CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* CRAIG KALLBERG
(SC 19536)

Rogers, C. J., and Palmer, McDonald, Espinosa and Robinson, Js.

Syllabus

The defendant, who had been convicted of the crimes of larceny in the third degree as an accessory and conspiracy to commit larceny in the third degree in connection with his role in the theft of certain items from an apartment building storage locker, appealed to the Appellate Court, claiming that the trial court had improperly denied his motion to dismiss those charges because they previously had been permanently disposed of as part of an agreement with the state. Approximately one year earlier, the state and the defendant had been prepared to enter into a plea agreement under which the defendant would plead guilty to possession of drug paraphernalia and pay a fine in one case, and the state would enter nolle prosequis in three other cases, including the case involving the larceny charges arising out of the storage locker thefts. The trial judge who had assisted the parties in negotiating that plea agreement was unavailable to accept the plea, so the state presented an agreement to a different judge pursuant to which the state would enter nolles with respect to the charges in all four cases and the defendant would make a donation to the Criminal Injuries Compensation Fund. Subsequently, the state withdrew the nolle in the case involving the larceny charges and initiated the prosecution on those charges. The trial court denied the defendant's motion to dismiss the charges, concluding that it was clear from the transcript of the hearing at which the agreement had been made that the donation to the compensation fund was to obtain a nolle only in the drug case, rather than to effectuate a global disposition of all four of the defendant's cases in exchange for the donation. The Appellate Court reversed the judgment of conviction, concluding, inter

alia, that the entry of the nolle in the case involving the larceny charges and the entry of the nolles in the three other cases were part of an agreement between the state and the defendant that contemplated a global disposition supported by consideration, which barred the defendant's prosecution on the larceny charges. The Appellate Court remanded the case to the trial court with direction to vacate the conviction and to dismiss the charges, and the state, on the granting of certification, appealed to this court. *Held* that the Appellate Court properly reversed the judgment of conviction and remanded the case to the trial court with direction to order specific performance of the agreement, the state having breached the parties' agreement by filing criminal charges related to the same conduct at issue in the larceny case: this court determined, after a review of the transcript memorializing the agreement, which was the sole evidence before the trial court when it ruled on the motion to dismiss, that the agreement was ambiguous as to the parties' intent, and the state bore the burden for that ambiguity and lack of clarity, which required the agreement to be construed in the defendant's favor as a global disposition, the prosecutor's remarks at the outset of the hearing did not indicate that any one of the four cases was being treated differently, he did not explicitly state on the record that he intended to enter unilateral nolle prosequis in three cases and effectuate an agreement confined to only the drug case, he did not state for the record any material change in circumstances relevant to the charges that would explain a change from the original intent to effectuate a global disposition other than the unavailability of the original trial judge, the defendant had a reasonable expectation that all of the nolles were entered as part of a global disposition akin to the original plea agreement, and the trial judge before whom the nolles were entered did not draw any distinction between the nolles in the four cases, never addressed the defendant to ask him if he understood the terms of the agreement, and did not make any statement on the record sanctioning the parties' agreement; furthermore, although the prosecutor's discussion of the defendant's donation to the compensation fund was temporally connected to the drug case, that consideration bore no logical connection to the drug case, as the reasons for entering the nolle in that case were wholly unrelated to victim compensation, and, instead, the donation bore a logical connection to certain of the other cases, each of which involved identifiable victims; moreover, certain comments by the prosecutor concerning the larceny charges, including his request that the property related to the case be returned to its rightful owner, reasonably would have suggested to the defendant that the prosecutor would not recommence prosecution in the larceny case.

(*One justice dissenting*)

Argued January 23—officially released June 13, 2017

Procedural History

Substitute information charging the defendant with the crimes of larceny in the third degree as an accessory and conspiracy to commit larceny in the third degree, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the trial court, *Alander*, *J.*, denied the defendant's motion to dismiss; thereafter, the matter was tried to the jury before *Alander*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Gruendel*, *Alvord* and *Borden*, *Js.*, which reversed the trial court's judgment and remanded the case to the trial court with direction to vacate the conviction and to render judgment of dismissal, and the state, on the granting of certification, appealed to this court. *Affirmed.*

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Kevin Murphy*, former supervisory assistant state's attorney, for the appellant (state).

Alice Osedach, senior assistant public defender, for the appellee (defendant).

Opinion

McDONALD, J. The defendant, Craig Kallberg, was convicted of larceny in the third degree as an accessory in violation of General Statutes §§ 53a-8 and 53a-124 (a) (2) and conspiracy to commit larceny in the third degree in violation of General Statutes §§ 53a-48 and 53a-124 (a) (2) after he unsuccessfully moved to dismiss those charges on the basis of the state's prior entry of a nolle prosequi on the same charges. The issue in

this certified appeal[1] is whether the Appellate Court properly reversed the judgment of conviction on the ground that the entry of a nolle on those charges and nolles on charges in three other cases was part of an agreement between the state and the defendant, contemplating a global disposition supported by consideration, which barred his prosecution in the present proceeding. The state contends that the Appellate Court improperly concluded that the trial court's finding that the parties intended to enter into an agreement relating to only one of the cases was clearly erroneous, or to the extent that the agreement was ambiguous, it should have been construed in the defendant's favor. *State* v. *Kallberg*, 157 Conn. App. 720, 729–30, 118 A.3d 84 (2015). We conclude that the agreement was ambiguous as to the parties' intent, and therefore must be construed in the defendant's favor as a global disposition. Accordingly, we affirm the Appellate Court's judgment.

The record reveals the following undisputed facts. Michael Higgins, an acquaintance of the defendant, confessed to the police that he and the defendant had pawned several items, including a set of golf clubs. A resident of the same apartment building where Higgins lived had reported to the police that various items had been stolen from his basement storage locker; many of those items were the same items that Higgins admitted to having pawned. In August, 2010, the defendant was arrested and charged with burglary in the third degree, larceny in the third degree, and conspiracy to commit both of those offenses under docket number CR-10-0046439-T (burglary/larceny case).

By September, 2011, the defendant had three other cases pending against him from arrests prior to 2011,

[1] We granted the state's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that the trial court improperly denied the defendant's pretrial motion to dismiss?" *State* v. *Kallberg*, 319 Conn. 903, 122 A.3d 637 (2015).

each under separate docket numbers, including one charging him with possession of narcotics (drug case).[2] In September, 2011, the state entered a nolle prosequi in each of the defendant's four pending cases at a hearing before Judge Kahn, who had been assigned to serve as the trial judge.[3] Approximately one year later, the state initiated the present prosecution, charging the defendant with larceny in the third degree as an accessory and conspiracy to commit larceny in the third degree for his role in the storage locker thefts.

The defendant filed a motion to dismiss the charges, claiming that they had been permanently disposed of as part of an agreement (nolle agreement) that was memorialized on the record in the hearing before Judge Kahn. The defendant asserted that Judge Strackbein had assisted the parties in negotiating a plea agreement that was a global disposition of the four pending cases, under which he would plead guilty to possession of drug paraphernalia in the drug case and pay a fine of $300, in exchange for which the state would enter nolles in the other three cases, including the burglary/larceny case. The defendant further asserted that due to Judge Strackbein's subsequent unavailability to accept the plea, the parties had effectuated a comparable global disposition whereby the defendant made a donation of $271 to the Connecticut Criminal Injuries Compensation Fund (victim's fund) in exchange for nolles on all of his cases. The state opposed the motion, contending that the donation was consideration for the nolle in the drug case only.

[2] At various points in the record, there are references to four docket numbers, but five files or five cases. At one point, the state suggested that two files were combined under one docket number. For convenience, we refer to four cases in this opinion, consistent with the four nolles entered on the record.

[3] Although the Appellate Court indicated that Judge Kahn had been assigned as the trial judge in the drug case; see *State* v. *Kallberg*, supra, 157 Conn. App. 723; Judge Kahn simply indicated that she "would have been the trial judge."

The sole evidence offered in connection with the motion to dismiss was the transcript of the hearing before Judge Kahn, which provided in relevant part as follows:

"[Judge Kahn]: Good afternoon . . . . They're four matters correct?

* * *

"[The Prosecutor]: MV-10-228488 . . . CR-10-46914 and then CR-10-47442 and lastly CR-10-46439. These matters are all on the trial list and over a course of time—some of these are a year old, going on a year and a half old, [defense counsel] and I we were able to have recent discussions.

"I'll start with the file ending in 488, no insurance, traveling unreasonably fast. What we do in those cases is make sure that the insurance is gotten, if in fact he's driving an automobile, and the license is still valid or is valid. [The defendant] says that . . . he was operating with a valid motor vehicle license. The state is entering a nolle on that.

"[Judge Kahn]: Nolle is noted.

"[The Prosecutor]: Breach of [the] peace [in the second degree], which is the file ending in 442, we reached out to the complainant in that matter. . . . [W]e spoke to his attorney . . . [who] indicated and represented to us that . . . he does not want to pursue. In a normal day what we do is probably sub this . . . but we're entering a nolle in that matter based on the victim's wishes.

"[Judge Kahn]: Nolle noted.

"[The Prosecutor]: I'll leave the file ending with 914 to the end. The other file it looks fairly complicated and serious ends in 439. It's a bunch of burglaries; it's a larceny, at least the allegations. We have a couple of

problems in that matter. One is the burglaries occurred to storage sheds. It doesn't mean they weren't burglaries, but the storage sheds had no tops on them. And it's arguable whether we could ever prove the breaking and entering or the illegal entry when in fact [the defendant] was alleged and admitted to peeking into the top. Many of those that he peeked into were empty. So what we really have in this case when it's all boiled down is a larceny in the [fourth] degree by possession. [The defendant] really gave up possession to the police of those possessions that he had possession of, isn't that true, [defense counsel]?

"[Defense Counsel]: That's true.

"[The Prosecutor]: So nobody here is out anything in this particular file. The state's entering a nolle in that file.

"[Judge Kahn]: Nolle noted.

"[The Prosecutor]: Now that leaves us with the drug case . . . . [W]e have various dosages of hydrocodone which is a narcotic or oxycodone a narcotic. But we have [the defendant] who over the course of time maybe not commensurate exactly with the day in question here, he has had prescriptions in the past and they have been provided to me—a copy of the bottles have been provided to me: I took some issue with [defense counsel] in that the prescription was say six or seven months old. But suffice it to say, this is still a simple possession of narcotics—a little shot glass of crushed up narcotics and another person in the car who's already copped to some of these. . . .

"*So what we had here was a proposed disposition to get rid of all of these files with a plea of drug paraphernalia and a fine of $300. That didn't work out today because we were unable to actually tap into Judge Strackbein. So I took the bull by the horns and*

asked [*the defendant*] *to make a donation of $271 to the victim's fund.*[4] Do we have a copy of that receipt in the file, madam clerk?

"The Clerk: Yes, we do. . . .

"[The Prosecutor]: . . . In light of that, what we do each and every day over in [another geographical area] is to nolle this case, as well. *So*, *now* [*the defendant's*] *matters are all resolved* . . . .

"[Judge Kahn]: All right, I'll note the nolle on that. I do have something I'd like to put on the record. First, I want to put on the record that I would have been the trial judge. I know that these matters had been, at least one of them if not more, on the trial list. And so [the prosecutor]—and by the way I do know his nature is not to enter nolles lightly and so it's not his practice to nolle cases unless there's good reason, so I'm going to take him at his word that he couldn't prove the case. He did mention to me there were some issues about some codefendants that may be deceased, as well, in chambers.

"[The Prosecutor]: Actually I should say that in the burglary/larceny case the codefendant in this matter is dead. The victim can't be found. That case as it stands today is unprovable.

"[Judge Kahn]: Okay, so I want to be able to note that [the prosecutor] was very careful not to mention what the offer was, but he came up to chambers. He told me that you were here [defense counsel], your client was here. *That you had worked out a deal.* That he had asked Judge Strackbein, I guess, to put this on." (Emphasis added; footnote added.)

Judge Kahn explained that Judge Strackbein was unavailable due to a scheduling conflict but that Judge

[4] The record is unclear why the state agreed to accept $271 instead of the original, agreed upon $300 of consideration.

Strackbein had "assured me that all the matters had been resolved. . . . I was hesitant to engage in the plea negotiations because I was going to be the trial judge, so I couldn't do that. But [the prosecutor] did tell me that he had some issues. He would nolle some matters because he had an inability to get certain witnesses, but he didn't share with me the substance of it. . . .

"So if Judge Strackbein were here, irrespective of which judge is present, we cannot if the state wishes to enter a nolle, there's nothing the court can do. The state can enter a nolle. It's within the prosecutorial discretion. All the . . . court can do is ask the state to put their reasons on the record. But they can nolle cases whenever they want, and all the court can do is ask the reasons. . . . You've put them on the record, and so I'm not quarreling with that at all."

Judge Kahn then addressed the defendant about his potential substance abuse issues, and warned him that the state would not hesitate to pursue charges against him even if he had a valid prescription, if he abused his medication. Judge Kahn concluded her admonishment by stating: "Hopefully we won't see you again, and I will note the nolles for the reasons stated on the record."[5] Finally, pursuant to the prosecutor's request at the end of the hearing, Judge Kahn ordered that the stolen property still remaining in police custody be returned to its rightful owner.

[5] In its brief, the state also cited a portion of the colloquy in which the prosecutor asserted: "[H]ad Judge Strackbein been here, I would have explained to her that her prior pretrial where she acknowledged Judge Brunetti's offer of one year suspended after [sixty] days on the larceny four. Perhaps the drug case changed significantly when [the] codefendant died and [the] victim was unavailable." The state asserts that these statements suggest that the prosecutor's "present inability to pursue prosecution of the larceny may have left him reluctant to concede too much in the stronger drug case." It is unclear to us what these statements mean, let alone their significance to the issue in the present case. Indeed, neither the trial court nor the Appellate Court relied on these statements in making their determinations.

At the hearing on the motion to dismiss, although the parties contested the meaning of the preceding exchange as to the parties' intent in making the nolle agreement, because neither the defendant nor the state was represented by the counsel from the nolle hearing, they offered no personal knowledge regarding the facts and circumstances surrounding the execution of the agreement. After hearing argument from the parties, the trial court denied the motion to dismiss in an oral decision. The trial court acknowledged that the original plea agreement worked out with Judge Strackbein was a "global deal," but ascribed no significance to that fact because that deal was never effectuated. As to the nolle agreement that was effectuated, the trial court concluded that the transcript did not support the defendant's claim that this agreement was a global disposition of all of the defendant's cases in exchange for the donation to the victim's fund. Rather, the trial court found it clear from the transcript that the donation had been made to obtain a nolle on the drug case alone. The court ascribed particular significance to the fact that the state had provided reasons for entering nolles on the other cases and to the absence of any statement by the prosecutor that all four cases were nolled in exchange for the donation to the victim's fund.

Following a jury trial, the defendant was convicted of both larceny charges. The court rendered judgment in accordance with the verdict and sentenced the defendant to a total effective sentence of four years of incarceration, suspended after two years, followed by three years of probation.

The defendant appealed to the Appellate Court, claiming, among other things, that the trial court improperly had denied his motion to dismiss. *State* v. *Kallberg*, supra, 157 Conn. App. 720, 722. The Appellate Court agreed. Id., 730. The court prefaced its analysis with this statement: "Whether we view the [nolle]

agreement as a purely factual matter of the parties' intent, or whether we view the agreement as ambiguous and therefore to be construed in the defendant's favor, we arrive at the same conclusion." Id., 727. As to the first view, the Appellate Court held that a factual finding that the parties intended to enter into an agreement for a nolle on the drug case only was clearly erroneous, as the court was left with a firm and definite conviction that a mistake had been made. See id., 727–29. The court explained: "The conduct of the parties reveals to us that the defendant was offered a plea agreement, which was to be accepted, but that the unavailability of the judge before whom the plea agreement was to be entered caused the prosecutor to adopt an alternative means of disposing of the cases in a substantially similar fashion in exchange for substantially similar consideration by the defendant. The statements of the prosecutor reflect the intended result: an equivalent substitute for the original plea agreement." Id., 729–30. As to the second possible view of the record, the Appellate Court concluded that to the extent that the nolle agreement was ambiguous as to whether it contemplated a global disposition, it must be construed in favor of the defendant. See id., 727, 730. Accordingly, the Appellate Court reversed the judgment of conviction and remanded the case to the trial court with direction to vacate the conviction and to dismiss the charges. Id., 730. The state's certified appeal to this court followed.

On appeal, the state concedes that the original plea agreement was a global disposition. It contends, however, that the trial court properly determined that the original plea agreement had no bearing on the construction of the nolle agreement effectuated. The state contends that the Appellate Court engaged in impermissible fact-finding by reading the transcript to reflect an intent to substitute the original global plea agreement with a substantially similar agreement whereby all four cases

were nolled in exchange for the donation. The state further contends that the Appellate Court improperly concluded that the trial court's factual finding as to the parties' intent was clearly erroneous, arguing that the transcript of the hearing before Judge Kahn reflects a clear intent by the state to (a) unilaterally nolle the three cases other than the drug case for the reasons stated on the record, and (b) effectuate an agreement in the drug case whereby the state would enter a nolle in exchange for the defendant's donation to the victim's fund. We agree with the Appellate Court that the nolle agreement was ambiguous and should be construed against the state.

"Because a motion to dismiss effectively challenges the jurisdiction of the court, asserting that the state, as a matter of law and fact, cannot state a proper cause of action against the defendant, our review of the court's legal conclusions and resulting denial of the defendant's motion to dismiss is de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous." (Citation omitted; internal quotation marks omitted.) *State* v. *Samuel M.*, 323 Conn. 785, 794–95, 151 A.3d 815 (2016). For the reasons that follow, we conclude that de novo review governs our resolution of the present case.

We begin by distinguishing a prosecutor's unilateral entry of a nolle from a bilateral agreement involving entry of a nolle. Practice Book § 39-29 provides that "[a] prosecuting authority shall have the power to enter a nolle prosequi in a case. It shall be entered upon the record after a brief statement by the prosecuting authority in open court of the reasons therefor." We have recognized that "a nolle is, except when limited by statute or rule of practice[6] . . . a unilateral act by

[6] General Statutes § 54-56b provides: "A nolle prosequi may not be entered as to any count in a complaint or information if the accused objects to the nolle prosequi and demands either a trial or dismissal, except with respect to prosecutions in which a nolle prosequi is entered upon a representation

a prosecutor, which ends the pending proceedings without an acquittal and without placing the defendant in jeopardy." (Citations omitted; footnote added; internal quotation marks omitted.) *Cislo* v. *Shelton*, 240 Conn. 590, 599 n.9, 692 A.2d 1255 (1997). "Although the entry of a nolle prosequi results in the defendant's release from custody, he can . . . be tried again upon a new information and a new arrest." (Citation omitted.) *State* v. *Lloyd*, 185 Conn. 199, 201, 440 A.2d 867 (1981); accord Practice Book § 39-31.

A nolle may, however, be bargained for as part of a plea agreement; see *State* v. *Daly*, 111 Conn. App. 397, 400 n.2, 960 A.2d 1040 (2008), cert. denied, 292 Conn. 909, 973 A.2d 108 (2009); Practice Book § 39-5 (2); see also *Mason* v. *State*, 302 Md. 434, 440, 488 A.2d 955 (1985) (nolle as part of plea agreement tantamount to dismissal of nolled charge); or as part of an agreement whereby the defendant provides something else of benefit to the state or the victim in exchange for entry of a nolle. See, e.g., *People* v. *Reagan*, 395 Mich. 306, 317–18, 235 N.W.2d 581 (1975) (enforcing agreement in which prosecution would enter nolle if defendant passed polygraph examination); see also *Holman* v. *Cascio*, 390 F. Supp. 2d 120, 123–24 (D. Conn. 2005) ("a nolle will preclude a subsequent case for malicious prosecution [due to lack of a favorable termination of the prior criminal case] when it was made as part of a plea bargain or under other circumstances that indicate that the defendant received the nolle in exchange for providing something of benefit to the state or victim").[7]

to the court by the prosecuting official that a material witness has died, disappeared or become disabled or that material evidence has disappeared or has been destroyed and that a further investigation is therefore necessary." Practice Book § 39-30 provides equivalent terms. Thus, a defendant may preclude the entry of a nolle by objection if the prosecutor cannot establish one of the aforementioned reasons for entry of the nolle.

[7] In the context of malicious prosecution claims, which require, among other things, that the plaintiff prove that the prior criminal action was terminated in his or her favor, courts have recognized that a unilateral nolle

Bilateral agreements in which the defendant provides a benefit to the state or the victim other than a guilty plea to a charge are typically treated as the functional equivalent to a plea agreement, in that subsequent prosecution is barred as long as the defendant has performed his obligation. See *People* v. *Reagan*, supra, 309 (nolle agreement was "a pledge of public faith which became binding when the [n]olle prosequi order was approved by the trial judge"); see also *Bowers* v. *State*, 500 N.E.2d 203, 204 (Ind. 1986) (enforcing agreement not to prosecute in exchange for defendant's provision of information sufficient to obtain search warrant); *State* v. *Franklin*, 147 So. 3d 231, 238 (La. App. 2014) (enforcing agreement not to prosecute conditioned on defendant's successful completion of pretrial diversion program), cert. denied, 159 So. 3d 460 (La. 2015); *Jackson* v. *State*, 358 Md. 259, 262, 277–78, 747 A.2d 1199 (2000) (enforcing agreement in which defendant waived speedy trial rights in exchange for state's promise to dismiss charges if DNA analysis of certain evidence came back negative).

The question in the present case, therefore, is whether the defendant's donation was made in exchange for all four nolles (and thus constituted a global nolle agreement) or only for the nolle in the drug case. If the latter, there would be no bar to prosecution on the present charges.

In resolving this question, we apply principles that also govern the interpretation of plea agreements. It is well settled that "[p]rinciples of contract law and spe-

is "really just an abandonment of prosecution that is not conditioned on the defendant 'giving up' anything," which would be a favorable disposition. By contrast, a bargained for nolle, where the defendant provides consideration for something of benefit to the state or the victim, would not constitute a favorable disposition and thus precludes a malicious prosecution claim. *Lupinacci* v. *Pizighelli*, 588 F. Supp. 2d 242, 249 (D. Conn. 2008); see also *DeLaurentis* v. *New Haven*, 220 Conn. 225, 251, 597 A.2d 807 (1991).

cial due process concerns for fairness govern our interpretation of plea agreements." (Internal quotation marks omitted.) *State* v. *Rivers*, 283 Conn. 713, 724, 931 A.2d 185 (2007); see also *State* v. *Lopez*, 77 Conn. App. 67, 77, 822 A.2d 948 (2003) ("a plea agreement is akin to a contract and . . . well established principles of contract law can provide guidance in the interpretation of a plea agreement"), aff'd, 269 Conn. 799, 850 A.2d 143 (2004); *State* v. *Franklin*, supra, 147 So. 3d 241 (drawing analogy to principles of commercial contracts in interpreting agreement not to prosecute conditioned on defendant's successful completion of pretrial diversion program).

As has previously been explained in the context of plea agreements, "[t]he primary goal of contract interpretation is to effectuate the intent of the parties . . . ." (Internal quotation marks omitted.) *State* v. *Rosado*, 92 Conn. App. 823, 827, 887 A.2d 917 (2006). In ascertaining that intent, we employ an objective standard and look to what the parties reasonably understood to be the terms of the plea agreement on the basis of their words and conduct, and in light of the circumstances surrounding the making of the agreement and the purposes they sought to accomplish. See *United States* v. *Alexander*, 736 F. Supp. 1236, 1239 (N.D.N.Y. 1989), aff'd, 901 F.2d 272 (2d Cir. 1990); accord *Paradiso* v. *United States*, 689 F.2d 28, 31 (2d Cir. 1982), cert. denied, 459 U.S. 1116, 103 S. Ct. 752, 74 L. Ed. 2d 970 (1983); *State* v. *Nelson*, 23 Conn. App. 215, 219–20, 579 A.2d 1104, cert. denied, 216 Conn. 826, 582 A.2d 205 (1990), cert. denied, 499 U.S. 922, 111 S. Ct. 1315, 113 L. Ed. 2d 248 (1991). An unambiguous agreement is presumptively an accurate reflection of the parties' intent. Thus, "[when] the language is unambiguous, we must give the contract effect according to its terms." (Internal quotation marks omitted.) *State* v. *Rivers*, supra, 283 Conn. 725.

"[When] the language is ambiguous, however, we must construe those ambiguities against the drafter [namely, the state]."[8] (Internal quotation marks omitted.) Id.; accord *State* v. *Nelson*, supra, 23 Conn. App. 219. The reason for this rule of construction, applied by a majority of the federal Circuit Courts of Appeal; *State* v. *Rivers*, supra, 283 Conn. 726; is that the state "generally holds substantially superior bargaining power over the other party to the agreement, the criminal defendant." Id., 725; see, e.g., *United States* v. *Palladino*, 347 F.3d 29, 33 (2d Cir. 2003) ("[b]ecause the government ordinarily has certain awesome advantages in bargaining power, any ambiguities in the agreement must be resolved in favor of the defendant" [internal quotation marks omitted]). These same principles apply to oral plea agreements. See *State* v. *Obas*, 320 Conn. 426, 442–43, 130 A.3d 252 (2016); *State* v. *Rosado*, supra, 92 Conn. App. 827–28.

It is well settled that the threshold determination as to whether a plea agreement is ambiguous as to the parties' intent is a question of law subject to plenary review. See, e.g., *State* v. *Rivers*, supra, 283 Conn. 725. If the reviewing court deems the agreement ambiguous and extrinsic evidence has been offered to dispel that ambiguity, such as testimony regarding the facts surrounding the making of the agreement, then intent is a

[8] Some courts have made clear that this rule of construction applies only after resort to facts and extrinsic evidence fails to resolve the ambiguity as to the parties' intent. See, e.g., *United States* v. *Clark*, 218 F.3d 1092, 1095 (9th Cir.) (when plea agreement contains ambiguities, court will first look to facts and extrinsic evidence to determine what parties reasonably understood to be terms of agreement and, if ambiguity remains, "the government ordinarily must bear responsibility for any lack of clarity . . . [because] [c]onstruing ambiguities in favor of the defendant makes sense in light of the parties' respective bargaining power and expertise" [citations omitted; internal quotation marks omitted]), cert. denied, 531 U.S. 1057, 121 S. Ct. 668, 148 L. Ed. 2d 569 (2000). We did not reach this question in *State* v. *Rivers*, supra, 283 Conn. 713, because, like the present case, no extrinsic evidence was presented to the court.

question of fact for the trial court, reversible only if clearly erroneous. See, e.g., *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 741–43, 937 A.2d 656 (2007); *Martinez* v. *Commissioner of Correction*, 105 Conn. App. 65, 73, 936 A.2d 665 (2007), cert. denied, 285 Conn. 917, 943 A.2d 475 (2008). If, however, the agreement is ambiguous and no extrinsic evidence has been offered, resolution of the dispute as to the parties' intent necessarily hinges on what inferences can be drawn solely from the four corners of the agreement. Under such circumstances, the intention of the parties presents a question of law over which we exercise plenary review. See *State* v. *Rivers*, supra, 723–24, 725 n.11 (noting that court would apply de novo review and that no extrinsic evidence was offered regarding formation of contract); see also *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 7–8, 931 A.2d 837 (2007) ("In the present case, even though there is a purported ambiguity in the lease agreement, no extrinsic evidence was offered at trial to establish the intent of the parties. Therefore, the trial court's determination of the parties' intent was based solely on the language of the lease agreement and did not involve the resolution of any evidentiary issues of credibility. Accordingly, our review of the trial court's interpretation of the lease agreement involves a question of law over which our review is plenary."); *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 230, 654 A.2d 342 (1995) ("because the trial court relied solely upon the written agreements in ascertaining the intent of the parties, the legal inferences properly to be drawn from the documents are questions of law, rather than fact"). In the absence of extrinsic evidence, determining the intent of the parties does not require resolution of disputed facts or credibility assessments.[9] See *State* v. *Lewis*, 273 Conn. 509, 516–17,

[9] We have continued, however, to draw a distinction between cases in which the sole evidence is documentary evidence in the nature of a contract and those in which transcripts reflect testimonial evidence that still is subject to a credibility assessment. See, e.g., *State* v. *Lawrence*, 282 Conn. 141, 157,

871 A.2d 986 (2005) ("[a]lthough we generally review a trial court's factual findings under the 'clearly erroneous' standard, when a trial court makes a decision based on pleadings and other documents, rather than on the live testimony of witnesses, we review its conclusions as questions of law"); *Morton Buildings, Inc.* v. *Bannon*, 222 Conn. 49, 53–54, 607 A.2d 424 (1992) ("In this case, the trial court's determinations were based on a record that consisted solely of a stipulation of facts, written briefs, and oral arguments by counsel. The trial court had no occasion to evaluate the credibility of witnesses or to assess the intent of the parties in light of additional evidence first presented at trial. The record before the trial court was, therefore, identical with the record before this court. In these circumstances, the legal inferences properly to be drawn from the parties' definitive stipulation of facts raises questions of law rather than of fact.").

In the present case, the sole evidence before the trial court in ruling on the motion to dismiss was the transcript memorializing the nolle agreement. Accordingly, we exercise plenary review in ascertaining the parties' intent.

Having articulated the proper standard of review and relevant guiding principles, we turn to the statements of counsel contained in the transcript to ascertain whether they reflect a clear intent consistent with the state's interpretation. We begin with the prosecutor's statements relating to the nolles. As we previously noted, the prosecutor addressed each of the four cases in turn,

920 A.2d 236 (2007) ("it would be improper for this court to supplant its credibility determinations for those of the fact finder, regardless of whether the fact finder relied on the cold printed record to make those determinations"); *Besade* v. *Interstate Security Services*, 212 Conn. 441, 447–49, 562 A.2d 1086 (1989) (rejecting claim that this court need not defer to factual findings because evidence largely was documentary and, therefore, findings were not based on personal appraisal of witness' demeanor).

articulating separate reasons for entering each nolle. The prosecutor then entered a nolle in each case, which Judge Kahn accepted. The prosecutor first discussed the motor vehicle case, followed by the breach of the peace case, the burglary/larceny case, and finally the drug case. After providing reasons for entering a nolle on the drug case, but before entering the nolle, the prosecutor made the following critical statement: "So what we had here was a proposed disposition to get rid of all of these files with a plea of drug paraphernalia and a fine of $300. That didn't work out today because we were unable to actually tap into Judge Strackbein. So I took the bull by the horns and asked [the defendant] to make a donation of $271 to the victim's fund. . . . In light of that, what we do each and every day over in [another geographical area] is to nolle this case, as well. So, now [the defendant's] matters are all resolved . . . ."

The meaning or scope of an agreement may be deemed ambiguous if it is susceptible to more than one reasonable interpretation. See *State* v. *Obas*, supra, 320 Conn. 444; *State* v. *Rosado*, supra, 92 Conn. App. 829. We conclude that the prosecutor's statements are susceptible to interpretations that support both parties' positions.

On the one hand, there is support for the state's interpretation. The prosecutor commenced his discussion of the drug case after entering nolles in the other three cases, each supported by independent reasons. The prosecutor discussed the defendant's donation to the victim's fund only in the course of addressing that case, indicating that, "[i]n light of that [donation]," he would "nolle this case, as well." The fact that the prosecutor's "took the bull by the horns" comment was made before he entered the nolle in the drug case lends support to the state's position, such that it could simply mean that, when Judge Strackbein became unavailable

to accept the original plea agreement, the prosecutor decided to exercise his discretion to enter unilateral nolles on three cases and effectuate an agreement only on the drug case.

On the other hand, there is ample evidence in the transcript supporting the defendant's view. The prosecutor made no remark at the outset of the hearing to indicate that one of the four cases was being treated differently, nor did he preface the discussion of the drug case with any such comment. There were several indications, however, of like treatment of the four cases. The prosecutor entered identical dispositions in every case—a nolle. The prosecutor articulated reasons in support of the nolles in every case, including the drug case. The reasons stated for the nolle in the drug case—problems in proof and lack of interest in pressing the matters given the circumstances attendant to the case—did not suggest a basis for differential treatment as they were not materially different from those offered in the other cases.

We also observe that, although the discussion of the defendant's donation to the victim's fund was temporally connected to the drug case, that consideration bore no logical connection to the drug case. The reasons for entering the nolle on the drug case were wholly unrelated to victim compensation. Indeed, a donation to the victim's fund bore a logical connection to the breach of the peace case and the burglary/larceny case, each of which involved identifiable victims, whereas there was no identifiable victim in the drug case other than arguably the defendant himself. The donation could have been reasonably understood as a logical alternative to restitution in those cases because the victim of the breach of the peace case was incarcerated and the victim of the burglary/larceny case could not be located.

In addition, certain comments by the prosecutor reasonably would have suggested to the defendant that the prosecutor would not recommence prosecution in the burglary/larceny case. The prosecutor's concluding statement before entering the nolle in the burglary/larceny case was "nobody here is out anything in this particular file." The prosecutor later noted for the record that the codefendant in the case was deceased. At the conclusion of the hearing, the prosecutor asked that any property relating to the case remaining in police custody be returned to its rightful owner. "The destruction of any evidence seized at a crime scene is consistent with a belief that no further charges will be brought and lends credence to the defendant's claim that [he] reasonably believed [his] plea ended [his] criminal liability."[10] *State* v. *Nelson*, supra, 23 Conn. App. 220.

Beyond this evidence suggesting like treatment of all of the cases, the prosecutor's expressed intention to take the "bull by the horns" due to Judge Strackbein's unavailability further suggests an intent to effectuate a global disposition substantially similar to the original plea agreement. The bull by the horns statement was made immediately after the prosecutor noted the terms of the parties' original agreement—to dispose of all of the defendant's cases in exchange for a guilty plea and

[10] The state correctly points to certain countervailing facts. It contends that photographs taken of the property would be admissible as secondary evidence in any subsequent prosecution. See General Statutes § 54-36a (b) (2). There was no indication on the record, however, that the state informed the defendant that photographs of the evidence had been taken or that they were being preserved for this purpose. The state points to the fact that the prosecutor stated that the burglary/larceny case was "unprovable" "as it stands today" because the codefendant was deceased and the victim could not be located. The state overlooks the facts that the death of the codefendant was not a fact that would change so as to make the case provable in the future and that the prosecutor added this reason after it entered the nolle in the case and only after Judge Kahn prompted the remark. At best, the state's arguments demonstrate why this aspect of the transcript is also ambiguous.

a fine. The mere fact that the prosecutor thought it was necessary to state these terms for the record suggests that this original plea agreement had relevance to the agreement executed before Judge Kahn. It is also notable that the prosecutor did not state for the record any material change in circumstances relevant to the charges that would explain a change from the original intent to effectuate a global disposition. Rather, the only changed circumstance identified was Judge Strackbein's unavailability. It is unreasonable to assume, without any explanation, that the mere happenstance of Judge Strackbein's unavailability would justify a substantive transformation of the parties' original global plea agreement to an agreement that conclusively disposed of only the drug case. Conversely, Judge Strackbein's unavailability provides a logical basis for going forward with a functionally similar agreement, minus the plea to the minor charge of possession of drug paraphernalia, because plea negotiations would have had to begin anew with Judge Kahn, who would thereafter have had to recuse herself from being the trial judge. Indeed, Judge Kahn repeatedly emphasized that she had assiduously avoided learning any substantive details of the plea agreement for that reason.

Finally, although the trial court gave dispositive weight to the fact that the prosecutor made no statement in the transcript that the donation was to be given in exchange for nolles in all four cases, in our view, it is far more significant that the prosecutor failed to make an unambiguous statement that the donation was consideration for a promise not to commence a future prosecution only on the drug case. If the prosecutor intended to enter unilateral nolles on three of the cases and effectuate a nolle agreement confined to only the drug case, then it was incumbent on the prosecutor to make that explicit on the record to avoid any ambiguity. See *State* v. *Nelson*, supra, 23 Conn. App. 219 ("[I]t was

incumbent upon the state to enunciate what was and was not covered by the agreement lest the defendant be allowed to go to plea under the impression that the criminal portion of this tragic episode was closed. If the state was reserving a right to reprosecute in the event of the victim's death, it could have, and should have, said so."). It bears emphasizing that "the state, as the drafting party wielding disproportionate power, must memorialize any and all obligations for which it holds the defendant responsible, as well as all promises that it has made for the purpose of inducing the defendant to cooperate. The terms of the agreement should be stated clearly and unambiguously, so that the defendant, in assenting to waive certain fundamental rights, knows what is expected of him and what he can expect in return. Likewise, such clarity ensures that the state knows what it may demand of the defendant and what it is obligated to provide in exchange for the defendant's cooperation." (Internal quotation marks omitted.) *State* v. *Obas*, supra, 320 Conn. 443. The defendant was entitled to a clear understanding that, contrary to the original global plea agreement contemplated by the state and the defendant, the nolle agreement as articulated by the state before Judge Kahn had been substantively changed, in the view of the state, and left him vulnerable to potential prosecution in the other three cases. The transcript of the hearing before Judge Kahn contains no language that would support any such notice to the defendant.

Nonetheless, the state points to Judge Kahn's statement during the plea hearing that she could not prevent the state from entering a nolle as evidence that she understood that the prosecutor was entering nolles in the cases independently and on his own initiative rather than as part of any agreement. The problem with this view is that it also undermines the state's argument that one of the nolles was part of an agreement, as

Judge Kahn drew no distinction between the nolles on the four cases. Judge Kahn never addressed the defendant to ask him if he understood the terms of the agreement and did not make any statement on the record sanctioning the parties' agreement. Indeed, Judge Kahn's statement underscores the inherent ambiguity in the record as to the parties' intention. See *State* v. *Obas*, 147 Conn. App. 465, 481, 83 A.3d 674 (2014) (plea agreement "is a contract between the defendant and the state—not between the defendant, the state and the court"), aff'd, 320 Conn. 426, 130 A.3d 252 (2016). Moreover, because Judge Kahn emphasized that the prosecutor was "very careful not to mention what the offer was" to her in chambers because she was assigned to serve as the trial judge, she would have no idea to what extent the nolle agreement conformed to the original global plea agreement.[11]

The state also asserts that defense counsel's silence evidenced the defendant's acquiescence to the state's purported intent to enter unilateral nolles on the three cases other than the drug case. One, however, cannot object to what one does not know. The silence of defense counsel during the hearing can also be indicative of his interpretation of the state's comments as effectuating the parties' original intent to enter a disposition to dispose of all of the files in exchange for the defendant's donation. Regardless, "derelictions on the part of defense counsel that contribute to ambiguities and imprecisions in plea agreements may not be allowed to relieve the [g]overnment of its primary responsibility for insuring precision in the agreement."

[11] To the extent the state relies on Judge Kahn's warning to the defendant about potential prosecution in the event of his continued substance abuse as evidence that the state was leaving open the possibility of prosecution even in the drug case, that argument is devoid of merit. Judge Kahn's comments plainly were directed at potential liability for the defendant's *future* conduct, not the possibility of prosecution for the past conduct alleged in the nolled drug case.

United States v. *Harvey*, 791 F.2d 294, 301 (4th Cir. 1986).

On the basis of the foregoing, we hold that the state must bear the burden for the ambiguity and lack of clarity in the nolle agreement as memorialized on the record by the prosecutor. We conclude that the defendant had a reasonable expectation that all the nolles were entered as a part of a global disposition akin to the original plea agreement. Our holding is consistent with the purposes underlying the application of this rule of construction—namely, to "encourage greater clarity and specificity in plea negotiations and plea agreements . . . to ensure fairness, stabilize and finalize the parties' expectations, and reduce the waste of judicial resources required to review challenges to guilty pleas that are encouraged when the record of the plea proceedings is ambiguous." *Innes* v. *Dalsheim*, 864 F.2d 974, 980 (2d Cir. 1988), cert. denied, 493 U.S. 809, 110 S. Ct. 50, 107 L. Ed. 2d 19 (1989).

Because the state breached the parties' nolle agreement by filing criminal charges related to the same conduct at issue in the burglary/larceny case, the Appellate Court properly reversed the judgment of conviction and remanded the case to the trial court with direction to order specific performance of the nolle agreement.

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and PALMER and ROBINSON, Js., concurred.

ESPINOSA, J., dissenting. The majority concludes that the disposition agreement between the defendant, Craig Kallberg, and the state, as reflected in the transcript of the September 22, 2011 disposition hearing, was ambiguous as to whether the defendant's charitable contribution of $271 was intended to be in exchange

for the nolle prosequi of the charges that the state has reinstituted in the present case. Construing that ambiguity in favor of the defendant, the majority concludes that the state agreed to the nolle in exchange for consideration. Accordingly, it holds that the charges in the present case should have been dismissed. I would conclude that, to the contrary, the transcript of the disposition hearing clearly and unambiguously demonstrates that the defendant agreed to make the charitable contribution in exchange for the nolle of the charges in a separate case and that the nolle of the charges that were reinstituted in the present case was unilateral. I would conclude, therefore, that there was no bar to bringing the charges in the present case.[1] Accordingly, I dissent.

As the majority indicates, in September, 2011, the defendant had four separate cases pending against him with separate docket numbers. For purposes of this dissenting opinion, I refer to the cases as: (1) the driving case (docket number MV-10-0228488); (2) the drug case (docket number CR-10-0046914); (3) the breach of the peace case (docket number CR-10-0047442); and (4) the burglary case (docket number CR-10-0046439-T, the underlying facts of which form the basis of the charges in the present case). With the assistance of Judge Strackbein, the defendant and the state entered into a tentative plea agreement pursuant to which the defendant agreed to plead guilty to possession of drug paraphernalia in the drug case and to pay a fine of $300, in

[1] Because I conclude that the intent of the disposition agreement was clear and unambiguous, I need not determine whether the majority correctly concludes that the standard of review of Judge Alander's decision denying the defendant's motion to dismiss is plenary because the ruling was based solely on his interpretation of the written transcript of the disposition hearing, and not on the live testimony of witnesses, and that any ambiguities in the disposition agreement must be resolved against the state. Even if I were to assume that those standards are correct, I would affirm Judge Alander's ruling denying the motion to dismiss.

exchange for which the state would enter nolles in the other three cases.[2] When the parties appeared in court to enter the plea on September 22, 2011, however, Judge Strackbein was unavailable. Accordingly, Judge Kahn, who was under the understanding that she was going to be the trial judge in this case, heard the matter. The state has represented to this court, and the defendant does not dispute, that, because Judge Strackbein was unavailable to take the guilty plea, and because Judge Kahn was reluctant to become involved in plea negotiations because she would be trying the case,[3] the parties agreed that entering a guilty plea on the drug charge would not be an option if they were to resolve the matter at that time. Accordingly, they reached a new disposition agreement under which all of the cases would be nolled.

Pursuant to Practice Book § 39-29,[4] the prosecutor explained the new disposition agreement to Judge Kahn as follows. First, the prosecutor read into the record the docket numbers of the four cases that were to be addressed at the disposition hearing, in the order set forth previously. With respect to the first case, the driving case, which involved charges of driving without insurance and driving unreasonably fast, the prosecutor explained that "[w]hat we do in those cases is make sure that the insurance is gotten, if in fact he's driving an automobile, and the license is still valid or is valid.

[2] See Practice Book § 39-5 ("[t]he parties may agree that the defendant will plead guilty or nolo contendere on one or more of the following conditions . . . [2] [t]hat the prosecuting authority will nolle . . . certain other charges against the defendant").

[3] Judge Kahn stated at the September 22, 2011 hearing that she "was hesitant to engage in the plea negotiations because [she] was going to be the trial judge . . . ."

[4] Practice Book § 39-29 provides: "A prosecuting authority shall have the power to enter a nolle prosequi in a case. It shall be entered upon the record after a brief statement by the prosecuting authority in open court of the reasons therefor."

[The defendant] says that . . . he was operating with a valid motor vehicle license." Accordingly, the prosecutor explained, "[t]he state is entering a nolle on that." Judge Kahn immediately responded, "Nolle is noted."

With respect to the third case, the breach of the peace case, the prosecutor explained that the complainant in that case had been incarcerated and did not want to pursue the matter. Accordingly, he explained "we're entering a nolle in that matter based on the victim's wishes." Judge Kahn again responded immediately, "Nolle noted." The prosecutor then stated that he would address the second case that he had mentioned at the outset, the drug case, at the end of the hearing.

With respect to the burglary case, the prosecutor explained that the state had serious doubts as to "whether [it] could ever prove the breaking and entering or the illegal entry . . . ."[5] In addition, the defendant had given up possession of the items at issue to the police. Accordingly, the prosecutor explained, "[t]he state's entering a nolle in that file." Yet again, Judge Kahn immediately responded, "Nolle noted."

Finally, with respect to the drug case, the prosecutor explained that the matter involved "a simple possession of narcotics," and that another individual had admitted to possessing some of the narcotics at issue. The prosecutor further explained that, as the result of these circumstances, the defendant originally had agreed to plead guilty to possession of drug paraphernalia and to pay a fine of $300, in exchange for which the state would nolle the other three cases. The prosecutor then explained that, because of the concerns over the entry of a guilty plea raised by Judge Strackbein's absence, the defendant had agreed that he would instead contrib-

[5] In addition, the prosecutor stated later in the proceeding that "in the [burglary case] the codefendant . . . is dead. The victim can't be found. That case as it stands today is unprovable."

ute $271 to the "victim's fund,"[6] "in light of [which the state agreed] . . . to nolle this case, as well."[7] Judge Kahn responded that she would "note the nolle on that."

In my view, the foregoing makes it inescapably clear that each of the four cases against the defendant was nolled for an entirely distinct reason, and *only* the drug case was nolled in exchange for the $271 charitable contribution. As I have explained, Judge Kahn noted that nolles in the driving case, the breach of the peace case and the burglary case had been entered *before* the prosecutor even mentioned the disposition of the drug case. In addition, Judge Kahn expressly stated at the September 22, 2011 hearing: "I do know [that the prosecutor's] nature is not to enter nolles lightly and so it's not his practice to nolle cases unless there's a good reason, so I'm going to take him at his word that he couldn't prove the [burglary] case."[8] Moreover, while he was attempting to explain to Judge Kahn why a previous guilty plea offer in the burglary case, of which Judge Strackbein had been aware, was no longer in effect, the prosecutor stated: "Perhaps the drug case changed significantly when [the codefendant] died and [the victim] was unavailable.[9] So I don't have a larceny four . . . ." (Footnote added.) Judge Kahn responded,

[6] Presumably, the prosecutor was referring to the Criminal Injuries Compensation Fund, the statutorily authorized victim's compensation fund. See General Statutes § 54-215.

[7] See *State* v. *Pieger*, 240 Conn. 639, 653, 692 A.2d 1273 (1997) (order that defendant make charitable contribution was authorized by General Statutes [Rev. to 1995] § 53a-30 [a] [12], [now General Statutes § 53a-30 (17)], under which court has authority to impose as condition on discharge that defendant "satisfy any other conditions reasonably related to his rehabilitation"); *See* v. *Gosselin*, 133 Conn. 158, 161, 48 A.2d 560 (1946) ("a nolle does necessarily imply a discharge").

[8] Although Judge Kahn did not expressly refer to the burglary case, that was the only case in which the prosecutor explained that it was being nolled because of problems of proof.

[9] It is possible that the prosecutor intended to refer to the burglary case. See footnote 5 of this dissenting opinion.

"I appreciate that you've made a full record of it . . . ." It is clear, therefore, that Judge Kahn understood that lack of proof was the reason for the nolle of the burglary case. Judge Kahn further stated that she understood that the prosecutor "would nolle some matters because he had an inability to get certain witnesses . . . ." In addition, she stated that "if the state wishes to enter a nolle, there's nothing the court can do. The state can enter a nolle. It's within the prosecutorial discretion. All the . . . court can do is ask the state to put their reasons on the record. But they can nolle cases whenever they want, and all the court can do is ask the reasons. I have no issues with [the prosecutor's] reasons . . . . I understand them. You've put them on the record, and so I'm not quarreling with that at all." Finally, Judge Kahn stated that she would "note the nolles *for the reasons stated on the record*." (Emphasis added.) Thus, Judge Kahn clearly viewed the reasons for entering the four nolles as distinct and independent reasons.

Indeed, if the defendant had agreed to make the $271 charitable contribution in exchange for all four nolles, there would have been absolutely no reason for the prosecutor to state on the record the reasons for the nolles in the driving case, the breach of the peace case and the burglary case. The prosecutor could have simply explained that, in exchange for the contribution, all four cases were being nolled. To the contrary, however, the prosecutor expressly stated that, in light of the charitable contribution, the state had agreed to nolle "*this case*"—the drug case—not all of the cases. (Emphasis added.) Thus, the only reasonable interpretation of the transcript of the disposition hearing is that the parties intended that *only* the drug case would be nolled in exchange for the defendant's charitable contribution of $271, and the other three cases would be nolled for entirely distinct reasons, none of which

involved any concessions by or consideration from the defendant.

In addition, there is a plausible explanation for this restructuring of the disposition agreement. Instead of receiving a conviction in the drug case and effective dismissals of the other three cases,[10] the defendant would receive an effective dismissal in the drug case and unilateral nolles on the other three charges, under which the state would be entitled to reinstitute the charges.[11] The original plea agreement was in accordance with Practice Book § 39-5, which authorizes the state to nolle other charges against the defendant in exchange for a *guilty plea* on a particular charge. Presumably, the parties' agreement that the defendant would plead guilty to possession of drug paraphernalia and pay a criminal fine only in the drug case was premised on their view that that was the state's strongest case, considering both the extent of the defendant's culpability and the strength of the state's evidence. A guilty plea in the drug case, however, was no longer an option. Accordingly, it is reasonable to conclude that, with a view to preserving the original intent to tie the financial consequences to the defendant exclusively to the drug case, and knowing that the guilty plea no longer provided consideration for the nolles in the other three cases, the parties agreed that the defendant would make a charitable contribution in exchange for the nolle in the drug case and the other cases would be nolled for distinct reasons. This new arrangement involved trade-offs for both parties, in that the state gave up the conviction in the drug case but gained the ability to

[10] See *Mason* v. *State*, 302 Md. 434, 440, 488 A.2d 955 (1985) (nolle as part of plea agreement is tantamount to dismissal of nolled charge).

[11] See *State* v. *Lloyd*, 185 Conn. 199, 201, 440 A.2d 867 (1981); Practice Book § 39-31 ("The 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.").

reinstitute charges in the other three cases if circumstances changed, while, conversely, the defendant avoided a certain criminal conviction in the drug case but took on the risk that the state might reinstitute the charges in the other cases. In contrast, if the parties had agreed to preserve the original intent to effectively dismiss the driving case, the breach of the peace case and the burglary case by entering nolles in all four cases in exchange for a charitable contribution, the benefits of the change in disposition would have flowed exclusively to the defendant. Specifically, the defendant would have avoided a criminal conviction in the drug case *and* the state would have been barred from reinstituting the charges in all four cases. Accordingly, because it is clear that it was the intent of the parties that the defendant would pay a charitable contribution in exchange only for the nolle in the drug case, and because there is a more than plausible explanation for the change in the disposition of the other cases, I would conclude that the state was barred only from reinstituting charges in the drug case, and it was free to reinstitute the charges in the present case arising from the conduct that was the basis of the nolled burglary case.

The majority makes numerous arguments in support of its conclusion to the contrary, none of which bears scrutiny. First, the majority points out that "[t]he prosecutor made no remark at the outset of the hearing to indicate that one of the four cases was being treated *differently*, nor did he preface the discussion of the drug case with any such comment." (Emphasis added.) As I have indicated, however, the prosecutor did treat the cases differently because he took the drug case out of order and addressed it last. Thus, he grouped the three cases that were unilaterally nolled together and treated the drug case separately. Moreover, the failure of the prosecutor to state expressly that only the drug case was being nolled in exchange for consideration

does not render the remarks that he *did* make ambiguous. As I have indicated, he unambiguously indicated that each of the four cases had a different reason for being nolled, and that the drug case was the only case that was being nolled in exchange for the defendant's charitable contribution.

The majority also contends that, because all of the cases were treated the *same*, i.e., they were nolled, it is reasonable to conclude that the parties intended that the driving case, the breach of the peace case and the burglary case would be effectively dismissed, like the drug case. Specifically, the majority contends that the reasons given by the prosecutor for the nolle in the drug case were "problems in proof and lack of interest in pressing the matters given the circumstances attendant to the case," reasons that were not markedly different from the reasons given in the other cases. The prosecutor mentioned these issues, however, in an attempt to explain the reasons for the previous plea agreement pursuant to which the defendant would plead guilty to possession of drug paraphernalia and pay a $300 fine. The prosecutor then explained that, in lieu of the fine, the defendant had made a $271 charitable contribution and, "[i]n light of that," the state was entering a nolle in that case. It is clear, therefore, that the *reason* for that nolle, *unlike* the nolles in the other cases, was the payment of the charitable contribution. The majority further contends that Judge Kahn's remarks referring to a prosecutor's broad discretion to enter nolles as long as the prosecutor states the reasons on the record merely "underscores the inherent ambiguity in the record as to the parties' intention" because she drew no distinction between the unilateral nolles and the nolle in the drug case. From the perspective of *Judge Kahn* however, there was no distinction between the unilateral nolles and the nolle in exchange for the charitable contribution, in the sense that she

could not reject any particular nolle and demand that the state continue with the prosecution. That does not mean that there was no distinction between a unilateral nolle and a nolle entered in exchange for consideration from the *defendant's* point of view.

To the extent that the majority suggests that the defendant might reasonably have had the mistaken belief that the nolle entered in exchange for consideration and the unilateral nolles would have the *same legal effect*, the defendant has raised no claim of legal mistake, unilateral or otherwise, before the trial court or on appeal. Rather, the defendant contended in his motion to dismiss only that "the state previously entered a nolle prosequi on these charges after the payment of a charitable contribution by the defendant. The payment of this charitable contribution was made by the defendant in consideration of the state entering a nolle prosequi on the pending charges [in the burglary case], constituting a valid and enforceable plea agreement." The defendant further contended in support of his motion to dismiss, as he does on appeal, that, to the extent that the disposition agreement, as reflected in the transcript of the disposition hearing, is ambiguous on this point, it should be construed in his favor. There is a difference between a contract that is ambiguous and a contract that is clear and unambiguous but, because of a mistake of fact or law, does not accurately reflect the intent of one of the parties, and the defendant has not raised a claim involving the latter issue. Accordingly, this court must presume that the defendant understood the legal distinction between unilateral nolles and nolles entered in exchange for consideration.

Second, the majority contends that the defendant's charitable contribution to the victim's fund "bore no logical connection to the drug case" because, according

to the majority, there was no victim in that case.[12] As I have explained, however, the logical connection to the drug case was the preexisting intent of the parties that the financial consequences to the defendant would be tied to that case. Because the defendant could not be required to pay a criminal fine if he did not plead guilty to the charge, a charitable contribution to the victim's fund, which is a common practice when disposing of criminal matters, was a logical substitute, regardless of whether any specific victim of this particular crime could be identified.

Third, the majority contends that the prosecutor made comments that "reasonably would have suggested to the defendant that the prosecutor would not recommence prosecution in the [burglary] case." Specifically, the majority relies on the prosecutor's comment that "nobody here is out anything in the particular file" and his request that any property relating to the case be returned to its rightful owner. The majority ignores the fact, however, that the primary reason that the prosecutor gave to Judge Kahn for entering a nolle in this case was that he had doubts that the state "could ever prove the breaking and entering or the illegal entry," thereby indicating that, if proof became available, all bets would be off. It was only after giving that reason for the nolle that the prosecutor made the offhand comment that "nobody here is out anything" as additional support for the nolle. The prosecutor was entitled to balance problems of proof with the extent of the harm to the victim, and when proof is difficult and the harm small, a nolle may be indicated. That does not mean that, if strong evidence becomes available, a decision not to prosecute would still be the appropriate course. In any

[12] I would note that the prosecutor stated at the September 22, 2011 hearing that "[p]erhaps the drug case changed significantly when [the codefendant] died and [the victim] was unavailable." But see footnote 9 of this dissenting opinion.

event, even if I were to agree that the prosecutor suggested that he did not anticipate any change in circumstances that would support reinstitution of the charges, that would not render the intent of the parties to enter a unilateral nolle ambiguous.

With respect to the prosecutor's request that the property be returned to its rightful owner, the return of stolen property does not constitute the "destruction of . . . evidence" and, therefore, the majority's reliance on *State* v. *Nelson*, 23 Conn. App. 215, 219–20, 579 A.2d 1104, cert. denied, 216 Conn. 826, 582 A.2d 205 (1990), cert. denied, 499 U.S. 922, 111 S. Ct. 1315, 113 L. Ed. 2d 248 (1991), for the proposition that the destruction of evidence evinces a belief that no further charges will be brought is misplaced. See General Statutes § 54-36a (b) (2).[13] The majority contends that, to the contrary, § 54-36a (b) (2) has no bearing on its argument because the prosecutor never indicated on the record "that photographs of the evidence had been taken or that they

[13] General Statutes § 54-36a (b) (2) provides in relevant part: "If the seized property is stolen property, within ten days of the seizure, the law enforcement agency seizing the property shall notify the owner of the property if known, or, if the owner of the property is unknown at the time of seizure, such agency shall within ten days of any subsequent ascertainment of the owner notify such owner, and, on a form prescribed by the Office of the Chief Court Administrator, advise the owner of such owner's rights concerning the property and the location of the property. Such written notice shall include a request form for the return of the property. The owner may request the return of the property by filing such request form with such law enforcement agency, and upon receipt of such request, the law enforcement agency shall forward it to the clerk of the court for the geographical area in which the criminal offense is alleged to have been committed. The clerk of the court shall notify the defendant or defendants of the request to return the property. The court shall order the return of the property within thirty days of the date of filing such return request by the owner, except that for good cause shown, the court may order retention of the property for a period to be determined by the court. Any secondary evidence of the identity, description or value of such property shall be admissible in evidence against such defendant in the trial of such case. The fact that the evidence is secondary in nature may be shown to affect the weight of such evidence, but not to affect its admissibility. . . ."

were being preserved" as secondary evidence. See footnote 10 of the majority opinion. There is no requirement, however, that a prosecutor who has entered a unilateral nolle and requested that stolen property be returned to the owner explain on the record whether or how secondary evidence is being preserved in order to maintain the right to reinstitute the charges. Moreover, even if I were to assume that the defendant reasonably could have believed that the state would no longer possess evidence to support the burglary charge, making it unlikely that it would reinstitute that charge, that would not render the *reason* for the nolle ambiguous, and if the defendant intended that the nolle would be unilateral, we must presume that he knew that the state was not barred from reinstituting the charges. The majority continually confuses the issue of whether the defendant could have misunderstood the *legal effect* of a unilateral nolle—an issue that has not been raised—with the issue of whether the parties intended that the nolle in the burglary case would be unilateral, which they clearly did.

Fourth, the majority makes an elaborate argument regarding the prosecutor's intent to take the "bull by the horns" in light of Judge Strackbein's unavailability and his failure to state on the record how this or any other change in circumstances "would explain a change from the original intent to effectuate a global disposition." As I have explained, however, Judge Strackbein's unavailability meant that the defendant could not plead guilty on the drug charge as consideration for the effective dismissal of the other cases. Because that was no longer an option, it is reasonable to conclude that the parties abandoned their plan to effectively dismiss the charges in those cases as part of a trade-off that involved gains and losses for both parties. In my view, the prosecutor had no obligation to explain on the record why the parties were not entering into a new agreement

that would benefit the defendant exclusively. Moreover, even under the state's view, the new disposition agreement, like the discarded plea agreement, would be "global" in the sense that each of the four cases would be disposed of in some manner. In any event, the prosecutor's failure to expressly discuss the theory underlying the new *overall* disposition on the record does not change the fact that the distinct reasons that he gave for entering a nolle in each of the four individual cases show clearly and unambiguously that *only* the drug case was nolled in exchange for the charitable contribution.

Finally, the majority argues—yet again—that "[i]f the prosecutor intended to enter unilateral nolles on three of the cases and effectuate a nolle agreement confined to only the drug case, then it was incumbent on the prosecutor to make that explicit on the record to avoid any ambiguity." It is clear to me, however, that the prosecutor did everything that was required by Practice Book § 38-29 when he gave a clear and unambiguous statement in open court of the specific reasons that each of the four cases was being nolled. He was not required to give those reasons and then to dispel all possible doubt about the reasons for the nolles by reiterating that the specific reason that he gave for the nolle in each case was, in fact, the reason for that nolle. Nor was the prosecutor required to explain to the defendant that the unilateral nolles did not bar the state from reinstituting the charges if the circumstances changed.[14]

[14] Because a guilty plea involves the waiver of important constitutional rights, the defendant must be canvassed by the court to ensure that the plea is knowing and voluntary. See *State* v. *Domian*, 235 Conn. 679, 687, 668 A.2d 1333 (1996) ("the federal constitution requires that the record of the plea canvass indicate the voluntariness of any waiver of the three core constitutional rights [implicated by the guilty plea]" [internal quotation marks omitted]). I am aware of no comparable requirement that a prosecutor advise the defendant of the legal effect and consequences of a unilateral nolle, which does not require the defendant to waive any constitutional rights. Although providing such an explanation is arguably the better practice if the prosecutor has any reason to believe that the defendant lacks knowl-

In any event, the defendant has made no claim that he did not understand the effect of a unilateral nolle.

It is clear to me, therefore, that the majority is allowing the defendant, in light of a subsequent change in circumstances, to substitute his hindsight view of what he should have done—request the state to nolle all four cases in exchange for a charitable contribution to the victim's fund—for what, as far as the transcript of the disposition hearing reveals, the parties actually agreed to do—nolle the drug case in exchange for a charitable contribution and nolle the other three cases for entirely distinct reasons, none of which barred the reinstitution of the underlying charges in those three cases if circumstances changed.[15] In doing so, the majority has entirely ignored the fact that the disposition agreement, as reflected in the transcript of the disposition hearing, involved trade-offs, and, instead, it has given effect to the terms of both the abandoned plea agreement and the substituted disposition agreement that favor the defendant, while nullifying the favorable terms for which the state bargained. In my view, it is not the role of this court to retroactively change the terms of a clear and unambiguous disposition agreement that is otherwise enforceable merely because subsequent developments have triggered a term that disfavors the defendant.

edge on that matter, that presumably would not be the case when the defendant is represented by counsel.

[15] As I have indicated, the defendant has made no claim that he agreed to the new disposition because he did not realize that a unilateral nolle would allow the state to reinstitute the charges. Even if the defendant had made such a claim, however, the remedy for a unilateral mistake ordinarily is not to reform the contract to conform to the mistaken party's intent, but, at most, to void the contract. See *Bender* v. *Bender*, 292 Conn. 696, 730–31, 975 A.2d 636 (2009) ("[t]he mistake of [only one] of the parties inducing him to sign a contract which, but for the mistake, he would not have entered into, may be a ground in some cases for cancelling the contract" [internal quotation marks omitted]).

Because I believe that the transcript of the disposition hearing shows clearly and unambiguously that the prosecutor unilaterally nolled the burglary case, I would conclude that there is no bar to the reinstitution of those charges in the present case. Accordingly, I would reverse the judgment of the Appellate Court reversing the trial court's judgment of conviction following its denial of the defendant's motion to dismiss, and I would direct that court to uphold the judgment of conviction. I therefore dissent.