

2009

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Recommended Citation

Everett, Timothy, "Developments in Connecticut Criminal Law: 2008" (2009). *Faculty Articles and Papers*. 329.
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Citation: 83 Conn. B.J. 163 2009



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DEVELOPMENTS IN CONNECTICUT CRIMINAL LAW: 2008

BY TIMOTHY H. EVERETT*

This article surveys criminal cases decided by Connecticut's higher courts in 2008, without hope of completeness but with the aim to identify cases that are "must reads" and "must re-reads" for members of the Bar. The Connecticut Supreme Court decided several especially significant cases in 2008. In a long, nonunanimous decision, *State v. DeJesus*,¹ the Supreme Court grappled with the relation between the new Code of Evidence and the Supreme Court's inherent powers under the common law and the state constitution. After concluding that adoption of the Code of Evidence had not altered its own authority to make common-law rules of evidence, the *DeJesus* Court announced a new "propensity" exception to the law governing use of uncharged misconduct evidence; the Court has already begun to map out the parameters of this propensity exception.² In *State v. Salamon*,³ the Court corrected its past construction of the abduction element in kidnapping, distinguishing it from unlawful restraint; in so doing the Court overruled long-standing precedent that the Court had affirmed as recently as 2002.

By design the Appellate Court decides most of the cases on its large docket by careful application of established legal paradigms, not by reconsidering precedent and fashioning novel law.⁴ The Appellate Court plays a critical role in the development of Connecticut criminal law and procedure, both through those relatively few of its decisions that the Supreme Court selects for further review and, as importantly, by providing "the final word" in the vast majority of criminal appeals taken from the Superior Court. Its middle

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¹ 288 Conn. 418 (2008).

² *State v. Snelgrove*, 288 Conn. 742 (2008); *State v. Johnson*, 289 Conn. 437 (2008).

³ 287 Conn. 509, 513 n.6, 542-43 (2008) (overruling *State v. Luurtsema*, 262 Conn. 179 (2002)).

⁴ Because the Appellate Court typically sits in panels of three, it is significant when the Court sits *en banc* in a criminal case, but the Court did not do so in 2008.

tier vantage point and high volume docket place the Appellate Court in a special role, with comparatively direct and usually final oversight of actual criminal practice in the trial courthouses of the State.⁵ This review cannot cover the extensive array of cases decided by the Appellate Court last year, so it includes a somewhat idiosyncratic sampling of some of the more interesting ones.

I. APPELLATE BOX SCORES AND RECAPS

In 2008 the Connecticut Supreme Court decided fifty-two cases involving criminal law. Forty-three were direct appeals from criminal judgments in the Superior Court, seven were appeals of Superior Court decisions on habeas corpus petitions, one was a Writ of Error from conviction of summary contempt, and one was an interlocutory appeal authorized by the Chief Justice in the interests of justice pursuant to General Statutes Section 52-265a. The Supreme Court fashioned its docket by transferring twenty-one cases from the Appellate Court this year and granting certification to review issues previously decided in the Appellate Court in another nineteen cases. Of the cases first decided by the

⁵ For just one example of the court's important vantage point on the day-to-day realities of actual criminal practice in G.A. and J.D. courthouses, see Chief Judge Flynn's concurrence in *State v. Outlaw*, 108 Conn. App. 772, cert. denied, 289 Conn. 915 (2008). The *Outlaw* majority rejected the defendant's sufficiency of the evidence challenge to a jury's conviction for willful failure to appear for sentencing in a previous criminal case. *Id.* at 776-80. The defendant testified that he had been in the courthouse on the date in question but that his lawyer told him that he could leave and that sentencing would be rescheduled. Chief Judge Flynn agreed with the sufficiency holding, but rued the fact that on appeal there was no claim that the trial court erred when it failed to give a requested jury charge on the role of trial counsel's advice. *Id.* at 788. Chief Judge Flynn's concurrence drew attention to an important reality of criminal practice in Connecticut courthouses: "My concern lies not in what the majority opinion says, but in what it does not say. *On a daily basis, defendants are instructed by their attorneys, by court personnel and by prosecutors that their cases will not be going forward on that particular day or that a dismissal or nolle will be recommended and, therefore, that they need not be present and are free to leave.* This avoids wasting the time of both the court and Connecticut citizens who are called to court when, for one good reason or another, cases cannot be heard or disposed of on that day can be disposed of quickly without the presence of the defendant. *Early every morning, lines form in the courthouses of our Superior Courts, filled with defendants waiting to meet with prosecutors on motor vehicle infractions. Many of these defendants are told that the case will be nolle for various reasons and that they should leave the courthouse. Unless the presiding judge has forbade such common practices a defendant should be able to rely on such statements without facing criminal charges.*" (Emphasis added.) *Id.* at 787-88.

Appellate Court, the Supreme Court affirmed nine times and reversed or modified the Appellate Court's decision ten times. The Supreme Court sat *en banc* in three criminal cases, but fell short of unanimity in deciding each.⁶

The Supreme Court did not review any capital cases resulting in the death penalty⁷ in 2008, though it did review a capital case in which a young defendant was given a life sentence without the possibility of parole.⁸ The Court decided a broad range of issues in the administration of criminal justice and constitutional rights, including protection of a complainant's mental health records,⁹ calculation of the time that a defen-

⁶ State v. DeJesus, 288 Conn. 418 (2008) (6-1 decision; Chief Justice Rogers' plurality opinion, joined by two justices, *id.* at 420-77, held that adoption of Connecticut Code of Evidence was not meant to alter the Supreme Court's common-law authority to adopt and modify rules of evidence; Justice Palmer, concurring, *Id.* at 477-88, agreed that the Court retained its common-law authority over evidentiary law, following a different analytic path; Justice Zarella, joined by Justice Sullivan, *Id.* at 488-94, also concurred, "like Justice Palmer, that the judges of the Superior Court do not possess authority under our constitution to divest this court of its inherent authority to change and develop the law of evidence." *Id.* at 490; Justice Katz, dissenting, *Id.* at 494-547, with the view that the process leading to the adoption of the Code did alter the Supreme Court's common-law authority over established, i.e., codified, rules of evidence and that it is now limited to interpreting and applying those rules in individual cases; see discussion, *infra*); State v. Salamon, 287 Conn. 509, 517-50 (2008) (4-3 decision overruling long-standing interpretation of the abduction element for kidnapping by recognizing that merely incidental restraint of victim during commission of another offense constitutes unlawful restraint, not abduction); State v. T.R.D., 286 Conn. 191, 198-206 (2008) (5-2 holding that canvas of defendant was inadequate to establish waiver of right to trial counsel under federal constitution because canvas did not ensure defendant had a "meaningful appreciation" of his criminal exposure if convicted).

⁷ The Supreme Court heard extended argument in a capital case, State v. Courchesne, on March 19, 2008, but as of June 15, 2009, the court has not issued its opinion. Meanwhile, a bill to abolish the death penalty passed both houses of the state legislature, a surprising turn of events, given the enduring shock waves stemming from the home invasion and multiple murders in Cheshire, Connecticut, in the summer of 2007. Governor Rell has vetoed the abolition bill.

⁸ State v. Allen, 289 Conn. 550 (2008). The Allen Court rejected the defendant's claim that his sentence of life imprisonment without the possibility of parole violates the Eighth Amendment prohibition on cruel and unusual punishment because he was under the age of eighteen at the time of the commission of the offense. *Id.* at 582-85 (tracking Delaware Supreme Court's reasoning in rejecting "an identical claim" in Wallace v. State, 956 A.2d 630 (Del. 2008)).

⁹ State v. Kemah, 289 Conn. 411 (2008). Justice Katz wrote the Kemah opinion, sustaining the state's public interest appeal and holding that a complaining witness who voluntarily disclosed confidential mental health records to police and prosecutors had not thereby broadly waived statutory confidentiality of those records so as to relieve trial court of its gate-keeping function under State v. Esposito, 192 Conn. 166 (1984). Under Esposito "two levels of consent from the holder of the privilege are required before a defendant may obtain access to confidential

dant may be kept in placements intended to restore his competency,¹⁰ the need to instruct a jury on the distinction between “true threats” and constitutionally protected speech,¹¹ when a continuance at the state’s request converts to a *nolle prosequi*,¹² and various suppression, consolidation and severance, evidentiary, and trial process issues.

If the Supreme Court docket year included a sizeable squadron of criminal cases, the Appellate Court docket comprised a veritable flotilla of criminal cases demanding decision. By written opinions (not counting memorandum decisions), the Appellate Court decided one hundred sixty-four direct appeals from judgment in criminal cases, sixty-eight appeals in habeas corpus cases, and five other cases presenting criminal law issues via less common procedural actions, such as petitions for a new trial and extraordinary writs.

As noted before, the Appellate Court’s work is most often the last word in a criminal case. The Court decided too many cases to recite. Just a few of the interesting decisions show the range of issues the Court handles. In *State v. Re*¹³ the Court held that it was not double jeopardy to convict and sentence a defendant for both manslaughter in the second degree and manslaughter in the second degree with a motor vehicle where the defendant, driving while intoxicated, caused the death of one person.¹⁴ In

records—consent to an in camera review and consent to disclose to the defendant any impeachment or exculpatory evidence that the court’s review yields. . . .” *Kemah*, 289 Conn. at 426.

¹⁰ *State v. Jenkins*, 288 Conn. 610, 625-28 (2008) (multiple placements are cumulative in determining whether 18-month limitation in CONN. GEN. STAT. §54-56d(i) has been exceeded).

¹¹ *State v. Cook*, 287 Conn. 237, 250-53, *cert. denied*, 129 S.Ct. 464, 172 L.Ed.2d 328 (2008) (reversed conviction for carrying a dangerous weapon, a wooden table leg, because “the trial court improperly failed to instruct the jury that it could not find the defendant guilty . . . unless it found, on the basis of the defendant’s conduct or statements, that his alleged threat to use the table leg constituted a true threat and not simply idle talk, banter or some other form of protected expression.” *Id.* at 252).

¹² *State v. Winer*, 286 Conn. 666 (2008) (state request to put case on firm jury list was not request for continuance triggering thirteen-month nolle and erasure rule in CONN. GEN. STAT. §54-142a(c)).

¹³ *State v. Re*, 111 Conn. App. 466 (2008), *cert. denied*, 290 Conn. 908 (2009).

¹⁴ *Id.* at 470-72 (2008) (CONN. GEN. STAT. §53a-56(a)(1) and CONN. GEN. STAT. §53a-56b(a) are not the “same offense” under *Blockburger* test and there is no indication in text or history of statutes that legislature did not intend to authorize conviction and punishment for each separately; however, the Court did find that the judgments of conviction on two counts of driving while intoxicated was double jeopardy).

*State v. Martin*¹⁵ the Court held that it was double jeopardy to convict a defendant of both felony possession of marijuana for his possession of 4.4 ounces of marijuana and *attempted* possession of more than a kilogram of marijuana where the police had removed all but the 4.4 ounces of marijuana from a mail package containing 18 pounds of marijuana before the defendant took possession of what he expected would be the larger amount.¹⁶ In *State v. Bonner*¹⁷ the Court held that the trial court properly applied collateral estoppel when it refused to hold an evidentiary hearing on the defendant's motion to suppress narcotics found after his arrest which he claimed was not supported by probable cause, because another court in a murder case had heard and rejected his motion to suppress his statement to police as fruit of an illegal arrest.¹⁸ In *State v. Ayuso*¹⁹ the Court held that a trial witness was properly permitted to invoke his Fifth Amendment privilege and that the trial court properly refused to order the state to use its statutory power to accord immunity to certain witnesses. In *State v. Callahan*²⁰ the Court found that the trial court had not erred in terminating a defendant's accelerated rehabilitation upon finding that she "had not complied with the court's order to send a genuine letter of apology to a person whom the defendant had accused of harassment."²¹ In *State v.*

¹⁵ *State v. Martin*, 110 Conn. App. 171 (2008), *cert. granted*, 289 Conn. 944 (2008) (certified issue: "Did the Appellate Court correctly conclude that a conviction for possession of four ounces or more of marijuana in violation of General Statutes § 21a-279 (b) should be merged with the conviction of attempt to possess one kilogram or more of marijuana with the intent to sell in violation of General Statutes §§ 21a-278 (b) and 53a-49?").

¹⁶ *Id.* at 175-80 (*Blockburger* test not appropriate where "but for the actions of the police, the defendant would [not] have been charged with multiple offenses." *Id.* at 177).

¹⁷ *State v. Bonner*, 110 Conn. App. 621, *cert. denied*, 289 Conn. 955 (2008).

¹⁸ *Id.* at 625-33.

¹⁹ 105 Conn. App. 305, 309-19, *cert. denied*, 286 Conn. 911 (2008).

²⁰ 108 Conn. App. 605, *cert. denied*, 289 Conn. 916 (2008).

²¹ *Id.* at 608. The trial court found that the defendant's letter was "'an insincere apology'" and the Appellate Court agreed, rejecting the defendant's argument "that the court was bound to find acceptable as an apology any document using any form of the word 'apology,' no matter how hedged by accompanying verbiage." *Id.* at 612. The Court also found that any claims that the condition set by the court interfered with the defendant's right against self-incrimination and was an acknowledgment of guilt inconsistent with the AR program were waived when the defendant agreed to the condition when the program was granted. *Id.* at 610-11.

*Houle*²² the Court reversed and ordered a new trial where the jury's conviction of the defendant of third degree arson and first degree criminal mischief depended on "proof of irreconcilably inconsistent states of mind."

II. WHAT IS THE CONNECTICUT CODE OF EVIDENCE?

The philosophically most far-reaching Supreme Court decision of the year was its *en banc*, split decision in *State v. DeJesus*,²³ affirming the Appellate Court's 2005 decision upholding the application of a special liberal rule of admissibility for uncharged misconduct evidence in prosecution of sex offenses.²⁴ However, the Supreme Court affirmed on alternative grounds unavailable to the Appellate Court, which had correctly considered itself bound by decisional law of the Supreme Court prior to *DeJesus*. Prior decisional law had grounded the liberal rule of admissibility in exceptions to the general rule against character evidence, though it sometimes required strained logic to apply them to uncharged misconduct in sex prosecutions.

The Connecticut Code of Evidence, adopted in 2000, makes no express reference to the liberal rule,²⁵ but the Code was intended to incorporate, unaltered, the decisional law of evidence in existence at the time of the Code's adoption.²⁶ Noting that its status as "an intermediate appellate court" barred it from adopting the opinion of a dissenting Supreme Court justice²⁷ or otherwise reconsidering or revising Supreme Court precedent, then Judge (later Justice) Schaller for the Appellate Court in 2005 had rejected *DeJesus*'s arguments asking for a new gloss on, or outright rejection of, the liberal rule of admissibility.²⁸ That constituted the central

²² *State v. Houle*, 105 Conn. App. 813, 817-18, 827 (2008).

²³ 288 Conn. 418 (2008).

²⁴ *State v. DeJesus*, 91 Conn. App. 47 (2005), *cert. granted*, 279 Conn. 912 (2006).

²⁵ See *State v. Kulmac*, 230 Conn. 43, 60-61 (1994).

²⁶ See Code of Evidence §1-2(a) and Commentary thereto ("Purposes of the Code.").

²⁷ The reference is to Justice Katz's dissent in *Kulmac*, 230 Conn. at 86-88. Justice Katz was already on record with her position that, post-Code, the Supreme Court itself no longer could change the liberal rule of admissibility—which she continued to oppose. See *State v. Sawyer*, 279 Conn. 331, 362-66 (2006) (Katz, J., concurring).

²⁸ *DeJesus*, 91 Conn. App. at 58 n. 4 and 60 n. 5.

issue²⁹ the Supreme Court certified for appeal: “Does this court, or any court, have the authority in light of the Connecticut Code of Evidence, to reconsider the rule that the introductions of prior sexual misconduct of the defendant in sexual assault cases, is viewed under a relaxed standard?”³⁰ The *DeJesus* Court, sitting *en banc*, spoke in many voices in answering the certified question in the affirmative.³¹ The upshot is that adoption of the Code did not diminish the Supreme Court’s pre-Code authority to change or modify evidence law and that the Supreme Court itself is not bound by the Code.

The *DeJesus* decision resolved that the Code of Evidence does not bind the Supreme Court, but it leaves other issues concerning the legal force of the Code in a state of uneasy irresolution. What, if anything, is “new” in the law of evidence after the Code’s adoption by vote of the judges of the Superior Court in 2000? Is it an actual “code” setting forth rules that govern evidence law or is it merely a well-composed snapshot of the common-law principles that govern evidence practice? Does the Code have any effect whatsoever on the common-law process by which Connecticut evidence law has always been applied and developed? Is the Code less binding on trial courts than the Connecticut Practice Book? Is there any reason hereafter to change the Code except to conform to any new appellate decisions that change the common law of evidence or to conform to any statutes that change evidence law?

In *State v. Sawyer*³² in 2006 the Supreme Court had recognized that the Code’s very existence raised a question regard-

²⁹ The Supreme Court also agreed to review the state’s claim that the Appellate Court had incorrectly reversed the defendant’s kidnapping conviction on vagueness grounds. The Supreme Court affirmed on alternate grounds, applying its just minted clarification of the distinction between the abduction element of kidnapping and unlawful restraint. *State v. DeJesus*, 288 Conn. at 421, 428-39 (applying *State v. Salamon*, 287 Conn. 509, 542 (2008)).

³⁰ *State v. DeJesus*, 279 Conn. at 912; *State v. DeJesus*, 288 Conn. at 421 n. 4.

³¹ On the Code status issue, Chief Justice Rogers (joined by Justices Norcott and Vertefeuille) wrote a plurality opinion, Justice Palmer concurred in a separate opinion, Justice Zarella (joined by Justice Sullivan) concurred separately, and Justice Katz dissented. *DeJesus*, 288 Conn. at 439-62 (Rogers, C.J.), 477-88 (Palmer, J.), 489-94 (Zarella, J.), 494-528 (Katz, J.).

³² 279 Conn. 331 (2006).

ing the ongoing vitality of the Court's pre-Code power to modify and change Connecticut's common-law rules of evidence (though not its statutory rules of evidence). But the *Sawyer* majority did not find it necessary to decide whether the Code had changed the high court's role in changing, as opposed to interpreting and applying, Connecticut's common-law rules of evidence.³³ Although Justices Borden and Katz staked out clear positions on the legal foundation for the Code's authority,³⁴ the *Sawyer* majority hesitated.³⁵ Meanwhile, those who had helped to draft the Code went public with their explanations of its purposes and provenance.³⁶ In April 2008 the Supreme Court side-stepped another opportunity to define the nature of the Connecticut Code of Evidence.³⁷ Then, in

³³ The *Sawyer* majority opinion tergiversated on the implications of the Code's adoption for the Court's own authority: "[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. . . . 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." *Id.* at 331 n. 1.

³⁴ Justice Katz and Justice Borden, in separate opinions, each declared unambiguously that changes to existing evidence law set out in the Code may be made only by the judges of the Superior Court in an exercise of their "rule making" function and with the guidance of its evidence oversight committee. Katz and Borden each declared that in the Code era the Supreme Court retains authority only to interpret and apply rules of evidence. *Id.* at 362-66 (Katz, J.), 366-93 (Borden, J.).

³⁵ See discussion of *State v. Sawyer*, 279 Conn. 331 (2006) and *State v. John M.*, 94 Conn. App. 667, subsequently reversed, 285 Conn. 528 (2008), in C. TAIT AND E. PRESCOTT, *TAIT'S HANDBOOK OF CONNECTICUT EVIDENCE* (4th ed. 2008) § 1.3, pp. 17-19 ("These two cases undermine the status of the Code as the definitive repository of the rules of evidence, and vitiate the basic purpose of a code to encapsulate the rules in one authoritative source. Until these issues are resolved, the hegemony of the Code will remain in limbo." *Id.* at 17). See also discussion in T.H. Everett, *Developments in Connecticut Criminal Law: 2006*, 81 CONN. BAR J. 161, 171-75 (2007) ("SETTING THE BOUNDS FOR EVIDENTIARY REVIEW UNDER THE CODE: *STATE V. SAWYER*").

³⁶ The chair of the committee that drafted the Code, Justice Borden, had already published in this journal. D. Borden, *The New Code of Evidence: A (Very) Brief Introduction and Overview*, 73 CONN. BAR J. 210-20 (1999). Professor Tait, who served on the drafting committee and serves on the evidence oversight committee, and his co-author Judge Prescott examined the relation of the Code to the state constitution, the common law, future case law, statutory rules of evidence, and the Practice Book. C. TAIT AND E. PRESCOTT, *TAIT'S HANDBOOK OF CONNECTICUT EVIDENCE*, §§ 1.2, 1.3, 1.4, 1.5 (4th ed. 2008).

³⁷ In *State v. John F.M.*, 285 Conn. 528 (2008), the Court reversed the Appellate Court without addressing the Appellate Court's premise that a conflict between decisional law of the Supreme Court and the Code of Evidence would have to be resolved in favor of the Supreme Court. See *State v. John M.*, 94 Conn. App. 667,

August 2008 the Supreme Court decided *DeJesus*.

The much-awaited outcome in *DeJesus* was not presaged by previous cases decided under the new Code since 2000, most notably *State v. Sawyer*. Chief Justice Rogers wrote the opinion of the Court in *DeJesus*, joined by Justices Norcott and Vertefeuille, concluding, *inter alia*, that judges of the Superior Court in adopting the Code had *not* actually “intended to divest this court of its long-standing inherent common-law adjudicative authority over evidentiary law.”³⁸ Separately concurring in the result, Justice Palmer and Justice Zarella (joined by Justice Sullivan) eschewed the majority’s reliance on what the Superior Court judges had intended in fact,³⁹ emphasizing instead the formal reasons why the Supreme Court’s authority is theoretically irreducible by a vote of the judges of the Superior Court. Justice Zarella wrote: “I conclude, like Justice Palmer, that the judges of the Superior Court do not possess authority under our constitution to divest this court of its inherent authority to change and develop the law of evidence.”⁴⁰

Justice Katz filed a fifty-four page dissent in *DeJesus*,⁴¹ taking the position that the Code is “a judicial codification of general rules of prospective application” and that “[t]hese rules are the functional equivalent of laws.”⁴² Katz’s opinion is a “must read” that explains the purpose and legitimacy of the new Code that she and former Justice Borden consistent-

672-73 n.5 (2006) (Noting an apparent conflict between an 1827 case, *State v. Roswell*, 6 Conn. 446 (1827), and Code § 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.”).

³⁸ *DeJesus*, 288 Conn. at 452; see also, *id.* at 455 n. 21.

³⁹ Chief Justice Rogers’s opinion also questioned whether the Code would be constitutional if its purpose had been to divest the Supreme Court of its “common law authority,” itself codified in Article Fifth, § 1, of the Constitution of 1818, which includes the “power to develop and change the law of evidence via case-by-case adjudication.” *Id.* at 459-60. Chief Justice Rogers declared: “We therefore decline to construe the code in such a potentially unconstitutional manner, and conclude that the evidentiary rules articulated therein are subject to change, modification, alteration or amendment by this court in the exercise of its constitutional and common-law adjudicative authority. To reiterate, we conclude that the code neither is, nor was intended to be, anything more than a concise, authoritative and . . . ‘readily accessible body of rules to which the legal profession conveniently may refer.’” *Id.* at 460.

⁴⁰ *Id.* at 490 (Zarella, J., citing p. 485 of Justice Palmer’s concurring opinion).

⁴¹ *DeJesus*, 288 Conn. at 494-547.

⁴² *Id.* at 494.

ly espoused in *Sawyer* and during their many years of work on the Code before and after its adoption. The prize for the reader who journeys to the end of Katz's forlorn dissent is an apology likening the Code's misfortune in *DeJesus* to the end of *A Midsummer Night's Dream*: "Like Shakespeare's Puck, I can only apologize to the audience and suggest that it also pretend that this has all been a bad dream."⁴³

While all the justices, but Justice Katz, subscribed to the *DeJesus* holding that the Court's traditional powers are unaffected by adoption of the Code, their differing rationales leave the legal foundation of the Code unsettled and the path (or paths) for future development of evidence law unclear. The six justices who concurred in the holding varied substantially in their reasoning. Chief Justice Rogers found that Code Section 1-2 (a), the provision governing growth and development of evidence law in the future, uses two terms, "interpretation" and "judicial rule-making," that are ambiguous⁴⁴ but concluded that the adoption of the Code by the judges of the Superior Court was not, as an empirical matter,⁴⁵ intended to change the Supreme Court's ultimate authority over evidence law. Justice Palmer found that the terms "interpretation" and "judicial rule-making" as used in Code Section 1-2 (a) are *not ambiguous*⁴⁶ but he and Justice Zarella concluded, as a theoretical matter, the Supreme Court has ultimate authority over evidentiary law.⁴⁷ Chief Justice Rogers and Justice Palmer

⁴³ *Id.* at 547. Footnote 35 on page 547 contains Puck's last speech from the play.

⁴⁴ *Id.* at 444-46 (Rogers, C.J.).

⁴⁵ Chief Justice Rogers reviewed the "history" behind the Superior Court's adoption of the Code and concluded that the Code was not intended to "divest *this court* of its inherent authority to change and develop the law of evidence through case-by-case common-law adjudication." *DeJesus*, 288 Conn. at 451 (emphasis in original). Chief Justice Rogers further noted that Justice Borden had not addressed the divestiture issue when he addressed the Superior Court judges at the meeting where the Code was adopted: "There was *no discussion* of the effect, if any, that adoption of the code would have upon this court's common-law adjudicative authority to change and develop evidentiary law on a case-by-case basis, an inherent authority that it has enjoyed since the seventeenth century." *Id.* (emphasis in original).

⁴⁶ *Id.* at 480-81 and n.3 (Palmer, J.).

⁴⁷ *Id.* at 485 (Palmer, J.) ("the ultimate authority to determine the law of evidence has resided in this court since its inception, and no persuasive reason has been proffered to support the contention that the judges of the Superior Court have the power to assert that authority for themselves"); *id.* at 490-91 (Zarella, J.) ("the judges of the Superior Court do not possess authority under our constitution to divest this court of its inherent authority to change and develop the law of evidence.

each acknowledged that the Court's common-law authority over evidence law is less than absolute because the legislature also makes evidence law.⁴⁸ Chief Justice Rogers wrote that the Code's special provenance and limited purposes make it different in kind from Superior Court Practice Book rules.⁴⁹ Justice Palmer declared that the supervisory authority of the Supreme Court is not subject to the rule-making authority of the Superior Court so that even if the Code were legally on par with Superior Court Practice Book rules, neither is ultimately binding on the Supreme Court.⁵⁰ Justice Zarella would have preferred that his colleagues not treat "our laws of evidence as akin to rules of practice" in part because the case did not require the Court to confront the "side effect" of such a comparison.⁵¹ Chief Justice Rogers noted, and Justice Palmer agreed, that the Code is also subject to "change, modification, alteration or amendment *by the Appellate Court* in the exer-

. . . I am puzzled by the majority's failure to declare that the lack of constitutional authority is clear."). *Cf. id.* at 459-60 (Rogers, C.J.) ("we *question* whether the judges of the Superior Court have the constitutional authority to adopt a code of evidence" that is binding upon the Supreme Court).

⁴⁸ *Id.* at 462 n. 31 (Rogers, C.J.) (statutes modifying the common law of evidence "'have never been challenged as violating the principle of separation of powers.'" (quoting *State v. James*, 211 Conn. 555, 560 (1989)); *id.* at 485 n. 7 (Palmer, J.) (citing *State v. James*).

⁴⁹ *Id.* at 460-61 (Rogers, C.J.) ("we conclude that the code neither is, nor was intended to be, anything more than a concise, authoritative and, as the commentary to § 1-2 (a) of the code describes it, 'readily accessible body of rules to which the legal profession conveniently may refer.' [new ¶] Our conclusion on this point is predicated on the unique procedural and factual history of the code and, as such, should not be construed to extend to the rules of practice codified in the Practice Book." (emphasis added)).

⁵⁰ *Id.* at 483-87 (Palmer, J.) ("I therefore view the rules of practice in the same way that I view the code, namely, as a set of rules adopted by the judges of the Superior Court that govern the manner in which cases are to proceed in our trial courts. Under its common-law adjudicative authority, however, this court is the final arbiter of any dispute between the parties regarding the interpretation of those rules. Similarly, this court, by virtue of its inherent authority as the state's highest court, ultimately retains the power—however infrequently it may choose to invoke it—to establish the rules that govern the administration of justice in the courts of this state." *Id.* at 487).

⁵¹ "By treating our laws of evidence as akin to rules of practice, my colleagues fail to credit these historically significant differences in the origins of each body of rules, as well as the importance of these differences in determining the judicial body with ultimate authority. [new ¶] A side effect of this appears to be Justice Palmer's conclusion that this court has authority to change, modify or enact a rule of practice, a conclusion that I suggest is premature in light of the language of the 1808 statute and the fact that the present case does not present a challenge to this court's authority over the rules of practice." *Id.* at 493.

cise of its constitutional and common-law adjudicative authority” if not inconsistent with Supreme Court decisions.⁵²

In any event, many questions raised by adoption of the Code remain unanswered by a majority of the current Supreme Court. The issues generated in the various opinions in *DeJesus* may eventually be resolved judicially. Another possibility is that the legislature may someday take a more formal stance on its own role in making evidence law,⁵³ though coordination between the judiciary and the legislature to avoid a separation of powers conflict seems likelier, given the political reality that “rigid lines of demarcation cannot be reconciled with the *operational interdependence* of the three branches of government that marks the modern state.”⁵⁴

More down to earth and of immediate interest is the impact that *DeJesus* will have on the work of the Code of Evidence Oversight Committee⁵⁵ and the adjudicative work

⁵² *Id.* at 460 n. 28 (Rogers, C.J.). See also *id.* at 481 n. 4 (Palmer, J.).

⁵³ For example, Senate Substitute Bill No. 1479 for the January 2007 legislative session, favorably reported out of the Committee on the Judiciary on April 13, 2007 and later passed in the Senate, would have amended CONN. GEN. STAT. §51-14(a) to add “rules of evidence” to the already statutorily authorized rule-making powers of the courts (“rules and forms regulating pleading, practice and procedure”) and would have required that “any proposed new rule and any change in any existing rule” be submitted to the judiciary committee “for approval or disapproval in its entirety” within ninety days of submission, with approval by default if not acted on in that time period. Had Senate Bill 1479 passed, it is conceivable that the legislature could disapprove a new decisional rule, once made part of the Code of Evidence, creating an impasse in which the decisional rule would be “good law” in the eyes of the Supreme Court but “bad law” in the eyes of the Judiciary Committee (thus not part of the Code unless the Code were to take a cue from certain baseball records by using asterisks to indicate debatable legitimacy).

⁵⁴ Ellen A. Peters, *Getting Away From the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1563-64 (1997) (emphasis added). Describing “state trial courts in action,” then Senior Justice Peters wrote: “Operationally, at least in Connecticut, separation of powers is largely irrelevant to much of the work of trial court judges and administrators. The governing principle is not separation but networking.” *Id.* at 1560-61. Justice Peters explained by way of example that state judicial administrators track pending bills in the legislature and use staff to “influence the language, content, and effect of pending legislation to minimize the risk of future points of conflict[]” and that “advance notice of pending legislation affords the judiciary the opportunity to exercise its rule-making authority and amend judicial rules to conform to forthcoming legislative policy initiatives.” *Id.* at 1561.

⁵⁵ *Id.* at 452 (Rogers, C.J.) (noting that the mission of the Code of Evidence Oversight Committee is not defined: “It is unclear, for example, whether the judges intended for the committee to recommend substantive revisions to the code, such as overruling well established common-law evidentiary rules developed by this court,

of lower courts in cases in which litigants challenge provisions in the Code.⁵⁶ For the time being it appears that the Oversight Committee could consider and make recommendations on proposed changes to the Code and that the judges of the Superior Court could vote on proposed changes, but that only the trial courts are obliged to follow the Code. Even the latter proposition should be hedged, since failure to employ the Code may not matter on appeal as long as trial courts have used binding decisional law accurately and as long as the reviewing court does not consider use of the Code critical to providing an adequate record for appellate review.⁵⁷ Trial practitioners will cautiously follow the Code while bearing in mind that the duty to make an adequate record for appeal may occasionally require challenging not just applications of the Code but the Code itself so that courts of review might be persuaded to modify or change the Code in an exercise of their preserved common-law authority over rules of evidence.

or whether the judges intended for the recommendations of the committee to be limited in scope, such as filling in gaps in evidentiary law and updating the code to reflect changes in evidentiary law developed by this court through the traditional common-law method of case-by-case adjudication.”).

⁵⁶ The philosophic and pragmatic implications of *DeJesus* will take time to be fully explored by actual practitioners and by seasoned commentators on Connecticut law and practice. Reflecting on the case’s broader implications for civil and criminal practice alike, Horton and Bartschi have already weighed in with eight provocative questions and eight provisional answers suggested by the various opinions of the various justices in *DeJesus*. Wesley W. Horton and Kenneth J. Bartschi, 2008 *Connecticut Appellate Review*, 83 CONN. BAR J. 1, 5-9 (2009). No doubt Professor Tait and Judge Prescott will address the implications of *DeJesus* in their next pocket part, amending, or altogether revamping, their pre-*DeJesus* description of the manner in which rules of evidence may be changed in the Code era: “The future development of the law of evidence will be accomplished through the rule-making process and common-law development . . . when amending the Code, the judges should adopt procedures analogous to those utilized when amending the Practice Book.” COLIN C. TAIT AND ELIOT D. PRESCOTT, TAIT’S HANDBOOK OF CONNECTICUT EVIDENCE (4th ed. 2008), §1.6.3, p. 25.

⁵⁷ See *State v. Calabrese*, 279 Conn. 393, 407-09 n. 18 (2006) (rejected state’s claim that citation to Code always necessary to alert trial court and preserve evidentiary claim for appellate review). When I discussed *Calabrese* in *Developments in Criminal Law: 2006*, 81 CONN. B.J. 161, 175 (2007), I presented it as an atypical instance in which the reviewing court showed a willingness to look functionally at the record and to forgive a formal deficiency, making the lesson of the case to be that failure to cite the Code at trial could bar appellate review in other instances. After *DeJesus*, the role of the Code in providing an adequate record for review under Practice Book §§ 60-5 and 61-10 is less clear than before.

III. A NEW LEGITIMACY FOR PROPENSITY EVIDENCE

It is easy to be distracted by the abstract issues raised in *DeJesus* and to forget that the case is also of concrete importance. Having decided that it retained power to revisit established rules of evidence, the Supreme Court did so, ultimately reaching a momentous decision to recognize a new "propensity" paradigm that supports the Court's continued commitment to a liberal rule of admissibility of uncharged misconduct in prosecutions for sex offenses.

Finding that the Code of Evidence incorporated the common-law liberal rule for admissibility of uncharged misconduct evidence in prosecutions for sexual offenses,⁵⁸ the *DeJesus* Court entertained the defendant's argument that "the liberal standard of admission should be overruled because it is inadequate to demonstrate the existence of a genuine plan in the defendant's mind, and crimes of a sexual nature are neither more secretive, aberrant nor pathological than crimes of a nonsexual nature."⁵⁹ The Court agreed with the defendant that the liberal rule has been used to discount need for a genuine plan when applied to the common plan or scheme exception. But the Court rejected the defendant's characterization of sexual crimes as non-secretive, non-aberrant and non-pathological:

We agree with the defendant that the adoption of the code did not divest this court of its inherent common-law adjudicative authority to develop and change the rules of evidence on a case-by-case basis. We further agree with the defendant that... *evidence of uncharged misconduct admitted under the liberal standard ordinarily does not reflect the existence of a genuine plan in the defendant's mind. Nonetheless, given the highly secretive, aberrant and frequently compulsive nature of sex crimes, we conclude that the admission of uncharged misconduct evidence under the liberal standard is warranted and, therefore, we adopt this standard as a limited exception to § 4-5 (a) of the code, which prohibits the admission of "[e]vidence of other crimes, wrongs or acts of a person... to prove the bad character or criminal tendencies of that person."*⁶⁰

⁵⁸ *Id.* at 443-44.

⁵⁹ *Id.* at 439.

⁶⁰ *DeJesus*, 288 Conn. at 439-40, 463-74.

The Court forthrightly acknowledged that the challenged liberal standard is not actually rooted in the common scheme or plan exception to the rule against use of character evidence: “Because the liberal standard does not focus on the existence of an overall scheme or plan in the defendant’s mind that encompasses the commission of the charged and uncharged crimes, but instead focuses on the similarity of the charged and uncharged crimes, we now acknowledge that evidence admitted under this standard ordinarily does not fall within the ‘true’ common scheme or plan exception.”⁶¹ Rather than faulting the rule for lacking such underpinnings, the Court legitimated it on an alternative basis. The Court for the first time acknowledged that the liberal rule is actually a *propensity* rule “rooted in this state’s unique jurisprudence”⁶² governing prosecution of sex crimes:

public policy considerations militate in favor of recognizing a *limited* exception to the prohibition on the admission of uncharged misconduct evidence in *sex crime* cases to prove that the defendant had a propensity to engage in aberrant and compulsive criminal sexual behavior. We therefore join the federal courts, as well as a multitude of our sister states, that recognize a similar propensity exception in sexual cases.⁶³

The new propensity rule permits use of uncharged sexual misconduct evidence “only if it is relevant to prove that the defendant had a propensity or a tendency to engage in the type of aberrant and compulsive criminal sexual behavior with which he or she is charged.”⁶⁴ Admissibility of uncharged misconduct evidence further depends upon evaluation of three factors: (1) the uncharged conduct is “‘not too remote in time’”; (2) the uncharged misconduct is similar to the charged conduct; and (3) the uncharged conduct was “‘committed

⁶¹ *Id.* at 468.

⁶² *Id.* at 473 n.35 (“The scope and contours of the propensity exception to the rule prohibiting the admission of uncharged misconduct that we adopt in this opinion therefore are rooted in this state’s unique jurisprudence concerning the admission of uncharged misconduct evidence in sex crime cases, and must be construed accordingly. Consequently, we do not anticipate that our decision today will open the floodgates to the admission of uncharged misconduct evidence that previously was inadmissible under the common scheme or plan exception.”).

⁶³ *Id.* at 470 (emphasis in original).

⁶⁴ *Id.* at 473.

upon persons similar to the prosecuting witness.”⁶⁵

Applying the new paradigm to the *DeJesus* case itself, the Court noted that the uncharged misconduct evidence had not been admissible for the purpose for which it was offered (common scheme or plan), but that it was admissible as propensity evidence,⁶⁶ and that the defendant could not show harm because his only claim of harm was that the jury could have misused the evidence “to infer that the defendant had a propensity or a tendency to commit the crime of sexual assault[,]” which is “the precise purpose” for which it can be used under the new propensity paradigm.⁶⁷ The Court also held that trial courts hereafter must give “an appropriate cautionary instruction to the jury” when admitting propensity evidence in sex cases.⁶⁸

The new exception has not (yet) been incorporated expressly into the Code of Evidence, though it has already been applied on appeal by the Supreme Court in other cases.⁶⁹ In a

⁶⁵ *Id.* at 473 (quoting *State v. McKenzie-Adams*, 281 Conn. 486, 522 (2007)).

⁶⁶ *Id.* at 474-75 (“although evidence of the defendant’s uncharged misconduct with N was inadmissible to prove the existence of a ‘true’ common scheme or plan in the defendant’s mind, it was admissible to prove that the defendant had a propensity or a tendency to sexually assault young women of limited mental ability with whom he worked and over whom he had supervisory authority.”).

⁶⁷ *Id.* at 476.

⁶⁸ *Id.* at 474 n. 36. The “precise content” of the required instruction was not prescribed, but an example was provided, *id.* at n.36, and the Criminal Jury Instructions Committee has since drafted such an instruction: “In a criminal case in which the defendant is charged with a crime exhibiting aberrant and compulsive criminal sexual behavior, evidence of the defendant’s commission of another offense or offenses is admissible and may be considered for its bearing on any matter to which it is relevant. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crimes charged in the information. . . .” (Emphasis added.) *Connecticut Selected Jury Instructions Criminal* §2.6-13 (new Nov. 1, 2008). Until now trial courts instructed the jury in all cases that prior misconduct evidence was not admitted to show propensity or tendency. In ordinary cases courts will still instruct on that boundary: “The state has offered evidence of other acts of misconduct of the defendant. This is not being admitted to prove the bad character of the defendant or the defendant’s tendency to commit criminal acts. Such evidence is being admitted solely to show or establish that [purpose specified]. . . .” (Emphasis added.) *Connecticut Selected Jury Instructions Criminal* §2.6-5. See complete instructions at the judicial web-site: <http://www.jud.ct.gov/JI/criminal/default.htm> See *State v. Snelgrove*, 288 Conn. 742, 757, 764 n.10 (2008) (ordinary standard charge used; absence of propensity charge harmless).

⁶⁹ If the new propensity rule is not ever codified, it creates a potentially confusing duality in evidentiary doctrine, requiring lower courts to rely on the Code and to check for decisional law inconsistent with the Code before deciding what evidentiary rule controls. To the extent that there is a conflict between the Code and

murder case, *State v. Snelgrove*,⁷⁰ the defendant argued that the trial court had admitted evidence of the defendant's commission of two previous murders under a host of inapplicable exceptions to the rule against character evidence and that "it was probable that the jury would conclude that he was guilty because he had a propensity to kill women for sexual reasons."⁷¹ Justice Vertefeuille for the Court concluded that the *DeJesus* propensity paradigm may also be used in prosecutions for non-sex crimes as long as the prosecuted crime and the uncharged misconduct were both "driven by an aberrant sexual compulsion."⁷² The Court concluded that the propensity exception was satisfied in *Snelgrove* as the evidence was "not too remote in time," and involved similar sexual compulsion and similar victims.⁷³ The Court noted that the prior misconduct evidence was used "primarily 'to establish a necessary motive or explanation for an otherwise inexplicably

the decisional law, at least *DeJesus* settles that the decisional law prevails, especially if decided after the Code was adopted. Checking both rules and case law, of course, has long been the bread and butter of trial practice, so it would be mistaken to take *DeJesus* to have changed the pragmatics of trial evidentiary practice. Careful practitioners will cite the Code in making a trial record because the Supreme Court said nothing about its willingness to review evidentiary claims on appeal that ignore the Code. *But see State v. Calabrese*, 279 Conn. 393, 407-08 n. 18, 408-09 (2006) (rejected state's claim that citation to Code always necessary to alert trial court and preserve evidentiary claim for appellate review) (discussed in Timothy H. Everett, *Developments in Criminal Law: 2006*, 81 CONN. B. J. 161, 175 (2007)).

⁷⁰ 288 Conn. 742 (2008).

⁷¹ *Id.* at 757-58.

⁷² *Id.* at 760. The Court explained: "[T]he exception to the rule barring propensity evidence applies whenever the evidence establishes that both the prior misconduct and the offense with which the defendant is charged were driven by an aberrant sexual compulsion, regardless of whether the prior misconduct or the conduct at issue resulted in sexual offense charges. Although we stated in *DeJesus* that '[t]he scope and contours of the propensity exception to the rule prohibiting the admission of uncharged misconduct . . . [is] rooted in this state's unique jurisprudence concerning the admission of uncharged misconduct evidence in sex crime cases, and must be construed accordingly' (emphasis added) [*DeJesus*, 288 Conn. at] 473 n.35 . . . ; nothing in that case suggests that it is the specific nature of the charges brought against a defendant that renders the evidence especially probative in such cases. Rather, *DeJesus* makes it clear that it is the aberrant and compulsive nature of the defendant's prior misconduct that permits a fact finder to infer that, because the defendant previously had engaged in such conduct, it is likely that he did so again. As a matter of pure logic, this rationale applies whenever the state is using the evidence of prior sexual proclivities 'to establish a necessary motive or explanation for an otherwise inexplicably horrible crime'; (internal quotation marks omitted) *id.*, at 469 . . . ; regardless of whether the crime itself was a sexual offense." *Snelgrove*, 288 Conn. at 760-61.

⁷³ *Id.* at 761-64.

horrible crime.”⁷⁴

Applying *DeJesus* and *Snelgrove*, the Court in *State v. Johnson*⁷⁵ found no error in the consolidation for trial of three murder charges where the trial court had concluded that “evidence of each murder was cross-admissible as to the other two murders to prove both intent and a common plan or scheme.”⁷⁶ The *Johnson* Court noted that it was not necessary to decide whether the trial court’s rationale for determining cross-admissibility was sustainable because “the evidence was cross admissible to demonstrate propensity” under *DeJesus* and *Snelgrove*.⁷⁷

IV. KIDNAPPING CLARIFIED: *STATE V. SALAMON*

In *State v. Salamon*,⁷⁸ in reviewing the defendant’s challenge to the jury instruction on the intent element of kidnapping in the second degree, the Supreme Court accepted the defendant’s invitation to “revisit and overrule our interpretation of this state’s kidnapping statutes, most recently articulated by this court in *State v. Luurtsema*,⁷⁹ under which a person who restrains another person with the intent to prevent that person’s liberation may be convicted of kidnapping even though the restraint involved in the kidnapping is merely incidental to the commission of another offense perpetrated against the victim by the accused.”⁸⁰ Justice Palmer wrote the majority opinion, joined by Justices Borden, Norcott, and Katz. Justice Borden added a short concurrence.⁸¹ Justice Zarella wrote separately, voicing strong disagreement with

⁷⁴ *Id.* at 766 (quoting *DeJesus*, 288 Conn. at 469).

⁷⁵ 289 Conn. 437 (2008).

⁷⁶ *Id.* at 439, 445, 448-49.

⁷⁷ *Id.* at 439 n.3, 450, 455-57.

⁷⁸ 287 Conn. 509 (2008).

⁷⁹ 262 Conn. 179 (2002).

⁸⁰ *Id.* at 513.

⁸¹ *Id.* at 574-76. Justice Borden writes: “I am persuaded by the majority opinion’s insight that, in establishing our prior kidnapping jurisprudence, this court never fully analyzed the kidnapping statute, its historical background, and the anomalous results that our jurisprudence was producing. In light of that analysis, which the majority has now produced, I am convinced that, in enacting the kidnapping statutes, the legislature did not intend that almost every assault, sexual assault or robbery automatically would be elevated to a kidnapping, with its attendant heavy penalties and opportunities for prosecutorial overcharging, simply by virtue of a minor restraint of liberty that was inherent in the underlying crime. Such a result now

the majority's holding but concurring in the remedy of a new trial on kidnapping because the trial court failed to instruct the jury adequately on the specific intent element of kidnapping.⁸² Justices Vertefeuille and Sullivan joined in Justice Zarella's strongly stated opinion.

The majority opinion in *Salamon* begins with an interesting discussion and rejection of the state's argument based on "two separate but related principles" that it should not revisit established precedent: the principle of *stare decisis* and the principle of statutory interpretation that militates against revisiting a judicial construction of a statute after the "legislature reasonably may be deemed to have acquiesced in that construction."⁸³ The majority first analyzed the plain text of the kidnapping and unlawful restraint statutes, as resort extratextual would be inconsistent with General Statutes Section 2-1z if a statutory text carries a plain, unambiguous meaning: "The crime of kidnapping and other offenses primarily involving restrictions of another person's liberty, including unlawful restraint and custodial interference, are set forth in part VII of the Connecticut Penal Code, General Statutes Section 53a-91 *et seq.* Under those provisions, the hallmark of a kidnapping is an abduction, whereas the hallmark of an unlawful restraint, a less serious crime, is a restraint."⁸⁴ The majority notes that since 1977 it had reject-

strikes me . . . as anomalous and not consistent with the likely legislative intent. It is time that we join the great majority of courts that have so concluded, as the majority has aptly demonstrated." *Id.* at 576.

⁸² *Id.* at 576-608. Justice Zarella declared: "*I disagree with the new interpretation of our kidnapping statutes that the majority announces in part I of its opinion and with its conclusion in part III that unlawful restraint is a specific intent crime. My disagreement with the majority is premised on what I believe to be serious flaws in its construction of the plain language of the statutory scheme, its treatment of the principle of stare decisis, and its usurpation of the roles of both the legislature and the office of the state's attorney set forth in our state constitution. I agree, however . . . that the defendant . . . is entitled to a new trial on the charge of kidnapping in the second degree, albeit for a different reason.*" *Id.* at 576-77 (Zarella, J.) (emphasis added).

⁸³ *Id.* at 519. The majority concluded that *stare decisis* should not cause it to hesitate to overrule prior holdings "once we are convinced that they were incorrect and unjust." *Id.* at 521. And the majority set forth six nuanced reasons for its conclusion that the doctrine of legislative acquiescence did not bar review of the defendant's claim. *Id.* at 521-28.

⁸⁴ *Id.* at 530.

ed many times the "claim that the crime of kidnapping was not intended to apply to a restraint that was merely incidental to the commission of another crime."⁸⁵ The majority added that the developed law is that proof of kidnapping "does not require proof that the victim was confined for any minimum period of time or moved any minimum distance[,]"" that under double jeopardy principles "it is of no moment that the confinement or movement that provides the basis of a kidnapping conviction is merely incidental to the commission of another crime against the victim[,]"" and that, "[a]ccordingly, the proper inquiry for a jury evaluating a kidnapping charge is not whether the confinement or movement of the victim was minimal or incidental to another offense against the victim but, rather, whether it was accomplished with the requisite intent, that is, to prevent the victim's liberation."⁸⁶ The majority's "close examination" of the statutory text revealed "an ambiguity" in the intent required for kidnapping as opposed to unlawful restraint.⁸⁷

Finding that "the point at which an intended interference with liberty crosses the line to become an intended prevention of liberation is not entirely clear"⁸⁸ in the statutes and as previously construed judicially, the majority sought guidance extrinsically, i.e., from "the history and circumstances surrounding the enactment of the kidnapping statutes, the policies that those statutes were designed to implement and their relationship to common-law kidnapping principles."⁸⁹ After an extensive analysis of those sources, the majority declared:

Upon examination of the common law of kidnapping, the history and circumstances surrounding the promulgation of our

⁸⁵ *Id.* at 531 (citing nine cases).

⁸⁶ *Id.* at 531-32.

⁸⁷ *Id.* at 533-34 ("in accordance with the statutory definitions of the terms 'abduct' and 'restrain,' our decisions have established that a defendant may be convicted of kidnapping upon proof that he restrained a victim when that restraint is accompanied by the requisite intent. Those previous decisions, however, have not explored the parameters of that intent, in particular, how the 'intent to prevent [a victim's] liberation'; General Statutes § 53a-91 (2); that is, the intent necessary to establish an abduction, differs from the intent "to interfere substantially with [a victim's] liberty"; General Statutes § 53a-91 (1); that is, the intent necessary to establish a restraint.").

⁸⁸ *Id.* at 534.

⁸⁹ *Id.* at 535.

current kidnapping statutes and the policy objectives animating those statutes, we now conclude the following: Our legislature, in replacing a single, broadly worded kidnapping provision with a graduated scheme that distinguishes kidnappings from unlawful restraints by the presence of an intent to prevent a victim's liberation, intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to and necessary for the commission of another crime against that victim. Stated otherwise, to commit a kidnapping in conjunction with another crime, *a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime.*⁹⁰

The majority further recognized that its previous failure to recognize the different intent needed for kidnapping as opposed to unlawful restraint “largely has eliminated the distinction between restraints and abductions” and had “afforded prosecutors virtually unbridled discretion to charge the same conduct either as a kidnapping or as an unlawful restraint despite the significant differences in the penalties that attach to those offenses.”⁹¹

Finally, the *Salamon* majority decided that the defendant was entitled to a new trial at which the jury would be instructed to differentiate between merely incident restraint during the defendant's commission of another crime and the intent necessary to prove kidnapping.⁹² Relying on *Salamon*, the Supreme Court reversed kidnapping convictions and has now ordered new trials in *State v. Sanseverino*⁹³ and *State v. DeJesus*.⁹⁴

⁹⁰ *Id.* at 542 (emphasis added).

⁹¹ *Id.* at 543-44.

⁹² *Id.* at 549-50.

⁹³ 287 Conn. 608, 618-26 (2008) (in Appellate Court defendant unsuccessfully claimed kidnapping was vague-as-applied to his conduct; Supreme Court avoided constitutional issue, found error under *Salamon* decision, issued same day; also initially found insufficient evidence to justify retrial), *upon rehearing*, 291 Conn. 574 (2009) (new trial ordered as remedy instead of acquittal).

⁹⁴ *DeJesus*, 288 Conn. at 428-39. Interestingly, the *DeJesus* majority agreed with Justice Zarella's dissent in *Sanseverino* in which he disagreed with the remedy of an acquittal: “we are persuaded that our conclusion that there should have been a judgment of acquittal in *Sanseverino* was incorrect, and that the proper remedy in that case should have been a new trial. Accordingly, our conclusion in *Sanseverino* hereby is overruled.” *DeJesus*, 288 Conn. at 437.

V. SUPPRESSION OF EVIDENCE

Appellate courts decided many suppression issues in 2008, most involving search and seizure and confessions claims controlled by the federal constitution. In *State v. Betts*,⁹⁵ Justice Norcott for the Court rejected the defendant's claim that his fiancée acted as an agent of the police when, at the behest of the police, she retrieved from the bedroom that she shared with the defendant an incriminating letter from the defendant to her daughter – the victim. The opinion usefully reviews case law that has dealt with the extent to which citizen/police involvement may take place without creating an agency relationship.⁹⁶

In *State v. Kalphat*,⁹⁷ the Supreme Court upheld the trial court's denial of the defendant's motion to suppress because the defendant failed to establish standing to challenge a police search of one of several boxes, sent by commercial carrier to a person with a name other than the defendant's, that contained more than a kilogram of marijuana. The defendant picked up the boxes after police obtained a positive canine alert for illegal drugs in one of the boxes.⁹⁸ Testifying at the suppression hearing, the defendant did not claim to be the package's addressee; thus the Supreme Court concluded that he had not established that he had a reasonable expectation of privacy in the boxes at the time that they were searched – which was before he took possession of them.⁹⁹ The Court also concluded that the record was deficient to show that the addressee was his alias, which might have established standing.¹⁰⁰

In *State v. Foreman*,¹⁰¹ the Supreme Court, in an opinion written by Justice Norcott, rejected the defendant's claim that a DNA sample via an oral swab obtained by the police during stationhouse questioning should be suppressed because he had been arrested without probable cause, because his

⁹⁵ 286 Conn. 88 (2008).

⁹⁶ *Id.* at 96-100.

⁹⁷ 285 Conn. 367 (2008).

⁹⁸ *Id.* at 370-72.

⁹⁹ *Id.* at 375-77.

¹⁰⁰ *Id.* at 377-81.

¹⁰¹ 288 Conn. 684 (2008).

Miranda waiver was not valid, his invocation of his right to counsel was not honored, because the police “intentionally thwarted” contact with his attorney in violation of *State v. Stoddard*,¹⁰² and because the defendant did not voluntarily consent to give a DNA sample. The Court held that the record was inadequate to review the illegal arrest claim because it was not argued in the trial court and thus the trial court neither made findings nor drew conclusions concerning his arrest status and the presence or absence of probable cause.¹⁰³ The Court found that the defendant had waived his *Miranda* rights after receiving proper warnings, though at a time when he was in the police station voluntarily, not yet in “custody,” and that the trial court correctly found that he had not requested counsel.¹⁰⁴ Closely reviewing the evidence concerning when private counsel had made an effort to visit and consult with the defendant on the evening of his arrest, the Court concluded that the trial court was correct in finding that there was no *Stoddard* violation because the attorney’s efforts came after the police obtained consent to take a DNA sample.¹⁰⁵ Finally, the Court rejected the defendant’s claim that his signed consent to the police taking a DNA sample was invalid because the police did not inform him of their purpose in obtaining it.¹⁰⁶

In *State v. Grant*,¹⁰⁷ the Supreme Court, in an opinion written by Chief Justice Rogers, rejected the defendant’s claim that a warrant authorizing the taking of a sample of his blood is “subject to a heightened evidentiary standard” beyond the probable cause standard¹⁰⁸ and rejected his claim

¹⁰² 206 Conn. 157 (1988).

¹⁰³ *Foreman*, 288 Conn. at 692-94.

¹⁰⁴ *Id.* at 699-700.

¹⁰⁵ *Id.* at 701-06.

¹⁰⁶ *Id.* at 708-09. There is no indication in *Foreman* that the defendant asked the Court to consider state and federal law relating to genetic research or human subjects protection that might provide a basis for recognizing DNA samples as *sui generis* search objects, given the range of information that DNA testing may disclose, thus providing a possible rationale for requiring particularized consent to the warrantless taking and use of DNA samples.

¹⁰⁷ 286 Conn. 499, *cert. denied*, 129 S.Ct. 721, 127 L.Ed.2d 200 (2008).

¹⁰⁸ *Id.* at 513-14. In an interesting footnote, the Court disagrees with Professor LaFave’s interpretation of the Court’s decision in *State v. Acquin*, 177 Conn. 352 (1979). *State v. Grant*, 286 Conn. at 514 n. 9 (discussing *Acquin* and 2 W. LAFAVE, SEARCH AND SEIZURE (4th Ed. 2004) § 4.1(e), p. 459 & 459 n. 100).

that the affidavit supporting the warrant failed to establish probable cause to infer that the defendant's blood had been found at the crime scene, a murder in a New Haven parking garage in 1973.¹⁰⁹ The Court also rejected the defendant's claim that the trial court should have ordered a *Franks* hearing on whether the police affidavit in support of the search warrant had materially misled the judge who issued the warrant.¹¹⁰ The *Grant* Court also rejected the defendant's argument that statements the defendant offered to police after his arrest were suppressible as the product of "interrogation" because an officer had upon his earlier arrest told him that blood evidence, not just fingerprint evidence, connected him to the murder scene. The test for "interrogation" is set forth in *Rhode Island v. Innis*.¹¹¹ The Court held that the *Innis* test does not set out a "per se rule" that post-arrest police confrontation of a suspect with incriminating evidence always constitutes interrogation: "Rather, whether such conduct constituted an interrogation depends on whether it was a normal incident of arrest and custody or, instead, was intended to elicit an incriminating response."¹¹²

In *State v. Robinson*,¹¹³ Judge Borden for a split Appellate Court rejected the defendant's claim that the police lacked probable cause to arrest him for criminal trespass and that evidence discovered during a search incident to that arrest should have been suppressed. The Court rejected the defendant's argument that an element of third degree criminal trespass, that premises be "fenced or otherwise enclosed in a manner designed to exclude intruders," cannot be established unless there is a gate instead of an opening for ingress and egress, so as to signal that only those with legitimate purposes may be on the premises.¹¹⁴ Judge Bishop dissented on that issue, but the Supreme Court has since affirmed in a *per curiam* opinion.¹¹⁵

¹⁰⁹ *Id.* at 515-18.

¹¹⁰ *Id.* at 518-22 (applying *Franks v. Delaware*, 438 U.S.154 (1978)).

¹¹¹ 446 U.S. 291 (1980).

¹¹² *Grant*, 286 Conn. at 526.

¹¹³ 105 Conn. App. 179, *aff'd*, 290 Conn. 381 (2009) (*per curiam*).

¹¹⁴ *Id.* at 190-96. The dissent placed a more restrictive gloss on the word "enclosed" in the statute. Compare *id.* at 195-96 (Borden, J.) with *id.* at 205-07 (Bishop, J., dissenting).

¹¹⁵ *State v. Robinson*, 290 Conn. 381 (2009) (*per curiam*).

The case also includes a useful explication of the standard for a warrantless strip search pursuant to a misdemeanor arrest and the distinction between a strip search and a body cavity search.¹¹⁶

In *State v. Fausel*,¹¹⁷ the Appellate Court sustained the defendant's claim that police violated the Fourth Amendment when they entered and searched his home in the process of pursuing and seizing the defendant's friend for driving while under suspension and reckless driving. Judge Bishop for the Court first noted the difference between the emergency doctrine and the exigent circumstances doctrine, then agreed with the defendant that the facts did not support either exception to the warrant requirement and that the trial court should have granted the defendant's motion to suppress evidence found in the defendant's house.¹¹⁸ The Supreme Court has granted the state's petition to appeal the decision.¹¹⁹

The Supreme Court has granted the state's petitions to appeal in several other cases where the defendant prevailed in the Appellate Court in 2008. In *State v. Clark*,¹²⁰ Judge Bishop for a split Appellate Court rejected the state's claim that the trial court erred in finding that the police lacked reasonable suspicion to stop the defendant in a car several hours after receiving a telephone tip from a confidential informant saying that the defendant was selling drugs in the Hill section of New Haven and that he was driving a tan Chevrolet Cobalt with Pennsylvania license plates.¹²¹ Judge Beach dissented, calling it a "close case," but arguing that the tip provided reasonable suspicion of criminal activity based on the informant's reliability in the past, because the tip "predicted, if somewhat generally, the location of the car and, with partic-

¹¹⁶ *Robinson*, 105 Conn. App. at 196-200.

¹¹⁷ 109 Conn. App. 820 (2008), *cert. granted*, 289 Conn. 940 (2008).

¹¹⁸ *Id.* at 826-31.

¹¹⁹ The certified issue in the Supreme Court is: "Did the Appellate Court properly reverse the trial court's suppression ruling that the police were justified in entering the defendant's house without a warrant?" *State v. Fausel*, 289 Conn. 940 (2008).

¹²⁰ 107 Conn. App. 819 (2008), *cert. granted*, 288 Conn. 916 (2008). The certified issue in the Supreme Court is: "Did the Appellate Court properly affirm the trial court's ruling that the evidence seized from the defendant's vehicle and person should be suppressed as the fruit of an illegal seizure?"

¹²¹ *Id.* at 821-22, 827-29.

ularity, the association of the defendant with the car,” even though there was no indication of his basis of knowledge for the tip.¹²² In *State v. Mitchell*,¹²³ Judge Bishop for the Court found that an officer’s questioning of a suspect just taken into custody, to find out if he knew why he had been apprehended, constituted custodial interrogation, that the defendant’s responses should have been suppressed because he had not been given *Miranda* warnings, and that the error was not harmless beyond a reasonable doubt.¹²⁴

In an important decision, *In re Kevin K.*,¹²⁵ involving statutory protections accorded children who undergo police questioning, Judge DiPentima for the Appellate Court, over Judge Lavine’s dissent, held that a thirteen-year-old’s written statement obtained by a Vernon police officer in the presence of the juvenile’s mother and signed by her and her son, was inadmissible at his delinquency trial because the officer’s failure to give the warnings mandated by statute undermined the voluntariness of the decision by the child and parent to give a statement – despite the fact that the officer had properly given the required warnings to mother and son two days earlier before taking a first statement. General Statutes Section 46b-137(a) states that “any admission, confession or statement” by a child to the police “shall be inadmissible” in any hearing on the child’s alleged delinquency unless it was taken in the presence of a parent or parents or guardian “after the parent or parents or guardian and child have been advised (1) of the child’s right to retain counsel, or if unable to afford counsel, to have counsel appointed on the child’s behalf, (2) of the child’s right to refuse to make any statements and (3) that any statements he makes may be introduced into evidence against him.”¹²⁶ Judge DiPentima demonstrated the

¹²² *Id.* at 831-32.

¹²³ 108 Conn. App. 388, *cert. granted*, 289 Conn. 904 (2008). The certified issue in the Supreme Court is: “‘Did the Appellate Court properly conclude that the defendant’s statement was admitted in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 [] (1966), and if so, was this harmful error requiring a new trial?’”

¹²⁴ *Id.* at 394, 397-402.

¹²⁵ 109 Conn. App. 206, *cert. granted*, 289 Conn. 930 (2008). The certified issue in the Supreme Court is: “Did the Appellate Court properly construe General Statutes § 46b-137(a) to decide that before giving a second statement a re-advisement of rights was required?”

¹²⁶ *Id.* at 211 (court quotes § 46b-137(a) and supplies emphasis).

ambiguity of the statute particularly with respect to the critical word “after,” employing some nifty language from an 1846 Supreme Court case, *Sands v. Lyon*,¹²⁷ to help make her point.¹²⁸ Having established ambiguity, DiPentima consulted extra-textual sources and concluded that “the purpose of the statute is to help the child and his parent or guardian decide whether to make a voluntary admission or to remain silent.”¹²⁹ Ultimately Judge DiPentima concluded that the circumstances in the case required reversal of the judgment because “we do not find support in the facts set out in the court’s memorandum of decision for the conclusion that the statement was admissible because we cannot conclude under the totality of these circumstances that the respondent and his parent made a valid decision to make a voluntary admission that was not the product of coercion, suggestion, ignorance of rights or adolescent fantasy, fright or despair.”¹³⁰ Dissenting, Judge Lavine agreed that the statute was ambiguous, not because “after” has more than one “reasonable interpretation,” but rather because “the statute does not address the length of time that permissibly may pass between the time the juvenile is advised of his rights and signs a waiver and the time a child gives a statement that is admissible.”¹³¹ Finding the legislative history was deficient to show whether readvisement was statutorily required under the facts of the case, Judge Lavine drew an analogy to doctrine concerning constitutional warnings, e.g., *Miranda*, which rejects “a per se rule as to when a suspect must be readvised of his rights

¹²⁷ 18 Conn. 18, 27 (1846).

¹²⁸ “We note parenthetically that our Supreme Court has acknowledged, in a different situation, the difficulty with this word: ‘The word “after” . . . like “from,” “succeeding,” “subsequent,” and similar words, where it is not expressly declared to be exclusive or inclusive, is susceptible of different significations, and is used in different senses, and with an exclusive or inclusive meaning, according to the subject to which it is applied; and, as it would deprive it of some of its proper significations to affix one invariable meaning to it, in all cases, it would, of course, in many of them, pervert it from the sense of the writer or speaker. Its true meaning, therefore, in any particular case, must be collected from its context and subject matter, which are only means by which the intention is ascertained . . .’ *Sands v. Lyon*, 18 Conn. 18, 27 (1846).” In re Kevin K., 109 Conn. App. at 212-13.

¹²⁹ *Id.* at 218.

¹³⁰ *Id.* at 223.

¹³¹ *Id.* at 228-29.

after the passage of time[.]”¹³² to support his conclusion that “the purpose of the statute was met when the respondent and his mother were advised and signed waiver or consent forms prior to the respondent’s giving a statement to the investigating police officer on October 11, 2005.”¹³³

VI. WAIVER AND PROTECTION OF CONSTITUTIONAL RIGHTS

In several cases defendants obtained new trials because the trial record did not establish waiver of fundamental trial rights that call for a knowing, intelligent and voluntary waiver by the defendant personally. In *State v. Gore*,¹³⁴ the Supreme Court affirmed the Appellate Court’s order of a new trial¹³⁵ where trial counsel informed the trial court of the defendant’s decision to change his election from a jury to a bench trial, but the defendant was not personally canvassed on his change of election and did not otherwise indicate agreement with his counsel’s announcement regarding his changed election. Because the record failed to satisfy the *Zerbst*¹³⁶ standard for waiver and because waiver of the right to a jury trial may not be presumed from a silent record,¹³⁷ the Court in *Gore* held that the Appellate Court had properly reviewed the constitutional issue under *State v. Golding*¹³⁸ and had properly reversed the defendant’s bench trial conviction.¹³⁹ Noting that the United States Supreme Court “arguably has left open the question of whether a defendant’s waiver of the fundamental right to a jury trial must be expressed explicitly on the record or whether it may be implied through silence[.]” the *Gore* Court nonetheless cited the “uniquely personal” nature of the right to a jury trial in reaching its conclusion: “A trial court . . . may not assume that counsel is invoking the wishes of the defendant when he or she purports to waive a jury trial on the defendant’s

¹³² *Id.* at 231 (citation and quotation marks omitted).

¹³³ *Id.* at 223-24.

¹³⁴ 288 Conn. 770 (2008).

¹³⁵ 96 Conn. App. 758 (2006).

¹³⁶ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

¹³⁷ *Gore*, 288 Conn. at 777-78.

¹³⁸ 213 Conn. 233 (1989).

¹³⁹ *Gore*, 288 Conn. at 789-90.

behalf.”¹⁴⁰ Further noting that “the constitution does not mandate the particular form” that a defendant’s personal waiver of the right to a jury trial must take, the Gore Court announced: “we hereby exercise our supervisory authority to require *prospectively* that, in the absence of a written waiver, the trial court must canvass the defendant briefly to ensure that his or her personal waiver of a jury trial is made knowingly, intelligently and voluntarily.”¹⁴¹ Following *Gore*’s constitutional holding, in *State v. Mauro*,¹⁴² the Appellate Court used *Golding* review to reverse and order a new trial where defense counsel had repeatedly—and erroneously—assured the trial court that his client had previously been canvassed and had already waived his right to a jury trial.¹⁴³

The Supreme Court reversed and ordered a new trial in *State v. T.R.D.*,¹⁴⁴ where the trial court’s canvas of the defendant was inadequate to establish a knowing, intelligent and voluntary waiver of his Sixth Amendment right to the assistance of counsel at the trial which resulted in his conviction of failing to register as a sex offender in violation of General Statutes Sections 54-251 and 54-257.¹⁴⁵ Unlike the jury cases previously discussed, this was a case where the issue

¹⁴⁰ *Id.* at 783.

¹⁴¹ *Id.* at 786-87 (emphasis added).

¹⁴² 111 Conn. App. 368 (2008).

¹⁴³ Emphasizing that the right to a jury trial may be waived only by the defendant personally, the *Mauro* Court declared: “this remains true no matter how many attempts defense counsel may make to waive the right or whether counsel makes mistaken representations to the court that a canvass has been made by another judge and that the defendant himself has made a valid waiver.” *Id.* at 374.

¹⁴⁴ 286 Conn. 191 (2008) (*en banc*).

¹⁴⁵ Sex offender registration requirements and exposure to criminal sanctions for their violation are sure to generate more appellate cases in the future. The major revamping of the registration law was accomplished in 1998; many issues relating to lifetime registration, ten year registration, and discretionary registration have not yet been raised at the appellate level. In 2008 the Supreme Court reviewed and rejected a defendant’s claim that the trial court abused its discretion in ordering ten years registration after accepting his guilty plea to risk of injury to a child. *State v. Arthur H.*, 288 Conn. 582 (2008). The Court rejected the defendant’s argument that the trial court had exercised its statutory discretion solely based on its finding that he had committed the crime for a sexual purpose. A finding of sexual purpose is prerequisite to a sentencing court’s consideration of whether to order registration but it does not raise a “presumption” that there is a risk to public safety so as to require registration. The Court found that the trial court had relied on other factors, including future dangerousness: “it seems clear from the record that the trial court did weigh this factor in deciding to order registration.” *Id.* at 593-95.

concerned the adequacy, not the existence, of a canvas to waive a basic trial right guaranteed by the Sixth Amendment. The defendant claimed that "his waiver of counsel was not knowing, intelligent and voluntary because the trial court failed to inform him of the range of possible penalties that he would face upon conviction."¹⁴⁶ Applying on-point precedent, *State v. Diaz*,¹⁴⁷ the five justice majority in *T.R.D.* concluded: "as in *Diaz*, there is simply no evidence present in the record from which we could infer that the defendant had any meaningful appreciation of the period of incarceration he faced if convicted of the charges he faced."¹⁴⁸

In the coming year, the Supreme Court may explicate on appellate review under *State v. Golding* and its relationship to waiver doctrine under *State v. Fabricatore*.¹⁴⁹

VII. CONFRONTATION AND CONSOLIDATION

Courts continue to explore the contours of the United States Supreme Court's paradigm-shifting confrontation clause decision five years ago in *Crawford v. Washington*.¹⁵⁰ in which the Court held that the confrontation clause bars admission of hearsay statement that are "testimonial" in nature if the declarant is "unavailable" as a trial witness and

¹⁴⁶ *Id.* at 198-99.

¹⁴⁷ 274 Conn. 818 (2005).

¹⁴⁸ *T.R.D.*, 286 Conn. at 206. Justice Schaller, joined by Justice Norcott, in dissent argued that the defendant in *T.R.D.* adamantly insisted on discharging his trial counsel, making the record regarding waiver of counsel inapposite to that in *Diaz*, and that the two cases are further distinguishable on other grounds, including "the magnitude of the possible sentence in the overall picture" in *Diaz*—exposure to a sentence of nearly fifty years and actual imposition of a forty-three year sentence as compared to the exposure of five years and actual imposition of a lesser sentence in *T.R.D.* *Id.* at 229-32.

¹⁴⁹ *State v. Fabricatore*, 281 Conn. 469 (2007). See, e.g., *State v. Akande*, 111 Conn. App. 596, 606-10 (2008) (discussing *Golding* review and express and implied waivers of claims under *Fabricatore* and *State v. Brewer*, 283 Conn. 352 (2007)), cert. granted, 290 Conn. 918 (2009) (certified issue: "Did the Appellate Court properly determine that the defendant waived his claim that the jury instructions were constitutionally deficient?").

¹⁵⁰ 541 U.S. 36 (2004). No doubt *Crawford's* architect, Justice Scalia, would be sensitive to any implication that the decision created a new paradigm for the confrontation clause since the decision's generative force stems from its recovering and reintroduction of the clause's original historical purpose, i.e., to require trial by challengeable testimony and not trial by evidence that functions in lieu of testimony, e.g., trial by affidavit.

the defendant has not had an opportunity to cross-examine the declarant about the statement. Last year the Connecticut Supreme Court reviewed several cases that delved into the nuances of the unavailability and testimonial elements in the *Crawford* rule. In two cases the Supreme Court held that the confrontation clause is not implicated under *Crawford* where the out-of-court declarant is available at trial to be cross-examined but is claimed to be “functionally unavailable” to the defense by dint of a loss of memory or the witness’s outright denial that he ever made the out-of-court statement. In *State v. Simpson*,¹⁵¹ a child witness testified that “she did not recall” making statements recorded in a videotape interview of her that was part of a DCF and police investigation of sexual assault and risk of injury to a child by her great uncle, but the Court rejected the defendant’s claim that the complainant’s lack of recall made her “functionally unavailable” and pointed out that she was extensively cross-examined at trial so as to satisfy the constitutional right to cross-examine her.¹⁵² Similarly, in *State v. Holness*,¹⁵³ the Supreme Court rejected the claim that admission of a signed, written statement of a witness to police violated the confrontation clause because the witness at trial testified that he “did not recognize” the statement and “did not recall telling the police most of what appeared in the statement.”¹⁵⁴

In *State v. Slater*,¹⁵⁵ Justice Katz for the Court provided a thorough review of the standard for deciding whether a statement is testimonial in nature under *Crawford* and later cases that have refined the meaning of “testimonial.”¹⁵⁶ In *Slater*, the Court wrote: “Although we recognize that there is no comprehensive definition of ‘testimonial,’ it is clear that much of the Supreme Court’s and our own jurisprudence

¹⁵¹ 286 Conn. 634 (2008).

¹⁵² *Id.* at 636-37, 651-55.

¹⁵³ 289 Conn. 535 (2008).

¹⁵⁴ *Id.* at 546-50.

¹⁵⁵ 285 Conn. 162, *cert. denied*, 128 S.Ct. 2885, 171 L.Ed.2d 822 (2008).

¹⁵⁶ Justice Katz makes clear that *Crawford* is correctly understood to have held that “the confrontation clause applies only to testimonial hearsay statements” and that the old doctrine applying a reliability test to all challenged hearsay has been abandoned by most courts, in light of *Davis v. Washington*, 547 U.S. 813 (2006). *Slater*, 285 Conn. at 169-71 and n. 6.

applying *Crawford* largely has focused on the *reasonable expectation* of the declarant that, under the circumstances, his or her words later could be used for prosecutorial purposes.”¹⁵⁷ In *Slater* the Court affirmed the Appellate Court’s previous conclusion that statements made by the victim of a sexual assault to passersby on the street from whom she sought help and to medical personnel who administered a rape kit did not constitute “testimonial” hearsay and thus did not implicate the confrontation clause¹⁵⁸ because in each instance the specific circumstances “would not have led the victim to believe that her statements . . . would be used at trial.”¹⁵⁹ Justice Katz also wrote the Court’s opinion in *State v. Smith*,¹⁶⁰ rejecting the defendant’s claim that admission of a four-hour recording of a conversation between his co-conspirator and a cellmate violated *Crawford* because the cellmate, deported before trial, was unavailable for cross-examination in a murder trial and had made testimonial statements triggering the confrontation guarantee.¹⁶¹

State v. Snelgrove, discussed previously, involved the consolidation for trial of three murder charges where evidence of each was cross-admissible as uncharged misconduct to prove the other charges, thereby undermining the defendant’s claim that the joint trial prejudiced him. A number of other 2008 cases involved severance and consolidation claims. In *State*

¹⁵⁷ *Id.* at 172 (emphasis added). The Court later wrote: “We emphasize, however, that this expectation must be *reasonable* under the circumstances and not some subjective or far-fetched, hypothetical expectation that takes the reasoning in *Crawford* and *Davis* to its logical extreme.” *Id.* at 175.

¹⁵⁸ Unavailability was established because the victim-declarant had died “of causes unrelated to the assault.” *Id.* at 167.

¹⁵⁹ *Id.* at 177, 183-85. The Court emphasized that its conclusions were not categorical, but hinged on the specific circumstances surrounding each challenged hearsay statement.

¹⁶⁰ 289 Conn. 598 (2008).

¹⁶¹ The defendant at trial conceded that his co-conspirator’s highly incriminating statements in the conversation, implicating himself and the defendant in the planning and commission of the murder and destruction of the body, were not testimonial so as to trigger *Crawford* protection, but did argue that the statements were inadmissible under the older confrontation test, now abandoned, of *Ohio v. Roberts*, 448 U.S. 56 (1980). *Smith*, 289 Conn. at 614, 616-17. Because of the defendant’s concession, the Court found that admission of the co-conspirator’s recorded statements did not raise a constitutional issue; *id.* at 630 n. 27; and held that they were properly admitted under § 8-6(4) of the Code of Evidence as “a dual-inculpatory statement against penal interest.” *Id.* at 630.

v. Davis,¹⁶² the Supreme Court found that the defendant was not substantially prejudiced by his trial on three unrelated informations,¹⁶³ one of which involved evidence of the defendant's "brutal and shocking" conduct, because the trial court's "thorough, explicit, and proper jury instructions cured the risk of prejudice to the defendant and, therefore, preserved the jury's ability to consider fairly and impartially the offenses charged in the jointly tried cases."¹⁶⁴ Concurring in the result, Justice Katz wrote separately to make two points, one directed at trial courts called to rule upon motions for consolidation and severance, the other directed at courts of review called to decide whether joinder was proper.¹⁶⁵ As to the trial standard, Justice Katz would have the current presumption in favor of joinder apply only in cases where substantive evidence is cross-admissible as other crimes evidence;¹⁶⁶ otherwise "trial courts should presume prejudice and grant joinder only when the risk of prejudice appears to be 'substantially reduced.'"¹⁶⁷ As to appellate review, Justice Katz would have courts make two separate determinations, as to error and as to harm: "(1) whether the trial court abused its discretion; and (2) whether that impropriety constituted harmful error. We apply this rubric to every other claim of nonconstitutional error, and I see no reason to do otherwise in our review of a claim of improper joinder."¹⁶⁸

VIII. CONCLUSION

In 2009 it will be interesting to see whether the Supreme Court on its own, or in coordination with judicial committees

¹⁶² 286 Conn. 17 (2008).

¹⁶³ The trial court granted the defendant's motion to sever fourth information because it included evidence that the defendant threatened children at gunpoint in their home, which "could well fuel the prejudice of jurors against the defendant" in the other three cases. *Id.* at 21-22.

¹⁶⁴ *Id.* at 34-35.

¹⁶⁵ *Id.* at 38-56 (Katz, J., concurring, joined by Palmer, J.).

¹⁶⁶ *Id.* at 38-45.

¹⁶⁷ *Id.* at 45.

¹⁶⁸ *Id.* at 45-46. Justice Katz writes: "Although the dispositive question is prejudice, that question is viewed from a predictive perspective when considering whether the trial court had abused its discretion when acting on the motion to join or sever, but is viewed from a fully informed perspective when determining whether improper joinder was harmful[.]" *Id.* at 48.

or the legislature's Judiciary Committee, will look to clarify the legal status of the Code of Evidence and to establish appellate rules for review of evidentiary rulings based on the Code. The legacy of *DeJesus* will also require that trial and appellate courts establish boundaries for application of the new propensity rule in prosecutions for sex offenses and offenses that qualify under the *Snelgrove* test. It will be interesting to see whether and how the rules and commentary in the Code of Evidence will affect the propensity rule.

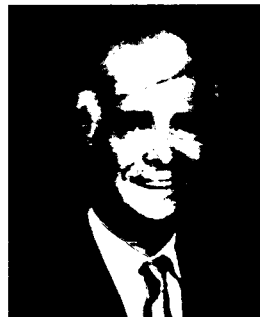
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