2007

Developments in Connecticut Criminal Law: 2006

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DEVELOPMENTS IN CONNECTICUT CRIMINAL LAW: 2006

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This article reviews some of the issues in criminal cases decided by the Connecticut Supreme Court and the Connecticut Appellate Court in 2006.[1] While no case garnered the popular attention given the Michael Ross case in 2005, the courts laid important groundwork in cases dealing with the definition of criminal law and its retroactive application, the reviewability of unpreserved claims of constitutional error, the impact of the code of evidence on the judiciary's common-law authority, the standard of harmfulness for evidentiary review, and the relation between hearsay and the confrontation clause. Five appellate cases particularly stand out: *State v. Skakel, State v. Brunetti, State v. Sawyer, State v. Scruggs,* and *State v. Kirby*. Each is discussed in its own section, along with mention of other cases that presented similar issues. The rest of the article reviews some of the other interesting criminal cases decided in 2006.

I. TURNING BACK THE CLOCK: *STATE V. SKAKEL*

In *State v. Skakel*,[2] the Supreme Court affirmed the state's successful murder prosecution of defendant, a 40-year-old adult, for a homicide committed in 1975 when he was a 15-year-old juvenile. In so doing the court grappled with thorny issues concerning the applicability of the juvenile and criminal law of 1975 to a prosecution begun in 2000. The defendant raised seven claims of error on appeal, chief among which were: that his case had been improperly transferred from the juvenile court docket to the adult criminal docket; that the prosecution was brought outside the statute of limi-

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[1] The Supreme Court decided 35 criminal and habeas corpus appeals by full opinion, with 6 dissenting and 8 concurring opinions. The Appellate Court decided a staggering 186 criminal and habeas corpus appeals by full opinion (and many more by "Memorandum Decisions"), with 7 dissenting and 5 concurring opinions.

[2] 276 Conn. 633, *cert. denied*, 127 S. Ct. 578 (2006). The defendant currently is pursuing a petition for a new trial pursuant to CONN. GEN. STAT. §52-270. Skakel v. State, CV-05-4006524.

tations; that the prosecution engaged in misconduct in pretrial discovery and at final argument; and that the trial court erred in various constitutional and evidentiary rulings on the admissibility of evidence.[3]

The first major issue addressed by the *Skakel* court was application of the juvenile transfer law of 1975 to a juvenile-become-an-adult in the 25 years that passed before the state commenced its prosecution. How does the law treat an accused who has outgrown the protected status[4] that he might have enjoyed if arrested when still a 15-year-old juvenile? The court found that the transfer of the case from juvenile court to the adult criminal docket was proper despite noncompliance with certain mandates in General Statutes Sections 17-60a and 17-66 (rev. 1975). The probation investigation prior to transfer omitted the statutorily required "examination of the 'parentage and surroundings of the child, his age, habits, and history, and . . . also an inquiry into the home conditions, habits and character of his parents or guardians.'"[5] The court found such statutory noncompliance to be harmless, given that the statute's purpose, to consider whether there existed alternative state facilities for the juvenile "in preference to the facilities otherwise available for the treatment and punishment of adult offenders," was not accomplishable for a 40-year-old defendant, long out of childhood.[6] The court also rejected the defendant's claim that it was error to apply transfer regulations current in 2000 instead of 1975 state regulations that had permitted alternative placements for persons over 18.[7]

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[3] The belated prosecution beginning in 2000 captured the attention of public and press for various reasons: the defendant is a first cousin in the Kennedy clan of political fame, the homicide was an "unsolved mystery" for a quarter century, the defendant and the victim were children of affluence in Greenwich, and every aspect of the case presented a problematic exercise in reconstruction of the past, factually and legally, for the witnesses, lawyers, and courts involved in the trial and appeal.

[4] The *Skakel* court indicated that a person's legal interest in his juvenile status, which carries with it adjudication as a juvenile instead of criminal prosecution as an adult, is a liberty interest that "derives from, and is limited by, the statutory provisions governing the transfer, adjudication and commitment of juveniles." 276 Conn. at 658.

[5] 276 Conn. at 659.

[6] 276 Conn. at 660.

[7] The court affirmed the trial court's conclusion that the 1975 law "'narrowly focus[es] on the availability and suitability of state institutions "designed for the care and treatment of children" to which the juvenile court *has authority* to "commit such child."' (Emphasis added.)." 276 Conn. at 661-62.

The second major holding in *Skakel* was that the prosecution of the defendant was not barred by the five-year statute of limitations, Gen. Stat. §54-193 (rev. 1975), despite on-point precedent from 1983, *State v. Paradise*,[8] in which the court had held that the five-year statute of limitations applied to murders committed in 1975 and that the legislature's repeal of the statute of limitations for murder in 1976 applied only prospectively.[9] In *Skakel* the state argued that the court should overrule *Paradise* and repudiate its underlying premise that a change in a statute of limitation is presumed not to apply retroactively. The *Skakel* court agreed with the state:

> Upon reconsideration, we are persuaded that *Paradise* was wrongly decided. In particular, we conclude that we were misguided in establishing a presumption that, in the absence of a contrary indication of legislative intent, an amendment to a criminal statute of limitations is not to be applied retroactively. . . . [W]e are convinced that, with respect to those offenses for which the preamendment limitation period has not expired, it is far more likely that the legislature intended for the amended limitation period to apply to those offenses. In view of the fact that the five year limitation period of the pre-1976 amendment version of § 54-193 had not expired with respect to the October, 1975 murder of the victim when the 1976 amendment to that statutory provision became effective, we conclude that P.A. 76-35, § 1, is the operative statute of limitations for purposes of this case.[10]

The precedential value of the statute of limitations holding in *Skakel* might, on first consideration, appear limited since few persons in the future are apt to be prosecuted for a murder committed prior to the 1976 amendment of the statute of limitations that is now understood to have retroactive, not just prospective, application. But the *Skakel* court announced an important, broader rule of statutory interpretation:

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[8] State v. Paradise, 189 Conn. 346, 350 (1983).

[9] The trial court in *Skakel* had denied the defendant's motion to dismiss on grounds not adopted by the Supreme Court, finding *Paradise* had been already been overruled implicitly by later decisions of the Supreme Court, State v. Ellis, 197 Conn. 436, 460 (1985), and State v. Golino, 201 Conn. 435, 438-39 (1986). *See* 276 Conn. at 664-65 n.30. While the *Skakel* court reached the same result as the trial court, it did not adopt the trial court's view that *Paradise* had already been overruled by *Ellis* and *Golino*. 276 Conn. at 665 n.30. Justice Katz, concurring, did employ the trial court's reasoning. *Id.* at 770.

[10] 276 Conn. at 666-67. *See also, id.* at 693.

changes in statutes of limitations laws are to be understood as "presumptively retroactive"[11] as long as the limitations period has not expired before the statutory change.[12] The court noted that "[i]n *Paradise*, we did not explain our conclusion that §54-193 is penal in nature, and therefore that that provision must be strictly construed."[13] The *Skakel* court held that the rule of strict construction of criminal statutes does not apply to statutes of limitation because a "statutory limitation period has nothing to do with the scope or reach of the substantive offense"[14] and "because criminal statutes of limitation do not define criminal conduct, establish the punishment to be imposed or otherwise burden defendants, such statutes are not truly penal at all."[15]

The *Skakel* court stated that its decision resolved "a tension between our mode of analysis in *Paradise* and the approach to the construction of statutes in the criminal realm that we have employed more recently" under which "provisions that, although a part of our system of criminal laws, nevertheless carry a presumption of retroactivity."[16] In a concurring opinion, Justice Katz agreed with the majority holding that *Paradise* should be reversed, but on alternate grounds.[17] In her view, *Paradise* was miscast as a retroactivity case in the first place.[18] Reviewing the history of mur-

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[11] *Id.* at 674.

[12] *Id.* at 681-83 (*Ex Post Facto* prohibition bars retroactive application of new statute of limitations to already time-barred prosecution; *id.* at 681 n. 45, citing, inter alia, Stogner v. California, 539 U.S. 607, 632-33 (2003)).

[13] *Id.* at 676.

[14] *Id.* at 675.

[15] *Id.* at 676.

[16] *Id.* at 689-90. The presumption of retroactivity may be overcome by express statutory language. *See* State v. George J., 280 Conn. 551, 561-62 n. 6 (2006) (citing *Skakel*). Consistent with *Skakel*, the rule of lenity played no role in the court's interpretation of the statute of limitations issue in *George J.*, where the court decided that DCF notification of police on behalf of a child in its custody was not "victim notification" so as to trigger the applicable five-year statute of limitations, which dates from the time that the victim notifies the police. Critical to its calculation of the five-year bar, the court held that the statute was not triggered until four days after DCF notification when the actual victim met with police to be interviewed. *Id.* at 664-71. The court acknowledged that the word "victim" in other legal contexts includes a victim's parents or legal representative, but the court held that such a broad gloss on the term would defeat the legislative purpose of the statute of limitations governing prosecutions for sex crimes. *Id.* at 569-70.

[17] *Id.* at 770-82.

[18] *Id.* at 771-72.

der under the common law and the Penal Code, Katz found an unexamined premise in *Paradise* that was false: "the crime of murder was not subject to the statute of limitations in effect in 1975, and, indeed, there never has been a limitations period on the prosecution of murder."[19]

II. UNDERDEVELOPED RECORD DOES NOT SUPPORT *GOLDING* REVIEW: *STATE V. BRUNETTI (II)*

In *State v. Brunetti ("Brunetti (II)"*[20]), an *en banc* panel of the Supreme Court issued a 4-3 decision affirming the defendant's conviction of murder. *Brunetti (II)* superseded the court's 3-2 decision issued in 2005 that had reversed the defendant's murder conviction (*"Brunetti (I)"*).[21] The changed outcome reflects the *Brunetti (II)* majority's conclusion that the search and seizure argument upon which the defendant had prevailed in *Brunetti (I)* could not be reached on the merits because the trial record was not adequate to support review under the doctrine of *State v. Golding*,[22] which established the test that governs appellate review of unpreserved constitutional claims.[23]

In *Brunetti (I)* a plurality of the court had held that a "consent search" of the defendant's home which he shared with his parents had violated the state constitution because the police obtained consent from the defendant's father but were denied consent by the defendant's mother.[24] *Brunetti (I)* was

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[19] *Id.* at 770.

[20] 279 Conn. 39 (2006), *cert. denied*, Brunetti v. Connecticut, 2007 U.S. LEXIS 2164 (U.S. Feb. 20, 2007).

[21] State v. Brunetti, 276 Conn. 40 (2005). *"Brunetti (I)"* was featured in last year's Criminal Law Year in Review. T.H. Everett, *Developments in Connecticut Criminal Law: 2005*, 80 CONN. BAR J. 185, 186-90 (2005).

[22] State v. Golding, 213 Conn. 233, 239-40 (1989).

[23] The *Golding* court announced a four-part test: "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original.) State v. Golding, 213 Conn. at 239-40. *See Brunetti (II)*, 279 Conn. at 42 n.1.

[24] *Brunetti (I)* also held that the defendant's motion to suppress his statements to police as fruits of the "consent" search of his home should have been granted. The

especially interesting because Justice Katz concurred in the result on federal constitutional grounds that presaged the United States Supreme Court's subsequent decision in *Georgia v. Randolph*.[25] In *Brunetti (I)*, Justice Palmer had strongly dissented,[26] arguing that the record was inadequate to support review under *State v. Golding*.

In *Brunetti (II)*, Justice Palmer's analysis prevailed and the court held that the record for review was inadequate to sustain review under *Golding*. The court described the tension between the need to raise a claim at trial so that it may be addressed then and the need to avail defendants of a remedy on appeal for constitutional error that is evident in the record.[27] The *Brunetti (II)* court affirmed the vitality of *Golding* review, but emphasized that an adequate record is the *sine qua non* of such appellate review.[28]

The majority in *Brunetti (II)* held that it was inappropriate to use the court's appellate authority to review the defendant's gloss on consent search doctrine for two reasons: (1) the record did not clearly establish whether the defendant's mother had in fact disagreed with her husband's decision to consent to a police search of their home; and (2) the defendant in the trial court had not claimed that a husband's consent to search was legally deficient in the absence of express concurrence from his wife when present. The court found

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defendant was in police custody when the consent search was executed. The state conceded that the police lacked probable cause to arrest the defendant until after the search of his home produced physical evidence of the murder, with which the police confronted the defendant before interrogating him. 276 Conn. at 65, 83-86.

25 Georgia v. Randolph, 126 S.Ct. 1515 (2006). *See Developments in Connecticut Criminal Law: 2005*, 80 CONN. B. J. at 187-90 (discussing Katz concurrence and *Randolph*).

26 276 Conn. at 86-143 (Palmer, J., dissenting).

27 Justice Palmer wrote: "*Golding* is a narrow exception to the general rule that an appellate court will not entertain a claim that has not been raised in the trial court. The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party. Nevertheless, because constitutional claims implicate fundamental rights, it also would be unfair automatically and categorically to bar a defendant from raising a meritorious constitutional claim that warrants a new trial solely because the defendant failed to identify the violation at trial. *Golding* strikes an appropriate balance between these competing interests: the defendant may raise such a constitutional claim on appeal, and the appellate tribunal will review it, *but only if the trial court record is adequate for appellate review*." (Citation omitted; emphasis added.). 279 Conn. at 55.

28 *Id.* at 55 n.27.

that the defendant's mother's refusal to sign a consent to search form did not necessarily mean that she objected to the police search. The undeveloped trial record made it impossible on appeal to disambiguate the meaning of her conduct:

> Because the mother's actions relating to the consent to search were not at issue at the suppression hearing—the defendant had claimed only that his father had not given valid consent to search and, in fact, expressly had indicated that the mother's consent was *not* necessary—the state had no reason to present any evidence regarding the mother's consent or lack thereof, and consequently, it did not do so. As a result, we simply do not know any of the other circumstances surrounding the mother's refusal to sign the consent to search form.[29]

The *Brunetti II* court held that the trial court's "passing observation that the defendant's mother 'had declined to consent to [the] search'" was not a sustainable finding because it "goes well beyond the record" in that the mother's actions had not been in issue at the suppression hearing.[30]

Now writing in dissent, Justice Katz, joined by Chief Justice Sullivan and Justice Vertefeuille, deemed the record adequate both to support *Golding* review[31] and to require reversal based on the Supreme Court's holding in *Georgia v. Randolph*.[32] In dicta, Justice Palmer for the majority argued that *Randolph* was distinguishable on the merits.[33]

III. BAD HOUSEKEEPING ALONE NOT A CRIMINAL OFFENSE: *STATE V. SCRUGGS*

The Supreme Court again this past year decided an important case involving prosecution under the "situation portion"[34]

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[29] (Emphasis in original). *Id.* at 57-58.

[30] *Id.* at 62-63 & n. 34.

[31] 279 Conn. at 87 n.1 (incorporating by reference the reasons given in Katz's concurring opinion in *Brunetti (I)*, 276 Conn. at 68-74).

[32] *Id.* at 87-89.

[33] Justice Palmer wrote: "In *Randolph*, however, the United States Supreme Court merely held that, for purposes of the federal constitution, 'a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable *as to him* on the basis of consent given to the police by another resident.' (Emphasis added.) *Id.*, 1526. Indeed, *Randolph expressly declined* to decide the very question raised by this appeal, namely, 'the constitutionality of . . . a search as to [an absent] *third tenant* against whom the government wishes to use evidence seized after a search with consent from one co-tenant subject to the contemporaneous objection of another.' (Emphasis added.) *Id., 1526-27 n.8.*" *Brunetti (II)*, 279 Conn. at 64 n.37.

of the risk of injury to a child statute, General Statutes Section 53-21(a)(1). In *State v. Scruggs*, the court reversed the state's conviction of a mother for maintaining a "cluttered and unclean residence"[35] that imperiled the mental health of her 12-year-old son.[36] The son committed suicide a week after the Department of Children and Families, which had recently inspected the conditions at his home, closed out its investigation of the troubled young boy's situation at school and home.

The trial court rejected the defendant's post-verdict motion for judgment of acquittal, noting that there had been sufficient evidence of unhealthy living conditions at home and that a lay jury had no need for expert testimony to determine the risk to the decedent's mental health created by his living in such conditions.[37] On appeal the defendant claimed that Section 53-21(a)(1) was unconstitutionally vague as applied to her because the statute "provides no notice that poor housekeeping may be a criminal offense" and she also claimed that the evidence was insufficient to sustain the conviction in the absence of expert testimony to provide the jury with "a basis upon which to conclude that the conditions in her apartment were likely to cause a mental health injury to a child."[38] Chief

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[34] *See* State v. Padua, 273 Conn. 138, 148 (2005) (danger of child ingesting marijuana kept in home); State v. Smith, 273 Conn. 204 (2005) (rock cocaine in child's home); T.H. Everett, *Developments in Criminal Law: 2005*, 80 CONN. B.J. at 210-11 (discussing *Padua* and *Smith*).

[35] The evidence showed that the family apartment was a "a home with a foul and offensive odor" that was "very messy and cluttered" and had "only an eighteen inch path between piles of debris from the front door to the kitchen" and provided "no clear surface in the kitchen to prepare or eat food." *Id.* at 703-06.

[36] *Id.* at 700-01.

[37] The trial court wrote: "'There were few places where Daniel could walk without stepping on clothing or debris. [The] [b]athtub and toilet were filthy, and the bathroom provided no privacy for cleaning himself. He went to school smelling bad. The only refuge for this troubled child, beset by bullies at school and fearful at home, was a closet. Even there, he felt unsafe. This is not a case about a messy house. No law of which this court is aware regulates the frequency of vacuuming or prescribes specific housekeeping practices. The law, however, does seek to protect children . . . . The evidence here went far beyond messy or disorderly living conditions. The evidence showed extreme clutter and pervasive odor throughout the home, unsanitary bathroom facilities, and a child whose obvious emotional distress manifested itself in severe hygiene problems. *It did not take an expert for this jury to conclude that the home living environment was likely to injure the mental, psychological, and emotional health of this troubled and fragile child.*'" (Emphasis added). *Id.* at 707.

[38] *Id.* at 708.

Justice Sullivan's opinion for a unanimous court upheld the defendant's claims, calling them "inextricably intertwined."[39]

At trial the state took the position that the prosecution for risk of injury was not based on the precarious mental health of the defendant's son[40] but rather on the objective proposition that living conditions in the defendant's apartment would injure *any child*,[41] not just one whose mental health was precarious.[42] Reasoning that it would be trial by "ambuscade" to permit the state on appeal to deviate from the objective theory of statutory liability upon which it had proceeded at trial, the Supreme Court chose to "apply an objective standard in addressing the defendant's [appellate] claim that she had no notice that the conditions in her apartment fell within the scope of §53-21(a)(1)."[43] Employing that objective standard,[44] the court declared the statute "unconstitutionally vague as applied to the defendant's conduct."[45] The court noted that "experts in child safety who had knowledge of the

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[39] *Id.* at 708.

[40] In denying the defendant's motion for judgment of acquittal, the trial court ruled that the jury *could* rely on evidence of "'the precarious emotional state of the specific child actually living in these conditions in determining whether the conditions were likely to injury his health.'" *Id.* at 718. The Supreme Court noted that the trial court "did not explain . . . why the state was not bound by its representation to the court that the theory under which it was prosecuting the defendant was that the living conditions in the defendant's apartment posed a risk to the mental health of *any* child." (Emphasis in original). *Id.*

[41] *Id.* at 717.

[42] Based on the state's representations at trial, the Supreme Court concluded: "the defendant was entitled to believe that, if the state did not meet its burden of proving that theory beyond a reasonable doubt, she could not be convicted, regardless of whether the evidence would have supported a claim that Daniel's mental health was endangered because he was particularly fragile. Thus, she was not on notice that there was any need to raise doubts about that issue during trial." *Id.* at 718.

[43] *Id.* at 719.

[44] The court wrote: "the state was obligated to prove beyond a reasonable doubt that the defendant knew or should have known that the conditions would constitute a risk of injury to the mental health of *any* child. Although the defendant reasonably could have been aware that the conditions were not optimal, we are not persuaded that the nature and severity of the risk were such that the defendant reasonably could not have believed that they were within the acceptable range." *Id.* at 721.

[45] *Id.* at 719. The court wrote: "The state has pointed to no statutes, published or unpublished court opinions in this state or from other jurisdictions, newspaper reports, television programs or other public information that would support a conclusion that the defendant should have known that the conditions in her apartment posed an unlawful risk to the mental health of a child. . . . We recognize that there may be generally accepted housekeeping norms and that it may be common knowledge that, all things being equal, a clean and orderly home is preferable to a dirty and cluttered home. The same could be said of any number of conditions and actions

conditions in the defendant's home during the relevant period apparently had concluded that they were *not* so deplorable as to pose an immediate threat to Daniel's mental health."[46] Declaring that DCF's own failure to protect the child was not itself conclusive evidence that the living conditions in the apartment posed no risk to a child's mental health, it did establish "that the conditions in the apartment did not pose such an obvious risk that it would be within the knowledge of an ordinary person."[47] Evidence the child actually involved had committed suicide was before the jury, but the court concluded "that evidence was not competent to prove that such harm was foreseeable."[48] The court found that the defendant in *Scruggs* was not on notice that her conduct was criminal and distinguished numerous other cases that upheld risk of injury convictions based on conduct that was itself criminal:

> When a defendant knows that he is engaged in conduct that is sufficiently dangerous to be criminalized, the defendant is on notice that exposure to that conduct could injure a child's mental health. In the present case, the state concedes that being messy is not, in and of itself, unlawful, and points to no objective standards for determining the point at which housekeeping becomes so poor that an ordinary person should know that it poses an unacceptable risk to the mental health of a child.[49]

In *Scruggs*, Justice Borden concurred with the majority opinion but wrote separately to emphasize several points: that the "trial court should have applied the objective stan-

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that affect a child's well-being. . . . Not *all* conduct that poses a risk to the mental or physical health of a child is unlawful. Rather, there is an acceptable range of risk." (Emphasis in original). *Id.* at 719-20. Later the court declared: "the state concedes that being messy is not, in and of itself, unlawful, and points to no objective standards for determining the point at which housekeeping becomes so poor that an ordinary person should know that it poses an unacceptable risk to the mental health of a child." *Id.* at 723-24.

[46] *Id.* at 721.

[47] *Id.* at 721.

[48] *Id.* at 722. The court reasoned that "actual effects are not necessarily foreseeable effects." *Id.* Calling "the application of hindsight to be particularly troubling in this context[,]" the court declared: "the state cannot decline to prosecute persons who maintain such conditions because it believes that the risk to children either is within an acceptable range or is speculative and then, only when catastrophic harm actually occurs, use that as evidence that the risk was unacceptable and foreseeable." *Id.* at 722 n.10.

[49] *Id.* at 723-24.

the case presented "a close call" on constitutional notice; and that DCF's recommendation to close its investigation, even if an error by the department, "deprived the defendant of fair notice" that her housekeeping exposed her to criminal liability and "entitled her to rely on the department's implicit conclusion . . . that her home was within an acceptable range of cleanliness."[50]

IV. SETTING THE BOUNDS FOR EVIDENTIARY REVIEW UNDER THE CODE: *STATE V. SAWYER*

In *State v. Sawyer*,[51] the Supreme Court by a 6-1 *en banc* decision reversed the Appellate Court and ordered a new trial for the defendant on charges of first degree sexual assault, third degree sexual assault (2 counts), first degree burglary, threatening and first degree reckless endangerment. The case is interesting both for how the majority interpreted and applied the Connecticut Code of Evidence and because the majority opinion did not directly confront and resolve issues raised in the case concerning judicial rule-making and the court's pre-Code common-law authority to change Connecticut evidence law. After initial argument and before reargument en banc, the *Sawyer* court ordered supplemental briefing of 4 issues: (1) whether uncharged misconduct evidence offered under the common scheme exception may also be used to prove identity; (2) whether the court should revisit its pre-Code holdings that viewed uncharged prior sexual misconduct evidence "more liberally" than other misconduct evidence; (3) whether the adoption of the Code removed or left intact the court's common-law authority to make rules of evidence; and (4) what standard reviewing courts should use to determine whether an erroneous evidentiary ruling is harmless.[52] The court resolved supplemental issues (1) and (4), but the majority opinion dealt with issues (2) and (3) only

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[50] *Id.* at 726-28.

[51] 279 Conn. 331 (2006).

[52] The four supplemental issues were: "(1) 'Should this court determine that, in sexual assault cases, prior misconduct evidence admitted under the common scheme exception is also admissible to prove the identity of the defendant as the perpetrator of the assault on the victim?' (2) 'Should this court reconsider its holdings that, in sexual assault cases, prior sexual misconduct is viewed more liberally than other

by way of dicta in a tantalizing footnote.[53]

In the majority opinion written by Justice Zarella, the court decided that uncharged misconduct evidence admitted to prove common scheme may not do double duty to prove identity. The court concluded also that prior holdings of the court viewing the admission of sexual misconduct evidence "more liberally than other types of misconduct should not be disturbed" and declared it "unnecessary to address" whether the court retains its pre-Code common-law authority to change the rules of evidence. Finally, the court settled on a single standard for determining whether evidentiary error is harmless. Both Justice Borden and Justice Katz, in separate opinions, faulted the majority for not reaching the third supplemental issue addressing the measure of constraint placed by the Code on courts in adjudicating evidentiary issues at trial and on appeal. Both took the position that *changes* to the existing evidence law may only be effected by the judges of the Superior Court in an exercise of their "rule making" function and with the guidance of its evidence code oversight committee.[54] Both took issue with the court's failure to acknowledge that the court's common-law adjudicative

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types of prior misconduct?' (3) 'To what extent, if any, is this court constrained by the Code of Evidence from answering either question 1 or 2 by changing our existing law?' 4) 'What standards should this court adopt for "harmless error" review of erroneous evidentiary rulings?'" (Citations omitted.) *Sawyer*, 279 Conn. at 331 n.1.

[53] Footnote 1 in *Sawyer* is appended to the listing of justices at the outset of the printed decision, not to the text of the majority opinion. The note states the that it is unnecessary to decide the third issue, whether the court has the authority to change evidence law codified by the Code of Evidence, but adds: "[W]e acknowledge that, since 2000, the year in which the Connecticut Code of Evidence was adopted, the authority to change the rules of evidence lies with the judges of the Superior Court in the discharge of their rule-making function. Of course, prior to that date, changes to substantive evidentiary rules were accomplished by our courts in the exercise of their common-law authority. *To the extent that our evidentiary rules may be deemed to implicate substantive rights, we believe that it is unclear whether those rules properly are the subject of judicial rule making rather than the subject of common-law adjudication.* Because that question raises an issue on which we did not request briefing by the parties, however, we *leave it for another day*." (Emphasis added.) *Sawyer*, 279 Conn. at 331 n.1. Justice Katz and Justice Borden both took issue with the majority's distinction between evidentiary rules subject to judicial rule-making and evidentiary rules implicating "substantive rights" that may still be subject of common-law adjudication. *Id.* at 364-66 (Katz, J.), 367-68 (Borden, J.).

[54] *Id.* at 362-66 (Katz, J., concurring), 366-93 (Borden, J., concurring and dissenting).

authority to change evidence law was wholly transferred to the rule-making authority of the judges of the Superior Court when the Code was adopted.[55]

The two issues sidestepped by the full court in Sawyer are before the court again this year, in *State v. DeJesus*,[56] a case on certification from the Appellate Court presenting the issue: "'Does this court, or any court, have the authority in light of the Connecticut Code of Evidence, to reconsider the rule that the introductions [sic] of prior sexual misconduct of the defendant in sexual assault cases, is viewed under a relaxed standard?'"[57]

The *Sawyer* court confronted and settled the last supplemental issue upon which it had ordered special briefing: what is the standard for determining whether evidentiary error is harmless. Over decades the court had articulated two different standards, a "more probable than not" test and a "substantial prejudice" test.[58] The *Sawyer* court wrote: "We conclude that there is no reason to perpetuate two competing formula-

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[55] Justice Katz in dicta declared: "were I free to do so, I would favor reconsidering our holding in State v. Kulmac, 230 Conn. 43, 60-61 (1994), wherein we held that, in sexual assault cases, prior misconduct evidence may be viewed more liberally." *Sawyer*, 279 Conn. at 362. Justice Katz noted, "I would rely on the reasons I articulated in my dissents in State v. Kulmac, supra, 230 Conn. 86-88, and State v. Merriam, 264 Conn. 617, 679-87 (2003), for rejecting a more liberal standard of admissibility." *Id.* at n.1. Justice Borden noted that he disagreed with "Justice Katz's suggestion that, were we free to do so, we should reconsider our holding in State v. Kulmac, 230 Conn. 43, 60 (1994)." *Sawyer*, 279 Conn. at 367 n.1.

[56] 91 Conn. App. 47 (2005), *cert. granted*, 279 Conn. 912 (2006).

[57] 279 Conn. 912 (2006). In another Appellate Court case also now before the Supreme Court, the Appellate Court wrote: "While we acknowledge the seemingly contradictory nature of [*State v.*] *Roswell*[, 6 Conn. 446 (1827)] and § 8-3, we know of no authority indicating that a decision of the Connecticut Supreme Court may be overruled by the promulgation of rules of evidence. Rather, the overruling of *Roswell* remains exclusively the province of that court." *John M.*, 94 Conn. App. 667, 672 n.5, *cert. granted*, 278 Conn. 916 (2006).

[58] The court phrased one standard: "It is well established that a defendant must demonstrate harmful error by showing that 'it is more probable than not' that the erroneous evidentiary ruling affected the result; or that the erroneous evidentiary ruling 'would have been likely' to affect the result." (Citations omitted) *Id.* at 353. Then the court set out the other standard: "This court also has declared that erroneous evidentiary rulings will be overturned on appeal only upon a showing by the defendant of substantial prejudice or injustice. In the context of erroneous evidentiary rulings, we have likened 'substantial prejudice' to error 'so prejudicial as to undermine confidence in the fairness of the verdict.'" (Citations omitted) 279 Conn. at 353.

tions of the standard. Accordingly, we now establish a single workable standard for harmless error review of erroneous evidentiary rulings in the context of criminal cases."[59] After concluding that there is not a uniform standard either in the federal system or among state courts, the *Sawyer* court adopted a standard derived from the United States Supreme Court decision in *Kotteakos v. United States*.[60] The court declared:

> [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. This is consistent with the outcome determinative approach followed by the overwhelming majority of state and federal courts because it expressly requires the reviewing court to consider the effect of the erroneous ruling on the jury's decision.
>
> We also adopt the standard expressed in *Kotteakos* and followed by the Second Circuit, namely, "fair assurance"as the appropriate level of confidence for assessing whether the erroneous ruling substantially affected the verdict. Accordingly, we conclude that a nonconstitutional error is harmless when "an appellate court has a fair assurance that the error did not substantially affect the verdict."[61]

In *Sawyer* itself, the majority applied the new standard to the erroneous admission of uncharged misconduct evidence and found it required reversal.[62] In *State v.*

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[59] *Id.* at 354.

[60] The *Sawyer* court wrote: "In *Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)*, the United States Supreme Court determined that '[i]f, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.' (Citation omitted.) *Id., 764-65.*" *Sawyer,* 279 Conn. at 355.

[61] (Citations omitted.) *Sawyer*, 279 Conn. at 357-58.

[62] Justice Borden dissented from the majority's disposition of the case but added a nuanced justification for the new standard: "I disagree with the majority's application of the standard to the facts of the present case, and I conclude that any error by the trial court was harmless. I write further to underscore why I think we rightly abandon the prior standard, which required the defendant to establish that it was more probable than not that the error resulted in the guilty verdict. The 'more probable than not' standard suggests that if our appellate minds are in equipoise on the question of the harm caused by a trial error, the error is deemed to be harmless and the defendant has not carried his burden of establishing harm. Although it is, in

Calabrese,[63] the court explained what factors are relevant in applying the "fair assurance" test[64] and ordered a new trial where the trial court failed to admit in evidence a tape of the complainant threatening the defendant.[65]

Also in *State v. Calabrese*, the Supreme Court sent an important signal concerning the use of the Code of Evidence in Connecticut trial and appellate practice. In *Calabrese*, the state argued that trial counsel's failure to cite the Code barred review of his claim on appeal that the trial court abused its discretion in disallowing evidence admissible under Section 8-8 of the Code to impeach a hearsay declarant. The Supreme Court ruled that review under Section 8-8 was appropriate in the case but took pains to support that conclusion, explaining that the "trial court's discussion of this issue consumed more than fourteen pages of transcript" and "the defendant clearly argued the policy and substance underlying § 8-8 at trial, and gave the trial court ample opportunity to accept that argument."[66] Practitioners should heed the implied warning in *Calabrese*: it might no longer be sufficient, as it was in the pre-Code era, to make evidentiary arguments based on case authority without making direct reference to applicable provisions in the Code of Evidence. Preservation of evidentiary error for review in the new era should include citation to any applicable rules and commentary in Code because it, not decisional law, controls evidentiary rulings of trial judges and review of those rulings on appeal.

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my view, a close question, I am persuaded that, if the defendant successfully brings our minds to that point of equipoise, then we do not have a fair assurance that the error did not substantially affect the verdict, and the defendant should be granted a new trial. In other words, whether the error was serious enough to require a new trial should not, in my view, rest on such a finely honed knife's edge." *Id.* at 392-93.

63 279 Conn. 393 (2006).

64 *Id.* at 412 ("In reviewing the case, we consider a number of factors, namely, the overall strength of the state's case, the impact of the improperly admitted or excluded evidence on the trier of fact, whether the proffered evidence was cumulative, and the presence of other evidence corroborating or contradicting the point for which the evidence was offered.").

65 *Id.* at 411-13.

66 279 Conn. at 392-93 n.18 ("Although it would have been preferable for the defendant to have cited § 8-8 to the trial court, the defendant's objection, 'while not the most artful, sufficiently alerted both the trial court and the [state] to the precise nature of the objection.'" (Citations omitted.)).

V. THE CONFRONTATION CLAUSE AFTER *CRAWFORD*: *STATE V. KIRBY* AND OTHER CASES

In 2006 the Connecticut Supreme and Appellate Courts decided many cases involving challenges to the admissibility of hearsay based on the United States Supreme Court's 2004 holding in *Crawford v. Washington*.[67] In *Crawford* the court uprooted confrontation clause doctrine and announced a new paradigm for confrontation analysis:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does [*Ohio v.*] *Roberts*, and as would an approach that exempted such statements from *Confrontation Clause* scrutiny altogether. Where testimonial evidence is at issue, however, the *Sixth Amendment* demands what the common law required: unavailability and a prior opportunity for cross-examination. *We leave for another day any effort to spell out a comprehensive definition of "testimonial."* Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the *Confrontation Clause* was directed.[68]

In his majority opinion in *Crawford*, Justice Scalia wrote: "We acknowledge the Chief Justice's objection that our refusal to articulate a comprehensive definition in this case will cause *interim uncertainty*."[69] The precise contours of the term "testimonial" have been the subject of myriad state and federal court decisions in the 3 years since *Crawford* was decided.[70] The Supreme Court in *Davis v. Washington* and other courts interpreting *Crawford* have indicated that the confrontation clause applies only to evidence that qualifies as testimonial and that the confrontation clause is not implicated by the admission of nontestimonial hearsay.[71] The line

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[67] 541 U.S. 36 (2004).

[68] (Emphasis added.) 541 U.S. at 68.

[69] (Emphasis added.) *Id.* at 68 n.10. Of the "interim uncertainty" Justice Scalia remarked: "But it can hardly be any worse than the status quo." *Id.*

[70] According to Shepards as of February 6, 2007, *Crawford* had been cited in 1474 state and federal reported cases.

[71] *See* Davis v. Washington, 126 S.Ct. 2266, 2273-74 (2006); United States v. Feliz, 467 F.3d 227, 231-32, 2006 U.S. App. LEXIS 26604 (2d Cir. 2006) (autopsy reports that qualify under the business records exception necessarily have not been prepared in anticipation of litigation, thus are not testimonial and do not implicate the confrontation clause).

demarcating testimonial hearsay whose admissibility is governed by the confrontation clause from nontestimonial hearsay whose admissibility is governed by the rules of evidence has now been starkly delineated. Nonetheless, some courts have not limited constitutional review under the confrontation clause to testimonial hearsay.[72]

The Connecticut Supreme Court in *State v. Kirby*[73] addressed "whether various hearsay statements made by the deceased complainant to a police dispatcher, a responding police officer, and an emergency medical technician were 'testimonial' and, therefore, inadmissible as violative of the confrontation guarantee of the sixth amendment to the United States constitution as explained by *Crawford v. Washington*."[74] Justice Norcott wrote the unanimous opinion of the court in *Kirby*, first holding that the challenged hearsay statements had all been admissible under exceptions to the hearsay rule set forth in the Connecticut Code of Evidence[75] and, second, holding that the admission of the statements to the dispatcher and the police officer had violated *Crawford*.[76]

The court held that the kidnapping victim's statements to

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[72] For example, in State v. Galarza, 97 Conn. App. 444, 449, *cert. denied*, 280 Conn. 936 (2006), the Appellate Court applied the constitutional harmless error rule to the erroneous admission of hearsay—statements of a murder victim made to another lay person several hours before he was killed: "Assuming without deciding that the defendant was denied the right to cross-examine the witness, we conclude, nonetheless, that the admission of the statement was harmless beyond a reasonable doubt because there was sufficient other circumstantial evidence from which the jury reasonably could have concluded beyond a reasonable doubt that the defendant was responsible for the death of the victims." *Id.* at 449. Concurring in the result, Judge Schaller emphasized that the admission of the hearsay evidence had violated the Connecticut Code of Evidence. *Id.* at 474-78.

[73] 280 Conn. 361 (2006).

[74] *Id.* at 363-64.

[75] At oral argument, which this author attended, counsel for Kirby urged the court to decide the case on evidentiary grounds, without reaching his constitutional claims under *Crawford*. By contrast, in a second case argued the same morning in the Supreme Court, defense counsel urged the court to reach out and decide his *Crawford* claims first. *See* State v. Calabrese, 279 Conn. 393, 413 (2006) (reversed without reaching *Crawford* claims, viewed not "likely to arise on remand").

[76] The court held that the challenged statements to the police dispatcher and investigating officer were admissible under the spontaneous utterance exception to the hearsay rule, codified in Connecticut Code of Evidence § 8-3(2). *Id.* at 376-77. The defendant did not challenge the trial court's admission of the declarant's statement to the medical technician under the medical treatment exception to the hearsay rule. *Id.* at 372 n.11 (citing Conn. Code Evid. §8-3 (5)).

the 911 operator and to the police constituted "testimonial" statements that were inadmissible in the absence of an opportunity to cross-examine the complainant. The court made use of the "primary purpose" test[77] set forth by the United States Supreme Court in *Davis v. Washington.*[78] *Davis* addressed "the applicability of *Crawford* to more informal statements to police dispatchers in the context of 911 calls, and to police officers on the scene of a crime."[79] The *Kirby* court held that the "primary purpose" of the complainant's phone call with a police dispatcher was "to investigate and apprehend a suspect from a prior crime, rather than to solve an ongoing emergency or crime in progress at the time of the call."[80] Therefore the statement was testimonial. Similarly, the statement to a police officer was testimonial because it was part of a police inquiry into what had already happened, not what was still happening.[81] Thus the admission of each statement violated the confrontation clause, necessitating a new trial.

The *Kirby* court also held that the complainant's statements to an emergency medical technician who attended to her were *not* "testimonial" for confrontation purposes because the statements were part of the medical technician's "immediate response to and medical assessment of the complainant at the scene."[82] The court applied the "third formulation of testimonial statements under *Crawford*, namely, 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . .'"[83] In deciding that the statements made during a medical examination were not testimonial, the court declared that "[t]he

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[77] *Kirby*, 280 Conn. at 381 ("'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.'" (quoting Davis v. Washington, 126 S.Ct. 2266, 2273-74 (2006))).

[78] 126 S.Ct. 2266 (2006).

[79] *Kirby*, 280 Conn. at 381

[80] *Id.* at 383-84.

[81] *Id.* at 385-86.

[82] *Id.* at 388.

[83] *Id.* at 389 (quoting Crawford v. Washington, 541 U.S. at 52).

key to the inquiry is whether the examination and questioning were for a 'diagnostic purpose' and whether the 'statement was the by-product of substantive medical activity.'"[84]

In *State v. Slater*,[85] the Appellate Court reached the same conclusion as *Kirby* in rejecting a *Crawford* challenge to a complainant's statements to medical personnel in an emergency room after she had been sexually assaulted at knifepoint.[86] The more interesting issue raised in *Slater* was whether *Crawford* applies at all to excited utterances made to civilian bystanders.[87] Noting that one gloss on *Crawford* is that such evidence admitted under the spontaneous utterance exception never violates the confrontation clause, the *Slater* court stated that it would "not rest our analysis on so narrow a filament."[88] Instead the court carefully analyzed "whether the victim's spontaneous utterances in the present case are testimonial, as that term is used in *Crawford*" and held that they were not testimonial.[89] Similarly, in *State v. Miller*,[90] the Appellate Court found a statement made by one layperson to another was not testimonial hearsay under *Crawford*.[91] The *Miller* opinion provides a helpful primer on the characteristics of testimonial hearsay[92] and a trove of federal and state case law in support of its conclusion:

> The statement at issue in the present case does not qualify as either testimony at a preliminary hearing, testimony before a

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[84] *Id.* at 391 (quoting In re T.T, 351 Ill. App. 3d 976, 992-93, 815 N.E.2d 789 (2004)).

[85] State v. Slater, 98 Conn. App. 288, 301-07 (2006).

[86] The court noted: "Her statements were made in an emergency room on the heels of the hurt received and were made for the purpose of obtaining medical treatment." *Id.* at 307.

[87] *Id.* at 294-301.

[88] *Id.* at 297.

[89] *Id.* at 299-300 (important under Davis v. Washington, the statement "lacked any degree of 'formality'" and also it did not fit into "'the core class' of testimonial statements identified by *Crawford*").

[90] 95 Conn. App. 362, *cert. denied*, 279 Conn. 907 (2006).

[91] The court also reviewed the statement under the pre-*Crawford* test for establishing adequate indicia of reliability to satisfy the confrontation clause. *Id.* at 385-86. *Miller* was decided in early 2006 before the Supreme Court decision in Davis v. Washington indicated that the confrontation clause applies only to testimonial evidence.

[92] In an aside on the notion that admissible hearsay is not "testimonial" for confrontation purposes, the *Miller* court states: "Although it seems counterintuitive to describe something that in most instances will be admitted as testimony in a court of law as 'nontestimonial,' we use that established terminology." *Id.* at 381 n.11.

> grand jury or testimony at a former trial, nor was it obtained via police interrogation. Rather, it was the sort of remark to an acquaintance that the *Crawford* court proclaimed to be nontestimonial. The courts of this land, both federal and state, are in agreement that statements made to friends in unofficial settings do not constitute testimonial hearsay.[93]

There were a number of other cases raising confrontation issues. In *State v. Gregory C.*,[94] the Appellate Court reversed the defendant's conviction of sexual assault in a spousal relationship at a bench trial at which the trial court barred the defendant from cross-examining the defendant's spouse (who by time of trial claimed that the intercourse had been consensual) about the couple's sexual history. The defendant claimed that evidence of their "sexual 'role-playing'" was relevant to whether the defendant used force on the night of the incident.[95] The Appellate Court held that the defendant's constitutional right to confrontation was violated, necessitating a new trial because the state could not establish "that the exclusion of evidence was harmless beyond a reasonable doubt."[96]

In *State v. Skakel*, the Supreme Court held that the confrontation clause was not violated by admission at the defendant's murder trial of former testimony of a witness at the probable cause hearing. The witness, now deceased, was unavailable for cross-examination in front of the jury.[97] Similarly, in *State v. Estrella*, the Supreme Court found that the confrontation guarantee was satisfied where testimony of

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[93] (Citations omitted) 95 Conn. App. at 384.

[94] 94 Conn. App. 759 (2006).

[95] *Id.* at 764-66.

[96] *Id.* at 768. The court also found that a statement made by the complainant 15 hours after the incident should not have been admitted as an excited or spontaneous utterance because it was neither spontaneous nor unreflective, given the victim's "considerable time and opportunity to collect her thoughts and reflect on what had occurred the night before." *Id.* at 772.

[97] 276 Conn. at 711-16. Noting that the evidence fell "squarely within Crawford's core class of testimonial evidence" the Court rejected the defendant's claim that the testimony was "inherently unreliable." *Id.* at 714-15. The court noted that "*Crawford* makes clear that the *opportunity* for cross-examination satisfies the requirements of the confrontation clause." *Id.* at 715. The Court found that standard met because the defense counsel had had an opportunity to challenge the witness's credibility at the probable cause hearing, the witness had testified "under oath and was subject to penalty for perjury[,]" there was an accurate record of the hearing, and the defendant had the same counsel at the hearing and at his later trial. *Id.* at 715.

a witness at the defendant's probable cause hearing was admitted as former testimony where the witness was unavailable because he invoked his right against self-incrimination and thereby refused to testify.[98] As the prior testimony was indisputably "testimonial in nature," the issue boiled down to whether the witness, a person named Rivers, was "unavailable at the time of trial" and whether the defendant "had a prior opportunity to cross-examine him regarding the details of his testimony."[99] There was no dispute that Rivers was "unavailable," so the sole issue was the adequacy of the defendant's opportunity to cross-examine Rivers. Reviewing the probable cause hearing transcript, the Court concluded that "the defendant had a more than adequate and full opportunity to cross-examine Rivers both generally and specifically to address whether Rivers was giving truthful testimony."[100]

The extra fillip in *Estrella* was that Rivers sent the defendant a letter *after the probable cause hearing* in which he "ostensibly retract[ed] that probable cause testimony."[101] The Court entertained the claim that such after-acquired impeachment evidence[102] is relevant to a determination whether the defendant was given an adequate opportunity to cross-examine Rivers at the probable cause hearing but it concluded that the additional impeachment evidence learned after the hearing did not include significant facts unknown to the defendant at the time of the hearing.[103] Declaring that the majority's approach "makes what is a very simple question into a needlessly complex one[,]" Justice Borden concurred in the result but argued: "Contrary to the majority's assumption of relevance of nonexistent evidence under *Crawford*, I

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[98] 277 Conn. 458, 465-466 (2006).

[99] *Id.* at 472.

[100] *Id.* at 475.

[101] *Id.* at 475.

[102] The Court held that the defendant had a constitutional right to have the letter admitted in evidence at trial, but that the trial court's refusal to admit the letter was harmless beyond a reasonable doubt. *Id.* at 477-79. Justice Borden agreed that it should have been admitted but would have found it to be evidentiary error and harmless. *Id.* at 495-96.

[103] *Id.* at 476. Distinguishing cases in which newly learned impeachment evidence was unknown before, the Court wrote: "Here, by contrast, the defendant knew better than anyone else whether Rivers was lying about the defendant's conduct and thus readily could have challenged his credibility even without the letter." *Id.*

conclude that such evidence is simply irrelevant to a proper *Crawford* analysis."[104]

VI. SEARCH AND SEIZURE

In *State v. Nash*,[105] the Supreme Court found that two police officers had acted reasonably within the meaning of the Fourth Amendment when they stopped, handcuffed and began to patdown a suspect but then transported him to a nearby police substation 30 seconds away to do a full patdown because a crowd of 15-20 people had gathered around them and the suspect had offered verbal resistance. Another officer had viewed the suspect through a mounted street camera engaging in apparent drug transactions with two different customers and appearing to be selling small items that he stored in a plastic bag in his left boot. The full patdown at the substation produced a crinkling sound in the suspect's boot, leading to the discovery of 38 baggies of crack and $319 in cash. The Supreme Court carefully considered and rejected the defendant's claims that the state had relied solely on the generality that drug dealers are known to carry guns to justify the patdown,[106] that the removal of the suspect to a nearby substation exceeded the scope of a valid investigative detention, and that the full patdown of the suspect at the substation was unjustified because the suspect was handcuffed and had already been partially frisked when stopped on the street.[107]

In *State v. Sulewski*,[108] the Appellate Court rejected the defendant's claim that the police violated the Fourth

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[104] *Id.* at 491. Showing genuine incredulity, Justice Borden wrote: "It is simply inconceivable to me that we could conclude that evidence that did not exist at the time of the prior testimony could somehow retroactively make that testimony *inadmissible* under the confrontation clause because the defendant did not have that evidence available to him. Of course he did not, and could not." (Emphasis in original) *Id.* at 493-94.

[105] 278 Conn. 620 (2006).

[106] In another stop and frisk case, the Appellate Court rejected the defendant's claims that he had been frisked by police merely because of his presence in an area known for drug activity and that the frisk exceeded constitutional bounds when the police seized marijuana from his watch pocket after realizing immediately upon frisking him that the hard object in his pocket was contraband. State v. Starks, 94 Conn. App. 325, *cert. denied*, 278 Conn. 918 (2006).

[107] *Id.* at 624-48.

[108] 98 Conn. App. 762 (2006).

Amendment when they briefly stopped a van owned by American Home Patient, Inc. on the pretext that a similar vehicle had been in a recent accident. The actual purpose in making the stop was to ascertain the identity of the van's driver because the police had reason to believe a person driving the van had sold an informant cocaine in a controlled buy an hour and a half before the stop. The police later used the identification information in establishing probable cause for a search warrant. Judge Rogers for the court affirmed the trial court's conclusion that the stop comported with the Fourth Amendment because the police had reasonable and articulable suspicion that the driver had committed a crime and rejected the defendant's claim that the state constitution requires a different conclusion.[109]

In *State v. Dalzell*,[110] a police officer followed the defendant's car for a mile before stopping him for a seat belt violation. The defendant was not wearing sunglasses on a sunny day, his eyes were contracted, his nose red, nostrils running, and he appeared "'slow and lethargic'"; noticing a rolled up dollar bill between the front seats, the officer "asked the defendant if he had used narcotics," to which he replied, "'No, and I'm not getting out of the vehicle, so start writing me a ticket.'"[111] When the defendant again refused to exit the car, the officer arrested him for driving while under the influence of drugs and searched the car, finding heroin.[112] The defendant challenged the stop and the arrest on state constitutional grounds. Judge Dupont for the court held that the stop was justified and not pretextual under the state constitution,[113] but held that probable cause to arrest (and search incident thereto) was not established by "facts that do not point any more in the direction of criminal behavior than in the

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[109] *Id.* at 773-77.

[110] 96 Conn. App. 515 (2006), *cert. granted*, 280 Conn. 914 (Issue in Supreme Court is: "Did the Appellate Court properly reach the question whether the defendant's arrest for operating a motor vehicle while under the influence of drugs was based on probable cause, and, if so, did it properly conclude that probable cause was lacking?").

[111] *Id.* at 519-20.

[112] *Id.* at 520.

[113] *Id.* at 524-26.

direction of entirely benign circumstances."[114]

In *State v. Gonzalez*,[115] the Supreme Court rejected the defendant's claim that he had a reasonable expectation of privacy under the Fourth Amendment that police violated when he placed a call to a cell phone owned by a drug dealer and made arrangements for a drug deal—unaware that the police had seized the phone and were at the other end of the conversation.[116]

VII. TRIAL PRACTICE: RAPE SHIELD LAW

The Supreme Court in *State v. Ritrovato*[117] reversed the Appellate Court and ordered a new trial on one count each of second degree sexual assault and one count of risk of injury to a child, but not on two drug charges and a second count of risk of injury. The court held that the trial court misapplied the rape shield law when it denied the defendant's statutory right to impeach a "victim [who] has testified on direct examination as to his or her prior sexual conduct."[118] The court found that it was unnecessary to decide the defendant's claim that his constitutional right to present a defense had been violated because the evidentiary ruling was harmful error necessitating retrial on the counts to which the evidence was relevant.[119] Similarly, in *State v. Smith*,[120] the Supreme Court affirmed the Appellate Court's order of a new trial on nine sexual assault and risk of injury charges against a defendant

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[114] *Id.* at 530 n.12.

[115] 278 Conn. 341, 349-54 (2006) (state constitutional issue not reached because independently raised only in reply brief, *id.* at 347 n.9).

[116] The court held: "because the defendant spoke voluntarily with police and made no effort to ascertain the identity of the person to whom he spoke, he lacked a reasonable expectation of privacy in his words spoken during his call to [the dealer's] cellular telephone." *Id.* at 353-54.

[117] 280 Conn. 36 (2006).

[118] CONN. GEN. STAT. §54-86f(2).

[119] *Ritrovato*, 280 Conn. at 50. The court applied its new "fair assurance" test for harmless evidentiary error in concluding that the defendant had met "his burden of proving that the evidentiary error was harmful with respect to the sexual assault charges because, upon consideration of the entire record, we do not have a fair assurance that the error did not substantially affect the verdict." *Id.* at 58. *See id.* at 56-57 (citing "fair assurance" standard announced in State v. Sawyer, 279 Conn. 331, 357 (2006)). *See also* State v. Smith, 280 Conn. 298, 307-10 (2006) (applying *Sawyer* test to different rape shield issue).

[120] 280 Conn. 285 (2006).

whose defense was misidentification and whose proffered DNA evidence regarding semen found on the victim in support of that defense should have been admitted without limitation under subdivision (1) of the rape shield statute.[121] The *Smith* opinion contains a useful discussion of the "two step process" necessary to determine the admissibility of evidence proffered by a defendant under one of the exceptions to the rule of exclusion set forth in the rape shield statute.[122]

In *State v. Tutson*, the Supreme Court reversed the Appellate Court and sustained the state's arguments that the trial court had properly found the defendant to have violated the alibi notice requirement in the rules of practice and that the trial court had properly excluded an alibi witness's testimony as a sanction for the defendant's noncompliance with the rules.[123]

VIII. TRIAL PRACTICE: COUNSEL ISSUES

In *State v. Brown*, the Supreme Court held that deprivation of the right to counsel at a probable cause hearing is not a "structural error" necessitating automatic reversal but instead constitutes "procedural error subject to harmless error review."[124] In *State v. Flanagan*, the Appellate Court sustained the state's arguments that a defendant's mid-trial invocation of his constitutional right to self-representation was neither a clear and unequivocal invocation of that right nor a timely invocation so as to necessitate a full canvas of the defendant by the trial court in the absence of exceptional circumstances.[125] Judge Flynn dissented in *Flanagan*, arguing

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[121] CONN. GEN. STAT. §54-86f(1) contains an exception to its presumptive rule of inadmissibility where "evidence is (1) offered by the defendant on the issue of whether the defendant was, with respect to the victim, the source of semen, disease, pregnancy or injury...." As in *Ritrovato*, the *Smith* Court noted that its holding on evidentiary grounds made it unnecessary to determine whether the defendant's constitutional right to present a defense had been violated. *Smith*, 280 Conn. at 295 n.6.

[122] State v. Smith, 280 Conn. at 295-98. The defendant personally aided his own cause when he expanded his counsel's offer of proof on relevance by exclaiming, "'I'm not trying to have no rape hearing. *I'm trying to prove that I ain't did nothing to this young lady.* That's it. I don't care about no hearing.'" (Emphasis supplied by court.) *Id.* at 293 (defense counsel had incorrectly claimed DNA evidence of victim's sexual encounters with others was relevant to impeach her credibility).

[123] 278 Conn. 715, 730-46 (2006).

[124] 279 Conn. 493, 504, 509-10 (2006).

[125] 93 Conn. App. 458, 471-79 (2006).

that the majority misconstrued both Practice Book Section 44-3 which guarantees the right of self-representation "at any stage of the proceedings" and Article First, Section 8 of the state constitution, which guarantees an accused in a criminal prosecution "the right to be heard by himself . . . ."[126] In another case, *State v. Caracoglia*,[127] the Appellate Court rejected a claim that the trial court had violated the defendant's right to the assistance of counsel by accepting his waiver of the right to counsel without an adequate canvas and by permitting him to represent himself at trial.[128]

In *State v. Rodriquez*, the Appellate Court rejected the defendant's claim that the trial court abused its discretion in denying his trial counsel's motion to withdraw filed a day before jury selection began and further found that the court had made a sufficient inquiry of counsel and the defendant as to the grounds for the motion, which was the defendant's "assertion" that the defendant had recently filed a grievance against his counsel a week previously.[129] In *State v. Sam*, the Appellate Court ordered a new trial where at the start of a joint trial the trial court conducted an in-chambers inquiry into defense counsel's co-representation of the defendant and his brother and reached a resolution under which the court severed the cases and ordered counsel to withdraw from representation of one brother but not the other.[130] Applying the holding of *State v. Lopez*,[131] the *Sam* court "agree[d] with the defendant that the court improperly deprived him of the right to be present at a critical stage of his prosecution and that the deprivation amounted to a structural error warranting reversal of his conviction."[132]

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126 *Id.* at 484-85.

127 95 Conn. App. 95, *cert. denied*, 278 Conn. 922 (2006).

128 *Id.* at 98-114. The court also rejected the defendant's claim that he was not competent to waive his right to counsel in October, 2003, because he had been found not competent to stand trial in December, 2001, after which he was found to have been restored to competence by February, 2002. *Id.* at 99-100, 105-09.

129 93 Conn. App. 739, 743-48, *cert. granted*, 277 Conn. 930 (2006) (Issue certified: "Whether the Appellate Court properly affirmed the trial court's decision denying defense counsel's motion to withdraw?").

130 98 Conn. App. 13, 17-31, *cert. denied*, 280 Conn. 944 (2006). A disclosure is in order: this author served as the defendant's special public defender on appeal.

131 State v. Lopez, 271 Conn. 724 (2004).

132 98 Conn. App. at 17.

In *Small v. Commissioner,* the Appellate Court reached and rejected the merits of an appeal from denial of a habeas corpus petition in which the petitioner claimed that his trial and appellate lawyers had rendered ineffective assistance of counsel by failing to claim error in a jury instruction on felony murder involving an attempted robbery where the instruction omitted any instruction on the law of attempt.[133] Judge Dupont for the majority first concluded that the habeas court had abused its discretion in denying the petition for certification to take an appeal because the issues raised were "debatable among jurists of reason[,]" because "[n]o appellate case has decided those precise issues" and "because the appellate panel in this case does not agree on the answers."[134] Agreeing that the claim was appealable, Judge Harper dissented from the majority holding that relief was not warranted, concluding instead that the petitioner had been denied effective assistance of counsel at trial and on appeal.[135]

Again this year there was a plethora of cases involving challenges to the conduct of counsel for the state. In recent years the reviewing courts have taken claims of prosecutorial misconduct much more seriously than in the 1990s when such claims not only met with little to no success, but also were often reviewed and rejected in a conclusory fashion without careful analysis of the rules governing prosecutorial conduct in criminal cases and the factors that determine whether a defendant's right to a fair trial by jury has been undermined. Claims of prosecutorial misconduct are now accorded careful

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[133] 98 Conn. App. 389 (2006), *cert. granted,* 281 Conn. 902 (2007).

[134] *Id.* at 391-92. Judge Dupont concluded that issues raised in the case "deserved encouragement to proceed further, and the petition for certification should have been granted so that these questions could be answered." *Id.* On the merits, however, Judge Dupont concluded that "[t]he flaw in the petitioner's statement of the issue is that *he was not charged with the predicate crime of attempt to commit robbery* pursuant to §53a-49(a)(2)." (Emphasis added.) *Id.* at 395.

[135] *Id.* at 402-09. Judge Harper found that the felony murder instruction should have contained an instruction on attempt, that counsel's failure to challenge the instruction was not in the range of sound trial strategy, and that "the court's omission of an instruction defining attempt prejudiced the petitioner." *Id.* at 407-09. The Supreme Court has granted an appeal on the general issue: "Did the Appellate Court properly determine that the petitioner was not denied effective assistance of counsel at trial and on appeal?" *Small,* 281 Conn. 902 (2007).

review even if not preserved by trial counsel.[136]

While the established standard for reviewing claims of prosecutorial misconduct is followed in every case,[137] its application to the particulars of a case has often lead to different results in different courts in the same case. For example, in both *State v. Warholic* and *State v. Rowe*, the Supreme Court reversed Appellate Court holdings that prosecutorial misconduct had undermined the fairness of the trials under review.[138] In many cases the courts have closely dissected and evaluated the claims of misconduct, sent useful signals concerning the parameters of acceptable advocacy by the prosecution, and then carefully determined the discrete question of prejudice, usually concluding that the right to a fair trial has not been violated.[139] The recent cases have typically

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[136] There is no longer a requirement that appellate counsel apply the specific four-pronged *Golding* analysis in raising unpreserved claims of prosecutorial misconduct State v. Stevenson, 269 Conn. 563, 572-76 (2004) (cited, *e.g.*, in State v. Skakel, 276 Conn. 633, 742-44 (2006)). However, the lack of preservation is factored into a reviewing court's calculus of the nature and extent of the harm stemming from misconduct that is established by the record. State v. Warholic, 278 Conn. 354, 360-61 (2006).

[137] *See, e.g.*, State v. Singleton, 95 Conn. App. 492, 499-505 (improprieties in summation did not require new trial; court applied factors set forth in State v. Williams, 204 Conn. 523, 540 (1987): "'extent to which the misconduct was invited by defense conduct or argument . . . the severity of the misconduct . . . the frequency of the misconduct . . . the centrality of the misconduct to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case.'"), *cert denied*, 279 Conn. 904 (2006). In dissent in State v. Quint, 97 Conn. App. 72, 95-119 (2006), Judge Schaller provides a thorough review of the "standards of review and principles of law" governing review of prosecutorial misconduct claims and observes: "Even when those standards and principles are accurately interpreted and precisely applied however, because they are fact specific, they may appear to produce inconsistent results." *Id.* at 96.

[138] State v. Warholic, 278 Conn. 354, 362-404 (2006) (despite various instances of misconduct on cross-examination and at final argument Supreme Court agreed with state's position that the Appellate Court "overstated the frequency and severity of the misconduct, and failed to give adequate weight to the trial court's curative instructions"; *id.* at 360, 404); State v. Rowe, 279 Conn. 139, 144-62 (2006) (Supreme Court disagreed with Appellate Court's characterization of prosecutor's arguments as improper comment on the evidence and on the defendant's failure to testify).

[139] *See, e.g.*, State v. Luster, 279 Conn. 414, 426-46 (2006) ("the defendant claims that the prosecutor committed misconduct during his closing arguments by: (1) bolstering his own credibility; (2) impugning defense counsel; and (3) expressing his personal belief in the strength of the state's case and the credibility of the state's witnesses. Although we conclude that *one of the prosecutor's remarks constituted misconduct,* we disagree with the defendant's claim that this misconduct deprived him of a fair trial." (Emphasis added.) *id.* at 426).

involved claims of discovery violations,[140] improper examination of witnesses,[141] and improper summations to the jury.[142]

IX. TRIAL PRACTICE: PROOF AND INSTRUCTION ON ELEMENTS OF OFFENSES AND DEFENSES

Most challenges to time-tested parts of jury instructions fail, even when the challenged instruction may not communicate as effectively with lay jurors as might be desirable.[143] Last year the Appellate Court rejected various challenges to

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[140] *See, e.g.*, State v. Skakel, 276 Conn. at 694-707 (no *Brady* violation where state did not provide defense with composite drawing of suspect until after verdict; drawing not available via "open file" policy but defense counsel had reports that made reference to the drawing and could have requested it specifically); State v. Ortiz, 280 Conn. 686, 710-23 (2006) (trial record augmented on appeal, to show state violated *Brady* by not disclosing that a witness stood to benefit at sentencing from plea agreement under which his trial testimony would be taken into consideration; *id.* at 711-16; independent review of "materiality" of nondisclosure concluded it did not undermine confidence in fairness of trial and jury verdict; *id.* at 718-23); State v. Bermudez, 94 Conn. App. 155, 157-60, *cert. denied*, 277 Conn. 933 (2006) (state's disclosure of co-defendant's statement during trial violated rule of practice but did not prejudice defendant).

[141] *See, e.g.*, State v. Bermudez, 94 Conn. App. at 161 (four questions on cross-examination of defendant about other witnesses's testimony improper but questions "too few in number" and impropriety "not severe enough to deprive the defendant of a fair trial."); State v. Singleton, 95 Conn. App. 492, 496-98, *cert. denied*, 279 Conn. 904 (2006) (defendant improperly cross-examined on state's witnesses veracity but not violation of right to fair trial).

[142] *See, e.g.*, State v. Skakel, 276 Conn. at 742-772 (multiple claims of improper argument rejected; reference to defendant as "spoiled brat" was "arguably injudicious" but not due process violation; reference to defendant as a "killer" not improper in context; use of audiovisual evidence in rebuttal summation not improper); State v. Alvarez, 95 Conn. App. 539, 550-55, *cert. denied*, 279 Conn. 910 (2006) (per *Williams* factors calling defendant "junkie" was improper but not violation of right to fair trial); State v. McCleese, 94 Conn. App. 521, 519-21, *cert. denied*, 278 Conn. 908 (2006) (improper argument using facts not in evidence about an arrest warrant and probable cause finding did not deprive defendant of fair trial); State v. Griffin, 97 Conn. App. 169, 176-77, *cert. denied*, 280 Conn. 925 (2006) (calling victim a "nice girl" and "nice lady" and once calling the defendant a "con man" not up to "level of prosecutorial misconduct").

[143] That is not to say that courts do not review such challenges carefully on appeal. But many such challenges are raised for the first time on appeal, thereby restricting the legal issue to the sheer juristic accuracy of the instruction and not the advisibility and communicative efficacy of the particular instruction in guiding the jury on fundamental constitutional principles. A recent Second Circuit decision is notable for its concern that even well-founded jury instructions may prejudice a defendant's right to the presumption of innocence: "This principle leads us to denounce any instruction, including the one at issue here, that tells a jury that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely. We do so not because the instruction is necessarily inaccurate, either generally or as applied to [the defendant]." United States v. Gaines, 457 F.3d 238, 246 (2d. Cir. 2006).

the standard jury charge on the reasonable doubt standard[144] but did find error in a case (now on appeal to the Supreme Court) in which the trial court's instruction went off the beaten track in an effort to improve upon the "standard charge 'routinely' upheld by our Supreme Court."[145]

In *State v. Montanez*, the Supreme Court held that it was error for the trial court to fail to instruct the jury on self-defense even though the defendant did not request such an instruction at trial where the defendant was prosecuted as an accessory to two counts of first degree manslaughter with a firearm and one count of first degree assault committed by a cohort who may have been justified in his use of force.[146] The case contains an illuminating discussion of the "interplay" between "two complex doctrines, justification defenses and accessorial liability."[147] In *State v. Miller*, the Appellate Court rejected the defendant's claim that the state must prove that a person charged as an accessory to manslaughter in the first degree with a firearm intended the use of a firearm.[148] The court includes close analysis of past Supreme Court cases that grappled with and rejected the proposition that the dual intent requirement of the accessory statute, Section 53a-8, converts into a "tripartite intent requirement"[149] when the criminal offense charged contains an "'aggravating circumstance that itself does not require proof of any particular mental state.'"[150]

Connecticut courts continue to clarify the nature of

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144 State v. Alexander, 95 Conn. App. 154, 160-61, *cert. denied*, 280 Conn. 909 (2006) (instruction that "'proof beyond a reasonable doubt does not mean proof beyond *all reasonable doubt*'" was an isolated inaccuracy that could not have misled jury); State v. LaSalle, 95 Conn. App. 263, *cert. denied*, 279 Conn. 908 (2006) (instruction that reasonable doubt must be a "real doubt" and "an honest doubt" did not dilute constitutional standard). *See also* State v. Smith, 94 Conn. App. 188, 198-202, *cert. denied*, 278 Conn. 906 (2006) (instruction to "'harmonize the evidence as far as it reasonably can be done'" did not lower state's burden of proof).

145 State v. Jackson, 93 Conn. 671, 678, *cert. granted*, 278 Conn. 902 (2006).

146 277 Conn. 735, 749-64 (2006).

147 *Id.* at 751.

148 95 Conn. App. 362, 371-77 (2006).

149 *Id.* at 372 (discussing Justice Shea's concurrence in State v. McCalpine, 190 Conn. 822, 833-835 (1983).

150 *Id.* at 372-74 (quoting Chief Justice Peters's opinion for the court in State v. Crosswell, 223 Conn. 243, 258 n.11 (1992)).

"Pinkerton"[151] liability under state law. In *State v. Martinez*,[152] the Supreme Court affirmed the defendant's conviction of conspiracy to commit murder but ordered a new trial on attempted murder, assault, and kidnapping charges where the trial court instructed the jury that it could find the defendant guilty of the latter three charges under principal, accessorial, or *Pinkerton* theories of liability without the jury's reaching unanimity as to its theory of liability. The *Martinez* opinion contains a very useful review of Connecticut *Pinkerton* case law and the distinction between *Pinkerton* "vicarious liability" and accessorial liability under General Statutes Section 53a-8.[153] The court concludes that it is "abundantly clear that accessory liability and coconspirator liability, although both relate to vicarious liability principles generally, are *conceptually distinct* ways to commit a crime."[154] In *State v. Leggett*,[155] the Appellate Court rejected various challenges to sufficiency of the evidence to prove conspiracy to commit second degree robbery and two counts of second degree robbery, as well as challenges to the jury charge on *Pinkerton* liability. In *State v. Martin*,[156] now on appeal in the Supreme Court, Judge Schaller relied on *Pinkerton* principles in his dissent from the majority's conclusion that the evidence was insufficient to support conviction of conspiracy to possess one kilogram or more of marijuana and of two possessory offenses because there was no direct proof that the defendant knew that a package contained eighteen pounds of marijuana where he and cohorts picked up the package in Middletown and transported it to Bridgeport in a two-car caravan.[157]

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[151] Our Supreme Court explains: "In Pinkerton v. United States, 328 U.S. 640, 647-48 (1946), 'the United States Supreme Court held that a conspirator may be held liable for criminal offenses committed by a coconspirator that are within the scope of the conspiracy, are in furtherance of it, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy.' State v. Walton, 227 Conn. 32, 43 (1993)." State v. Martinez, 278 Conn. 598, 604 n.14 (2006).

[152] 278 Conn. 598 (2006).

[153] *Id.* at 611-18. It is settled that a jury does not have to be unanimous as to whether a defendant is guilty as a principal or accessory. *Id.* at 605 (citing State v. Correa, 241 Conn. 322, 348 (1997)).

[154] (Emphasis added.) *Id.* at 618.

[155] 94 Conn. App. 392, *cert. denied*, 278 Conn. 911 (2006).

[156] 98 Conn. App. 458, *cert. granted*, 281 Conn. 901 (2007).

[157] *Id.* at 473-92.

In *State v. Hardy*,[158] the Supreme Court rejected the claim that a gun constitutes a "deadly weapon" as defined in the Penal Code only if it is a "firearm" that uses gunpowder as a propellant and the court held that an operable pellet gun is a "deadly weapon" because it is "designed for violence" and "capable of causing death or serious physical injury."[159] In *State v. Flowers*,[160] the Supreme Court held that the defendant was entitled to a new trial on burglary in the first degree because it was reasonable possible that the jury convicted the defendant in reliance on a jury charge authorizing conviction of an uncognizable theory of burglary, namely "that the defendant unlawfully entered the building with the intent to commit an *attempted* assault[.]"[161]

The Appellate Court reversed convictions in a number of cases that are now before the Supreme Court for further review. In *State v. John M.*,[162] the court found two discrete bases for reversing the defendant's conviction of sexual assault in the second degree for having intercourse with his stepdaughter. First, the court held that the defendant's admission that he was married to the victim's mother and the victim's testimony that the defendant's wife was her mother constituted insufficient proof that the victim was the defendant's stepdaughter.[163] Second,[164] the court held that General

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158 278 Conn. 113, 131-33 (2006).

159 Dissenting, Justice Katz disagreed with the majority's conclusion that the evidence had established that the pellet gun in issue was "capable of causing death or serious physical injury." *Id.* at 137. In an interesting concurring opinion, Justice Borden disagreed "with both the majority and the dissent in their heavy emphasis on the reference in the commentary to the Penal Code (commentary) to a 'deadly weapon' as requiring an inquiry into whether a particular weapon is 'designed for violence.'" *Id.* at 134. Justice Borden noted the "irony" that he himself had been "heavily involved in drafting both the Penal Code and its commentary" in his capacity as the executive director of the commission to revise the Penal Code from 1963 to 1971. *Id.* at 134 n.2.

160 278 Conn. 533 (2006).

161 (Emphasis added.) *Id.* at 547. In dissent, Justice Zarella argued that it was not reasonably possible that the jury relied on the trial court's improper instruction. *Id.* at 551-56.

162 94 Conn. App. 667, *cert. granted*, 278 Conn. 916 (2006).

163 The court relied on an early nineteenth century Supreme Court case, State v. Roswell, 6 Conn. 446 (1827), which held that a defendant's admission of his marriage to the mother of the victim in an incest case was both inadmissible and insufficient to prove kinship between the defendant and the victim. The Appellate Court acknowledged that the *Roswell* rule is inconsistent with the Code of Evidence, §8-3(1)(A) and other modern authority: "While we acknowledge the seemingly contra-

Statutes Section 53a-72a(a)(2) violates the equal protection clause because it proscribes heterosexual but not homosexual intercourse between kindred persons.[165] In *State v. Winot*,[166] the court reversed two of the defendant's three convictions, finding the second degree kidnapping statute, General Statutes Section 53a-94(a), was vague as applied to the facts of the case relating to "restraint"[167] and that the evidence was insufficient to sustain the conviction of risk of injury to a child under the portion of Gen. Stat. §53-21(a)(1) that prohibits "'injurious *acts* directly perpetrated on the child.'"[168]

In *State v. Silva*,[169] the court reversed two convictions of interfering with an officer, one count based on the defendant's use of profane speech when the police requested license, insurance and registration information during a motor vehicle stop for unsafe backing in making a three-point turn and the second count based on her countermanding

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dictory nature of *Roswell* and §8-3, we know of no authority indicating that a decision of the Connecticut Supreme Court may be overruled by the promulgation of rules of evidence. Rather, the overruling of *Roswell* remains exclusively the province of that court." State v. John M., 94 Conn. App. at 672 n.5. That *John M.* was decided before State v. Sawyer, 279 Conn. 331 n.1 (2006), may help explain the Appellate Court's view that *Roswell* is good law despite its inconsistency with the Code of Evidence. It is interesting that *Roswell* itself was a 3-2 decision in which the dissent wrote that "upon the general principles of evidence, an acknowledgment of the fact of marriage seems admissible to prove that fact against the defendant." *Roswell*, 6 Conn. at 453.

164 Concurring on the insufficiency issue, Judge Schaller declared that it was improper to reach the equal protection issue: "our obligation is clearly to avoid unnecessary constitutional adjudication." *Id.* at 695. The Supreme Court has certified both issues for appeal.

165 *Id.* at 674-95.

166 95 Conn. App. 332, *cert. granted in part*, 279 Conn. 905 (2006) (on whether CONN. GEN. STAT. §53a-94 is unconstitutional on facts of case).

167 *Id.* at 343 ("the evidence reveals that the only restraint imposed on the victim was the defendant's forcibly taking the victim's arm and pulling on it for a few seconds. We conclude, therefore, that the evidence of the movement and confinement in this case falls into the realm of the 'minuscule' movement or duration of confinement. To hold that the defendant was put on notice that this conduct would violate the kidnapping statute, *§ 53a-94 (a)*, would be an absurd and unconscionable result."). The successful appellate lawyer in *Winot* was not successful in making a similar vagueness-as-applied challenge to the first degree kidnapping statute in State v. Sanseverino, 98 Conn. App. 198, 209-213, *cert. granted*, 280 Conn. 946 (2006), but the court reversed on other grounds and the Supreme Court has granted the defendant's petition to appeal on the vagueness issue (as well as the state's petition to appeal a prejudicial joinder issue).

168 *Id.* at 359 (quoting State v. Padua, 273 Conn. 138, 148 (2005)).

169 93 Conn. App. 349, *cert. granted*, 277 Conn. 931 (2006) (as applied issue certified for appeal).

police orders to stay at the scene later on.[170] In *State v. Khadijah*,[171] the court held that the state's evidence of *wilfulness* was insufficient to support a failure to appear conviction where the defendant arrived for a 10:45 a.m. court appearance at 11:30 a.m. Her attorney called her from the courthouse to wake her up from her couch where she had dozed at 8 a.m. upon her return from her all-night job.[172]

X. JURY ISSUES

In *State v. James P.*,[173] the Appellate Court held that the defendant was entitled to a new trial where the trial court refused to recall the jury from the jury room to be polled individually on its verdict after the court had accepted the verdict but not yet discharged the jury. A rule of automatic reversal applies where a request for polling is "timely." The court found the request still timely where the record showed that the court had put off excusing the jury so that it could "spend a couple of minutes with you in the jury deliberation room."[174] Judicial communications with jurors after trial played a different role in *State v. Durant*,[175] where the trial judge spoke with the jury after its discharge and the judge later presided, without objection from counsel, over the defendant's violation of probation hearing based on the conduct in issue at the trial. The judge informed counsel of his discussion with the jury about the trial evidence and stated it would not consider anything "'imparted to this court in that ex parte discussion.'"[176] Because both parties consented in

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[170] The Appellate Court concluded that the "first responsibility" of the police at the scene had been to procure medical assistance for victims of a car accident that occurred before the defendant's arrival and that the defendant herself was fulfilling the police obligation for them when she left the scene after informing them that she was taking her injured brother to a hospital. *Id.* at 359-60.

[171] 98 Conn. App. 409 (2006), *cert. granted*, 281 Conn. 901 (2007).

[172] *Id.* at 418-19 ("Working late the night before a court appearance, pursuant to a regularly kept work schedule, failing to set an alarm clock or asking a friend to awaken her from a potentially inadvertent doze does not amount to purposefully and intentionally absenting oneself from the courthouse. At best, the state's first two offered pieces of evidence would support a finding of negligent, not *purposeful*, absence from court." (Emphasis in original)).

[173] 96 Conn. App. 93, *cert. denied*, 280 Conn. 910 (2006).

[174] (Emphasis added in opinion.) *Id.* at 99.

[175] 94 Conn. App. 219, 229-33 *aff'd*, 281 Conn. 548, 2007 Conn. LEXIS 78 (March 6, 2007) (*per curiam* affirmance of other issue).

[176] *Id.* at 231.

open court to have the trial judge continue to preside at the hearing, the court found no error.[177]

The Appellate Court reviewed various claims relating to severance and consolidation. The court rejected challenges to the consolidated trial of three separate informations against the defendant in *State v. Davis*[178] and two informations in *State v. Santaniello*,[179] but sustained a defendant's claim that charges against him should have been severed and tried separately in *State v. Sanseverino*.[180] The Supreme Court has granted review in both *Davis* and *Sanseverino*.

XI. IMMIGRATION

The severe immigration consequences of a criminal conviction make it unsurprising that there has been a recent increase in post-conviction efforts to challenge state convictions in order to avoid deportation. In *State v. Reid*,[181] the Supreme Court held that it retained jurisdiction to consider an untimely appeal by a defendant who pleaded guilty to second degree assault in 1997 and received a sentence concurrent with a longer sentence for a much more serious offense. In May, 2003, DNA evidence exonerated the defendant on the more serious offense. Nonetheless he was deported in June, 2003 based on the assault conviction. Lawyers for Reid then made an unsuccessful challenge in the trial court to the adequacy of the original plea to assault. The Supreme Court held that the trial court had lacked jurisdiction even to consider his challenge[182] but that under the "rare circumstances" of the case the Supreme Court would exercise its "supervisory powers to treat the defendant's appeal as though he had filed a request for permission to file an untimely appeal from his judgment of conviction."[183] While the court denied

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177 *Id.* at 233.

178 98 Conn. App. 608 (2006), *cert. granted*, 281 Conn. 915 (2007). The court also rejected challenges to the joinder for a single trial of co-defendants in State v. [W.] Madore, 96 Conn. App. 235, *cert. denied*, 280 Conn. 907 (2006), and State v. [R.] Madore, 96 Conn. App. 271, *cert. denied*, 280 Conn. 907 (2006).

179 96 Conn. App. 646, *cert. denied*, 280 Conn. 920 (2006).

180 98 Conn. App. 198, *cert. granted*, 280 Conn. 946 (2006).

181 277 Conn. 764 (2006).

182 *Id.* at 776 ("trial court's lack of subject matter jurisdiction to hear the motion to withdraw rendered void its denial of that motion.").

183 *Id.* at 778.

Reid's appeal on the merits, the case establishes a procedural path for other individuals facing deportation who cannot otherwise obtain review of constitutional infirmities in their criminal convictions.[184]

In *Ajadi v. Commissioner*,[185] the Supreme Court held that a petitioner facing deportation who was no longer serving a sentence for a criminal conviction could not bring a habeas action to challenge the conviction because the state habeas statute requires "custody."[186] The court noted that the petitioner did not challenge the proposition that deportation is a "collateral consequence" of a criminal conviction.[187] The court also rejected the defendant's argument, first made on appeal, that his petition for a writ of habeas corpus should be treated as a writ of error *coram nobis*.[188]

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[184] Justice Norcott concurred in the result but called it "ill-advised" of the court to invoke its supervisory authority in order to hear an appeal overdue by seven years. *Id.* at 800.

[185] 280 Conn 514 (2006).

[186] *Id.* at 536-48.

[187] In dicta the *Ajadi* court noted that most jurisdictions still consider deportation a collateral consequence of a criminal conviction despite changes in federal law eliminating discretionary sources of relief from deportation. *Id.* at 539 n.28. In *Reid*, the court had noted that defendant could not bring a habeas corpus action because he was no longer in custody under the criminal judgment that he sought to vacate. *Reid*, 277 Conn. at 779 n.17. However, Justice Norcott in his concurrence in *Reid* had noted that the Second Circuit permits a deportee to file a federal habeas petition. *Id.* at 799-800 n.14 (citing Swaby v. Ashcroft, 357 F.3d 156, 160 (2d Cir. 2004)).

[188] *Ajadi*, 280 Conn. at 548-50. *See* State v. Jweinat, 2006 Conn. Super LEXIS 2125 (Scheinblum, J., granted writ of *coram nobis*). Defendants may also move to vacate a judgment within three years of a plea "[i]f the court fails to address the defendant personally and determine that the defendant fully understands the possible [deportation, exclusion and denial] consequences of the defendant's plea, as required in subsection (a) of this section [CONN. GEN. STAT. §54-1j]." *See, e.g.*, State v. Hu, 2005 Conn. Super LEXIS 3283 (Sequino, J., granted §54-1j motion). In State v. Aquino, 279 Conn. 293 (2006), the Supreme Court dismissed as moot an appeal from a motion to vacate a guilty plea where the defendant had already been deported and had not established that the conviction he sought to vacate was the "sole reason for his deportation." *Id.* at 298 n.2.