BEACH, J., concurring and dissenting. I respectfully concur with the conclusion of the majority that further proceedings are required. I believe, however, that the habeas court was not constrained to delay action on the request by the respondent, the commissioner of correction, for a dismissal of the claims by the petitioner, John Taylor, until a second hearing could be held. I also believe that the court erred in not holding a hearing on the petitioner's motion to open and to vacate the judgment of dismissal at which the petitioner would be afforded the right to be present.

I agree with the majority's summary of the facts and will not repeat them here at length. At the time of the scheduled trial on the merits of the habeas action, neither the petitioner nor his attorney appeared. After it became apparent that neither was going to appear, the attorney for the respondent moved the court to dismiss the case.

Unlike the majority, I believe that the court was not required at that juncture to notify the petitioner, presumably through his attorney, that a motion to dismiss had been filed and to schedule another hearing to determine whether the matter should be dismissed in some fashion. Practice Book § 23-29 (5) provides that the court may at any time dismiss the petition if it determines that, among other reasons, "any . . . legally sufficient ground for dismissal of the petition exists." A habeas corpus action, as a variant of civil actions, is subject to the ordinary rules of civil procedure, unless superseded by the more specific rules pertaining to habeas actions. In *Fuller* v. *Commissioner of Correction*, 75 Conn. App. 814, 817–19, 817 A.2d 1274, cert. denied, 263 Conn. 926, 823 A.2d 1217 (2003), for example, we held that a dismissal for lack of due diligence in prosecuting the case pursuant to Practice Book § 14-3[1] was a legally sufficient ground for dismissal of a habeas corpus action and fell under the catchall "other legally sufficient ground" provision of Practice Book § 23-29 (5). Similarly, a failure to appear for trial may result in an immediate nonsuit[2] pursuant to Practice Book § 17-19; a nonsuit so entered ends the case unless there is a subsequent motion to open.[3] See, e.g., *Segretario* v. *Stewart-Warner Corp.*, 9 Conn. App. 355, 359, 519 A.2d 76 (1986).

It is true, as pointed out by the majority, that a habeas petitioner has a right to be present at any evidentiary hearing and any argument on a question of law that may be dispositive of the case, *unless the petitioner waives* the right. Practice Book § 23-40; see also *Mitchell* v. *Commissioner of Correction*, 93 Conn. App. 719, 726 n.5, 891 A.2d 25, cert. denied, 278 Conn. 902, 896 A.2d 104 (2006); *Mercer* v. *Commissioner of Correction*,

230 Conn. 88, 93, 644 A.2d 340 (1994). The more common posture in habeas actions is that the petitioner is in the custody of the commissioner, who has a duty to deliver the body to court; indeed, "habeas corpus" means "you have the body." This court has held that legal arguments may be held in the absence of the petitioner when his presence cannot be compelled by statute or interstate compact, despite the language of Practice Book § 23-40. *Hickey* v. *Commissioner of Correction*, 82 Conn. App. 25, 37–40, 842 A.2d 606 (2004), appeal dismissed, 274 Conn. 553, 876 A.2d 1195 (2005). Actual physical presence is not, then, categorically required for the court to act. The petitioner in the present case undoubtedly had the *right* to be present in court when the discussion regarding dismissal occurred; the case was terminated because he (or counsel) was *not* present. In light of the authority cited above and the standard practice of our courts, a litigant ought to anticipate that not showing up may result in the dismissal of the case. See, e.g., *Osborne* v. *Osborne*, 2 Conn. App. 635, 638, 482 A.2d 77 (1984). In the circumstances here, I believe that the habeas court had the discretion to render judgment in favor of the respondent when neither the petitioner nor his counsel appeared for a trial that had been duly scheduled.[4]

The habeas court, however, ordered a dismissal "with prejudice." Although there may be some ambiguity in the phrase "with prejudice," it appears from the court's summary denial of the motion to open and to vacate the judgment and the explanation in its articulation of the denial that no recourse was possible. In any event, it is clear that the petitioner was not extended the right to be present at the time the motion was decided. Because a substantial right of the petitioner was at stake in the motion to open and to vacate the judgment, he should have been afforded the opportunity to be present.[5] *Mitchell* v. *Commissioner of Correction*, supra, 93 Conn. App. 724–26.

Accordingly, I would reverse the judgment of the habeas court on the petitioner's motion to open and to vacate the judgment and would remand the case for a hearing on that motion.[6]

[1] Practice Book § 14-3 provides in relevant part that dismissal for lack of due diligence requires at least two weeks notice, "*except in cases appearing on an assignment list for final adjudication. . . .*" (Emphasis added.)

[2] For the purpose of this opinion, I find no meaningful distinction between "nonsuits" and "dismissals."

[3] The scheduling order in the trial court provided that failure to comply could result in dismissal.

[4] The request of the petitioner's counsel for a continuance had been denied and notice of the denial sent. The basis for the request was, essentially, that counsel did not yet have the information he felt that he needed for trial. He had not communicated any personal circumstance, such as the relative's illness, which perhaps for humane reasons might have justified a continuance.

[5] Videoconferencing could conceivably satisfy the requirement that a petitioner be "present."

[6] I would leave for another day and factual context the question of what standards apply to such a motion.