2004

Developments in Connecticut Criminal Law: 2005

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DEVELOPMENTS IN
CONNECTICUT CRIMINAL LAW: 2005

BY TIMOTHY H. EVERETT*

In the winter and spring of 2005 the central topic in criminal law in the Bar and in public discourse was the Michael Ross case. Before Mr. Ross's execution on May 13, 2005; there had not been an execution in Connecticut since 1960.¹ The attention of the Bar and the public was now drawn to the difference between debating capital punishment and actually imposing it. The previous debates on capital punishment had occurred politically and philosophically, sporadically and abstractly. But now startling events awakened the entire state to the imminent reality of Ross's execution.²

To function according to its constitutional and common law design, the criminal law depends on a trial and appellate process that is adversarial, not congenial. After multiple trial and appellate proceedings in his case over two decades, Ross had no interest in authorizing further adversarial testing of the legality of his death sentence. His personal decision unified the prosecution and Ross together against would-be “interested parties” who opposed his decision and feared its implications.

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¹ The last person executed in Connecticut before Michael Ross was Joseph Taborsky in 1960. The Connecticut State Law Library web-site contains a number of useful legal and historical materials on capital punishment in Connecticut history, including a list of the executions in Connecticut since 1894. See http://www.cslib.org/capitalpunishment.htm.

² Of course, the courts, prosecutors and defense counsel who had dedicated years of labor to the Michael Ross case had already long understood the extremely difficult issues of fairness and justice and finality that a capital case poses. The defendant’s underlying capital convictions were affirmed in 1994, at which time the Supreme Court found error in the penalty phase of the trial and ordered a new sentencing hearing. State v. Ross, 230 Conn. 183 (1994), cert. denied, Ross v. Connecticut, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995). The defendant’s appeal after the new penalty hearing again resulted in multiple sentences of death and was denied by the Supreme Court on June 1, 2004. State v. Ross, 269 Conn. 213 (2004). The public defender's office's first efforts to override Ross's decision to abandon further challenges to the judgment was heard and decided expeditiously in December, 2004, and January, 2005. State v. Ross, 272 Conn. 577 (2005) (on Dec. 1, 2004 trial court denied public defender office’s motion for “next friend” status under Whitmore v. Arkansas, 495 U.S. 149, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990); on Jan. 14, 2005 Supreme Court affirmed, finding Ross not shown to be incompetent to appear in court and make his own decisions).
for capital punishment in Connecticut. There followed a blitz of state and federal legal challenges to Ross's competence in choosing to terminate post-conviction challenges in his name. This article cannot do justice to the legal issues and the stalwart efforts of all the jurists, lawyers and others who exhausted their professional and personal energies in fulfilling their allotted roles in the case. The narrative of the Ross case needs to be fully chronicled and sufficiently reflected upon, but not here. The purpose of this year in review article is to direct the reader to a goodly number of the more interesting and important cases decided in Connecticut criminal law in 2005.

A. SEARCH AND SEIZURE.

The biggest decision of the year in search and seizure law was *State v. Brunetti*, a murder case raising the question whether the police may search a home when one occupant gives his consent to do so in the presence of another occupant who withholds her consent. By a split (3-2) decision, the

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4 276 Conn. 40 (2005)

5 The disharmonious owners were the father and mother of the murder suspect, Nicholas Brunetti, who lived with them. Both parents were in the waiting room at
court held that the trial court erred in denying the defendant’s motion to suppress because the police may not act on the consent to search a home if two co-occupants are at odds, with one consenting and the other refusing consent. At this writing, the case is undergoing reconsideration en banc, with Justice Borden and Judge Lavery joining the original panel of five made up of Chief Justice Sullivan and Justices Vertefeuille, Katz, Palmer, and Zarella. Meanwhile, the United States Supreme Court has heard and decided a state case on its docket, Georgia v. Randolph, which raised the federal constitutional issue reached by only one of the five justices who decided Brunetti the first time around. The court held that one co-tenant’s consent to search a home does not trump the refusal by a second present co-tenant who refuses consent.

The United States Supreme Court was also split, with a five justice majority opinion and three dissenting opinions.

While the Connecticut Supreme Court reconsiders its Brunetti decision en banc and in light of Georgia v. Randolph, its original decision remains important and interesting on a number of grounds. The three justices voting to reverse Brunetti’s conviction were split in their reasoning. Justice Vertefeuille wrote the plurality opinion in which Chief Justice

5 (cont.) the West Haven police department when the father signed a consent to search form and the mother refused to do so. The son was in the interrogation room at the police department, though not formally under arrest at the time that his father gave consent. On the authority of the father’s consents, the police searched the Brunetti home and found in the laundry area recently washed items of clothing, including a towel and sweat pants with “bleach-like stains” and two tank tops, one with “reddish brown blood-like stains.” The police then informed the suspect that they had discovered and seized the items, at which point the suspect requested a Bible, was given Miranda warnings, and made statements incriminating himself in the murder. Thereafter, he was formally arrested. Id. at 43-45.

6 Id. at 41-65 (Vertefeuille, J., plurality opinion); 66-86 (Katz, J., concurring); 86-143 (Palmer, J., dissenting, joined by Zarella, J.).

7 126 S. Ct. 1515, 164 L. Ed.2d 208 (March 26, 2006).

8 The majority wrote: “Since the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all.” 126 S. Ct. at 1523.

9 Justice Souter wrote the majority opinion, in which Justices Stevens, Kennedy, Ginsburg, and Breyer joined. Justices Stevens and Breyer also filed concurring opinions. Chief Justice Roberts and Justices Scalia and Thomas each wrote dissenting opinions. Justice Alito did not participate in the decision.
Sullivan joined, finding the search of the defendant’s home unconstitutional based on a new state constitutional rule that would require the consent of both co-occupants, if both are present, before the police may conduct search their home. Concurring, Justice Katz recognized the same rule but on federal, not state, constitutional grounds. Applying the *Golding* test\(^\text{10}\) for reviewing unpreserved claims of constitutional error, the Court found the record sufficient to support review of the defendant’s appellate claim and reversal of his conviction even though the defendant had not made the same claim in the trial court.\(^\text{11}\) Passionate in dissent, Justice Palmer, joined by Justice Zarella, castigated the plurality for finding the record adequate to support *Golding* review and called the reversal “a result that is both wholly unwarranted and grossly unfair to the state.”\(^\text{12}\)

Justice Vertefeuille’s plurality opinion held that Article I, Section 7 of the Connecticut Constitution “favor[s] the rule requiring the consent of both co-occupants when both are present to consent to a search.”\(^\text{13}\) It is notable that the plurality opinion did not engage in federal constitutional analysis at all.\(^\text{14}\) The plurality applied the “framework” for state constitutional

\(^{10}\) State v. Golding, 213 Conn. 233, 239 (1989).

\(^{11}\) *Id.* at 47-53. The plurality accorded review of the defendant’s constitutional challenge to the search of his home under the *Golding* doctrine which permits review of unpreserved claims of error in criminal cases where the record is adequate for review and the record shows a clear violation of a fundamental constitutional right. Justice Katz agreed with the plurality but noted “that the adequacy of the record to review the claim in this case warrants further explanation.” *Id.* at 69. Reviewing the record to determine whether it supported the factual finding that the defendant’s mother had actually refused to consent, Justice Katz concluded: “I disagree with the state’s contention that the record merely reflects that the defendant’s mother refused to sign the consent form and that such failure to sign is tantamount to a refusal to consent.” *Id.* at 72.

\(^{12}\) *Id.* at 86. Justice Palmer noted that his “comments” were applicable both to the plurality and the concurring opinions. *Id.* at 86 n.2.

\(^{13}\) *Id.* at 65.

\(^{14}\) The plurality gave two reasons for giving primacy to the state constitution and eschewing any federal constitutional analysis: (1) that the defendant had briefed his claim “primarily and substantially under the state constitution” and (2) that “fourth amendment jurisprudence is not instructive with regard to the defendant’s claim in the present case.” *Id.* at 51 n.7. The plurality added: “The issue of whether the consent of both present joint occupants is required when authorities seek consent to search the occupants’ jointly controlled property has not been addressed directly by the United States Supreme Court. *Id.*

\(^{15}\) *Id.* at 51-52 (citing *State v. Geisler*, 222 Conn. 672 (1992)). It is notable that the same appellate attorney represented Brunetti and Geisler.
analysis established in *State v. Geisler*.\(^{15}\) The plurality found a textual, historical, and precedential basis under Connecticut law for the "fundamental significance of the constitutional right to privacy in the home"\(^{16}\) and for according a preference for warrants such that "a warrantless search is per se unreasonable, justified only by limited exceptions...."\(^{17}\) The plurality distinguished a number of state and federal cases that held that one co-occupant’s consent sufficed to authorize a police search, as many cases involve exigent circumstances, including the specter of one co-occupant victimizing the other.\(^{18}\) After taking account of the case law that does require both occupants’ consents\(^{19}\) and of Professor LaFave’s treatise on search and seizure,\(^{20}\) the plurality found dispositive "the sixth *Geisler* factor, the public policy implications of adopting the defendant’s position."\(^{21}\) The plurality declared:

> We conclude that the rule requiring the consent of both present joint occupants strikes the appropriate balance between individual liberties and police expediency. Specifically, requiring the consent of both present joint occupants for a valid consent search is consistent with our manifest preference for warrants and our well established regard for the sanctity of the home. We agree that, under United States v. Matlock,\(^{22}\) an absent joint occupant assumes the risk that a present joint occupant may permit access to shared space for a search. To extend this assumption of risk analysis to the present circumstances, however, would relegate the objecting joint occupant’s constitutional rights to inferior status. Our long-standing public policy of protecting the sanctity of the home and favoring searches conducted pursuant to a warrant weighs heavily against such a result.\(^{23}\)

Justice Katz wrote a concurring opinion in which she agreed with the plurality’s result but disputed its analytic preference for the state constitution over the federal constitu-

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\(^{15}\) Id. at 55.

\(^{16}\) Id. at 56.

\(^{17}\) Id. at 57-60.

\(^{18}\) Id. at 62-63.

\(^{19}\) Id. at 62 (quoting W. LAFAVE, SEARCH AND SEIZURE (4th Ed. 2004) §8.3(d), p.159)).

\(^{20}\) Id. at 63.

\(^{21}\) Id.


\(^{23}\) Id.

\(^{24}\) Justice Katz acknowledged that the defendant on appeal had done "an extensive analysis of the *Geisler* factors in briefing his state constitutional claim" *Id.* at
tion.24 Addressing the defendant’s claim under the fourth amendment, Justice Katz acknowledged that the United States Supreme Court had not “spoken directly on this issue” and that lower federal and state courts were “split on whether, under the federal constitution, a person present and refusing consent has a constitutionally cognizable privacy interest when another similarly situated person consents to the search.”25 Justice Katz ultimately reached “the issue left open in [United States v.] Matlock26 and conclude[d] that, under the federal constitution, a consent to search given by one co-occupant is invalid as against the other when both are on the scene and one has refused to consent.”27 Justice Katz’s federal constitutional conclusion prefigured the recent Supreme Court decision in Georgia v. Randolph.28

In State v. Edman, the Appellate Court drew a nice constitutional distinction, not often illuminated in the case law, between a valid warrant issued upon a finding of probable cause by a neutral and detached magistrate and an invalid warrant supported by a finding of probable cause but issued by a magistrate who is not “neutral and detached.”29

24 (cont.) 67 n.4. But Justice Katz pointed out that the defendant had not conceded “that he could not prevail under the federal constitution” and that “[generally, when we rely solely on the state constitution, we do so when the federal constitution clearly does not afford the relief requested; ... or we conduct an analysis under the state and federal constitutions together, treating the rights as coextensive.” Id. (internal citations omitted). Justice Katz concluded, “I fail to see a persuasive justification for deviating from our normal course and deciding the issue under the state constitution alone.” Id.

25 Id. at 75-76. Justice Katz noted that the majority view was “that consent of a co-occupant should prevail, despite the objection of a co-occupant who is present.” Id. at 76. Justice Katz surmised that such courts may have been influenced by facts in which one of the co-occupants had engaged in criminal conduct against the other. Id.


27 Id. at 82-83.

28 The Supreme Court in Georgia v. Randolph addressed “two loose ends” left by prior Supreme Court decisions, including United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). Randolph, 126 S. Ct. at 1527-28. First, the court held that Matlock had left open the issue whether a co-tenant’s consent was sufficient to authorize a police entry and search in the face of a physically present tenant who objects, as Matlock had held only that a co-tenant’s consent was “good against ‘the absent, nonconsenting’ resident”. Randolph, 126 S. Ct. at 1527 (quoting Matlock, 415 U.S. at 170). Second, the court held that the police need not seek out a second tenant for permission to search if that person is not present and “there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection....” Id. at 1527.

court ruled that the trial court should have granted the defendant’s motion to suppress narcotics seized from his home under authority of a warrant that was issued by a judge whose past friendliness with the defendant disqualified the judge from fulfilling the fourth amendment role of magistrates in the warrant issuance process. The defendant, a former marshal in the court, presented an affidavit in the trial court describing his relationship with the judge who had issued the warrant. The two had assisted one another personally and vocationally and developed a friendship. The police executing the warrant told the defendant that the friendly judge “had signed the warrant and had been ‘sick to his stomach’ for having had to do so.”

Reviewing the seminal United States Supreme Court cases involving the fourth amendment role of neutral and detached magistrates, the Appellate Court wrote: “we glean that a magistrate’s neutrality and detachment may be compromised in one of two ways – either (1) by his or her conduct or (2) by indicia of partiality.”

The court quoted the state’s argument that, if anything, based on the friendship, the judge “would have had more of a stake in assuring either that the search warrant not issue or that it was valid and supported by ample probable cause.” Re-casting the state’s argument as a concession, the court explained that the state had “acknowledged that an inherent temptation existed for [the judge] to treat the case differently from any other case.” The court concluded: “having what the state described as a ‘stake’ in the matter cuts against the very grain of the fourth amendment notion of neutrality and detachment.”

Rejecting the state’s request for a full evidentiary hearing on the judge’s neutrality and detachment, the court declared that the state’s opportunity to dispute the defendant’s affidavit had been when the issue was presented in the trial court. The Edman court reversed based on the lack of a neutral and detached magistrate, not because the

30 Id. at 824.
32 90 Conn. App. at 828.
33 Id. at 831
34 Id.
35 Id.
The magistrate had erred in determining that the warrant was supported by probable cause. The court remanded with an order that the defendant's motion to suppress be granted.

While other search and seizure cases did not require re-examination of cardinal principles as in *Brunetti* and *Edman*, they presented interesting applications of established principles. In *State v. Pink*, the Supreme Court made short work of the defendant's claim that the Department of Correction had violated his constitutional right against unreasonable searches when a correctional officer strip-searched him as he was about to be taken to court for an appearance in his murder case. Previously the DOC had intercepted a phone conversation between the defendant and his sister and learned that he was going to bring a note to hand his sister in the courtroom. The officer who searched the defendant found a note in his pocket which set forth his plan to hire a terminally ill person to take the blame for the murder with which the defendant was charged. The court found that the fruits of the search did not require suppression of the note at trial because the DOC search did not violate an expectation of privacy of the defendant that society would recognize as reasonable in the prison setting: "[t]he department has an important security interest in searching prisoners before transporting them to and from court appearances and the defendant was or reasonably should have been aware of that practice."  

In *State v. Vazquez*, the Appellate Court rejected the defendant's claim that the police were not justified in relying on his girlfriend's consent for them to enter and search his apartment for a firearm connecting the defendant to an armed robbery. The girlfriend told the police that she resided in the apartment with her children and that the defendant was not home. She signed a written consent form for the search. Soon after beginning the search, the police found the defendant under a bed and took from his grasp folded bills as evidence of the robbery. The girlfriend then withdrew her consent to search, stating that she was not the renter and did not reside in the apartment. The

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37 *Id.* at 260.
38 87 Conn. App. 792 (2005)
police ceased their search for a firearm but the money was used as evidence at the robbery trial. The court found that it was reasonable for the police to have depended on the girlfriend’s apparent authority to consent to the search.

II. EYEWITNESS IDENTIFICATION PROCEDURES IN THE FIELD AND IN THE COURTROOM.

In State v. Ledbetter, the Supreme Court rejected federal and state constitutional challenges to the admissibility of an identification of the defendant by the victim of a street robbery. The defendant and multiple amici curiae presented the court with “research on the perils of eyewitness identification” that were not sufficient to persuade the court that the police had violated the constitutional standard that governs motions to suppress identifications that are produced by police identification procedures. Further the court rejected the argument that the state constitution places a greater restriction than does the federal constitution on eyewitness identification procedures conducted by the police. Notwithstanding its rejection of the defendant’s constitutional claims and over the state’s objection that an appellate court

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39 Id. at 800-01.
40 Id. at 802-03.
42 The victim had been attacked on the street by two persons who had fled in a black sedan containing three other black males. Id. at 538-39. The police soon apprehended five suspects in such a car and, upon hearing a dispatcher’s report of the apprehension, the witness asked to be taken to where the vehicle had been stopped in order to attempt an identification. Id. at 539-40. The witness identified the defendant and a second suspect, but, as to a third suspect, “could not be ‘100 percent positive . . . .’” Id. at 540.
43 Id. at 546 n.10 (lists amici curiae).
44 The established due process standard requires that a defendant making a motion to suppress an identification prove both that a police identification procedure is “unnecessarily suggestive” and that it resulted in an “unreliable” identification. Id. at 546-48.
45 The court noted that it lacks the authority to find that the federal constitution places greater restrictions upon police activity than the restrictions recognized by the United States Supreme court. Id. at 559. But the court recognized the theoretical possibility that the Connecticut Constitution could impose greater restrictions on police activity. Id. at 560.
46 Applying the six factor “analytical framework” for reviewing state constitutional claims from State v. Geisler, 222 Conn. 672, 684-86 (1992), the court found that three Geisler factors (federal precedent, textual approach, holdings and dicta of Connecticut appellate courts) were in the state’s favor, two factors (historical, sibling state approach) were “neutral,” and “[t]he sixth factor, economic and sociological considerations, favors the defendant.” Ledbetter, 275 Conn. at 561-63, 566.
should not consider economic, scientific and social research not presented in the trial court,\textsuperscript{47} the Ledbetter court demonstrated receptivity to the research on "the potential dangers of eyewitness identification" presented by the defendant and the \textit{amici curiae} in their briefs.\textsuperscript{48}

The defendant and \textit{amici curiae} argued that research shows that an eyewitness's certainty is not a reliable indicator of the witness's accuracy in making an identification, that level of certainty is given too much stock by judges ruling on admissibility and jurors hearing eyewitness testimony, and that an eyewitness's certainty is "'malleable' or susceptible to cues from the administrator of the identification procedure."\textsuperscript{49} The court, however, pointed out that studies varied in their results on the correlation, whether negative, positive or nonexistent, "between witness confidence and the accuracy of the identification."\textsuperscript{50} The court declined to adopt a rule that an identification procedure is \textit{per se} suggestive if the police fail to indicate to the witness that the police may not have included the perpetrator in the procedure.\textsuperscript{51} Nonetheless, the court was impressed with scientific research supporting the contention of the \textit{amici curiae} that "[w]ithout such a warning, ... the witness feels obligated to select one of the photographs or participants in the procedure, which may result in the witness choosing the individual who is the most similar to or least dissimilar from the actual perpetrator, regardless of whether the perpetrator is one of the choices in the identification procedure."\textsuperscript{52}

Based on its nuanced consideration of the research presented on appeal, the court broke new ground in the law in two very significant ways. First, in a signal to criminal practitioners and trial judges, the court declared that trial courts should take account of the research on eyewitness identification in employing the established due process test for deter-

\begin{itemize}
  \item \textsuperscript{47} \textit{Id.} at 567.
  \item \textsuperscript{48} \textit{Id.} at 566-69.
  \item \textsuperscript{49} \textit{Id.} at 566-67.
  \item \textsuperscript{50} \textit{Id.} at 568-69.
  \item \textsuperscript{51} \textit{Id.} at 569-70.
  \item \textsuperscript{52} \textit{Id.} at 571. The court sets forth in some detail the research that calls into question the "'relative judgment process'" that eyewitnesses may employ when police do not give them the understanding that the culprit being sought may in fact not be included in the police identification procedure. \textit{Id.} at 572.
\end{itemize}
mining whether an identification is admissible or not.\textsuperscript{53} Second, signaling that the defendant and \textit{amici curiae} had struck a deep chord with their presentation on the usefulness of science in improving the reliability of criminal judgments, the court declared:

Because of the importance of eyewitness identifications in the criminal justice system and the risks of failing to warn the witness that the perpetrator may or may not be present in the identification procedure, we deem it appropriate to exercise our supervisory authority to require an instruction to the jury in those cases where the identification procedure administrator fails to provide such a warning, unless no significant risk of misidentification exists.

The \textit{Ledbetter} decision is likely to have a lasting value in Connecticut law. The court balanced the valid and sometimes competing interests of law enforcement with a concern that the law should not remain static where there is new research whose recognition may lead to more reliable criminal trial verdicts. The court noted that “case studies consistently identify mistaken identifications as a significant source of wrongful convictions of innocent people.”\textsuperscript{54} Balanced against the spectre of wrongful convictions, the court declared: “Nevertheless, we must recognize that eyewitness identification remains a vital element in the investigation and adjudication of criminal acts.”\textsuperscript{55} Concluding, the court wrote:

Although neither the federal nor the state constitution requires additional protections beyond the Manson standard; 

\begin{itemize}
\item we retain an interest in mitigating the risks of misidenti-
\end{itemize}

\textsuperscript{53} “We reiterate, however, that an indication by the identification procedure administrator that a suspect is present in the procedure is an unnecessarily suggestive element of the process that should be considered by the trial court in its analysis. \textit{See State v. Austin}, 195 Conn. 496, 500 (1985). We also agree that the trial court, as part of its analysis, should consider whether the identification procedure administrator instructed the witness that the perpetrator may or may not be present in the procedure and should take into account the results of the research studies concerning that instruction.” \textit{Id.} at 574-75.

\textsuperscript{54} \textit{Id.} at 576. The court noted that a study commissioned by the National Institute of Justice that reviewed twenty-eight cases in which DNA was used to exonerate defendants had “concluded that ‘[i]n the majority of the cases, given the absence of DNA evidence at the trial, eyewitness testimony was the most compelling evidence.’” \textit{Id.} (quoting \textit{E. CONNORS, T. LUNDREGAN & N. MILLER ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL}, National Institute of Justice, Dept. Of Justice Pub. No. NCJ 161258 (1996), p. 24.

\textsuperscript{55} 275 Conn. at 577.
fication in the courts of this state. Therefore, we invoke our supervisory authority to do so.\textsuperscript{56}

The court took the extraordinary step of providing a model instruction that it directed trial courts to employ.\textsuperscript{57}

III. TRIAL PROCEDURE: COUNSEL CASES.

Both the Supreme and Appellate courts reversed criminal convictions involving \textit{pro se} defendants who had not been adequately canvassed to ensure that they were waiving the right to counsel and choosing self-representation with their eyes open to the risks that the choice carries.

In \textit{State v. Diaz}\textsuperscript{58} the defendant was convicted of narcotics and firearm charges and sentenced to serve forty-three years. The record showed that the trial court did not inform the defendant that his criminal exposure in the case was "a period of nearly fifty years."\textsuperscript{59} The Supreme Court agreed with the defendant's claim that "his waiver of counsel was not knowing, intelligent and voluntary by virtue of the trial court's failure to inform him of the range of possible penalties that he would face upon conviction."\textsuperscript{60}

In \textit{State v. Ming Zhi Li},\textsuperscript{61} the defendant was convicted in a bench trial of criminal trespass in the first degree and sen-

\textsuperscript{56} Id.
\textsuperscript{57} The instruction is as follows:
\textit{In this case, the state has presented evidence that an eyewitness identified the defendant in connection with the crime charged. That identification was the result of an identification procedure in which the individual conducting the procedure either indicated to the witness that a suspect was present in the procedure or failed to warn the witness that the perpetrator may or may not be in the procedure. Indicating to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure may increase the likelihood that the witness will select one of the individuals in the procedure even when the perpetrator is not present. Thus, such action on the part of the procedure administrator may increase the probability of a misidentification. This information is not intended to direct you to give more or less weight to the eyewitness identification evidence offered by the state. It is your duty to determine what weight to give to that evidence. You may, however, take into account this information, as just explained to you, in making that determination.}
 \textsuperscript{58} Id. at 579-80 (Emphasis in original).
\textsuperscript{59} 274 Conn. 818 (2005).
\textsuperscript{60} Id. at 831.
\textsuperscript{61} Id. at 828.
\textsuperscript{61} 90 Conn. App. 52 (2005).
tenced to one year of incarceration, execution suspended after thirty days, with two years conditional discharge. The defendant twice applied for a public defender, but was denied with the court declaring: "‘there is no chance that you could go to jail if convicted. And we don’t allow public defenders for nonjailable offenses.’”62 The case was transferred to the infractions docket, but it was placed back on the criminal docket and the criminal trespass charge was reinstated. The court informed the defendant that he faced incarceration for a year, but not that he was entitled to counsel. On appeal the Appellate Court found that the defendant’s constitutional right to counsel had been violated and the state conceded that the violation “was harmful to the defendant.” Noting that the defendant had already served his prison sentence, the court stated: “Regrettably, . . . the only relief that this court can provide to him is a reversal of his wrongful conviction.” Additionally, the court took the “unusual action of dismissing the information in this instance because the defendant has already served his sentence.”63

Commonly, trial courts appoint standby counsel for criminal defendants who choose to exercise their constitutional right to self-representation. In State v. Beaulieu,64 reversed in part on other grounds, the Supreme Court learned at oral argument that a pro se defendant had been appointed a different standby counsel for each day of his three day trial. Though not claimed as error on appeal, the Beaulieu court took the opportunity to express its “concern over the trial court’s decision to allow this practice.”65 The court noted that Practice Book Section 44-5 requires standby counsel upon the defendant’s request “to advise the defendant as to legal and procedural matters” and further provides “[i]f there is no objection by the defendant, such counsel may also call the judicial authority’s attention to matters favorable to the defendant.” The Supreme Court described the purpose behind the appointment of standby counsel is “to ensure a defendant meaningful access to the courts.”66 That purpose is undercut where different counsel

62 Id. at 56.
63 Id. at 58.
64 274 Conn. 471 (2005).
65 Id. at 478 n.3.
66 Id.
each day acts as standby, each counsel thereby lacking a first-hand understanding of the "legal issues and strategies [that] become evident only in the course of the unfolding of a trial." The court issued an order that should become the norm in Connecticut practice hereafter: a single standby counsel should be appointed for the duration of trial.

In *Higgins v. Liston*, the Appellate Court reviewed a writ of error brought on behalf of the petitioner in error who claimed that he was deprived of his right to counsel when he was convicted of summary criminal contempt and given six extra months in jail for his obnoxious behavior in response to being sentenced in his criminal case. The *Higgins* court reviewed binding Supreme Court precedent holding that summary criminal contempt proceedings are not criminal prosecutions. Therefore, neither the Sixth amendment or state constitutional right to counsel in "all criminal prosecutions" nor due process of law required that Higgins be accorded counsel when he was summarily held in contempt and sentenced for it.

Both the sovereign and the defendant rely on professional counsel in our system of criminal justice to make sure that criminal trials are fairly and sufficiently contested. When either government counsel or defense counsels fail functionally, the adversarial process breaks down and trial results are less dependable. In 2005, many cases raised issues relating to the performance of counsel for the state, as well as of counsel for the defense. A short and selective review of counsel cases involving prosecutorial misconduct and ineffective assistance of defense counsel follows.

Christopher Champagne recently published in this journal a thorough review of the history of prosecutorial misconduct.

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67 *Id.*

68 *Id.*


70 The *Higgins* court noted that the paperwork for the writ of error had mistakenly cited CONN. GEN. STAT. Section 51-33a instead of Section 51-33. The former statute applies to prosecutions for criminal contempt by way of information and the latter statute applies to summary criminal contempt, which "allows the court, as it did in this case, to proceed to resolve such matters summarily at the tie of the contumacious conduct . . . ." *Id.* at 609 n.6. The distinction between the two modes of criminal contempt was pivotal in the *Higgins* decision.

71 *Id.* at 610-13.
claims in Connecticut from 1902 to 2005. It is not necessary to cover the same territory in this article. However, a few cases decided in 2005 bear special mention. Of the many cases reviewing claims of prosecutorial misconduct during trial and at final argument, two stand out which raise the question whether and when prosecutorial misconduct may deprive a defendant of a fair trial on only some, not all, of the charges in the case. In *State v. Beaulieu*, the defendant was convicted of sexual assault in the first degree and kidnapping in the first degree. On appeal the Appellate Court found that the trial prosecutor had committed misconduct in examining a witness and at final argument, but found that it had an impact on the fairness of the trial as to the sexual assault charge and not the kidnapping charge.

The Supreme Court granted the defendant’s petition for certification for review of the kidnapping affirmance. The state did not seek certification to challenge the reversal of the sexual assault conviction. In hearing the defendant’s appeal, the Supreme Court declared: “We therefore take it as a given that the state committed prosecutorial misconduct that deprived the defendant of a fair trial on that conviction.” The Supreme Court posited that the issue was “whether there was a significant difference in the facts and circumstances of the kidnapping conviction to warrant a different result.” The Supreme Court faulted the Appellate Court’s differentiation between the misconduct’s impact on the two verdicts, noting that the prosecutor’s jury summation had not made such a differentiation regarding the state’s proof of the two charges. Thus, the Supreme Court concluded that misconduct had violated the defendant’s right to a fair trial on the kidnapping count just as it had on the sexual assault count.

It would be a misconstruction to read *Beaulieu* to mean that prosecutorial misconduct that deprives a defendant of a fair trial on one count deprives him on all counts. Later in the

73 274 Conn. 471 (2005).
74 Id. at 476-77.
75 Id. at 480-83.
year the Supreme Court reviewed another case in which prosecutorial misconduct was found by the Appellate Court, only this time it was the state that sought obtained certification to appeal. In *State v. Spencer*, the state argued that prosecutorial misconduct had occurred but that it required reversal of only two of the defendant's convictions, not all four convictions. The Supreme Court agreed, finding that reversal was not required for the defendant’s risk of injury to a child and sexual assault in the second degree convictions: "there is no reasonable likelihood that the jury’s verdict on these charges would have been different absent the misconduct."77

In *State v. Michael J.*, the Supreme Court issued a split decision on whether the trial court abused its discretion in ruling on the defendant’s motion to dismiss without first holding an evidentiary hearing to determine whether the trial prosecutor had deliberately provoked the defendant’s motion for a mistrial. Justice Zarella, joined by Justices Norcott and Vertefeuille, held that the trial court had properly denied the motion to dismiss without holding a hearing. Justice Katz, joined by Justice Borden, dissented. The state had charged the defendant with two counts of risk of injury to a child, one count of sexual assault in the first degree, and one count of sexual assault in the second degree, based on his alleged sexual abuse of his eleven year old daughter in November and December of 1998.

The trial court granted the defendant’s motion in *limine* so that the state was limited to offering evidence relating to the charges brought and not evidence of other acts of misconduct. When the child complainant testified, she related events that exceeded the scope of the *in limine* ruling. The trial court granted the defendant’s motion for a mistrial but later denied the defendant’s motion to dismiss based on the double jeopardy principle that the sovereign may not intentionally provoke a mistrial and then retry the defendant.79

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76 275 Conn. 171 (2005).
77 Id. at 183. The court explained that in *Beaulieu* "we concluded that there was an insufficient disparity in the strength of the state’s evidence, absent the tainted testimony, on each conviction to justify the different outcomes." *Spencer*, 275 Conn. at 18 (citing *State v. Beaulieu*, 274 Conn. at 480).
78 274 Conn. 321 (2005).
The majority in *Michael J.* held that the trial court had been within its discretion in finding that the trial prosecutor's conduct was not intended to provoke a mistrial, in part because the trial court had observed the events and was entitled to credit the trial prosecutor's representation that the witness's testimony was unexpected.80

In addition to his federal double jeopardy claim, the defendant in *Michael J.* raised an independent claim under the state constitution. Section III of Justice Zarella's majority opinion, with which the dissenters concurred, rejected the defendant's claim that the state constitution supports a broader double jeopardy protection than the double jeopardy clause in the Fifth Amendment.81 The Connecticut constitution does not contain a double jeopardy clause, but Connecticut courts have consistently recognized that protection against double jeopardy "is implied in the due process and personal liberty guarantees of article first, Sections 8 and 9, of the constitution of Connecticut."82 But Connecticut precedent has "historically accorded less protection against double jeopardy than the federal constitution."83
Interestingly, Justice Zarella’s analysis focuses on the Connecticut Constitution of 1965, not the original state constitution of 1818, and notes that the delegates at the 1965 Connecticut Constitutional Convention considered and rejected “an amendment that would have added a specific double jeopardy clause to our constitution.”

Just as prosecutorial misconduct claims require proof both that misconduct occurred and that it had an impact on the defendant’s right to a fair trial, so must challenges to the conduct of defense counsel include proof both of deficient performance and actual prejudice. However, because the right to effective assistance of counsel is part of the right to counsel guarantee specifically set forth in the sixth amendment, the defendant need not prove that he was denied a fair trial by due process standards as is the case for prosecutorial misconduct claims. Rather a criminal client must prove that, but for his lawyer’s deficient performance, there is a reasonable probability that the outcome would have been different.

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83 (cont.) jeopardy clause of fifth amendment barred retrial of defendant after he had been acquitted and noting that vase majority of states adhered to that rule).” Michael J., 274 Conn. at 352. It is of consequence that Justice Holmes, dissenting in Kepner, cited “the well-reasoned decision in State v. Lee, 65 Connecticut, 265.” Kepner, 195 U.S. at 135. Connecticut’s commitment to the continuing jeopardy theory was the basis of the state’s successful appeal from the defendant’s conviction of murder in the second degree and its conviction of him at a second trial for the capital crime of murder in the first degree in the Palko case. See State v. Palko, 121 Conn. 669, 681 (1936) (state’s successful appeal of errors at first trial); State v. Palko, 122 Conn. 529, 538-42 (1937) (holding that the Lee principle of continuing jeopardy is consistent with due process under the state and federal constitutions; noting that Lee decision “has been referred to by a great jurist as a ‘well-reasoned decision.’” Id. at 539 (quoting Kepner v. United States, 195 U.S. at 135)). Justice Cardozo for the United States Supreme Court rejected Palko’s claim that the protections of the double jeopardy clause in the Fifth Amendment applied to the states through the fourteenth amendment. Deciding that the Kepner majority’s model of double jeopardy is not a right “implicit in the concept of ordered liberty,” Justice Cardozo made use of the fact that “right-minded men” (e.g., Justice Holmes) “could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case.” Palko v. Connecticut, 302 U.S. 319, 322-23, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937).

84 Michael J., 274 Conn. at 352-53. In a provocative footnote, the court writes: “Indeed, our historical analysis leads us to question the fundamental premise of the defendant’s claim, namely, whether a guarantee against double jeopardy even exists in the state constitution. In other words, if our constitutional forebears [in 1965] rejected an express textual ban on double jeopardy in the revised constitution of Connecticut, then how could they have intended that such a right be implied in the due process clause?” Id. at 353-54 n.16 (Bracketed material added.).

In *Ledbetter v. Commissioner*, the Supreme Court rejected the petitioner’s claim that his trial counsel was ineffective when he tactically chose to concede voluntariness in challenging the admission of a confession on other grounds. The petitioner claimed that trial counsel’s concession was unreasonable because it precluded petitioner from later raising a “novel” state constitutional claim that voluntariness should be judged differently for juveniles. The *Ledbetter* court found that counsel’s performance was reasonable:

To conclude that counsel is obligated to recognize and to preserve previously undecided constitutional claims, the viability of which is purely speculative, would be to require criminal defense lawyers to possess a measure of clairvoyance that the sixth amendment surely does not demand.

In *Dontigney v. Commissioner*, the Appellate Court sustained the dismissal of the petitioner’s second *habeas corpus* case and denial of certification to appeal on grounds of *res judicata*. In his first *habeas* case the petitioner had claimed that his trial counsel had prevented him from testifying at his trial when petitioner arrived at court intoxicated. In his second habeas case, he alleged that his lawyer “should have requested a continuance to give the petitioner time to become sober.” The Appellate Court noted that the first *habeas* petition had decided the prejudice prong of the Strickland test against the petitioner: “the habeas court made a factual determination that his testimony lacked credibility and found that his testimony at the criminal trial would not have caused a different result.” For that reason the Appellate Court concluded that collateral estoppel barred the petitioner from relitigating the issue of prejudice and that the *habeas* court had correctly denied certification to appeal its dismissal of the ineffective assistance of counsel claim.

In *Thompson v. Commissioner*, the Appellate Court

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86 275 Conn. 451 (2005).
87 Id. at 458-60.
88 Id. at 462.
89 Id. at 681 (2005).
90 Id. at 683.
91 Id. at 684-85 (quoting *Dontigney v. Commissioner*, 42 Conn. App. 304, 305-06, cert. denied, 239 Conn. 918 (1996)).
found ineffective assistance of counsel where counsel did not make a motion to dismiss on statute of limitations grounds, given that the defendant was not arrested until 1998 on a failure to appear warrant that issued in 1989. In *Brown v. Commissioner*, the Appellate Court considered and rejected an unorthodox claim of ineffective assistance of counsel based on two public defenders' alleged failure to provide the petitioner with a copy of the client's file in a timely manner after the public defenders withdrew from representation two years into the case because the client was not then eligible for assistance. The *Brown* court found "it troubling that the petitioner did not have possession of his file prior to the commencement of trial" but concluded that the public defenders had not performed deficiently and that they "acted in accordance with statutory law when they withdrew their representation." The court added that the "petitioner must bear some of the responsibility for his own inaction in not requesting his file even once following his counsel's withdrawal."  

**IV. TRIAL PROCEDURE: JURY INSTRUCTIONS.**

Several cases on the adequacy and propriety of jury charges announced new rules. In *State v. Patterson*, the Supreme Court reversed the defendant's conviction of conspiracy to commit murder because the trial court did not comply with the defendant's request to charge the jury that a jailhouse informant's testimony should "be reviewed with particular scrutiny and weighed . . . with greater care than the testimony of an ordinary witness." The chief state's witness was an informant who testified that the defendant made various admissions to him during the seven months that he and the defendant were cellmates after the defendant's arrest. The informant agreed to assist police in exchange for various benefits including a reduction in his current sentence, favorable sentencing recommendations for as yet unresolved charges, a jail transfer, and

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94 Id. at 386.
95 Id. at 388-89.
96 Id. at 389.
97 276 Conn. 452 (2005).
98 Id. at 465.
restoration of visitation privileges.99 The Supreme Court noted that special instructions for particular witnesses are not generally required in the law but that there are two exceptions to the rule, "the complaining witness exception and the accomplice exception."100 The court agreed with the defendant that "an informant who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate falsely the accused."101 Because such informant testimony is "inevitably suspect," the court announced a third exception for informants: "Because the testimony of an informant who expects to receive a benefit from the state in exchange for his or her cooperation is no less suspect than the testimony of an accomplice who expects leniency from the state, we conclude that the defendant was entitled to an instruction substantially in accord with the one that he had sought."102

In State v. Cortes,103 the Supreme Court granted the state’s petition for certification to appeal two issues, one of which was "Did the Appellate Court properly conclude that the trial court’s instructional references to the complainant as the ‘the victim’ deprived the defendant of his right to a fair trial?"104 The Supreme Court did not decide that certified issue because the other issue mandated a new trial. Nonetheless, in an important footnote, the court related that the trial court’s jury charge referred to the complainant as the "victim" seventy-six times.105 The state conceded that the references were improper but made the argument that the references in context meant only that the complainant was the alleged victim. The Supreme Court remarked, "[t]he state’s contention is, at best, dubious."106 The court pointed out that

99 Id. at 459-60, 465.
100 Id. at 467.
101 Id. at 469.
102 Id. at 470. The Patterson court overruled State v. Santiago, 48 Conn. App. 19, cert. denied, 245 Conn. 901 (1998), a decision relied upon by the state for the proposition that a special credibility instruction is only required for a complaining witness or an accomplice. Patterson, 276 Conn. at 470-71.
103 276 Conn. 241 (2005).
104 Id. at 242 n.1 (quoting State v. Cortes, 271 Conn. 917 (2004).
105 Id. at 249 n.4.
106 Id.
the commonly understood meaning of "victim" is "the person harmed by a crime or other injurious event." The court concluded:

In the context of the present case, the jury could have drawn only one inference from its repeated use, namely, that the defendant had committed a crime against the complainant. For this reason, we agree with those courts that have deemed references to the complainant as the "victim" inappropriate where the very commission of a crime is at issue.

In *State v. DeJesus*, the Appellate Court found error in a jury instruction on a charge of conspiracy to commit murder where the trial court failed to instruct the jury that the conspiracy count related to the same victim named in the murder count of the same information but not to a second person alleged as the victim in a third count charging attempted murder.

The *Pinkerton* doctrine of vicarious liability was the subject of claims of error in conspiracy cases. In *State v. Santiago*, the Supreme Court held that the state was not collaterally estopped from prosecuting the defendant for burglary in the first degree where his separately tried co-conspirator had been acquitted of burglary in the first degree and where the sole theory of liability for the defendant was vicarious liability under *Pinkerton* for the conduct of the other conspirator. In *State v. McFarlane*, the Appellate Court upheld the defendant's convictions of burglary in the third degree and larceny in the first degree under *Pinkerton* because the defendant's participation in planning the crimes and as a lookout "was not so attenuated or remote that it was unjust to hold him responsible for his coconspirators' criminal conduct."

107 Id.
108 Id. (authorities cited here omitted).
110 Id. at 102-04, 108-09. Two companion cases were tried and heard on appeal with *DeJesus* were also reversed on the same basis, i.e., that there was a reasonable possibility that the jury convicted of conspiracy with reference to the wrong victim. *State v. Rivera*, 92 Conn. App. 110 (2005); *State v. Sanchez*, 92 Conn. App. 112 (2005).
112 275 Conn. 192 (2005).
113 Id. at 197-99, 203-04.
115 Id. at 168.
The nature of conspiracy liability itself was the source of error in *State v. Coltherst*\(^{116}\) where the defendant was convicted and sentenced on counts of conspiracy, all arising out of a single plan. On appeal the defendant, prosecution and Appellate Court agreed that the six counts were the same offense for double jeopardy purposes; accordingly, so the court remanded for vacating of five of the six sentences.\(^{117}\) In another case, the Supreme Court vacated a conviction of conspiracy to commit manslaughter in the first degree with a firearm, explaining that it "is not a cognizable crime because it 'requires a logical impossibility, namely, that the actor ... [agree and] intend that an unintended death result.'"\(^{118}\)

Manslaughter in the first degree with a firearm carries a forty year maximum sentence, while manslaughter in the first degree carries a twenty year maximum.\(^{119}\) Thus, in a series of cases defendants tried for murder but convicted of manslaughter in the first degree with a firearm have disputed whether it is a proper lesser included offense of murder. In *State v. Greene*,\(^{120}\) the Supreme Court explained that Connecticut lesser included offense law uses a "cognate pleadings" test\(^{121}\) under which manslaughter in the first degree with a firearm is sometimes a lesser included offense of murder and sometimes not – depending on whether the information charging murder alleged that the killing was committed with a firearm. Under prong two of Connecticut's test for lesser included offenses, the "relevant inquiry ... is whether it is possible to commit the greater offense of murder, as described in the information,

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\(^{116}\) 87 Conn. App. 93 (2005).


\(^{119}\) Manslaughter in the first degree with a firearm is set forth in CONN. GEN. STAT. Section 53a-55a and manslaughter in the first degree is set forth in Section 53a-55.

\(^{120}\) 274 Conn. 134 (2005).

\(^{121}\) *Id.* at 156. The "cognate-pleadings approach" is reflected in the second prong of the four prong Whistnant test used in Connecticut in preference to elements-centered and evidence-centered tests used in some other jurisdictions. *Id.* at 156. (discussing *State v. Whistnant*, 179 Conn. 576, 588 (1980) and its precursor *State v. Brown*, 163 Conn. 52 (1972)).
without first having committed the lesser offense of manslaughter in the first degree with a firearm."\(^{122}\) In Greene the information charging murder alleged "that the defendant had the 'intent to cause the death of another person by means of a firearm' and that he 'aided another in causing the death of another,'" but the information did "not allege that either he or the principal used, were armed with, threatened the use of, displayed or represented by their words or conduct that they possessed a firearm during the commission of the crime."\(^{123}\) The Greene court interpreted the state's charge to permit proof that did not have to include shooting the victim with a firearm: "In other words, the defendant and the principal could have carried out the crime without a firearm and, thus, in a manner different from that intended by the defendant."\(^{124}\) Therefore, the court found that the trial court's instruction on manslaughter in the first degree with a firearm and the defendant's conviction of it violated the constitution.\(^{125}\) The court agreed, however, with the state's argument that the appropriate remedy was to vacate the judgment of conviction for manslaughter in the first degree with a firearm and to remand with direction that the judgment be modified to reflect a conviction of manslaughter in the first degree and for resentencing.\(^{126}\)

E. TRIAL PROOF: ELEMENTS OF CRIMINAL OFFENSES.

A spate of cases decided in 2005 dealt with the elements of proof for the different modes of liability set forth in the statute defining risk of injury to a child, CONN. GEN. STAT. Section 53-21. In State v. Robert H.\(^{127}\) the Supreme Court affirmed the Appellate Court's finding that the evidence was insufficient to

\(^{122}\) Id. at 158 (emphasis in original).
\(^{123}\) Id. at 158-59.
\(^{124}\) Id. at 159.
\(^{125}\) Id. at 160. The Greene court cited the sixth amendment right "to be informed of the nature and cause of the accusation" but also noted that it would only "assume without deciding" that right is applicable to the states. Id. at 153 n.15. Alternatively, the fourteenth amendment due process clause requires specific notice of criminal charges. Id. (citing Cole v. Arkansas, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948). See also State v. Aldridge, 87 Conn. App. 750, 753 (2005) (claim that instruction and conviction of offense that is not lesser included offense is reviewable claim of "constitutional dimension").
\(^{126}\) Id. at 160, 162.
\(^{127}\) 273 Conn 56 (2005)
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sustain three of the defendant’s four convictions of risk of injury. The state’s information for those counts charged that the defendant “did an act likely to impair the health or morals of a child under the age of sixteen years in violation of [Section] 53-21(1) . . . .”128 The Appellate Court had “determined that the defendant’s act of asking F to place a syringe on his penis and his act of exposing himself to F and B after exiting the shower were not ‘acts directly perpetrated on the person of the [victims]’ within the meaning of the second part of Section 53-21(1).”129 The Supreme Court rejected the state’s argument that recent law had “eliminated the physical touching requirement”130 for Section 53-21 that it recognized in its 1980 and 1988 decisions in State v. Pickering131 and State v. Schriver.132 The court in Robert H. reviewed the case law and statutory changes of the last two decades, but concluded that the physical touching requirement had not been eroded:

we conclude that in cases concerning alleged sexual misconduct, an “act likely to impair the . . . morals of . . . [a] child”; CONN. GEN. STAT. (Rev. To 1997) Section 53-21(1); must involve a physical touching of the victim’s person in a sexual and indecent manner. Likewise, we conclude that an “act likely to impair the health . . . of . . . [a] child”; CONN. GEN. STAT. Section 53-21(1); when committed in a sexual context, includes only those acts that involve a direct touching of the victim’s person and are or are likely to be injurious to the victim’s physical health.133

The Supreme Court in Greene conducted an insufficiency of the evidence analysis and found that the Appellate Court had correctly determined that there was insufficient evidence of the physical touching requirement in CONN. GEN. STAT. Section 53-21(1).134

128 Id. at 61.
129 Id. at 63 (quoting in part State v. Robert H., 71 Conn App. 289, 296 (2002)).
130 Id. at 64.
131 180 Conn. 54, 64-65 (1980).
133 Robert H., 273 Conn. at 77.
134 The Supreme Court also considered the state’s claim that the Appellate Court had ignored some testimony that the jury may have relied upon in convicting on one of the three counts. Acknowledging that an insufficiency analysis should focus on all the evidence, not merely the evidence relied on and referenced by the prosecution at trial, the court stated: “We also recognize, however, that these principles cannot be applied in a vacuum. Rather, they must be considered in conjunction with an equally important doctrine, namely, that the state cannot change the theory of the
The Supreme Court interpreted and applied a different mode of liability: the “situation portion” of the risk of injury to a child statute in *State v. Padua* and *State v. Smith.* Under the “situation portion” of Section 53-21(1), the state need not prove actual injury to a child but rather that “the defendant willfully created a situation that posed a risk to the child’s health or morals.” In *Padua,* the Supreme Court found that the Appellate Court had erred in finding it necessary for the state to offer expert evidence to prove that oral ingestion of marijuana would be likely to injure a child. Police executing a search warrant had found marijuana throughout an apartment, including some being packaged for sale on the kitchen table near boxes of cereal, in a household that included the defendants’ seven and three year old children. In *Smith,* the police

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134 (cont.) case on appeal.” *Id.* at 81-82. The court stated that “‘theory of the case’ doctrine is rooted in principles of due process of law.” *Id.* at 82 (citing *Dunn v. United States,* 442 U.S. 100, 106, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979)). The court cited with approval and adopted a test for theory of the case articulated by the First Circuit Court of Appeals: “In *Cola v. Reardon,* 787 F.2d 681 (1st Cir.), *cert. denied,* 479 U.S. 938, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986)], there was evidence in the record that would have been sufficient to sustain the petitioner’s conviction, but the Court of Appeals held that the state appellate court should not have considered that evidence in support of the conviction because it was not part of the state’s theory of the case at trial. *Id.,* at 693. In reaching that result the Court of Appeals interpreted Dunn and its progeny as follows:

[In order for any appellate theory to withstand scrutiny under Dunn, it must be shown to be not merely before the jury due to an incidental reference, but as part of a coherent theory of guilt that, upon review of the principal stages of trial, can be characterized as having been presented in a focused or otherwise cognizable sense.]” *Id.* We conclude that this statement is an accurate synthesis of *Dunn* and *Chiarella* [v. United States, 445 U.S. 222, 237 n.21, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980)]. We therefore adopt it as the standard by which to gauge whether evidence introduced at trial, but not relied on by the state in its legal argument, is properly cognizable by an appellate court when evaluating the sufficiency of the evidence.” *Id.* at 83.


136 273 Conn. 204 (2005).

137 *Padua,* 273 Conn. at 148.

138 *Id.* at 143-44, 146-64. The Supreme Court sat *en banc* in *Padua.* Justices Borden and Katz wrote dissenting opinions, joined by Justice Norcott. They would have affirmed the Appellate Court because the “‘state should have been required to present expert testimony concerning the possible injurious effects of the oral consumption of raw marijuana.” *Id.* at 187 (Borden, J., dissenting). Justice Katz noted that the risk of injury to a child statute required the state to prove that the defendants had created a situation that “was likely to harm the health of a child.” *Id.* at 192 (emphasis in original). Positing that “[c]ommon knowledge is limited ... to those well substantiated facts that are obvious to the general community[,]” Justice Katz would have had the court conclude that “the effects of eating raw marijuana are far
found the defendant semi-conscious on a bed with a small child sitting nearby, and enough rock cocaine on the mattress for "six or seven adult doses."\textsuperscript{139} Finding that expert testimony was unnecessary in \textit{Smith} because a jury possesses the common knowledge that ingesting cocaine, even in rock form, would create a risk to a child's health, the Supreme Court reversed the Appellate Court and ordered that the judgment of conviction for risk of injury to a child be reinstated.

In \textit{State v. Miranda},\textsuperscript{140} the Supreme Court reversed precedent that it had set in the same case in 1998,\textsuperscript{141} now concluding that it had erred when it had then held that the defendant could be convicted of assault in the first degree for failing to protect a child from physical abuse by the child's mother. The case is extraordinary on several grounds,\textsuperscript{142} not the least of which is the court's recognition that \textit{stare decisis} should not bar the court from "reaching a just conclusion in a matter."\textsuperscript{143} Six justices joined in a short prefatory opinion that declared:

After careful reconsideration, we have become persuaded that our conclusion in \textit{Miranda I, supra}, 245 Conn. 230, that the defendant could be convicted of assault in the first degree in violation of Section 53a-59 (a) (3) was clearly wrong and should be overruled. The six justices of this court who agree with this conclusion and join in this opinion do not, however, arrive at that conclusion by employing the same analysis. As a result, the reasoning of these six justices is set forth in the two concurring opinions issued herewith. The judgment is reversed in part and the case is remanded with direction to dismiss the two counts of the information for assault in the first degree and for resentencing on the one count of risk of injury to a child.\textsuperscript{144}
Justice Borden, joined by Justices Norcott and Palmer, wrote that:

the linchpin of the court’s reasoning [in Miranda I] was that there is a recognized common law duty of a parent or legal guardian to protect his or her child from abuse, the breach of which may constitute assault under our Penal Code pursuant to Section 53a-4; and the defendant, although neither a parent nor legal guardian, was subject to the same duty because he had established a familial relationship with the victim’s mother, had assumed the responsibility for the victim’s care, and considered himself the victim’s stepfather.145

Noting that the defendant had never challenged his criminal liability under the risk of injury to a child statute, Justice Borden took the position that parents and guardians are in clear recognizable legal categories that may admit of assault liability for failing to act to protect a child, but that “[i]t simply goes too far to say that [the defendant] should be treated precisely the same as a parent or legal guardian for purposes of criminal liability, because he had established a ‘familial relationship’ with the victim’s mother, had assumed responsibility for the victim’s care, and considered himself her stepfather.”146

Justice Vertefeuille, joined by Chief Justice Sullivan and Justice Zarella, began her analysis by pointing out that the court in its 1998 Miranda decision “did not address the text of the [assault in the first degree] statute or its legislative history” but instead had focused at length on “a common-law duty to protect the victim from her mother’s abuse, the breach of which can be the basis of a conviction under Section 53a-59(a)(3).”147 Justice Vertefeuille’s analysis then employed the language of the statute, dictionary authority for the commonly understood meanings of “assault” and “conduct,” legislative history, the rule of lenity, and a critique of the earlier decision’s reliance on authority from other jurisdictions

145 Id. at 747-48.
146 Id. at 749. Justice Borden added that “the emerging demographic trend toward nontraditional alternative family arrangements, which we cited as support in Miranda I’ now seemed a better “counter argument” because “the boundaries of this duty-based criminal liability will be too amorphous, and too fact-based and based on hindsight, to fit comfortably within our Penal Code.” Id. He further added that such amorphousness in determining criminal liability “will discourage others, such as volunteers and close friends, from establishing ‘familial relationships’ with the children who are likely to be the most in need of them.” Id. at 750
147 Id. at 758 (quoting Miranda I, 245 Conn. at 218).
interpreting different statutes.\textsuperscript{148} Justice Vertefeuille concluded that "the legislature did not intend that inaction, such as the failure to protect a child, should constitute assault under this statute."\textsuperscript{149} Her view of assault liability would appear to exclude parents and guardians as well as persons who do not have a categorical duty to protect a given child.\textsuperscript{150}

Justice Katz in dissent opens her opinion "with the doctrine of stare decisis, the principle that cautions courts to tread lightly into the world of overruling precedent."\textsuperscript{151} Justice Katz writes that it is very significant that, in the seven years since the court's first decision in Miranda, the legislature did not choose to act to correct the court's statutory interpretation of assault liability.\textsuperscript{152} Justice Katz also questions the "wisdom of revisiting the issue" because it undermines the value of finality of judgments.\textsuperscript{153} Her dissent also recounts the analytic methodology of the Miranda I decision, replies to various arguments made in the plurality opinions, and strongly argues that "imposing criminal liability for omissions is not tantamount to creating a common-law crime."\textsuperscript{154} Justice Katz declares:

\begin{itemize}
  \item \textsuperscript{148} Id. at 758-66.
  \item \textsuperscript{149} Id. at 766. Justice Vertefeuille also notes, as did Justice Borden, that the defendant had never questioned his criminal liability under the risk of injury to a child statute. Id.
  \item \textsuperscript{150} Justice Borden differed from Justice Vertefeuille in his methodology and the scope of his conclusion as to assault liability, though not the result in the case. Justice Borden stated that he does "not think that the question of whether there can be criminal liability for a failure to act necessarily can be decided solely by reference to the language and legislative history of the assault statutes." Id. at 748. It is mildly ironic that Justice Vertefeuille in her legislative history analysis relies on testimony given by "David Borden, then executive director of the commission to revise the criminal statutes". Id. at 761. Substantively, Justice Borden differed with Justice Vertefeuille over whether to limit the scope of the decision so as to leave for another day whether a parent or guardian may have a duty that the defendant did not have in Miranda. Justice Borden wrote:
    Although, as Justice Vertefeuille's opinion indicates, a strong case may be made that our assault statutes preclude any criminal liability based on the omission of conduct, as opposed to active conduct, a strong case may also be made that, consistent with the great weight of authority elsewhere, as our opinion in Miranda I indicated, § 53a-4 would permit this court to recognize the principle of criminal liability based on the failure to act where there is a clear legal duty to act, such as where parents or legal guardians are concerned. Id. at 748.
  \item \textsuperscript{151} Id. at 768.
  \item \textsuperscript{152} Id. at 769-72.
  \item \textsuperscript{153} Id. at 772-74.
  \item \textsuperscript{154} Id. at 788.
\end{itemize}
Therefore, at the risk of repeating myself, I would not adopt a broad general rule covering other circumstances, but, rather, I would conclude only that, in accordance with the trial court findings, when the defendant, who considered himself the victim's parent, established a familial relationship with the victim's mother and her children and assumed the role of a father, he assumed, under the common law, the same legal duty to protect the victim for the abuse as if he were, in fact, the victim's guardian. Under these circumstances, to require the defendant as a matter of law to take affirmative action to prevent harm to the victim or be criminally responsible imposes a reasonable duty.

VI. MISCELLANEOUS.

Many other cases in 2005 decided issues of importance. Among them were two decisions of the Supreme Court further refining the rule set forth in *State v. Troupe* for the state's use of constancy of accusation witnesses to corroborate testimony by a victim of sexual assault. In *State v. Samuels* the Supreme Court modified the *Troupe* doctrine so as to limit constancy testimony to statements made by a complainant before filing a complaint with the police. In *State v. Gonzalez*, the Supreme Court held that the defendant was not entitled to a new trial even though two constancy witnesses gave detailed and graphic testimony in violation of the *Troupe* rule despite the fact that defense counsel had obtained an *in limine* ruling to enforce the *Troupe* rule. The *Gonzalez* court held that the inadmissible evidence did not prejudice the defendant under either of the two standards the court has used for "reversing non-constitutional, evidentiary improprieties."

Many cases raised issues concerning expert testimony and

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155 Id. at 789 (quoting in part State v. Miranda, 245 Conn. at 226-27).
158 The court in *Samuels* concluded, however, that the erroneous admission of testimony by four constancy witnesses was evidentiary, not constitutional, error. *Id.* at 556-562. The court concluded that it was not reversible error because it did not "substantially prejudice the defendant." *Id.* at 564.
159 272 Conn. 515 (2005).
160 *Id.* at 527 (discussing one line of cases that requires a showing that "it is more probable than not that the result of the trial would have been different if the error had not been committed" and a second line of cases that requires a showing that "the prejudice resulting from the impropriety was so substantial as to undermine confidence in the fairness of the verdict.").
the need for so-called *Porter* hearings to determine whether expert testimony was admissible. In *State v. Finan*, the Supreme Court ruled that it was reversible error for the trial court to permit four police officers to testify regarding their suspicions that the defendant was the person depicted on a videotape from a surveillance camera in the convenience store that the defendant was alleged to have robbed. In *State v. Aaron L.*, the Supreme Court found that a two and a half year old victim's statement to her mother had properly been admitted in evidence because it satisfied the "residual exception" to the hearsay rule. In *Aaron L.*, Justice Borden wrote a concurrence in which he declared: "I write separately . . . to highlight the point that, in a future case such as this one, in which we are asked to apply the residual exception to the hearsay rule to the statement of a very young child, this court would benefit greatly from some expert learning about how such children typically recall and relate what happens to them." In two cases the courts held that it was not necessary to hold a *Porter* hearing in order for the state to establish the validity of expert scientific evidence, in one case on microscopic hair analysis and in the other on the horizon-
tal gaze nystagmus test,\textsuperscript{168} because the validity of the underlying scientific methodology had previously been established and affirmed on appeal in other cases, obviating the necessity of a trial court revisiting the legal issues under Porter. In another case, the Supreme Court affirmed a trial court ruling under Porter that excluded evidence offered by the defendant concerning a special protocol for measuring a juvenile’s “competency relative to Miranda warnings.”\textsuperscript{169}

VII. CONCLUSION

Some important criminal law decisions issued in 2005 have been omitted from this article because it is a survey. Some areas of criminal law would need much closer analysis than is fitting here. Certain areas of criminal law will continue to be featured in the case law. For example, while the law relating to prosecutorial misconduct claims has been refined in recent years, practitioners will continue to raise such claims with a much greater frequency than they did in the 1990s when the review accorded prosecutorial claims was comparatively amorphous. Questions relating to scientific evidence and to expert testimony will need further exploration at both the trial and appellate level in coming years. Indeed, certain justices of the Supreme Court have voiced an intellectual hunger for better records upon which to review claims relating to novel kinds of specialized evidence. The year 2005 should be remembered for the case, \textit{State v. Ross}, that lifted criminal practice into the public arena for intense debate on the death penalty in modern Connecticut. But 2005 was also a year in which courts and counsel for the state and the defense dealt with more arcane issues that will affect criminal practice in 2006 and beyond.


\textsuperscript{169} \textit{State v. Griffin}, 273 Conn. 266, 278-82 (2005) (not error to subject “Grisso protocol” to \textit{Porter} test; based on record in case no abuse of discretion found in applying the test. \textit{Id.} at 86.).