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DEVELOPMENTS IN CONNECTICUT CRIMINAL LAW: 2007

By Timothy H. Everett*

This article reviews some issues of procedural and substantive criminal law that arose in appellate cases decided by the Connecticut Supreme and Appellate Courts in 2007. In 2007 the Connecticut Supreme Court decided a total of 47 criminal appeals, the vast majority of which were direct appeals from judgment after criminal trials, with just a few cases involving collateral review and other post-judgment issues such as habeas corpus petitions, motions to correct an illegal sentence, and new trial petitions. The Supreme Court issued 36 full opinions and 11 per curiam opinions. The court sat en banc seven times.  

1 One of the en banc cases, State v. Lawrence, generated the year's sole dissent and also one of the year's two concurring opinions. The Supreme Court docket comprised 12 cases brought directly to the court, 10 cases transferred from the Appellate Court and 25 cases in

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1 State v. Lawrence, 282 Conn. 141 (2007) (6-1 holding that state constitutional standard for proof of voluntariness of a confession is same as federal preponderance standard); State v. Casiano, 282 Conn. 614, 627-28 (2007) (indigent has right to appointment of counsel for filing and appeal of a motion to correct sentence that has a "sound basis"); State v. Saucier, 283 Conn. 207, 217-18 (2007) (affirmed Appellate Court review of claim regarding state of mind exception to hearsay rule; clarified standard of review on appeal of hearsay rulings, adopting neither abuse of discretion nor de novo review, preferring a "more nuanced," context-sensitive approach "driven by the specific nature of the claim"); State v. Davis, 283 Conn. 280 (2007) (rejected state constitutional argument for adopting pre-1980 federal "automatic standing" test for challenges to police searches); State v. Brewer, 283 Conn. 352, 360-61 (2007) (no clear violation of the Constitution where trial court gave Connecticut's "acquittal first" jury charge relating to lesser included offenses as requested by trial counsel, who "expressed his satisfaction with that instruction"); State v. Randolph, 284 Conn. 328 (2007) (consolidated trial at which trial judge court erroneously instructed jury it could consider evidence from each case in the other; common scheme or plan exception analyzed); State v. Britton, 283 Conn. 598 (2007) (custody not established to trigger Miranda protections; Golding review denied to claim that court should not have read charge on aggravating factor for capital charge to jurors during voir dire).

2 2282 Conn. 141 (2007).

3 Justice Palmer joined the majority opinion in Lawrence but wrote a brief concurrence. Id. at 184-85. Justice Katz dissented at length. Id. at 185-209.

4 Most of the transfers were initiated by the Supreme Court itself pursuant to CONN. GEN. STAT. § 51-199(c) and PRACTICE BOOK § 65-1, but one case was transferred at the request of the Appellate Court after oral argument in that court; Mead
court certified issues for appeal following decision of the Appellate Court. In the certified appeals, the Supreme Court reviewed 106 Appellate Court decisions 19 times and denied 26 times. The Appellate Court decided 129 direct appeals in cases and another 53 appeals of claims made for collateral review stemming from criminal cases (primarily petitions for habeas corpus). Altogether there were 13 opinions and seven concurring (or partially concurring) opinions. The Appellate Court sat en banc only once, in Flanagan. In Flanagan, the court granted the defendant’s motion for reconsideration and reargument following a decision, split 5-4, in which the court found that the plaintiff had violated his constitutional right to self-representation. Chief Judge Flynn and the majority of the court (joined by Judges DiPentima and McLaughlin) dissented, with Flynn’s opinion commencing with the following topic sentence of the season: “We are heirs of our forefathers who distrusted lawyers because so many of the profession were aligned with King George.”

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Footnotes:
1. 282 Conn. 317, 318 n.1, 322 (2007); and one case was transferred by motion of a party before oral argument in the Appellate Court. Practice governs transfers by motion of a party before oral argument in the Appellate Court; and upon the Appellate Court’s own filing “at any time before the resolution of an appeal” of a “statement of the reasons why transfer is sought” by which the Supreme Court will “treat” and “promptly decide” as if it had granted the motion to transfer.
2. 284 Conn. 922 (2007). The issue now before the Supreme Court is: “Did the Appellate Court properly determine that the trial court did not violate the defendant’s right to self-representation?”
3. A split (2-1) regular panel of the court had reached the same conclusion in State v. Batts, 281 Conn. 682, 688 n.5 (2007).
Andly, the Supreme Court has granted certification
the split decision of the en banc court in Flanagan.9
icle attends to some of the more important appel-
eced in 2007 and also calls attention to cases
ues of continuing currency in criminal practice.
of the "cutting edge" criminal law issues from past
in so. For example, the Connecticut Supreme
et to settle the issue left open in State v. Sawyer,10
er the adoption of the Connecticut Code of
2000 removed or left intact the court's common-
ty to change rules of evidence.11 Connecticut
ue to grapple with novel applications of con-
clause doctrine based on the United States
t's paradigm-shifting decision in Crawford v.
12 in 2004.13 The state Supreme Court in State v.
ed the paradigmatic principles set forth in
New Jersey15 and held that the defendant had a
ment right to have a jury decide the statutory
mandate an enhanced sentence for a persistent
ny offender.16
al review of criminal appellate practice in 2007
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9 Flanagan, 331, n.1 (2006). The issue may be resolved when the court
ified issue in State v. DeJesus, 91 Conn. App. 47 (2005), cert. grant-
2 (2006) ("Does this court, or any court, have the authority in light
Code of Evidence, to reconsider the rule that the introduction of
conduct of the defendant in sexual assault cases, is viewed under a

10 Section, "Setting the Bounds for Evidentiary Review under the
" in last year's annual review. T.H. Everett, Developments in
a reasonable doubt), cert. denied, 283 Conn. 909 (2007), cert. denied,
08); State v. Torelli, 103 Conn. App. 646, 657-58 (2007).
incomplete without mention of personnel changes on the Supreme Court. Appellate Court Judge Chase Rogers was appointed as Chief Justice of the Supreme Court, Justice Borden reached the age of mandatory retirement from the Court, and Appellate Court Judge Barry was appointed to the Supreme Court. Justice Borden’s retirement bears special recognition. Justice Borden was a justice on the Supreme Court from 1990 until prior to that served as an original member of the Court from the time it was constituted as a court in 1983. In his last year on the Supreme Court, Borden continued his career-long drive to clarify legal doctrine articulated with less than ideal precision, a “given” on the appellate scene in Connecticut that the vast majority of criminal lawyers have no that pre-dates his elevation from the Superior Court, some of us are surprised to find no textual support for the implication that the Constitution requires his presence on a court. Thankfully, like other retired justices, Borden now sits on panels of the Supreme Court, Borden’s intellectually keen presence on the appellate scene in Connecticut typifies the depth of analysis for which Borden is renowned, even in this particular subset of evidentiary law, Borden has a for the factors that most accurately reflect the proper and inappropriate misconduct evidence in a criminal case. See State v. Mooney, 125-32 (1991); State v. Worrall, 7 Conn. App. 75 (1986).
I. POLICE INVESTIGATIONS: CONFESSIONS AND SEARCH AND SEIZURE DOCTRINE

During courts in 2007 decided confessions cases under due process, Miranda, and right to counsel conclusions on police interrogation of criminal suspects and defendants. In the leading due process case, State v. James, the Supreme Court rejected the defendant's claim that his confession to ownership of cocaine seized during a search of his home was coerced from police threat to have the Department of Children and Families remove his children and grandchildren from his care if he confessed. Justice Borden wrote the opinion of the court, rejecting the defendant's argument that his confession was inadmissible under the federal constitution because the trial court's conclusion that the state had proven by a preponderance of evidence that the defendant confessed voluntarily despite the defendant's insistence in his suppression hearing that the police had coerced him. On appeal the defendant's second constitutional claim was that the court should overrule its decade-old decision in State v. James, in which the court had held that the constitutional standard for establishing the voluntariness of confessions is the same as the federal preponderance of evidence standard. The court rejected the defendant's invitation to adopt a state constitutional rule.
have required the government to prove voluntari-
and a reasonable doubt. 

Katz dissented in Lawrence on the state constitu-
tion, declaring that the stare decisis strength of
would not withstand the “‘lessons of experience’” to
from numerous instances of exoneration of per-
NA evidence and by other means, many of which
utable to false confessions and police coercion.

ed out that the underlying concern in modern fed-
stitutional voluntariness doctrine is to determine
fession was coerced, but that the singular con-
coercion represents a narrowing of purpose from
ederal doctrine which also represented “the notion
urpose of a voluntariness hearing was to enhance
ility of jury verdicts.” In a brief concurrence in
joined the majority opinion, Justice Palmer
strong reasons why the legislature would be well-
change the law governing police interrogation in
ut, especially when a suspect is young or suffers
ntal disability:

separately wrote only to underscore that, to the extent
confessions have led to a number of wrongful con-

158-77.
185-209.
187 (quoting from Justice Brandeis’s dissent in Burnet v. Coronado
, 285 U.S. 393, 406-10 (1932), part of which declares, “[I]n cases
Federal Constitution, where correction through legislative action is
possible, this Court has often overruled its earlier decisions. The Court
lessons of experience and the force of better reasoning, recognizing that
trial and error, so fruitful in the physical sciences, is appropriate also
function.” Id. at 406-07).

Katz wrote: “Recent studies demonstrating the significant role of
involuntary and false confessions in wrongful convictions in this
de compelling evidence that our conclusion in James as to the admis-
fessions fails to promote just verdicts. Therefore, stare decisis should
r decision in this case.” Lawrence, 282 Conn. at 188. Justice Katz
ation of involuntary and false confessions, as those in the criminal

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Across the United States, our legislature is free to consider the translation requiring police to videotape confessions in cases where it is reasonably feasible to do so. Although valid concerns may exist not to impose such a requirement on the police, there can be little doubt that recording confessions would dramatically reduce, if not eliminate, any possible risk of an erroneous conviction predicated on an involuntary confession. Indeed, videotaping confessions would serve to inform both the trial court and the jury in evaluating the voluntariness and, ultimately, the reliability, of those confessions.

Palmer agreed with Justice Katz that “the risk of a confession is appreciably greater in cases of juveniles and those with mental disabilities.” 31 Because such persons are more vulnerable to police overreaching” and may be more likely than others to confess falsely” even without custodial interrogation, Palmer declared that “videotaping confessions would serve an especially salutary purpose.” 32

In Britton, 33 an en banc Supreme Court upheld the trial court’s determination that the defendant’s statements to the police after he voluntarily went to the New London police station to answer a summons so that they could take his palm prints were admissible because he was not in custody when he remained and state police at the New London police department after he had voluntarily gone there at his own volition so that they could take his palm prints. The Court noted that the defendant contested only the trial court, not the facts found by the police at the suppression hearing, including that the police said “tediously” told the defendant (“suspect”) that he was under arrest and was free to leave. 34 In State v. the Supreme Court concluded that the trial court

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admitted into evidence the defendant's inculpatory made in an Arizona jail in the absence of counsel visit from a Connecticut detective and an inspector state's attorney's office after they informed the that the state had obtained a warrant for his arrest and showed him a copy of the warrant. On the defendant conceded that his federal Sixth right to counsel was not triggered by the of the warrant, but argued that his state constitu- to counsel had been triggered. The Stenner court the defendant's claim, holding that under at law the right to counsel "is triggered at the same right to counsel afforded by the sixth amend- namely when adversary judicial criminal proceed- begin with the defendant's arraignment in court information. The v. Edman, the Supreme Court affirmed the Court's 2005 decision reversing the defendant's convictions on the grounds that the judge who search warrant for the defendant's home had a person- onship with the defendant that prevented him from the federal and state constitutional requirements that be issued by a neutral and detached magistrate. In v.atts, the Supreme Court held that the trial court denied the defendant's claim that the police acted un- in approaching his already stopped car to con- pel an officer's suspicion that the defendant was ile his license was suspended, discerned the smell nana, asked for and obtained the defendant's marijuan-
en arrested him.\textsuperscript{42} Further, the court rejected the defendant’s claim that the arresting officer’s suppression hearing and representations in an affidavit in support of his motion to search the defendant’s apartment after his arrest were sufficiently inconsistent so as to require an evidentiary hearing under the Franks exception to the rule that a warrant’s truthfulness be determined by reviewing the “four corners” of the affidavit without taking extrinsic evidence.\textsuperscript{43} The court also refused a four corners review and found no error.\textsuperscript{44}

In\textsuperscript{v. Davis,}\textsuperscript{45} the Supreme Court sitting en banc,\textsuperscript{46} rejected the defendant’s claim that the state’s adoption of the “automatic standing rule” that once embraced the “automatic standing rule” that once shunned Fourth Amendment doctrine but was put aside by the Supreme Court of the United States\textsuperscript{47} in recognition that the doctrine makes the automatic standing rule unnecessary.\textsuperscript{48} For the court Justice Palmer undertook a Franks standard analysis and concluded that none of the factors favored the defendant’s position.\textsuperscript{49}

In\textsuperscript{Browne,}\textsuperscript{49} the Appellate Court in a split decision ruled that the defendant’s motion to suppress should have been denied because the evidence seized by warrant was not the items for which the warrant gave authority to search.\textsuperscript{50} The majority opinion, written by Judge Berdon, found that the majority requirement of the Fourth Amendment warrant was violated because the warrant listed cocaine but not marijuana. The supporting application for search named only marijuana and the police intended to search for marijuana. The majority declared: “This on its face, simply did not describe the property

\textsuperscript{36,690, 692-94.}

The police officer who drafted the warrant application testified that he did so by using the “cut and paste” function, taking language from an earlier warrant and pasting it into another case. The majority held that the particularity requirement applies to the warrant application itself, not merely the supporting documents. The majority rejected the state’s alternate “plain view” argument because the warrant was not supported by probable cause to search for cocaine and crack and it did not authorize a search for heroin. Concluding his energetic dissent, Judge declared: “To invalidate a warrant premised upon an affidavit that referenced cocaine is the quintessential exaltation of the particularity clause.” The Supreme Court granted certification to review.

As appellate counsel for the defendant and the case before the Supreme Court, it is not appropriate to further on the case.

18.
17 n. 3.
18-19.
21-45.
45.

107 Conn. App. 903 (2007) (“Whether the Appellate Court correctly determined that the defendant was unlawfully detained, that his search of the vehicle was tainted by that illegal detention, that the police failed to purge the taint of the illegal search, and that the evidence procured through the defendant’s consent should have been suppressed.”).
II. TRIAL PRACTICE AND PROCEDURE: PLEA BARGAINING, TRIAL PROOF, INSTRUCTIONS ON OFFENSES AND DEFENSES

The Supreme Court decided two cases of importance in the law governing plea bargaining and the enforceability of promises leading to bargained-for guilty pleas. The decisions were written by both decisions. In *State v. Rivers*, the defendant and the state entered into a written plea and cooperation agreement under which the defendant promised to plead guilty to kidnapping in the first degree and to cooperate with the state in exchange for sentencing considerations. Under the agreement, the defendant gave a taped police statement and later testified consistently with that statement at a probable cause hearing, which resulted in a murder charge against a co-defendant. At the co-defendant's trial, the defense asserted that his performance under the agreement would have been barred under the terms of the agreement. The trial court denied the defendant's motion to dismiss the charge, which again hinged upon whether the defendant had performed or breached his promises under the agreement. The defendant then pleaded nolo contendere to the murder charge, conditional on obtaining appellate review. The trial court's ruling denying his motion to dismiss was affirmed, and regarding the plea agreement as a contract.
the defendant’s waiver of fundamental constitutional rights, the Supreme Court noted that the state’s “superior power” means that it bore a special burden of clarifying the terms of the agreement:

as the drafting party wielding disproportionate power, must memorialize any and all obligations for which it 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 certain fundamental rights, knows what is expected of him and what he can expect in return. Likewise, such clarity that the state knows what it may demand of the defendant and what it is obligated to provide in exchange for defendant’s cooperation. Indeed, a majority of the federal Courts of Appeals follow similar rules, construing ambiguity in plea agreements against the government.61

The Supreme Court rejected the state’s argument that the agreement contained an implicit promise to be a witness because the written agreement only provided for the defendant’s obligation to be truthful “in the event that [the defendant] becomes a witness”’ and because “we resolve ambiguous language against the state[.]”62 The court reversed the judgment and remanded with an instruction to dismiss the defendant’s motion to dismiss be granted and for specific performance of the plea agreement. In Connecticut:

If the fundamental nature of an obligation to testify in text of a cooperation agreement, we expect and require in the government intends for a cooperating defendant, it will include such an explicit requirement in the agreement. [Citation]64 Unless a plea agreement contains an

provision requiring that a defendant fulfill a substantiation such as testifying, this court will not require the defendant to do so. Likewise, the state may not claim retroactively that a particular act or omission of a defendant constitutes a breach of an agreement when the language of the agreement does not prohibit such an act or omission.65

In a second plea bargaining case, Orcutt v. Commission, the Supreme Court upheld a habeas court’s order of the petitioner who established that he received a sentence for violation of his “right to be sentenced in accordance with the terms of his plea agreement as mandated by Santobello v. New York, 404 U.S. 257 (1971).”67 The court affirmed that the habeas court had properly held that the petitioner was entitled to a sentence that would fulfill “the actual bargain parties to the plea agreement” as to the length of time actually to serve in prison, as it was a benefit for which the defendant had bargained with the state in exchange for his guilty plea.68 While recognizing that a criminal defendant normally expected to raise a Santobello claim on direct review by way of a motion to correct an illegal sentence,69 the court found that the habeas court, in reaching the merits of the petitioner’s failure to seek articulation by the habeas court, had impliedly found that the defendant had not professed default; the court also found that the respondent’s failure to seek articulation by the habeas court did not conclude the Supreme Court of an adequate record from which to conclude otherwise.70 The Orcutt court did agree; the respondent, however, that the habeas court should have ordered that the petitioner be resentenced by the trial judge instead of resentencing the petitioner itself.

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67. Santobello, 404 U.S. at 257.
68. 283 Conn. at 729-30.
69. 283 Conn. at 724 (2007).
70. 283 Conn. at 729-30.
The Supreme Court decided a number of cases that review of constitutional and statutory challenges to defendant's burden of proof for particular offenses and Justise Katz wrote an important opinion in State v. in which the court analyzed the statute defining dangerous felony offender liability as it is affected di v. New Jersey, a seminal United States court case decided in 2000, which that court has in later cases. Applying Apprendi, the Bell that, absent waiver, a defendant has a right to have the sentencing judge, make any findings that are the legislature's prescription of an enhanced penal-sistent dangerous felony offender under General actions 53a-40(b) and 53a-40(h). Jurispruden- represents our Supreme Court's first major appli-

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Katz's opinion reviews the major cases that have illuminated the Sixth Amendment jury guarantee in light of Apprendi. See Bell, 283 9 (discusses "evolving legal landscape" post-Apprendi, including 536 U.S. 584 (2002); Blakely v. Washington, 542 U.S. 296 (2004); Booker, 543 U.S. 220 (2005); and Cunningham v. California, 549 EN. STAT. § 53a-40(h) provides in pertinent part: "When any person to be a persistent dangerous felony offender, and the court is of the person's history and character and the nature and circumstances of
have been only a few cases so far in which Connecticut courts have applied the scope of the Apprendi ruling. See, e.g., State v. Fagan, 280 Conn. 2006) (Apprendi inapplicable, but harmless error even if applicable), 08-25 (Vertefeuille, J., dissenting) (Apprendi error); State v. Rizzo, 229 n.33 (2003); State v. Pierce, 69 Conn. App. 516 (2002) (predi-ffender registration requirement not sentence enhancement finding pre-Apprendi error); State v. Myers, 101 Conn. App. 167, cert. granted, 283 Conn. 906 (2003), the Appellate Court found that it was plain error for a trial court to impose an enhanced penalty without a guilty plea or B information against him. Id. at 181-86. The case is now on review in the Supreme Court. GEN. STAT. § 53a-40 (rev. 2007) covered six categories of persistent authorized enhanced penalties for each, while mandating an enhanced sentence for two of the categories. Contrast use of word “shall” in Subsections (h) and the word “may” in Subsections (j), (k), (l) and (m). All six categories present Apprendi problems, to the extent that each makes a sentencing decision the critical feature that triggers availability of an enhanced sentence otherwise authorized for the offense for which the defendant is convicted by a jury. The legislature in a special session in January, the judicial opinion language in the statute that implicated Apprendi. Special Session, Public Act 08-01, section 7 (effective from passage). Example, the court explained: “§ 53a-40 (h) is unconstitutional, to the extent that it does not provide that a defendant is entitled to have the jury make a finding [that] expose[s] the defendant to a greater punishment than that to which the jury’s guilty verdict . . . .’ Apprendi v. New Jersey, supra, 530 U.S. 469 (2000). Publicly, if the phrase ‘the court is of the opinion that’ was excised, §
the court declined to "usurp" the legislature's authority in determining the types and limits of penalties for crimes."83

Partial treatment of conduct as a function of the age status of the persons involved was at the heart of federal constitutional issues resolved against the party in a unanimous, en banc panel of the Supreme Court in State v. McKenzie-Adams.84 The defendant, a teacher, challenged his conviction of thirteen counts of sexual assault in the second degree for engaging in consensual intercourse with two students at his school, sixteen years of age, normally the age of consent. The victims' ages and consents did not spare the defendant criminal liability under General Statutes section 53a-72, which proscribes sexual intercourse between [who] is a school employee and . . . a person who is enrolled in a school in which the actor works or under the jurisdiction of the local or regional board on which employs the actor . . . " For the court,den rejected the defendant's facial and as-applied challenge to the statute predicated on a claim that he had to engage in noncommercial consensual sexual relations with individuals over the age of consent."85 The court wrote: "We acknowledge the defendant's plea, acknowledge that he have more immature decision-making capability and recognize the sorting the notion that juveniles are more vulnerable to all sorts of noncommercial, but not limited to, duress. The flaw with the defendant's pro-

"We need not decide whether a fundamental right to privacy exists generally because we agree with the court even if such a right exists, it does not protect sex-

...
In the context of an inherently coercive relationship, as the teacher-student relationship, wherein consent not easily be refused.”

Relying on that conclusion, the court looked at the principi
tion two United States Supreme Court’s decisions on privacy, first, Bowers v. Hardwick in 1986, and, Lawrence v. Texas, the 2003 case that overruled McKenzie-Adams, the court framed the issue in Lawrence to have been “whether freely consenting adults have a liberty interest in intimate personal relationships where consent might not easily be refused.” Relying on the Lawrence court’s distinction between a case involving adults engaged in sexual practices “‘with full and mutual consent from each other’” and a case involving minors or others who might be injured or coerced or who are situated in relationships where consent might not easily be refused, the McKenzie-Adams court reasoned that the defendant’s sexual conduct with his students was outside the protected private conduct recognized in Lawrence. Relying on its rational relation to the government’s interest in promoting a safe school environment, the court rejected the defendant’s separate argument that “the state constitution confers a fundamental privacy on an elementary or secondary school-student to engage in consensual sexual intercourse with students of age enrolled in the school system in
Teacher is employed."93

McKenzie-Adams was also one of several cases that view of the evidentiary principles governing the admissibility of uncharged misconduct as proof of a common plan despite the general rule that uncharged misconduct is inadmissible.94 Issues concerning the common plan exception arise unidirectionally when the uncharged misconduct evidence as part of its charged offense. Issues concerning the common plan exception also arise, one might say, reciprocally, such as McKenzie-Adams and State v. involving consolidation of cases against a defendant. A trial court's decision to consolidate takes account whether the evidence against the defendant is not cross admissible, fair consolidation of evidence on whether the trial court can give a cautionary instruction to the jury adequate to ensure that the jury

15. The court reached this conclusion by using the factorial analysis in v. Geisler, 222 Conn. 672, 684-86 (1992). Five of the Geisler factors—precedent, textual approach, Connecticut precedent, sister state precedent, and sociological considerations—favored the state's position. McKenzie-Adams at 510-15. The remaining factor, the historical approach, was based on the lack of "any relevant evidence of the intent of our constitution with respect to the right of privacy." Id. at 511.

McKenzie-Adams, 281 Conn. at 515-533 (cases brought on behalf of two properly consolidated where each gave evidence that would be admissible as a common plan or scheme if tried separately; uncharged misconduct evidence relating to a third young third person also properly admitted); State v. Jacobson, 283 Conn. 70 (affirmed multiple convictions of sexual assault and risk of injury where uncharged misconduct evidence relating to a third young person stemming from two discrete robbery scenarios, one including a trial court erred in authorizing the jury to consider evidence from liberating upon the other).

Borden’s opinion for the court in State v. Randolph sizes Connecticut evidentiary doctrine governing the admissibility of uncharged misconduct evidence, then painstakingly thorough analysis of the proper use of scheme and plan evidence, with a focus on its use in involving sex crimes. This effort is extraordinary, and consistent with Borden’s long history of pressing to upon the logic, clarity, and precision with which the governing uncharged misconduct law have been by our reviewing courts. Borden observes that the charged is a factor that changes the standard “by admissibility of evidence of uncharged is conduct is .” A “liberal standard” applies in cases “when a is charged with a sex crime and evidence of sexual misconduct is offered to establish that the had a common scheme or plan to engage in sex. By contrast, a “more stringent standard” applies in that do not involve sex crimes.” Borden writes, we have been consistent in our application of this standard, we have been inconsistent in our articulation of the principles that guide our analysis.”
en's analysis "reveals the existence of two separate categories of cases in which we have applied the scheme or plan exception."\textsuperscript{104} His \textit{Randolph} opinion explains the two categories, the first called "true" scheme or plan cases and the second called "signature cases."\textsuperscript{105}

In 2007 the higher courts reviewed confrontation clauses requiring more precise delineation of the scope of the United States Supreme Court's parallel decision in \textit{Crawford v. Washington}\textsuperscript{106} in \textit{State v. Camacho}.\textsuperscript{108} Justice Katz for a unanimous Court rejected the defendant's federal and state confrontation challenges to the admission of testimony under the conspirator's and dual-inculpatory exceptions to the rule.\textsuperscript{109} First, the court distinguished between clause analysis controlled by the \textit{Crawford} test that is "testimonial" and confrontation clause analysis controlled by the pre-\textit{Crawford} test set forth in \textit{Ohio} which gauges the reliability of evidence admitted under the hearsay exception.\textsuperscript{111} Finding that \textit{Roberts} controlled the court examined the record and concluded that the defendant's taped statements were admissible under established hearsay exceptions\textsuperscript{113} and were sufficiently reliable to satisfy the confrontation clause.\textsuperscript{114} In \textit{v. Arroyo},\textsuperscript{115} the defendant made confrontation

\textsuperscript{104} Id. at 343.

\textsuperscript{105} Id. at 357.


\textsuperscript{107} Year's review, T.H. Everett, \textit{Developments In Connecticut Criminal Procedure}, at 176-82 ("V: The Confrontation Clause After Crawford: And Other Cases").

\textsuperscript{108} Id. at 328 (2007).

\textsuperscript{109} 1980 Conn. L. 56 (1980).

\textsuperscript{110} Id. at 348, 363-64.

\textsuperscript{111} Id. 51.

\textsuperscript{112} Id. 63.

\textsuperscript{113} The court noted that constitutional analysis requires an intrinsic
Challenges to the admission of videotaped testimony of victim, using Jarzbek{superscript}116 procedures and the admission of testimony under the medical exception to the privilege and under the constancy of accusation exception rule.{superscript}117 Justice Borden for the court concluded that the videotaped testimony was “the functional equivalent of in-court testimony.” The court also concluded that the videotaped testimony produced pursuant to established statutory procedures was consistent with the United States Supreme Court’s holding in Maryland v. Craig,{superscript}119 which governs instances in which a witness may be examined in the presence of counsel and the court but outside the presence of the defendant. Employing the “primary purpose test” developed by the United States Supreme Court in Davis v. Utah{superscript}121 in 2006, the Arroyo court also held that statements by the complainant to a licensed social worker or interviewer while being observed and taped by personnel did not constitute “testimonial statements” under Crawford: “the primary purpose of the interview was not to build a case against the defendant, but to assist the victim with assistance in the form of medical and health treatment.”{superscript}123

In Arroyo, the Supreme Court in Arroyo ordered a new trial on sexual assault and risk of injury counts, holding that the trial court had committed reversible error when it denied the defendant’s request for a jury charge on his “third party liability defense.”{superscript}124 The court denied the defendant’s claims of error, including a claim that the victim’s statements given after a formal complaint had been filed were admitted in violation of established procedures.
Constancy of accusation law, and a couple of other issues that may command different results if raised in different records.

In *State v. Moore*, the Appellate Court found that the right of confrontation was violated, requiring a new trial where a state’s witness who had altered his testimony on redirect before invoking his Fifth Amendment privilege and refusing any further redirect examination, preventing recross-examination. The trial court defendant’s motion to strike the redirect testimony on new matters raised on redirect. The Appellate Court found that ruling violated the right of confrontation, which guarantees the right to new trials. The Appellate Court used harmless error analysis but found that the error was not harmless.
cases raised “structural” constitutional claims relating to first principles of criminal procedure. In State v. Loved, Justice Palmer for the Supreme Court rejected the defendant’s claim that his constitutional right to be present at trial was violated when he was, at his own request, removed from the courtroom during his murder trial and again he was not permitted to return to the courtroom after a violent outburst and other confrontational behavior by marshals holding him outside the courtroom after he was moved. Similarly, the court found that, by his own request, the defendant had “forfeited” his constitutional right to himself, which he had requested to do even as he was being marshals removing him from the courtroom on his court in response to his own request to leave. The Appellate Court rejected the defendant’s claims that he was “removed from the courtroom in an manner” following his disruptive behavior and that the court misinstructed the jury regarding the defendant’s and his absence at final arguments. The Strich court found that it was constitutional error not to inform the defendant that he could “reclaim” his right to be present for the trial if he gave “proper assurances” of no further unreasonableness, but the court found that the error implicated his right to be present guaranteed by Sixth Amendment confrontation clause, but “only his generic fifth right to participate in the proceedings.” That did not call for automatic reversal, but instead called for harmless error analysis. The court concluded that the defendant was given the opportunity to listen to the small
of the trial (the prosecutor’s closing argument and jury charge) by a closed circuit hook-up.\footnote{139}

\footnote{140} v. Canales,\footnote{141} Justice Norcott for the court rejected defendant’s claim that it violates due process of law to have the same judge have previously issued arrest and search warrants against her in the case.\footnote{142} In \textit{Jackson},\footnote{143} Justice Katz for the Supreme Court sustained the state’s appeal from the Appellate Court which had ruled that the trial court’s instruction on the reasonable doubt standard was unconstitutional because its use of the phrase “\textit{convinced}...” diluted the state’s burden of proof from a reasonable doubt standard to a clear and convincing standard.”\footnote{144} The court’s discussion of different attempts to define reasonable doubt, the Federal Defender’s model instruction, and scholarly studies of “\textit{convincing}” instruction makes for interesting reading and shows how difficult it is to put an accurate and precise definition on a basic principle of law that is used everyday.\footnote{145} It is not until we begin to explain the meaning of “reasonable doubt” using into epistemological talk or settling for a taunt disclaimer — that the reasonable doubt is what its deeper meaning is ineffable. Concluding that “\textit{doubt}” can be defined, Justice Katz for the court endorsed an instruction adopted by the New
have held that the concept of reasonable doubt is
ible, or that trial courts should not, as a matter of
provide a definition. As the foregoing discussion
s, there is no mandatory or talismanic phraseology
spoken will render the instruction constitutionally
l. "[E]ven if definitions of reasonable doubt are nec-
imperfect, the alternative—refusing to define the
at all—is not obviously preferable." Victor v. 
1, 511 U.S. [1.] 26 [(1994)] (Ginsberg, J., concur-
therefore, we encourage our trial judges to exercise
soned discretion, as did Judge Blue in the present
ashion a proper instruction. Reference to the Federal
eter's instruction in the present case was appropri-
we particularly cite with approval the New Jersey
Court's instruction attempting to improve upon that
ederal charge.146

v. Phillips,147 the Appellate Court reversed the
s denial of the defendant's motion for a new trial
ed for "a determination on the existing record, of
for a new trial, including a finding as to whether
acial bias on the part of a juror against the defen-
udge DiPentima wrote the unanimous opinion of
declaring: "Our task in this case is to strike an
delicate balance between preserving the sanctity of
liberative process and ensuring that racial preju-
do place in the jury room."149 The trial court had
identiary hearing on the defendant's motion for a
it which all six jurors in the case testified concern-
bias on the part of a white juror toward the defen-
Appellate Court opinion relates that four of the
black, testified that "they believed juror B to be
judged against the defendant, who is a black
ror B himself "acknowledged the racial overtones
The trial court "found jurors' testimony to be credible" but held that there was no evidence that comments attributed to Juror B "comprise jury in any way." The Appellate Court remanded for a new ruling because the trial court's ruling employed the wrong legal standard: "It instead restricted its inquiry to objective evidence of juror misconduct but took into account that that such an inquiry is a core constitutional guarantee and that an inquiry of juror misconduct is "all the more grave when said to be racial bias." The Appellate Court found the "delicate and complex task of investigating the "delicate and complex task of investigating the jury's deliberations." The trial court "found jurors' testimony to be credible" but held that there was no evidence that comments attributed to Juror B "comprise jury in any way." The Appellate Court remanded for a new ruling because the trial court's ruling employed the wrong legal standard: "It instead restricted its inquiry to objective evidence of juror misconduct but took into account that such an inquiry is a core constitutional guarantee and that an inquiry of juror misconduct is "all the more grave when said to be racial bias."
One would expect that all but the most obdurate defense appellate counsel will now refrain from alleging improprieties instead of acts of misconduct when claiming reversible error based on rule-breaking actions of trial prosecutors.\textsuperscript{160}

The Supreme Court issued three decisions involving the correction of an illegal sentence under Practice Book \textsuperscript{-22}. In \textit{State v. Lawrence},\textsuperscript{161} the court affirmed a decision of an \textit{en banc} Appellate Court that had upheld the trial court's dismissal of a defendant's motion to correct an illegal sentence. The defendant's claim was that he should not have been convicted of and sentenced for first degree murder instead of first degree manslaughter with a deadly weapon. Justice Katz for a unanimous court concluded that the problem was not one over which a trial court has jurisdiction to correct an illegal sentence. The authority to correct an illegal sentence is limited to categories of corrective claims recognized at common law.

In \textit{State v. Casiano},\textsuperscript{163} a case before the Supreme Court, a motion to review the trial court’s denial of counsel for an appeal from the denial of a motion to correct an illegal sentence, the court held that “an indigent defendant has a right to the appointment of counsel if the nature of language being what it is, there may come a day in which a generation of cases alleging prosecutorial “impropriety” will lose its current pejorative connotation and to be once again useful in better reflecting the actions of a prosecutor under [\textit{State v. Williams} 23 (1987)] because the first part of our analysis looks at whether the prosecutor are improper rather than the effects of those actions on the trial. \textit{Id.}, 540. If these actions do, in fact, so infect the trial with fundamental impropriety,” \textit{Id.} at 26 n.2.
tation in connection with a motion under Practice n 43-22. The right to counsel is statutory\(^6\) at the trial level and extends to the appellate level initially appointed counsel determines that “the who wishes to file such a motion has a sound basis .”\(^{166}\)

As discussed earlier in this article, Orcutt v. officer,\(^{167}\) the petitioner successfully employed a writ of habeas corpus to enforce the terms of a consent (a “Santobello claim”\(^{168}\). On appeal the state the claim should not have been reached by the court because such claims properly must be brought on to correct an illegal sentence or on direct The petitioner had attempted to file a pro se a correct an illegal sentence, but there was no evi- not was ever received by the clerk of the court.\(^{170}\) Supreme Court affirmed the habeas court’s con- the merits, it did make clear that it agreed with the motion to correct an illegal sentence “is a proper Santobello claim”\(^{171}\) and that failure to pursue (or an appeal) would be a procedural default bar- corpus save for the “highly unusual circum- Orcutt.\(^{172}\)

v. Commissioner,\(^{173}\) the hands of time had to be and the clock rewound in a case reminiscent of time-bending case, State v. Skakel.\(^{174}\) In Mead,
The petitioner challenged the respondent’s calculation of his three concurrent sentences of “life” for three acts of second-degree murder committed on or about August 12, 1975, at the respondent’s calculation of his offenses, “life” prisonment for the duration of the defendant’s natural life. The respondent later recalculated petitioner’s sentence based upon a 1980 Public Act regarding indeterminacies for “any felony committed prior to July 1, 1980.” The petitioner has since been serving a sentence of 5-year minimum and with life as its maximum. The petitioner earned statutory good time against the minimum of 5 years now serving, and later was considered for, but not released seven times. The trial habeas court denied the petition in which he asserted that he was entitled to have his “life” sentence converted to reflect the current definition of “life” as 60 years.

Oral argument and after receiving supplemental briefs, the Court panel hearing Mead itself moved for transfer to the Supreme Court and the motion was granted. The Supreme Court affirmed the habeas court, construing the current statute defining “life” “affects substantive rights and, in the absence of any clear and unequivocal indication by the legislature rebutting the presumption of retroactive application, that the statute does not apply to persons sentenced prior to its enactment.”

Noting dictum at the end of Mead, Justice Sullivan in a 1989 Second Circuit decision supports the proposition the petitioner’s sentence should never have been converted into an indeterminate sentence at all. Because
IV. ADEQUACY OF RECORD

In a number of 2007 cases, the Supreme Court faulted the lower court for failing to provide an adequate record for review. In such cases, the court drew an inference in favor of the petitioner's position on procedural default even though the lower court decision under review only implicitly had addressed the procedural issue.184 Ambiguity in the habeas decision against the respondent-appellee: “Having failed to articulate by the habeas court on the issue of procedural default, the respondent cannot now complain that the habeas court record does not contain an express finding by the habeas court that issue.”185 In *Dickinson v. Mullaney*, the court reversed the Appellate Court, concluding that the habeas court record is inadequate to permit any meaningful review of the petitioner’s appeal because the habeas court record is inadequately articulated by the habeas court on the issue of procedural default.186 The court called the lack of an articulate finding on inexcusable delay an “overlooked matter” in the lower court’s memorandum of decision and concluded that the habeas court had not made the requisite finding of inexcusable delay [when the habeas court found the barred by laches].”187

Similarly, in *State v. Dalzell*,188 the Supreme Court reversed the Appellate Court for reaching out to decide a
seizure case on legal grounds that "never had been argued or briefed by the parties before that court." The Supreme Court also rejected the defendant’s alternate affirmance based on a pretextual stop argument not raised in the trial court and for which the trial court made no findings, leaving the record inadequate for review State v. Golding.190

Seeking remands for further development of the record do not fare well. In affirming the Appellate Court’s order that the defendant’s motion to suppress be denied, the Supreme Court in State v. Edman,191 found that the defendant was not entitled to a remand to the trial court for a evidentiary hearing to augment the record, having at the previously “relinquished the opportunity for an evidentiary hearing.”192 In Taylor v. Commissioner,193 the Court held that there was no need for the Appellate Court to have ordered a remand for the habeas court to make findings on procedural default (for which the respondent pleaded and argued throughout the case), instead to dispose of the case more efficiently in the Court’s favor on other grounds.194

In v. Fabricatore,195 the Supreme Court found that the defendant at trial had “expressly
his appellate right to challenge a jury charge on
retreat where trial counsel “clearly expressed his
with that instruction” and “openly acquiesced at
he retreat theory upon which the case was tried.197