

2008

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Recommended Citation

Everett, Timothy, "Developments in Connecticut Criminal Law: 2007" (2008). *Faculty Articles and Papers*. 327.
https://opencommons.uconn.edu/law_papers/327

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Citation: 82 Conn. B.J. 173 2008



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DEVELOPMENTS IN CONNECTICUT CRIMINAL LAW: 2007

BY TIMOTHY H. EVERETT*

This article reviews some issues of procedural and substantive criminal law that arose in appellate cases decided by the Connecticut Supreme and Appellate Courts in 2007. In 2007 the Connecticut Supreme Court decided a total of 47 criminal appeals, the vast majority of which were direct appeals from judgment after criminal trials, with just a few cases involving collateral review and other post-judgment issues such as habeas corpus petitions, motions to correct an illegal sentence, and new trial petitions. The Supreme Court issued 36 full opinions and 11 *per curiam* opinions. The court sat *en banc* seven times.¹ One of the *en banc* cases, *State v. Lawrence*,² generated the year's sole dissent and also one of the year's two concurring opinions.³ The Supreme Court docket comprised 12 cases brought directly to the court, 10 cases transferred from the Appellate Court⁴ and 25 cases in

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

² 282 Conn. 141 (2007).

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

⁴ Most of the transfers were initiated by the Supreme Court itself pursuant to CONN. GEN. STAT. § 51-199(c) and PRACTICE BOOK § 65-1, but one case was transferred at the request of the Appellate Court after oral argument in that court; *Mead*

court certified issues for appeal following decision of the Appellate Court. In the certified appeals, the Supreme Court affirmed the Appellate Court decisions 19 times and reversed them 11 times.

In 2007, the Appellate Court decided 129 direct appeals in criminal cases and another 53 appeals of claims made for collateral relief stemming from criminal cases (primarily petitions for writs of habeas corpus). Altogether there were 13 dissents, 10 concurrences and seven concurring (or partially concurring) opinions. The Appellate Court sat *en banc* only once, in *Flanagan*.⁵ In *Flanagan*, the court granted the defendant's motion for reconsideration and reargument following a split, first, decision by a regular three-judge panel affirming the judgment.⁶ In its *en banc* review, the court again affirmed the judgment, this time in a decision, split 5-4, rejecting the defendant's claim that the trial court had violated his constitutional right of self-representation.⁷ Chief Judge Flynn and Justices DiPentima and McLaughlin concurred in the judgment (joined by Judges DiPentima and McLaughlin). Justices Batts and Dranginis dissented, with Flynn's opinion commencing with the following topic sentence of the season: "We are heirs of the great colonists who distrusted lawyers because so often the profession were aligned with King George."⁸

er, 282 Conn. 317, 318 n.1, 322 (2007); and one case was transferred to the Appellate Court because the defendant was not the defendant; State v. Batts, 281 Conn. 682, 688 n.5 (2007). PRACTICE BOOK § 36-2 governs transfers by motion of a party *before* oral argument in the Appellate Court and upon the Appellate Court's own filing "*at any time before the oral argument of an appeal*" of a "statement of the reasons why transfer is warranted." PRACTICE BOOK § 36-2(b) provides that the Supreme Court will "treat" and "promptly decide" as if it were the Appellate Court to transfer.

nn. App. 105 (2007), *cert. granted* (in part), 284 Conn. 922 (2007). The issue now before the Supreme Court is: "Did the Appellate Court properly affirm the trial court did not violate the defendant's right to self-representation?"

usly, a split (2-1) regular panel of the court had reached the same result. In *Dranginis* (joined by Judge Bishop) authoring the majority opinion, Chief Judge Flynn dissented as to the self-representation issue. *Dranginis*, 93 Conn. App. 458 (2006). The *en banc* panel reconsidered only the self-representation issue decided by the first panel, and its decision superseded the decision on that issue alone. *Flanagan*, 102 Conn. App. at 107 n.2.

ngly, the Supreme Court has granted certification e split decision of the *en banc* court in *Flanagan*.⁹ cle attends to some of the more important appel- decided in 2007 and also calls attention to cases issues of continuing currency in criminal practice. f the “cutting edge” criminal law issues from past in so. For example, the Connecticut Supreme et to settle the issue left open in *State v. Sawyer*,¹⁰ er the adoption of the Connecticut Code of 2000 removed or left intact the court’s common- ty to change rules of evidence.¹¹ Connecticut nue to grapple with novel applications of con- clause doctrine based on the United States ourt’s paradigm-shifting decision in *Crawford v.* ¹² in 2004.¹³ The state Supreme Court in *State v.* ied the paradigmatic principles set forth in *New Jersey*¹⁵ and held that the defendant had a dment right to have a jury decide the statutory mandate an enhanced sentence for a persistent ny offender.¹⁶

al review of criminal appellate practice in 2007

ified issue is: “Did the Appellate Court properly conclude that the ot violate the defendant’s right to self-representation?” *Flanagan*, (2007).

nn. 331, n.1 (2006). The issue may be resolved when the court ified issue in *State v. DeJesus*, 91 Conn. App. 47 (2005), *cert. grant-* 2 (2006) (““Does this court, or any court, have the authority in light ut Code of Evidence, to reconsider the rule that the introduction of conduct of the defendant in sexual assault cases, is viewed under a ?””).

section, “Setting the Bounds for Evidentiary Review under the awyer,” in last year’s annual review. T.H. Everett, *Developments in ininal Law: 2006*, 81 CONN. B. J. 161, 171-75 (2007).

. 36 (2004).
State v. Camacho, 282 Conn. 328 (2007); *State v. Stenner*, 281 Conn. v. Ramirez, 101 Conn. App. 283, 287-94 (2007) (*Crawford* error but a reasonable doubt), *cert. denied*, 283 Conn. 909 (2007), *cert. denied*, (2008); *State v. Torelli*, 103 Conn. App. 646, 657-58 (2007).

incomplete without mention of personnel changes on the Supreme Court. Appellate Court Judge Chase Rogers was named as Chief Justice of the Supreme Court, Justice Borden reached the age of mandatory retirement from the Supreme Court, and Appellate Court Judge Barry was appointed to the Supreme Court. Justice Borden's retirement bears special recognition. Justice Borden was a justice on the Supreme Court from 1990 until 2007. Prior to that served as an original member of the Supreme Court from the time it was constituted as a constitutional court in 1983. In his last year on the Supreme Court, Justice Borden continued his career-long drive to clarify legal doctrine often articulated with less than ideal precision in previous cases.¹⁷ Borden's intellectually keen presence has been a "given" on the appellate scene in Connecticut. It is not that the vast majority of criminal lawyers have no doubt that pre-dates his elevation from the Superior Court. Some of us are surprised to find no textual support for the assumption that the Constitution requires his presence on the appellate court.¹⁸ Thankfully, like other retired justices on the Supreme Court, Borden now sits on panels of the Appellate Court deciding cases and clarifying legal doctrine as appropriate.¹⁹

As an appellate judge over the last quarter century, Borden has relentlessly articulated a more consistent, functional, and reasonable body of legal doctrine, by disentangling inconsistencies in received doctrine and by clarifying the normal nature of a given legal rule, often aided by a functional analysis of the underlying purpose of the rule. For example, in *State v. Randolph*, 284 Conn. 3-68 (2007), Justice Borden writing for the court seized "this opportunity to carefully our jurisprudence concerning the admissibility of evagated misconduct offered to establish the existence of a common law doctrine in nonsex crime cases, and to clarify the principles that govern our application of the doctrine." 342. *Randolph* typifies the depth of analysis for which Borden is justly famous. Interestingly, even in this particular subset of evidentiary law, Borden has a strong following for the factors that most accurately reflect the proper and improper use of evagated misconduct evidence in a criminal case. See *State v. Mooney*, 284 Conn. 125-32 (1991); *State Morrell*, 7 Conn. App. 75 (1986). The text of the state constitution does not mention him by name, it is

I. POLICE INVESTIGATIONS: DUE PROCESS AND SEARCH AND SEIZURE DOCTRINE

In 2007 the state supreme court decided two cases involving the due process, *Miranda*, and right to counsel components of the police interrogation of criminal suspects and confessions. In the leading due process case, *State v. James*,²¹ the Supreme Court rejected the defendant's argument that his confession to ownership of cocaine seized during a search of his home was coerced from him by police threat to have the Department of Children and Families remove his children and grandchildren from his home if he confessed.²¹ Justice Borden wrote the opinion for the court, rejecting the defendant's argument that his confession was inadmissible under the federal constitution and affirming the trial court's conclusion that the state had met its burden of a preponderance of evidence that the defendant confessed voluntarily despite the defendant's insistence in his motion for suppression hearing that the police had coerced him.²² On appeal the defendant's second constitutional argument was that the court should overrule its decade-old decision in *State v. James*,²³ in which the court had held that the state constitutional standard for establishing the voluntariness of confessions is the same as the federal preponderance standard.²⁴ The court rejected the defendant's invitation to overrule *James* and to adopt a state constitutional rule

of the court, written by him, in which the court overstepped those bounds and think that this court should . . . be in the business of drafting specific instructions for trial courts. We do our appellate job better by doing what we are best at, namely, reviewing instructions given by trial courts in the context of the facts and deciding whether they meet the specific legal challenge presented. . . . In this connection, I acknowledge that this court, in an opinion written by me for the court, did draft specific instruction language in *State v. James*, 34 Conn. 534, 579-80, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1179, 164 L. Ed. 2d 537 (2005). In hindsight, I think that this was not proven to be so by the fact that, immediately upon the release of

have required the government to prove voluntariness beyond a reasonable doubt.²⁵

Justice Katz dissented in *Lawrence* on the state constitutional ground,²⁶ declaring that the *stare decisis* strength of *Burnet* could not withstand the “‘lessons of experience’”²⁷ to be drawn from numerous instances of exoneration of persons by DNA evidence and by other means, many of which were attributable to false confessions and police coercion.²⁸ Justice Katz stated that the underlying concern in modern federal constitutional voluntariness doctrine is to determine whether a confession was coerced, but that the singular concern in *Lawrence* represents a narrowing of purpose from the federal doctrine which also represented “the notion that the purpose of a voluntariness hearing was to enhance the reliability of jury verdicts.”²⁹ In a brief concurrence in *Lawrence*, Justice Palmer joined the majority opinion, Justice Palmer stated strong reasons why the legislature would be well-served to change the law governing police interrogation in Connecticut, especially when a suspect is young or suffers from mental disability:

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

²⁵ 158-77.

²⁶ 185-209.

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

²⁸ Justice Katz wrote: “Recent studies demonstrating the significant role of involuntary and false confessions in wrongful convictions in this country provide compelling evidence that our conclusion in *James* as to the admission of false confessions fails to promote just verdicts. Therefore, *stare decisis* should not control our decision in this case.” *Lawrence*, 282 Conn. at 188. Justice Katz also cited an exoneration and false confessions authored by the national

across the United States, our legislature is free to legislate requiring police to videotape confessions if it is reasonably feasible to do so. Although valid reasons may exist not to impose such a requirement on the police, there can be little doubt that recording confessions would dramatically reduce, if not eliminate, any possibility of an erroneous conviction predicated on an involuntary confession. Indeed, videotaping confessions would assist both the trial court and the jury in evaluating the voluntariness and, ultimately, the reliability, of those confes-

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

In *Britton*,³³ an *en banc* Supreme Court upheld the trial court’s determination that the defendant’s statements to the police in the absence of *Miranda* warnings were admissible because he was not in custody when he remained in the police car and state police at the New London police department questioned him after he had voluntarily gone there at the request of police so that they could take his palm prints. The Court noted that the defendant contested only the legal conclusion of the trial court, not the facts found by the trial court at the suppression hearing, including that the police “repeatedly” told the defendant (“suspect”) that he was free to leave and was free to leave.³⁴ In *State v. Britton*, the Supreme Court concluded that the trial court

admitted into evidence the defendant's inculpatory statement made in an Arizona jail in the absence of counsel. The defendant's visit from a Connecticut detective and an inspector at the state's attorney's office after they informed the defendant that the state had obtained a warrant for his arrest and showed him a copy of the warrant.³⁶ On appeal, the defendant conceded that his federal Sixth Amendment right to counsel was not triggered by the issuance of the warrant,³⁷ but argued that his state constitutional right to counsel had been triggered. The *Stenner* court rejected the defendant's claim, holding that under Connecticut law the right to counsel "is triggered at the same time as the right to counsel afforded by the sixth amendment—namely when adversary judicial criminal proceedings begin with the defendant's arraignment in court and the provision of information."³⁸

In *State v. Edman*,³⁹ the Supreme Court affirmed the defendant's conviction. The Court's 2005 decision reversing the defendant's convictions on the grounds that the judge who issued the search warrant for the defendant's home had a personal relationship with the defendant that prevented him from complying with the federal and state constitutional requirements that a search warrant be issued by a neutral and detached magistrate.⁴⁰ In *Edman*,⁴¹ the Supreme Court held that the trial court properly denied the defendant's claim that the police acted unreasonably in approaching his already stopped car to compel an officer's suspicion that the defendant was driving while his license was suspended, discerned the smell of marijuana, asked for and obtained the defendant's marijuana.

758-59.

³⁶ 758 n.19. The defendant's concession regarding any federal constitutional issue was necessitated by the Supreme Court's 2006 decision in *State v. Edman*, 323 Conn. 42, cert. denied, 126 S. Ct. 2873 (2006). The *Stenner* court noted that the defendant's briefing and analysis using the factors set forth in *State v. Geisler*, 302 Conn. 684-86 (1992), gave the court the opportunity to decide the state

was arrested him.⁴² Further, the court rejected the claim that the arresting officer's suppression hearing and representations in an affidavit in support of the search of the defendant's apartment after his arrest were inherently inconsistent so as to require an evidentiary hearing under the *Franks* exception to the rule that a warrant's validity is to be determined by reviewing the "four corners" of the warrant without taking extrinsic evidence.⁴³ The court also conducted a four corners review and found no error.⁴⁴

In *State v. Davis*,⁴⁵ the Supreme Court sitting *en banc* rejected the defendant's claim that the state constitution embraces the "automatic standing rule" that once established by the U.S. Supreme Court under the Fourth Amendment doctrine but was put aside by the U.S. Supreme Court in recognition that the doctrine is "unnecessary." *Illinois v. Gates*⁴⁶ makes the automatic standing rule unnecessary.⁴⁷ For the court Justice Palmer conducted a factorial analysis and concluded that none of the *Illinois* factors favored the defendant's position.⁴⁸

In *State v. Browne*,⁴⁹ the Appellate Court in a split decision rejected the defendant's motion to suppress should have been granted because the evidence seized by warrant was not relevant to the items for which the warrant gave authority to search. The majority opinion, written by Judge Berdon, found that the majority requirement of the Fourth Amendment warrant was violated because the warrant listed cocaine but not marijuana. The supporting application for the warrant named only marijuana and the police intended to search for marijuana. The majority declared: "This warrant on its face, simply did not describe the property

86,690, 692-94.

94-99. *Franks* refers to *Franks v. Delaware*, 438 U.S. 154 (1978). The court declined to revisit its decision in *State v. Glenn*, 251 Conn. 567 (1999), which applied the *Franks* standard as a matter of state constitutional law." *Batts*, 281 Conn. 77.

99-706

we hold that it is invalid.”⁵⁰ The police officer who signed the warrant application testified that he did so by using the “cut and paste” function, taking language verbatim from the text of a warrant in another case.⁵¹ The majority held that the particularity requirement applies to the warrant itself, not merely the supporting documents.⁵² The majority rejected the state’s alternate “plain view” argument because the items were not legally on the premises that they searched, and the warrant was not supported by probable cause to believe that cocaine and crack and it did not authorize a search for such items. Concluding his energetic dissent,⁵³ Judge Sullivan declared: “To invalidate a warrant premised upon an affidavit and affidavit that detailed the possession and sale of cocaine by the defendant but, due to typographical error, the affidavit referenced cocaine is the quintessential exaltation over substance and is inconsistent with a practical application of the particularity clause.”⁵⁴ The Supreme Court granted certification to review.⁵⁵

In *State v. Jenkins*,⁵⁶ a split panel of the Appellate Court affirmed the trial court’s denial of a motion to suppress, concluding that the defendant was unlawfully detained, that his search of the vehicle was tainted by that illegal detention, and that the state failed to purge the taint of the illegal search. For those reasons, the evidence procured through the defendant’s consent should have been suppressed.”⁵⁷ As the state’s appellate counsel for the defendant and the case was argued before the Supreme Court, it is not appropriate to comment further on the case.

⁵⁰18.

⁵¹17 n. 3.

⁵²18-19.

⁵³21-45.

⁵⁴45.

⁵⁵Conn. 903 (2007) (“Whether the Appellate Court correctly determined that the trial court improperly denied the defendant’s motion to suppress evidence obtained from a search warrant?”).

⁵⁶31 Conn. App. 417 (2007), cert. granted, 325 Conn. 800 (2008) (4/15/10).

II. TRIAL PRACTICE AND PROCEDURE: PLEA BARGAINING, TRIAL PROOF, JURY INSTRUCTIONS ON OFFENSES AND DEFENSES

The Supreme Court decided two cases of importance on the law governing plea bargaining and the enforceability of promises leading to bargained-for guilty pleas. Justice C. J. Emdin wrote both decisions. In *State v. Rivers*,⁵⁸ the defendant and the state entered into a written plea and cooperation agreement under which the defendant promised to testify to kidnapping in the first degree and to cooperate with the state in exchange for sentencing considerations. Under the agreement, the defendant gave a taped statement to the police and later testified consistently with that statement at a probable cause hearing, which resulted in a conviction for murder against a co-defendant. At the co-defendant's trial, though, on advice of counsel, the defendant invoked his Fifth Amendment privilege and refused to testify. The state declared the plea and cooperation agreement "null and void" and charged the defendant with offenses, including kidnapping, that would have been barred under the terms of the agreement. The trial court denied the defendant's motion to dismiss, which asserted that his performance under the agreement barred the state from using his police statement and probable cause hearing testimony at trial on the new charges. The trial court also denied a later motion to dismiss the charges, which again hinged upon whether the defendant had performed or breached his promises under the agreement. The defendant then pleaded nolo contendere to the murder charge, conditional on obtaining appellate review of the trial court's ruling denying his motion to dismiss. The state argued de novo review to the denial of the motion to dismiss and regarding the plea agreement as a contract

the defendant's waiver of fundamental constitutional rights. The Supreme Court noted that the state's "superior power" means that it bore a special burden of clarifying the terms of the agreement:

... as the drafting party wielding disproportionate power must memorialize any and all obligations for which it holds the defendant responsible, as well as all promises that it made for the purpose of inducing the defendant to agree. The terms of the agreement should be stated clearly and unambiguously, so that the defendant, in assenting to the agreement, knows what is expected of him and what he can expect in return. Likewise, such clarity is required so that the state knows what it may demand of the defendant and what it is obligated to provide in exchange for the defendant's cooperation. . . . Indeed, a majority of the federal Circuit Courts of Appeals follow similar rules, construing ambiguity in plea agreements against the government.⁶¹

The Supreme Court rejected the state's argument that the agreement contained an *implicit* promise to be a witness at any trial⁶² because the written agreement only stated the defendant's obligation to be truthful "in the presence of the defendant] becomes a witness" and because "we cannot construe ambiguous language against the state[.]"⁶³ The court reversed the judgment and remanded with an instruction that the defendant's motion to dismiss be granted and that specific performance of the plea agreement.⁶³ In this case, the court articulated a rule to govern agreements to waive fundamental rights in Connecticut:

... of the fundamental nature of an obligation to testify in the presence of a cooperation agreement, we expect and require that the government intends for a cooperating defendant to waive his or her fundamental rights. It will include such an explicit requirement in the agreement. [Citation⁶⁴] Unless a plea agreement contains an

... conclusions and resulting denial of the defendant's motion to dismiss is not reversible error. See *State v. Haight*, 279 Conn. 546, 550 (2006)).
... [omitted] *Rivers*, 283 Conn. at 726.

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

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

... of the victim's death, it could have, and should have, said so. It remotely imply that this was its intent."), *cert. denied*, 216 Conn. 826, 827 (1990), *cert. denied*, 499 U.S. 922, 111 S. Ct. 1315, 113 L. Ed. 2d 248 (1991), 283 Conn. at 730.
 ... , 283 Conn. at 729-30.
 ... Conn. 724 (2007).
 ... 727.

the *Apprendi* line of cases.⁷⁶ Other *Apprendi* challenges to Connecticut practices and procedures⁷⁷ can be seen in cases involving other subsections of the pre-2008 offender statute and other statutes prescribing penalties under prescribed certain conditions.⁷⁸ This opinion, however, provided a practical primer on how the legislature may draft statutes constitutionally so as to avoid a foul of *Apprendi* and its progeny.⁷⁹

In *State v. Heinemann*,⁸⁰ the court rejected the defendant's claim that he was entitled to have his jury instructed to consider, "specifically, the level of maturity, sense of responsibility, vulnerability and personality traits of a sixteen-year-old when it decided his defense of duress." After analyzing the subjective and objective components of the defendant's statutory defense of duress⁸¹ and its Model

There have been only a few cases so far in which Connecticut courts have questioned the scope of the *Apprendi* ruling. See, e.g., *State v. Fagan*, 280 Conn. 206 (2006) (*Apprendi* inapplicable, but harmless error even if applicable); *State v. Rizzo*, 208-25 (Vertefeuille, J., dissenting) (*Apprendi* error); *State v. Rizzo*, 208-25, 229 n.33 (2003); *State v. Pierce*, 69 Conn. App. 516 (2002) (predictor offender registration requirement not sentence enhancement finding *Apprendi*), *rev'd on other grounds*, 269 Conn. 442 (2004).

In *State v. Myers*, 101 Conn. App. 167, *cert. granted*, 283 Conn. 906 (2004), the Appellate Court found that it was plain error for a trial court to sentence a repeat drug offender to an enhanced penalty without a guilty plea or B information against him. *Id.* at 181-86. The case is now on review in the Supreme Court.

GEN. STAT. § 53a-40 (rev. 2007) covered six categories of persistent offenders, authorizing enhanced penalties for each, while *mandating* an enhanced penalty for two of the categories. Contrast use of word "shall" in Subsections (h) and (i) of the word "may" in Subsections (j), (k), (l) and (m). All six categories present *Apprendi* problems, to the extent that each makes a sentencing decision the critical feature that triggers availability of an enhanced sentence otherwise authorized for the offense for which the defendant was charged and convicted by a jury. The legislature in a special session in January, 2007, changed the judicial opinion language in the statute that implicated *Apprendi*. In the Special Session, Public Act 08-01, section 7 (effective from passage). For example, the court explained: "§ 53a-40 (h) is unconstitutional, to the extent that it does not provide that a defendant is entitled to have the jury make a finding [that] expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" *Apprendi v. New Jersey*, *supra*, 530 U.S. 471, 484 n.11. Subtly, if the phrase 'the court is of the opinion that' was excised, §

the genesis, and even while acknowledging that brain development appears to support differentiation between the criminal responsibility of adults and young people,⁸² the court declined to “usurp” the legislature’s authority . . . in determining the types and limits of punishment for crimes.”⁸³

The differential treatment of conduct as a function of the age and status of the persons involved was at the heart of the federal constitutional issues resolved against the defendant by an unanimous, *en banc* panel of the Supreme Court in *State v. McKenzie-Adams*.⁸⁴ The defendant, a teacher, challenged his conviction of thirteen counts of sexual assault in the second degree for engaging in consensual intercourse with two students at his school, sixteen years of age, normally the age of consent. The victims’ ages and consents did not spare the defendant from criminal liability under General Statutes section 54-2a(8), which proscribes sexual intercourse between “[a] person who] is a school employee and . . . a person who is enrolled in a school in which the actor works or who is under the jurisdiction of the local or regional board of education which employs the actor” For the court, the defendant’s claim was rejected because the defendant had not shown that the statute was unconstitutional. The court held that the defendant’s claim was rejected because the defendant’s claim was predicated on a claim that he had been denied the right to engage in noncommercial consensual sexual intercourse with individuals over the age of consent.”⁸⁵ The court stated: “We need not decide whether a fundamental right to privacy exists generally because we agree with the majority that even if such a right exists, it does not protect sex-

The court wrote: “We acknowledge the defendant’s plea, acknowledge that juveniles have more immature decision-making capability and recognize the importance of protecting the notion that juveniles are more vulnerable to all sorts of pressures, but not limited to, duress. The flaw with the defendant’s proposition is that, carried to its logical conclusion, it essentially would require

ty in the context of an inherently coercive relationship as the teacher-student relationship, wherein consent not easily be refused.”⁸⁶

In reaching that conclusion, the court looked at the principles of the two United States Supreme Court’s decisions on privacy, first, *Bowers v. Hardwick*⁸⁷ in 1986, and, second, *Lawrence v. Texas*,⁸⁸ the 2003 case that overruled *Bowers*. In *McKenzie-Adams*, the court framed the issue as whether the defendant’s conduct violated the right to privacy under the state constitution. The court in *Lawrence* to have been “whether freely consenting adults have a liberty interest in intimate personal relationships conducted in the privacy of their own home.”⁸⁹ Relying on the Supreme Court’s distinction between a case involving adults who are engaged in sexual practices “‘with full and mutual consent from each other’” and a case involving minors or adults who might be injured or coerced or who are in institutional settings where consent might not easily be given,⁹⁰ the *McKenzie-Adams* court reasoned that the defendant’s sexual conduct with his students was outside the protected private conduct recognized in *Lawrence*.⁹¹ The court found that the defendant’s conduct was not subject to strict scrutiny constitutionally unnecessary, the court applied the rational basis test and upheld the sexual assault statute. The court based its decision on its rational relation to the government’s interest in promoting a safe school environment. Finally, the court rejected the defendant’s separate argument that “the state constitution confers a fundamental right to privacy on an elementary or secondary school student who engages in consensual sexual intercourse with a teacher of the age of consent enrolled in the school system in

⁸⁶ 98-99.
⁸⁷ 478 U.S. 186 (1986).
⁸⁸ 539 U.S. 558 (2003).
⁸⁹ *McKenzie-Adams*, 281 Conn. at 504, citing *Lawrence v. Texas*, 539 U.S. at 567.
⁹⁰ *McKenzie-Adams*, 281 Conn. at 505-06, quoting *Lawrence v. Texas*, 539

teacher is employed.”⁹³

McKenzie-Adams was also one of several cases that view of the evidentiary principles governing the admissibility of uncharged misconduct as proof of a common plan despite the general rule that uncharged misconduct is inadmissible.⁹⁴ Issues concerning the common plan exception arise unidirectionally when the state introduces uncharged misconduct evidence as part of its case against the defendant on a charged offense. Issues concerning the common plan exception also arise, one might say, reciprocally in cases, such as *McKenzie-Adams* and *State v. Jacobson*,⁹⁵ involving consolidation of cases against a defendant for a single trial. A trial court’s decision to consolidate cases must take account whether the evidence against the defendant in one case to the other is “cross admissible.”⁹⁶ If the evidence is not cross admissible, fair consolidation of cases depends on whether the trial court can give a cautionary instruction to the jury adequate to ensure that the jury

⁹³15. The court reached this conclusion by using the factorial analysis in *State v. Geisler*, 222 Conn. 672, 684-86 (1992). Five of the *Geisler* factors (precedent, textual approach, Connecticut precedent, sister state precedent, sociological considerations) favored the state’s position. *McKenzie-Adams*, 281 Conn. at 510-15. The remaining factor, the historical approach, was based on the lack of “any relevant evidence of the intent of our constitution with respect to the right of privacy.” *Id.* at 511.

⁹⁴*McKenzie-Adams*, 281 Conn. at 515-533 (cases brought on behalf of two defendants properly consolidated where each gave evidence that would be admissible on a common plan or scheme if tried separately; uncharged misconduct of a third person also properly admitted); *State v. Jacobson*, 283 Conn. 328 (2007) (affirmed multiple convictions of sexual assault and risk of sexual assault where uncharged misconduct evidence relating to a third young person was admissible to show common scheme or plan; Appellate Court had previously affirmed the evidence to be error, but not to necessitate new trials); *State v. Jacobson*, 284 Conn. 328, 334-68 (reversals ordered where, at consolidated trials stemming from two discrete robbery scenarios, one including a third person, the trial court erred in authorizing the jury to consider evidence from one scenario in liberating upon the other).

⁹⁵*State v. Jacobson*, 283 Conn. 328 (2007).

⁹⁶*State v. Jacobson*, 284 Conn. at 338-39 (“if evidence of a defendant’s uncharged misconduct is cross admissible to establish a common scheme or plan, then separate

use evidence from either case to decide the other.⁹⁷

Borden's opinion for the court in *State v. Randolph* sizes Connecticut evidentiary doctrine governing the admissibility of uncharged misconduct evidence,⁹⁸ then compainstakingly thorough analysis of the proper use of common scheme and plan evidence, with a focus on its use in cases involving sex crimes. This effort is extraordinary, and consistent with Borden's long history of pressing to the limit the logic, clarity, and precision with which the Connecticut governing uncharged misconduct law have been interpreted by our reviewing courts.⁹⁹ Borden observes that the presence of a common scheme or plan is a factor that changes the standard "by which the admissibility of evidence of uncharged misconduct is determined." [.]¹⁰⁰ A "liberal standard" applies in cases "when a defendant is charged with a sex crime and evidence of sexual misconduct is offered to establish that the defendant had a common scheme or plan to engage in sex crimes." By contrast, a "more stringent standard" applies in cases that do not involve sex crimes.¹⁰² Borden writes, "We have been consistent in our application of this standard, but we have been inconsistent in our articulation of the principles that guide our analysis."¹⁰³

Randolph, 284 Conn. at 362-63, 368 (discussing "circumstances in which the court is able of assessing the merits of each case fairly and independently in light of the trial court's cautionary instructions." *Id.* at 362).
339-41.

For example, in *State v. Murrell*, 7 Conn. App. 75, 83 (1986), for the first time, Justice Borden closely analyzed the functional similarities and legal distinctions between prior misconduct evidence offered to prove identity and such evidence offered to prove common scheme or plan. *Id.* at 83-84. *See also State v. Murrell*, 28 Conn. 85, 132 n.35 (1991) (Borden, J.) (recognizing a "concern" in the prejudicial use of common scheme evidence to prove identity). In *Murrell*, Justice Borden wrote that "the common scheme or system of criminal activity is proven by several separate but related strands . . ." *Id.* at 84. The opinion is *different* "strands" with the view that such "categorization" would minimize the evidentiary risks which inhere in an otherwise mechanical test of identity." *Id.* at 87.

en's analysis "reveals the existence of two separate categories of cases in which we have applied the same or plan exception."¹⁰⁴ His *Randolph* opinion explains the two categories, the first called "true" same or plan cases and the second called "signature."¹⁰⁵

In 2007 the higher courts reviewed confrontation cases requiring more precise delineation of the scope of the United States Supreme Court's paragoning decision in *Crawford v. Washington*¹⁰⁶ in *State v. Camacho*,¹⁰⁸ Justice Katz for a unanimous Court rejected the defendant's federal and confrontation challenges to the admission of testimony of a co-conspirator's and dual-inculpatory exceptions to the rule.¹⁰⁹ First, the court distinguished between the confrontation clause analysis controlled by the *Crawford* test that is "testimonial" and confrontation clause analysis controlled by the pre-*Crawford* test set forth in *Ohio v. Roberts*¹¹⁰ which gauges the reliability of evidence admitted under the hearsay exception.¹¹¹ Finding that *Roberts* controlled the court examined the record and concluded that the defendant's statements were admissible under established hearsay exceptions¹¹³ and were sufficiently reliable to satisfy the confrontation clause.¹¹⁴

In *v. Arroyo*,¹¹⁵ the defendant made confrontation

analysis added.) *Id.* at 343.

3-57.

36 (2004).

year's review, T.H. Everett, *Developments In Connecticut Criminal Law*, 82 CONN. B. J. at 176-82 ("V: The Confrontation Clause After *Crawford*: A Review of Other Cases").

in. 328 (2007).

2 n.21 and 358.

56 (1980).

in. at 348, 363-64.

0-51.

7, 362-63.

3-64. The court noted that constitutional analysis requires an intrinsic

challenges to the admission of videotaped testimony of a victim, using *Jarzbek*¹¹⁶ procedures and the admission of hearsay testimony under the medical exception to the hearsay rule and under the constancy of accusation exception to the hearsay rule.¹¹⁷ Justice Borden for the court concluded that the *Crawford* rule did not apply to the videotaped testimony because it was “the functional equivalent of in-court testimony.”¹¹⁸ The court also concluded that the videotaped testimony was “produced pursuant to established statutory procedures consistent with the United States Supreme Court’s holding in *Maryland v. Craig*,¹¹⁹ which governs the circumstances in which a witness may be examined in the absence of counsel and the court but outside the presence of the defendant.”¹²⁰ Employing the “primary purpose test” developed by the United States Supreme Court in *Davis v. Washington*,¹²¹ in 2006, the *Arroyo* court also held that statements made by the complainant to a licensed social worker and a police interviewer while being observed and taped by police personnel did not constitute “testimonial statements” under *Crawford*: “the primary purpose of the statements was not to build a case against the defendant, but to assist the victim with assistance in the form of medical treatment and health treatment.”¹²³

Finally, the Supreme Court in *Arroyo* ordered a new trial for the defendant on sexual assault and risk of injury counts, holding that the trial court had committed reversible error when it denied the defendant’s request for a jury charge on his “third-party culpability defense.”¹²⁴ The court denied the defendant’s claims of error, including a claim that the five-plaintiff’s statements given after a formal complaint had been filed were admitted in violation of estab-

120-21. See *State v. Jarzbek*, 204 Conn. 683, cert. denied, 484 U.S. 1000 (1987), 15 Conn. Gen. Stat. § 54-86g.

constancy of accusation law,¹²⁵ and a couple of other issues that may command different results if raised in context on different records.¹²⁶

In *Moore*,¹²⁷ the Appellate Court found that the defendant's right of confrontation was violated, requiring a retrial where a state's witness who had altered his testimony was absolved the defendant on cross-examination, then testified on redirect before invoking his Fifth Amendment privilege and refusing any further redirect examination, thus preventing recross-examination.¹²⁸ The trial court denied the defendant's motion to strike the redirect testimony. The Appellate Court found that ruling violated the defendant's right of confrontation, which guarantees the right to cross-examine on new matters raised on redirect.¹²⁹ The Appellate Court applied harmless error analysis but found that the error was not harmless.¹³⁰

36-40. In *State v. Samuels*, 273 Conn. 541 (2005), the court held that evidence obtained by a victim after he or she had filed an official complaint with the police was inadmissible as constancy of accusation evidence.” *Arroyo*, 284 Conn. 486, 541 (2007)). In *State v. McKenzie-Adams*, 281 Conn. 486, 541 (2007)). In *Samuels*, the court held that the history and purpose of *Samuels* rule “persuade us that the rule is triggered when the declarant is a young child, as in the present case, rather than the child’s parent or guardian, makes an official complaint on behalf of the victim.” *Id.* at 639.

The defendant claimed that the trial court “failed to inform the defendant of his right to consular notification under the Vienna Convention of Consular Rights.” *Id.* at 601. The Supreme Court declined to address the claim as briefed. The defendant also claimed that the trial court failed to conduct an inquiry “into his complaints that he could not communicate adequately with his Spanish-speaking attorney” *Id.* at 640. While the reviewing court found that the inquiry to have been adequate, the court makes an interesting point about the record under review: “Although the defendant several times requested the services of an interpreter, he never claimed that the interpreter services that were provided were inadequate.” *Id.* at 644. Monolingual English-speaking trial judges face a special challenge as guardians of the fair trial rights of non-English-speaking defendants who need interpreters because they are competent linguistically but not in native language, not English. Attorneys must develop strategies to ensure that interpreter services are effective and to recognize and challenge, where appropriate, the inadequacy of interpreters’ services that are not effective for a given client.

ases raised “structural” constitutional claims relating to the first principles of criminal procedure. In *State v. Justice Palmer* for the Supreme Court rejected the defendant’s claim that his constitutional right to be present at trial was violated when he was, *at his own request*, removed from the courtroom during his murder trial and again when he was not permitted to return to the courtroom following a violent outburst and other confrontational behavior by the marshals holding him outside the courtroom after he was removed.¹³² Similarly, the court found that, by his conduct, the defendant had “forfeited” his constitutional right to be present at trial, which he had requested to do even as he was being removed from the courtroom on his own request in response to his own request to leave.¹³³

In *State v. Strich*,¹³⁴ the Appellate Court rejected the defendant’s claims that he was “removed from the courtroom in an unconstitutional manner” following his disruptive behavior and that the court misinstructed the jury regarding the defendant’s right to be present and his absence at final arguments.¹³⁵ The *Strich* court found that it was constitutional error not to inform the defendant that he could “reclaim” his right to be present for the remainder of the trial if he gave “proper assurances” of no future disruptive behavior, but the court found that the error implicated the defendant’s right to be present guaranteed by Sixth Amendment confrontation clause, but “only his generic fifth amendment right to participate in the proceedings.”¹³⁶ That error did not call for automatic reversal,¹³⁷ but instead called for harmless error analysis.¹³⁸ The court concluded that the error was harmless beyond a reasonable doubt, in part because the defendant was given the opportunity to listen to the small

Conn. 613 (2007).

36-46.

46-50.

Conn. App. 611, cert. denied, 282 Conn. 907, cert. denied, 128 S. Ct. 225

of the trial (the prosecutor's closing argument and jury charge) by a closed circuit hook-up.¹³⁹

v. Canales,¹⁴⁰ Justice Norcott for the court rejected defendant's claim that it violates due process of law to preside at a hearing in probable cause resulting in a jury charge where the same judge had previously issued arrest and search warrants against her in the case.¹⁴¹ In *Johnson*,¹⁴² Justice Katz for the Supreme Court sustained the state's appeal from the Appellate Court which had reversed the trial court's instruction on the reasonable doubt standard as unconstitutional because its use of the phrase "not convinced . . . diluted the state's burden of proof from the reasonable doubt standard to a clear and convincing standard."¹⁴³ The court's discussion of different jury instructions to define reasonable doubt, the Federal Pattern Jury Instruction's model instruction, and scholarly studies of the "not convinced" instruction makes for interesting reading and shows how difficult it is to put an accurate and simple instruction on a basic principle of law that is used everyday. The court's effort to explain the meaning of "reasonable doubt" by resorting to epistemological talk or settling for a tautological instruction with a disclaimer — that the reasonable doubt is what it is — and its deeper meaning is ineffable. Concluding that "reasonable doubt" can be defined, Justice Katz for the court endorsed¹⁴⁵ an instruction adopted by the New

23.

Conn. 572 (2007).

592-600. The court posited that "the question . . . is not whether the court's failure to disqualify himself constituted an abuse of discretion, but whether the failure resulted in a violation of the defendant's constitutional right to a fair trial." *Id.* at 593-94. Agreeing that "the statutes and rules of practice evince a policy that having a different judge reconsider previously decided questions, or even a new trial, is far more important than the efficiency of the trial process than to those previously decided[.]" the court declared: "we strongly encourage our trial judges that they disqualify themselves from conducting a new trial or a hearing when they already have issued arrest or search warrants in the case." *Id.* at 599.

Conn. 111 (2007).

reme Court:

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

v. Phillips,¹⁴⁷ the Appellate Court reversed the s denial of the defendant’s motion for a new trial ded for “a determination on the existing record, of for a new trial, including a finding as to whether racial bias on the part of a juror against the defen- dge DiPentima wrote the unanimous opinion of declaring: “Our task in this case is to strike an delicate balance between preserving the sanctity of deliberative process and ensuring that racial preju- o place in the jury room.”¹⁴⁹ The trial court had dentiary hearing on the defendant’s motion for a t which all six jurors in the case testified concern- bias on the part of a white juror toward the defen- e Appellate Court opinion relates that four of the black, testified that “they believed juror B to be ejudiced against the defendant, who is a black uror B himself “acknowledged the racial overtones

the jury's deliberations."¹⁵² The trial court "found jurors' testimony to be credible" but held that there was no evidence that comments attributed to Juror B "com-
promised the jury in any way."¹⁵³ The Appellate Court took issue with the trial court's compliance with the procedural requirements of the "delicate and complex task of investigating the possibility of juror bias"¹⁵⁴ but took into account that that possibility is a core constitutional guarantee and that an allegation of juror misconduct is "all the more grave when it is said to be racial bias."¹⁵⁵ The Appellate Court vacated the ruling and remanded for a new ruling because the trial court's ruling employed the wrong legal standard: "It is error to instead restrict its inquiry to objective evi-
dentially related statements and behavior. The court should have decided whether that evidence amounted to a verdict against the defendant on the part of one or more jurors, which would have automatically warranted a new

trial." *Id.* ¹⁵⁶ *Fauci*,¹⁵⁷ the Supreme Court broke new ground by, announcing that the term "prosecutorial misconduct" now replaces the traditional term, "prosecutor-
misconduct," as a reviewing court's denomination for the trial prosecutor that breach trial rules and imper-
ment the defendant's right to a fair trial. Justice Zarella opens his opinion with a lengthy footnote announcing the change in nomenclature, explaining the reasoning behind the change and providing an overview of how other jurisdic-

21.

22.

25.

23.

25 (citing *State v. Santiago*, 245 Conn.301, 336 (1998)).

Conn. 23 (2007).

Fauci court makes clear that the change of terms is a formal, not a func-
tional change in the law. The new term is "more appropriate" than the old, but the
law is for such claims unchanged. *Id.* at 26 n.2. The old term carries

minate such claims.¹⁵⁹ One would expect that all most obdurate defense appellate counsel will now that allege improprieties instead of acts of mis- when claiming reversible error based on rule-break- s of trial prosecutors.¹⁶⁰

POST-CONVICTION PRACTICE AND PROCEDURE.

Supreme Court issued three decisions involving to correct an illegal sentence under Practice Book 22. In *State v. Lawrence*,¹⁶¹ the court affirmed a on of an *en banc* Appellate Court that had upheld ourt's dismissal of a defendant's motion to correct sentence. The defendant's claim was that he should convicted of and sentenced for first degree ter instead of first degree manslaughter with a justice Katz for a unanimous court concluded that was not one over which a trial court has jurisdiction authority to correct an illegal sentence is limited egories of corrective claims recognized at common *State v. Casiano*,¹⁶³ a case before the Supreme a motion to review the trial court's denial of counsel for an appeal from the denial of a motion an illegal sentence, the court held that "an indigent efendant has a right to the appointment of counsel

gy better reflects the actions of a prosecutor under [*State v.*] *Williams* 23 (1987)] because the first part of our analysis looks at whether the prosecutor are improper rather than the effects of those actions on the trial. *Id.*, 540. If these actions do, in fact, so infect the trial with o make the resulting conviction a denial of due process, they rise to mful impropriety." *Id.* at 26 n.2.

16-28 n.2.

er, the nature of language being what it is, there may come a day in hen a generation of cases alleging prosecutorial "impropriety" will the benign aspect that term now presents (not yet having been wield- vocates), and when the word "misconduct" will have been rested long lost its current pejorative connotation and to be once again useful

tation in connection with a motion under Practice
n 43-22.”¹⁶⁴ The right to counsel is statutory¹⁶⁵
at the trial level and extends to the appellate level
initially appointed counsel determines that “the
who wishes to file such a motion has a sound basis
.”¹⁶⁶

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

v. Commissioner,¹⁷³ the hands of time had to be
and the clock rewound in a case reminiscent of
nt time-bending case, *State v. Skakel*.¹⁷⁴ In *Mead*,

7.
GEN. STAT. § 51-296(a).
282 Conn. at 627-28.
n. 724 (2007).
Santobello v. New York, 404 U.S. 257 (1971).
n. at 737.
2.

sis in original.) *Id.* at 738 n.25.
0. The court noted that “the factual scenario of this case is highly
” and added that the *Casiano* decision according counsel to an indi-

ner challenged the respondent's calculation of his three concurrent sentences of "life" for three acts of degree murder committed on or about August 12, 1975, when the petitioner committed his offenses, "life" meant imprisonment for the duration of the defendant's natural life.¹⁷⁵ The respondent later recalculated petitioner's sentences based upon a 1980 Public Act regarding indeterminacy sentences for "any felony committed prior to July 1, 1980," and the petitioner has since been serving a sentence of 60 years with a 10-year minimum and with life as its maximum.¹⁷⁶ The petitioner earned statutory good time against the minimum sentence, and is now serving, and later was considered for, but not released, parole seven times.¹⁷⁷ The trial habeas court denied the petition in which he asserted that he was entitled to have his 60-year "life" sentence converted to reflect the current definition of "life" as 60 years.¹⁷⁸

The habeas court made a moral argument and after receiving supplemental briefing, the effect, if any, of *State v. Skakel*, on the case, the habeas court denied the petition. The Court panel hearing *Mead* itself moved for transfer of the case to the Supreme Court and the motion was granted. The Supreme Court affirmed the habeas court, concluding that the current statute defining "life" "affects substantive rights and, in the absence of any clear and unequivocal legislative intent, the presumption of constitutionality requires the application of the statute to persons sentenced prior to its enactment."¹⁸⁰ In his dissenting dictum at the end of *Mead*, Justice Sullivan stated that a 1989 Second Circuit decision supports the proposition that the petitioner's sentence should never have been converted into an indeterminate sentence at all.¹⁸¹ Because

¹⁷⁵ 2007 Skakel filed a petition for a writ of habeas corpus in the United States District Court for the District of Connecticut, No. 07-01625 (DCD). (D.C. Conn. 2007).

ent was presented only in the petitioner's supplement "to which the respondent had no opportunity to respond" and because the petitioner did not claim that he suffered any deleterious effect" by serving the recalculation, the Mead court left the judgment intact.¹⁸³

IV. ADEQUACY OF RECORD

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

In *State v. Dalzell*,¹⁸⁸ the Supreme Court reversed the Appellate Court for reaching out to decide a

l seizure case on legal grounds that “never had been argued or briefed by the parties before that court.”¹⁸⁹ The Supreme Court also rejected the defendant’s alternate argument for affirmance based on a pretextual stop argument not raised in the trial court and for which the trial court made no findings, leaving the record inadequate for review under *State v. Golding*.¹⁹⁰

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

In *State v. Fabricatore*,¹⁹⁵ the Supreme Court found that the record showed that the defendant at trial had “expressly

¹⁸⁹ 715 Conn. 22 (2007) (discussing doctrinal tension in use of *State v. Golding*, 213 Conn. 40 (1989), to review unpreserved search and seizure claims, recently rejected in *State v. Brunetti*, 279 Conn. 39, 55-56 (2006), cert. denied, 127 S. Ct. 1077 (2007)).

¹⁹⁰ 715 Conn. 444 (2007).

¹⁹¹ 715 Conn. 465 (2007). The court had first explained: “Like the Appellate Court, we find that the state a second opportunity to contest the defendant’s affidavit in support of this motion to suppress, which the trial court accepted as true and on which the trial court’s legal determinations were premised, given the absence of any record to demonstrate that the state did not acquiesce to the truth the defendant presented.” (Emphasis added.) *Id.*

his appellate right to challenge a jury charge on retreat where trial counsel “clearly expressed his with that instruction” and “openly acquiesced at the retreat theory upon which the case was tried.”¹⁹⁷