third, the suspect in *Mathiason*, as a parolee, had experience in the criminal justice system. As the Ninth Circuit pointed out, in *Alvarado*, ''[the petitioner] had no prior experience with the police.'' Id.

The Ninth Circuit acknowledged that both the petitioner and the state had constructed their arguments regarding the custody status of the petitioner under an objective standard. Id., 848. The court explained, however, that the petitioner's ''status as a minor is an important subsidiary issue that potentially alters the constitutional analysis.'' Id. The court noted that under the United States Supreme Court's due process jurisprudence, a criminal defendant's age ''has long been a relevant factor in determining whether a confession or a waiver of a constitutional right was voluntary.'' Id.

The court in *Alvarado* additionally relied on *In re Gault*, 387 U.S. 1, 42–43, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), to conclude that the petitioner's juvenile status could be taken into account when determining custody. *Alvarado* v. *Hickman*, supra, 316 F.3d 849. In *In re Gault*, supra, 55, the United States Supreme Court stated: ''If counsel was not present for some permissible reason when an admission was obtained, *the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or adolescent fantasy, fright or despair*.'' (Emphasis added.) The court in *Alvarado* relied on that language to explain that ''if a juvenile is more susceptible to police coercion during a custodial interrogation than would be a similarly situated adult, there is no reason why the same juvenile would not similarly be less capable of determining whether he was, in fact, in custody in the first place.'' *Alvarado* v. *Hickman*, supra, 849–50. Considering other factors[5] as well as the age of the petitioner in the objective determination of custodial status, the court concluded that they did not believe a reasonable seventeen year old in the petitioner's position would have felt ''at liberty to terminate the interrogation and leave.'' (Internal quotation

marks omitted.) Id., 851; see also *People* v. *Savory*, 105 Ill. App. 3d 1023, 1028, 435 N.E.2d 226 (1982) (factors involved in determination regarding custodial status include: location, time, length, mood and mode of interrogation; number of police officers present; presence or absence of friends or family of accused; any indicia of formal arrest; manner in which person questioned got to place of interrogation; whether suspect voluntarily assists police in their investigation; whether subject is allowed to walk within and from location of interrogation unaccompanied by police; and ''*the age, intelligence and mental makeup of the accused*'' [emphasis added]); *State* v. *Smith*, 546 N.W.2d 916, 923 (Iowa 1996) (holding that ''it is appropriate to consider the age of the defendants as an additional factor in making a determination as to custody status'').[6]

Additionally, although the majority relies in part on the fact that the defendant was told that he was free to leave the interrogation, that fact is not dispositive of the question of custodial status. See *People* v. *Horn*, 790 P.2d 816, 818–19 (Colo. 1990) (custody found where interrogation was ''accusative from the outset'' and stating that ''[a]lthough the defendant was repeatedly told that he was free to leave and that he would not be arrested that day, he was also confronted with the evidence against him and informed that charges would be filed against him regardless of his interview responses'').

Although I acknowledge that the defendant in this case was eighteen years old at the time of the interrogation, I see no difference in kind between a seventeen year old murder suspect and an eighteen year old high school student who has no experience with the criminal justice system and has lived in this country for only two years. In the present case, while the defendant was told that he was free to leave, he contemporaneously was being asked questions that implicated him in a crime and was told he was there for the police to ''gather evidence'' about a crime. Moreover, although this court previously has found that there is no custody when a defendant voluntarily goes to the police station,[7] here, the defendant was told he would be ''better off'' if he went to the station. Consequently, although technically the defendant voluntarily traveled to the station, it was a result of the threat of embarrassment in front of his peers and teachers at school. Under these circumstances, I believe that reasonable jurists could disagree over whether a reasonable person in the defendant's position would have believed that he was free to leave the interrogation.

Accordingly, I respectfully dissent.

[1] It is unclear to me why the majority would conclude that the defendant would need to establish that the victim would not have testified against him. As the majority acknowledges, the trial court's denial of the motion to suppress need not be dispositive of the case, but only have a significant impact on the outcome. Thus, in my opinion, even if the victim testified, in the absence of a confession from the defendant, and any medical or scientific

evidence, the trial would become a much weaker case from the standpoint of the state. Accordingly, even if the victim testified in this case, the denial of the defendant's motion to suppress would still have had a substantial impact on the case.

[2] The majority concludes that my analysis is incomplete because the record leaves doubt as to whether the trial court even would have accepted a nolo contendere plea. Although the trial court indicated that such a plea was inappropriate in this case; see footnote 10 of the majority opinion; in fact the trial court apparently utilized an improper standard. As the majority opinion states: "The [trial] court concluded, moreover, that a conditional plea of nolo contendere was inappropriate in this case because the trial was scheduled to begin shortly and the victim was expected to testify, meaning that the defendant's appeal would not have been '*dispositive*' of the case . . . ." (Emphasis added.) Footnote 10 of the majority opinion. As noted previously in this dissent, pursuant to the rules in effect at the time of the trial court's statement, the denial of the defendant's motion to suppress must have had only a substantial impact on the outcome of the proceedings at the trial court.

More fundamentally, the very reason that we do not know whether the trial court would have accepted a conditional plea of nolo contendere if it had been proffered prior to the defendant's pleading guilty is that the court was never asked to do so. Put differently, the failure of the defendant's prior counsel to notify the defendant of the possibility of the plea and to inquire of the trial court whether a conditional nolo contendere plea would be accepted is exactly what is being claimed as ineffective assistance of counsel. I cannot conceive how any fact finder could determine at this point whether the trial court would have accepted the plea if it had been offered at the appropriate time and the trial court had been apprised of the appropriate standard for accepting it. Thus, although the record does not establish conclusively that the trial court would have accepted a nolo contendere plea, it does not prevent me from considering whether the failure of the defendant's prior counsel at least to notify the defendant of the possibility of pleading nolo contendere constituted ineffective assistance of counsel.

Moreover, the majority misapplies the prejudice requirement as set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As the Appellate Court has recognized, "[f]or ineffectiveness claims resulting from guilty pleas, we apply the standard set forth in *Hill* v. *Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), which modified *Strickland*'s prejudice prong." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, 80 Conn. App. 96, 99, 832 A.2d 1210 (2003). In *Hill*, the United States Supreme Court stated that, in such cases, the focus is "on whether counsel's constitutionally ineffective performance affected the outcome of the *plea process*. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Emphasis added.) *Hill* v. *Lockhart*, supra, 59. Therefore, the defendant's required showing of actual harm is satisfied by evidence of a reasonable probability that, but for the ineffective assistance of counsel, the defendant would not have pleaded guilty.

Thus, in my view, the defendant should not be required to show that, "but for counsel's deficient performance, he would have entered a plea under [General Statutes] § 54-94a, which, in turn, requires him to show that the court would have accepted such a plea." See footnote 15 of the majority opinion. It is clear to me that there was at least a reasonable probability that the defendant in the present case would not have pleaded guilty but for his prior counsel's failure to notify him of the possibility of pleading nolo contendere. I also believe that there is at least a reasonable probability that, if the court had refused to accept the defendant's nolo contendere plea, the defendant would have insisted on going to trial in order to preserve his right to appeal. Specifically, the defendant subsequently attempted to withdraw that guilty plea after he acquired new counsel. Accordingly, I would conclude that the defendant has satisfied the second prong of *Strickland*, as modified by *Hill*. Consequently, contrary to the majority's assertion, a fundamental predicate indeed exists for the review of the defendant's ineffective assistance of counsel claim.

[3] Good faith is defined by Black's Law Dictionary as: "[h]onesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law,

together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. . . .'' Black's Law Dictionary (6th Ed. 1990).

[4] I find curious the majority's characterization of this dissent as applying a subjective rather than objective test. See footnote 17 of the majority opinion. Specifically, I do not question the majority's conclusion that courts are to apply an objective test rather than a subjective standard when determining whether a suspect was in custody for *Miranda* purposes. My belief, however, is that anyone in the defendant's position similarly would feel as though he was not free to leave, *because of* such factors as his age and his inexperience with the legal system. Thus, I am not declaring that, because the *defendant* felt he could not leave he was in custody for *Miranda* purposes, which would indeed be applying a subjective test. Rather, in my opinion, a reasonable person, *when in the defendant's position*, would not have felt that he was free to leave the police station.

[5] The other factors considered by the court included ''[1] the language used by the officer to summon the individual, [2] the extent to which he or she is confronted with evidence of guilt, [3] the physical surroundings of the interrogation, [4] the duration of the detention and [5] the degree of pressure applied to detain the individual.'' (Internal quotation marks omitted.) *Alvarado* v. *Hickman*, supra, 316 F.3d 846.

[6] See also *In re L.M.*, 993 S.W.2d 276, 289 (Tex. App. 1999) ([S]tandard for determining whether juvenile is in custody is ''whether, based upon the objective circumstances, a reasonable child of the same age would believe her freedom of movement was significantly restricted. Our holding does not conflict with the standard applied in earlier Texas cases, but expressly provides for consideration of age under the reasonable-person standard established in *Stansbury* [v. *California*, 511 U.S. 318, 322–24, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994)].).

[7] But see *State* v. *Zancauske*, 804 S.W.2d 851 (Mo. App.) (although defendant voluntarily traveled to police station, he was in custody for *Miranda* purposes), cert. denied, 502 U.S. 817, 112 S. Ct. 73, 116 L. Ed. 2d 47 (1991).