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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. 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 reversed the Appellate Court decisions 19 times and affirmed 10 times.

The Appellate Court decided 129 direct appeals in cases and another 53 appeals of claims made for collateral stemming from criminal cases (primarily petitions of 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 the court's first, split decision by a regular three-judge panel of the court, which affirmed the judgment of the trial court.

In its en banc review, the court again heard argument, this time in a decision, split 5-4, rejecting the defendant's claim that the trial court had violated his constitutional right of self-representation. Chief Judge Flynn and Members (joined by Judges DiPentima and McLaughlin) wrote, with Flynn's opinion commencing with the following topic sentence of the season: “We are heirs of the colonists who distrusted lawyers because so often the profession were aligned with King George.”

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1. Flanagan, 282 Conn. 317, 318 n.1, 322 (2007); and one case was transferred to the defendant; State v. Batts, 281 Conn. 682, 688 n.5 (2007).
2. PRACTICE governs transfers by motion of a party before oral argument in the court and upon the Appellate Court’s own filing “at any time before the certification 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 were an original transfer.
4. The issue now before the Supreme Court is: “Did the Appellate Court properly hold that the trial court did not violate the defendant’s right to self-representation?”
5. Flanagan, 282 Conn. 317, 318 n.1, 322 (2007); and one case was transferred to the defendant; State v. Batts, 281 Conn. 682, 688 n.5 (2007).
6. PRACTICE governs transfers by motion of a party before oral argument in the court and upon the Appellate Court’s own filing “at any time before the certification 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 were an original transfer.
velopments in Connecticut Criminal Law 2007

...ngly, the Supreme Court has granted certification of the split decision of the en banc court in Flanagan.9

Article attends to some of the more important appellate decisions in 2007 and also calls attention to cases of continuing currency in criminal practice. Of the "cutting edge" criminal law issues from past in so. For example, the Connecticut Supreme Court settled the issue left open in State v. Sawyer,10 after the adoption of the Connecticut Code of 2000 removed or left intact the court’s common law to change rules of evidence.11 Connecticut continues to grapple with novel applications of confrontation doctrine based on the United States court’s paradigm-shifting decision in Crawford v.12 in 2004.13 The state Supreme Court in State v.14 relied the paradigmatic principles set forth in New Jersey15 and held that the defendant had a right to have a jury decide the statutory mandate an enhanced sentence for a persistent sex offender.16

incomplete without mention of personnel changes at 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 served on the Supreme Court from 1990 until he reached the age of mandatory retirement from 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 in previous cases. Borden’s intellectually keen presence as a “given” on the appellate scene in Connecticut was a “given” on the appellate scene in Connecticut that the vast majority of criminal lawyers have no difficulty in pre-dating his elevation from the Superior Court. Some of us are surprised to find no textual support for the impression that the Constitution requires his presence on the court. Thankfully, like other retired justices of the Supreme Court, Borden now sits on panels of the Court deciding cases and clarifying legal doctrine appropriately.

Appellate judge over the last quarter century, Borden has relentlessly clarified a more consistent, functional, and reasonable body of doctrine, by disentangling inconsistencies in received doctrine and by identifying the formal nature of a given legal rule, often aided by a functional analysis of the underlying purpose of the rule. For example, in State v. Randolph, 284 Conn. 342-48 (2007), Justice Borden writing for the court seized “this opportunity to carefully consider our jurisprudence concerning the admissibility of evidence of prior misconduct offered to establish the existence of a common purpose in non-sex crime cases, and to clarify the principles that govern our approach.” Randolph typifies the depth of analysis for which Borden is known, even in this particular subset of evidentiary law, Borden has a long history of factors that most accurately reflect the proper and inappropriate use of evidence in a criminal case. See State v. Mooney, 125 Conn. App. 75 (1991); State v. Morrell, 7 Conn. App. 342 (2007).
I. Police Investigations: Confessions and Search and Seizure Doctrine

During courts in 2007 decided confessions cases based on due process, Miranda, and right to counsel controlling police interrogation of criminal suspects and. In the leading due process case, State v. the Supreme Court rejected the defendant’s argument 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 remove his children and grandchildren from his home 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 based on the trial court’s conclusion that the state had proven beyond 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 argument was that the court should overrule its decades old opinion, in State v. James, in which the court had held the constitutional standard for establishing the voluntariness of confessions is the same as the federal preponderance standard. The court rejected the defendant’s invitation to overrule James and to adopt a state constitutional rule...
have required the government to prove voluntariness and a reasonable doubt.25

Katz dissented in Lawrence on the state constitution,26 declaring that the stare decisis strength of

sd law not withstand the "'lessons of experience'"27 to

e from numerous instances of exoneration of per-

tRNA evidence and by other means, many of which

utable to false confessions and police coercion.28

ed out that the underlying concern in modern fed-

tional voluntariness doctrine is to determine

ession was coerced, but that the singular con-

cision represents a narrowing of purpose from

eral doctrine which also represented "the notion

of a voluntariness hearing was to enhance

ility of jury verdicts."29 In a brief concurrence in

ed the majority opinion, Justice Palmer

rong reasons why the legislature would be well-

g the law governing police interrogation in

t, especially when a suspect is young or suffers

ental disability:

eparately wrote only to underscore that, to the extent

e confessions have led to a number of wrongful con-

5187 (quoting from Justice Brandeis's dissent in Burnet v. Coronado

eraction, where correction through legislative action is

isible, this Court has often overruled its earlier decisions. The Court

ons of experience and the force of better reasoning, recognizing that

trial and error, so fruitful in the physical sciences, is appropriate also

ction." Id. at 406-07).

he Katz wrote: "Recent studies demonstrating the significant role of

voluntary and false confessions in wrongful convictions in this
ile compelling evidence that our conclusion in James as to the admis-

isions fails to promote just verdicts. Therefore, stare decisis should

sion in this case." Lawrence, 282 Conn. at 188. Justice Katz

ition of ...
Across the United States, our legislature is free to translation requiring police to videotape confessions it is reasonably feasible to do so. Although valid may exist not to impose such a requirement on the here can be little doubt that recording confessions dramatically reduce, if not eliminate, any possible of an erroneous conviction predicated on an invol-

almer agreed with Justice Katz that "the risk of a

rer, Palmer declared that "videotaping confessions ons would serve an especially salutary purpose."32 an en banc Supreme Court upheld the determination that the defendant's statements to in the absence of Miranda warnings were admission because he was not in custody when he remained nd state police at the New London police depart-

the Court noted that the defendant contested only nclusion of the trial court, not the facts found by court at the suppression hearing, including that the eatedly" told the defendant ("suspect") that he der arrest and was free to leave.34 In State v. ne Supreme Court concluded that the trial court

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n. 598 (2007).

3-05. The defendant's argument on appeal was that the "trial court
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
law the right to counsel “is triggered at the same
time right to counsel afforded by the sixth amend-
amely when adversary judicial criminal proceed-
only begin with the defendant’s arraignment in court
information. In St. 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 per-
sonal relationship with the defendant that prevented him from
the federal and state constitutional requirements that
be issued by a neutral and detached magistrate. In
atts, the Supreme Court held that the trial court
denied the defendant’s claim that the police acted
inapproaching his already stopped car to con-
spel an officer’s suspicion that the defendant was
drive his license was suspended, discerned the smell
marijuana, asked for and obtained the defendant’s marijua-

758 n.19. The defendant’s concession regarding any federal constitu-
was necessitated by the Supreme Court’s 2006 decision in State v.
42, cert. denied, 126 S. Ct. 2873 (2006). The Stenner court noted
briefing and analysis using the factors set forth in State v. Geisler,
2, 684-86 (1992), gave the court the opportunity to decide the state
been arrested him. Further, the court rejected the claim that the arresting officer’s suppression hearing and representations in an affidavit in support of his search the defendant’s apartment after his arrest sufficiently inconsistent so as to require an evidentiary hearing under the Franks exception to the rule that a warrant’s veracity be determined by reviewing the “four corners” of the affidavit without taking extrinsic evidence. The court also rejected the defendant’s claim that the state embraces the “automatic standing rule” that once Fourth Amendment doctrine but was put aside by States Supreme Court in recognition that the doctrine of automatic standing becomes unnecessary. For the court Justice Palmer’s factorial analysis and concluded that none of the factors favored the defendant’s position.

In v. Browne, the Appellate Court in a split decision rejected the defendant’s motion to suppress because the evidence seized by warrant was not the items for which the warrant gave authority to search. 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 for marijuana. The majority declared: “This on its face, simply did not describe the property

We hold that it is invalid." The police officer and the warrant application testified that he did so by using the "cut and paste" function, taking language text of a warrant in another case. The majority held that the particularity requirement applies to the warrant merely the supporting documents. The majority held the state's alternate "plain view" argument because were not legally on the premises that they searched, the warrant was not supported by probable cause to cocaine and crack and it did not authorize a search anala. Concluding his energetic dissent, Judge declared: "To invalidate a warrant premised upon an and affidavit that detailed the possession and sale by the defendant but, due to typographical error, referenced cocaine is the quintessential exaltation ever substance and is inconsistent with a practical of the particularity clause." The Supreme Court and certification to review.

v. Jenkins, a split panel of the Appellate Court the trial court's denial of a motion to suppress, con- that the defendant was unlawfully detained, that his search the vehicle was tainted by that illegal deten- that the state failed to purge the taint of the illegal. For those reasons, the evidence procured through ant's consent should have been suppressed." As appellate counsel for the defendant and the case fore the Supreme Court, it is not appropriate to further on the case.
II. Trial Practice And Procedure:

Plea Bargaining, Trial Proof,

jury Instructions On Offenses And Defenses

Supreme Court decided two cases of importance in the law governing plea bargaining and the enforcement of promises leading to bargained-for guilty pleas. The court wrote both decisions. In State v. Rivers, 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, on advice of counsel, the defendant claimed Fifth Amendment privilege and refused to testify. The state declared the plea and cooperation agreement "null and void" and charged the defendant with offenses, including the murder charge, that would have been barred under the terms of the agreement. The trial court denied the defendant's motion asserting that his performance under the agreement barred the state from using his police statement at a probable cause hearing. The defendant then pleaded nolo contendere to the murder charge, conditional on obtaining appellate review of the trial court's ruling denying his motion to dismiss the charges, which again hinged upon whether the defendant performed or breached his promises under the agreement. The court then granted the defendant's motion to dismiss the charges 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 influence, must memorialize any and all obligations for which it deems the defendant responsible, as well as all promises that it makes 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’s cooperation... Indeed, a majority of the federal Courts of Appeals follow similar rules, construing ambiguity in plea agreements against the government.6

The Supreme Court rejected the state’s argument that the agreement contained an implicit promise to be a witness if the defendant’s obligation to be truthful “in the court” becomes a witness” and because “we view ambiguous language against the state[.]”62 The court reversed the judgment and remanded with an order to the defendant’s motion to dismiss be granted and for specific performance of the plea agreement.63 In Connecticut: if the fundamental nature of an obligation to testify in the context of a cooperation agreement, we expect and require that the government intends for a cooperating defendant, it will include such an explicit requirement in the agreement. [Citation64] 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 that would fulfill 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 explained that the habeas court had properly held that the petitioner was entitled to a sentence that would fulfill “the actual agreement between the parties to the plea agreement” as to the length of terms actually to serve in prison, as it was a benefit for which the defendant had bargained with the state in exchange for a guilty plea.68 While recognizing that a criminal defendant normally expected to raise a Santobello claim on direct appeal, the court found that the habeas court, in reaching the merits of the petitioner’s habeas petition, had impliedly found that the defendant had not proximately defaulted; 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.69 The Orcutt court did agree with the respondent, however, that the habeas court should have ordered that the petitioner be resentenced by the trial court before resentencing the petitioner itself.

65 The court meant to imply that the habeas court should have said so. It remotely imply that this was its intent.
67 cert. denied, 216 Conn. 826, 581 A. 2d 283 (1990), cert. denied, 499 U.S. 922, 111 S. Ct. 1315, 113 L. Ed. 2d 248 (1991), 216 Conn. at 829, 581 A. 2d at 284
Supreme Court decided a number of cases that review of constitutional and statutory challenges to a defendant's burden of proof for particular offenses and Justice 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 persistent dangerous felony offender under General Statutes § 53a-40(h). Jurisprudence represents our Supreme Court's first major appli-
The Apprendi line of cases. Other Apprendi challenges to Connecticut practices and procedures can be found in cases involving other subsections of the pre-2008 offender statute and other statutes prescribing penalties under prescribed certain conditions. Opinion, however, provided a practical primer on how the legislature may draft statutes constitutionally so as to avoid Apprendi and its progeny.

In v. Heinemann, the court rejected the defendant's habeas corpus petition, specifically, the level of maturity, sense of security, vulnerability and personality traits of a sixteen year old when it decided his defense of duress. After analyzing the subjective and objective components of the defendant's statutory defense of duress and its Model Penal Code, the court explained:

Gen. Stat. § 53a-40 (rev. 2007) covered six categories of persistent authorized enhanced penalties for each, while mandating an enhanced sentence for the categories. Contrast use of word “shall” in Subsections (h) of the word “may” in Subsections (j), (k), (l) and (m). All six categories present Apprendi problems, to the extent that each makes a sentence the critical feature that triggers availability of an enhanced sentence otherwise authorized for the offense for which the defendant 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 he was entitled even if the phrase 'the court is of the opinion that' was excised. §
The genesis, and even while acknowledging that brain development appears to support differentiation in the criminal responsibility of adults and young people, the court declined to "usurp" the legislature's authority in determining the types and limits of punishment for crimes.83

The court wrote: "We acknowledge the defendant's plea, acknowledge that he has more immature decision-making capability and recognize the notion that juveniles are more vulnerable to all sorts of influence, but not limited to, duress. The flaw with the defendant's position is that, carried to its logical conclusion, it essentially would require..."
victing that conclusion, the court looked at the princi-

ting two United States Supreme Court’s decisions

privacy, first, Bowers v. Hardwick\(^8\) in 1986, and, Lawrence v. Texas,\(^8\) the 2003 case that overruled

in McKenzie-Adams, the court framed the issue

Lawrence to have been “whether freely consenting

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Teacher is employed."93

McKenzie-Adams was also one of several cases that view of the evidentiary principles governing the

ity of uncharged misconduct as proof of a common plan despite the general rule that uncharged mis-

admissible.94 Issues concerning the common plan exception arise unidirectionally when the

charged misconduct evidence as part of its

offense. Issues concerning the common plan exception also arise, one might say, recipro-

cases, such as McKenzie-Adams and State v.

involved consolidation of cases against a defen-

A trial court's decision to consolidate

take account whether the evidence against the

from one case to the other is "cross admissible."96

ence is not cross admissible, fair consolidation of

ends on whether the trial court can give a caution-

15. The court reached this conclusion by using the factorial analysis ge v. Geisler, 222 Conn. 672, 684-86 (1992). Five of the Geisler fac-

ecedent, textual approach, Connecticut precedent, sister state prece-

(sociological considerations) favored the state's position. McKenzie-

at 510-15. The remaining factor, the historical approach, was

of the lack of "any relevant evidence of the intent of our constitu-

with respect to the right of privacy." Id. at 511.

zie-Adams, 281 Conn. at 515-533 (cases brought on behalf of two

propriely consolidated where each gave evidence that would be admis-

common plan or scheme if tried separately; uncharged misconduct

a third person also properly admitted); State v. Jacobson, 283 Conn.

(affirmed multiple convictions of sexual assault and risk of

ed where uncharged misconduct evidence relating to a third young

ible to show common scheme or plan; Appellate Court had previ-

sion of the evidence to be error, but not to necessitate new trials);

ph, 284 Conn. 328, 334-68 (reversals ordered where, at consolidated

es stemming from two discrete robbery scenarios, one including a

the trial court erred in authorizing the jury to consider evidence from

liberating upon the other).


nn. 338-39 ("if evidence of a defendant's uncharged

cross admissible to establish a common scheme or plan, then separate

sions granting habeas corpus (in

insisting 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 compainstakingly 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.”

Borden, 284 Conn. at 362-63, 368 (discussing “circumstances in which le of assessing the merits of each case fairly and independently in the trial court’s cautionary instructions.” Id. at 362).

Example, in State v. Murrell, 7 Conn. App. 75, 83 (1986 ), for the art Judge Borden closely analyzed the functional similarities and legal between prior misconduct evidence offered to prove identity and such offered to prove common scheme or plan. Id. at 83-84. See also State 8 Conn. 85, 132 n.35 (1991) (Borden, J.) (recognizing a “concern” in prejudicial use of common scheme evidence to prove identity). In en wrote that “the common scheme or system of criminal activity proven of several separate but related strands . . . .” Id. at 84. The opin-six different “strands” with the view that such “categorization” would nize the evidentiary risks which inhere in an otherwise mechanical test-
His analysis "reveals the existence of two separate categories of cases in which we have applied the scheme or plan exception." His Randolph opinion explains the two categories, the first called "true scheme or plan cases and the second called "signature

2007 the higher courts reviewed confrontation as requiring more precise delineation of the scope of the United States Supreme Court's para-dime or plan decision in Crawford v. Washington in State v. Camacho, Justice Katz for a unanimous court rejected the defendant's federal and confrontation challenges to the admission of testimony of-conspirator's and dual-inculpatory exceptions to rule. First, the court distinguished between clause analysis controlled by the Crawford test that is "testimonial" and confrontation clause controlled by the pre-Crawford test set forth in Ohio which gauges the reliability of evidence admitting hearsay exception. Finding that Roberts con-tione court examined the record and concluded that statements were admissible under established hearsay exceptions and were sufficiently to satisfy the confrontation clause.

v. Arroyo, the defendant made confrontation
Challenges to the admission of videotaped testimony of victim, using Jarzbek procedures and the admission of testimony under the medical exception to the privilege and under the constancy of accusation exception rules.\(^{117}\) Justice Borden for the court concluded that did not apply to the videotaped testimony because “the functional equivalent of in-court testimony” was “the primary purpose test” developed by the United States Supreme Court in Davis v.\(^{121}\) Arroyo ordered a new trial because the complainant to a licensed social worker being observed and taped by personnel did not constitute “testimonial” under Crawford: “the primary purpose of the was not to build a case against the defendant, but the victim with assistance in the form of medical health treatment.”\(^{123}\)

The court denied the defendant’s request for a jury charge on his “third party liability defense.”\(^{124}\) The court denied the defendant’s claims of error, including a claim that the victim’s statements given after a formal complaint been filed were admitted in violation of estab-
constancy of accusation law,125 and a couple of other as that may command different results if raised in s on different records.126

in v. Moore,127 the Appellate Court found that the right of confrontation was violated, requiring a where a state’s witness who had altered his testi-solved the defendant on cross-examination, then testimony on redirect before invoking his Fifth privilege and refusing any further redirect exam-preventing recross-examination.128 The trial court defendant’s motion to strike the redirect testimo-Appellate Court found that ruling violated the right of confrontation, which guarantees the right in new matters raised on redirect.129 The Appellate ed harmless error analysis but found that the error 130

126-40. In State v. Samuels, 273 Conn. 541 (2005), the court held that made by a victim after he or she had filed an official complaint with the admissible as constancy of accusation evidence.” Arroyo, 284 Conn. ting State v. McKenzie-Adams, 281 Conn. 486, 541 (2007)). In part held that the history and purpose of Samuels rule “persuade us that triggered when the declarant is a young child, as in the present case, cy, rather than the child’s parent or guardian, makes an official com-ice on behalf of the victim.” Id. at 639.

rendant claimed that the trial court “failed to inform the defendant of consular notification under the Vienna Convention of Consular at 601. The Supreme Court declined to address the claim as briefed. The defendant also claimed that the trial court failed to conduct an y “into his complaints that he could not communicate adequately anish-speaking attorney” Id. at 640. While the reviewing court found inquiry to have been adequate, the court makes an interesting point cord under review: “Although the defendant several times requested ing attorney, he never claimed that the interpreter services that were n were inadequate.” Id. at 644. Monolingual English-speaking trial judges face a special challenge as guardians of the fair trial rights of ants who need interpreters because they are competent linguisticalnative language, not English. Attorneys must develop strategies to services effectively and to recognize and challenge, where appro-priacy of interpreters’ services that are not effective for a given client.
cases raised “structural” constitutional claims relating to first principles of criminal procedure. In *State v.*
justice Palmer for the Supreme Court rejected the 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 for a violent outburst and other confrontational behavior. Marshals holding him outside the courtroom after he was moved. Similarly, the court found that, by his con-
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 the court in response to his own request to leave.

In *Strich,* the Appellate Court rejected the defendant’s claims that he was “removed from the courtroom in an manner” following his disruptive behavior and that 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 fur-
tiveness, 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 less error analysis. The court concluded that the error was harmless beyond a reasonable doubt, in part because 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.\textsuperscript{139}

\textit{v. Canales},\textsuperscript{140} Justice Norcott for the court rejects defendant’s claim that it violates due process of law to preside at a hearing in probable cause resulting her charge where the same judge had previously arrest and search warrants against her in the case.\textsuperscript{141} In \textit{Jackson},\textsuperscript{142} Justice Katz for the Supreme Court sustains the state’s appeal from the Appellate Court which had the trial court’s instruction on the reasonable doubt as unconstitutional because its use of the phrase convinced . . . diluted the state’s burden of proof from reasonable doubt standard to a clear and convince standard.”\textsuperscript{143} The court’s discussion of different attempts to define reasonable doubt, the Federal center’s model instruction, and scholarly studies of “convinced” instruction makes for interesting and shows how difficult it is to put an accurate and on a basic principle of law that is used everyday. To explain the meaning of “reasonable doubt” using into epistemological talk or settling for a tau disclaimer — that the reasonable doubt is what its deeper meaning is ineffable. Concluding that doubt” can be defined, Justice Katz for the court endorses\textsuperscript{145} an instruction adopted by the New

\textsuperscript{139} Ibid. at 593-94. Agreeing that “the statutes and rules of practice evince having a different judge reconsider previously decided questions, or air to those previously decided[.]” the court declared: “we strongly our trial judges that they disqualify themselves from conducting a hearing when they already have issued arrest or search warrants in id. at 599.

\textsuperscript{140} Id. at 599.

\textsuperscript{141} Id. at 599.

\textsuperscript{142} Id. at 599.

\textsuperscript{143} Id. at 599.

\textsuperscript{144} Id. at 599.

\textsuperscript{145} Id. at 599.
Supreme Court:

...or have held that the concept of reasonable doubt is invariable, or that trial courts should not, as a matter of provide a definition. As the foregoing discussion shows, there is no mandatory or talismanic phraseology spoken will render the instruction constitutionally perfect. “[E]ven if definitions of reasonable doubt are nec-
imperfect, the alternative—refusing to define the term at all—is not obviously preferable.” *Victor v. *Cara, 511 U.S. [1.] 26 [(1994)] (Ginsberg, J., concur-
therefore, we encourage our trial judges to exercise unbounded discretion, as did Judge Blue in the present case in fashion a proper instruction. Reference to the Federal Center’s instruction in the present case was appropri-
ate particularly cite with approval the New Jersey Appellate Court’s instruction attempting to improve upon that
federal charge.146

In *v. *Phillips,147 the Appellate Court reversed the denial of the defendant’s motion for a new trial based on a determination on the existing record, of which this case, including a finding as to whether racial bias on the part of a juror against the defense. Judge DiPentima wrote the unanimous opinion of the Appellate Court opinion relates that four of the six jurors in the case testified concerning bias on the part of a white juror toward the defendant, who is a black, testified that “they believed juror B to be prejudiced against the defendant, who is a black juror B himself “acknowledged the racial overtones...
the jury’s deliberations.” The trial court “found District Attorney’s testimony to be credible” but held that there was “no evidence that comments attributed to Juror B ‘could taint the jury in any way.’” The Appellate Court took the trial court’s compliance with the procedural requirements of the “delicate and complex task of investigating the possibility of juror bias” but took into account that that the presumption of juror misconduct is “all the more grave when a juror is said to be racial bias.” The Appellate Court remanded for a new ruling because the trial court’s ruling employed the wrong legal standard: “It is true that the court instead restricted its inquiry to objective evidence of racially related statements and behavior. The court have decided whether that evidence amounted to ‘willful’ conduct that would have automatically warranted a new trial.”

In the case of "Fauci," the Supreme Court broke new ground on the importance of the term “prosecutorial misconduct,” now replacing the traditional term, “prosecutor’s misconduct,” as a reviewing court’s denomination for conduct that breach trial rules and imperil a defendant’s right to a fair trial. Justice Zarella opens the opinion with a lengthy footnote announcing the change of terms, explaining the reasoning behind the change and providing an overview of how other jurisdictional courts have made similar changes.
One would expect that all post-obdurate defense appellate counsel will now claim that all claims instead of acts of misconduct that alleges improprieties instead of acts of misrepresentations of trial prosecutors. 159

POST-CONVICTION PRACTICE AND PROCEDURE.

The Supreme Court issued three decisions involving a motion to correct an illegal sentence under Practice Book § 22. In State v. Lawrence, 161 the court affirmed an 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 have been convicted of and sentenced for first degree murder instead of first degree manslaughter with a term of restitution. For a unanimous court concluded that was not one over which a trial court has jurisdiction to correct an illegal sentence is limited to the categories of corrective claims recognized at common law. State v. Casiano, 163 a case before the Supreme Court involving 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 who better reflects the actions of a prosecutor under [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. Id., 540. If these actions do, in fact, so infect the trial with so as to make the resulting conviction a denial of due process, they rise to a constitutional level of impropriety," Id. at 26 n.2.

6-28 n.2.

Moreover, the nature of language being what it is, there may come a day when a generation of cases alleging prosecutorial "impropriety" will lose its current pejorative connotation and to be once again useful.
The right to counsel is statutory 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. 

The petitioner successfully employed a writ of habeas corpus to enforce the terms of a sentence (a "Santobello claim"168). On appeal the state court determined that "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 appeal." The petitioner had attempted to file a pro se motion to correct an illegal sentence, but there was no evidence that was ever received by the clerk of the court.170

The Supreme Court affirmed the habeas court's conclusion on 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 it (or an appeal) would be a procedural default barring habeas corpus save for the "highly unusual circumstances." Orcutt.172

v. Commissioner,173 the hands of time had to be stopped and the clock rewound in a case reminiscent of a recent 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 murder committed on or about August 12, when the petitioner committed 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 indeterminates for “any felony committed prior to July 1, 1980,” and the petitioner has since been serving a sentence of 20 years minimum and with life as its maximum. The petitioner earned statutory good time against the minimum now serving, and later was considered for, but denied parole 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.

During argument and after receiving supplemental briefing, if any, of State v. Skakel, on the case, 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, contending that the current statute defining “life” “affects substantial rights and, in the absence of any clear and unequivocal expression by the legislature rebutting the presumption of retroactive application, that the statute does not apply retroactively to persons sentenced prior to its enactment.”

State v. Skakel, a 1989 Second Circuit decision supports the proposition that the petitioner’s sentence should never have been converted into an indeterminate sentence at all.

4 (Memorandum of Decision per Karazin, J. (35pp.)). Also, on or about 2007 Skakel filed a petition for a writ of habeas corpus in the United States District Court for the District of Connecticut. See College, 369 F.3d 100 (3rd Cir. 2007).
sent was presented only in the petitioner's supplement of "to which the respondent had no opportunity to and because the petitioner did not claim that he suffer any deleterious effect" by serving the recalculation, the Mead court left the judgment intact.

IV. ADEQUACY OF RECORD

In a number of 2007 cases, the Supreme Court faulted the court for failing to provide an adequate record for review. The court drew an inference in favor of the petitioner's position on procedural default even though the court decision under review only implicitly had the petitioner. Ambiguity in the habeas decision against the respondent-appellee: "Having failed articulation by the habeas court on the issue of pro-
default, the respondent cannot now complain that the record does not contain an express finding by the habeas court on that issue." In Dickinson v. Mullaney, the court reversed the Appellate Court, concluding that properly reached the merits of the petitioner's appeal because the habeas court record is inadequate to permit any meaningful review of the petitioner's claim; the habeas court had not made the requisite finding of inexcusable delay [when the habeas court found the barred by laches]." The court called the lack of an inexcusable delay an "overlooked matter" in the court's memorandum of decision and concluded that the-appellant had failed to make the record adequate for review by filing a motion of articulation.  

In State v. Dalzell, 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.”189

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
told made no findings, leaving the record inadequate for
order State v. Golding.190

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

ey v. Fabricatore,195 the Supreme Court found that
showed that the defendant at trial had “expressly

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717-22 (discussing doctrinal tension in use of State v. Golding, 213
9-40 (1989), to review unpreserved search and seizure claims, recent-
Conn. 444 (2007).

465. The court had first explained: “Like the Appellate Court, we
ord the state a second opportunity to contest the defendant’s affidavit
his motion to suppress, which the trial court accepted as true and on
the trial court’s legal determinations were premised, given the absence of any-
record to demonstrate that the state did not acquiesce to the truth the

(Emphasis added.) /d.
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