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STATE OF CONNECTICUT *v.* CARLOS DEJESUS
(SC 17710)
(SC 17711)

Rogers, C. J., and Norcott, Katz, Palmer, Vertefeuille, Zarella and Sullivan, Js.

Argued January 11—officially released August 19, 2008

Darcy McGraw, special public defender, for the appellant in Docket No. SC 17710, appellee in Docket No. SC 17711 (defendant).

Marjorie Allen Dauster, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Vicki Melchiorre*, senior assistant state's attorney, for the appellee in Docket No. SC 17710, appellant in Docket No. SC 17711 (state).

Opinion

ROGERS, C. J. This case involves two separate certified appeals. First, the state appeals from the judgment of the Appellate Court reversing the conviction of the defendant, Carlos DeJesus, for kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A),[1] claiming that the Appellate Court improperly concluded that the kidnapping statute is unconstitutionally void for vagueness.[2] See *State* v. *DeJesus*, 91 Conn. App. 47, 83, 97–98, 880 A.2d 910 (2005). Second, the defendant appeals from the judgment of the Appellate Court affirming his conviction of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1)[3] and one count of kidnapping in the first degree in violation of § 53a-92 (a) (2) (A), claiming that, despite the codification of the common law of evidence in the Connecticut Code of Evidence (code), this court retains the authority to reconsider and reverse the liberal standard by which evidence of uncharged misconduct is admitted in sexual assault cases.[4]

We conclude that the state's appeal is governed by the principles recently articulated in *State* v. *Salamon*, 287 Conn. 509, 542, 949 A.2d 1092 (2008), wherein we determined that the crime of kidnapping requires an intent "to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit [an underlying] crime." Accordingly, the defendant is entitled to a new trial on the charge of kidnapping in the first degree wherein the jury properly is instructed on the element of intent. With respect to the defendant's appeal, we conclude that, despite the adoption of the code by the judges of the Superior Court, the appellate courts of this state retain the authority to develop and change the rules of evidence through case-by-case common-law adjudication. In light of our recent clarification of the common scheme or plan exception in *State* v. *Randolph*, 284 Conn. 328, 933 A.2d 1158 (2007), we further conclude that evidence of uncharged misconduct admitted under the liberal standard of admissibility ordinarily does not reflect the existence of a genuine plan in the defendant's mind. Nonetheless, because strong public policy reasons continue to exist to admit evidence of uncharged misconduct in sexual assault cases more liberally than in other cases, we will maintain the liberal standard, but do so as a limited exception to the prohibition on the admission of uncharged misconduct evidence in sexual assault cases to prove that the defendant had a propensity to engage in aberrant and compulsive criminal sexual behavior. Accordingly, we reverse in part and affirm in part the judgment of the Appellate Court.

The jury reasonably could have found the following facts, as summarized by the Appellate Court. "At all pertinent times, the defendant was employed by a supermarket chain as a customer service manager. As

part of his employment duties, the defendant was responsible for hiring individuals to work at the store. In August, 2000, he hired the nineteen year old victim,[5] and she eventually assumed the duties of a bagger. She had attended special education classes while in high school and had difficulty learning new tasks. Other witnesses, including the victim's father and a police officer, also testified that the victim had limited mental abilities. The victim's immediate supervisor was someone other than the defendant, but the defendant often managed the entire store and was aware of the victim's special needs.

"The defendant sexually assaulted the victim on two separate occasions in 2000. The first assault occurred when the defendant instructed the victim to go to the payroll room, which is located in the upper level of the store, to sit in a chair, to close her eyes and to open her mouth. The defendant then ordered the victim to 'suck [on] his finger.' After she had done so, the defendant forced her to perform oral sex on him.

"The second sexual assault committed by the defendant on the victim also occurred in the upper level of the store. After telling the victim to go to a room near his office, the defendant entered and proceeded to remove the victim's pants and underwear and had her sit on a desk. The victim told the defendant that she did not want to do that, but he ignored her protests and remained silent. The defendant penetrated the victim's vagina with his penis, causing her a great deal of discomfort. She was able to move away from him, replace her clothes and leave the room. The defendant did not say anything but looked angry as she left.[6]

"The victim subsequently ended her employment at the supermarket but continued to shop at that particular location with her family. At some point in 2001, the defendant approached the victim and her father while they were shopping. In speaking with her father, the defendant indicated that the victim had been a 'good worker' and that he wanted her to resume her employment at the supermarket. The victim's father, who at that time was unaware that the defendant had sexually abused his daughter, encouraged her to return to work. She agreed and was required to attend an orientation session prior to resuming her employment.

"Toward the end of June, 2001, the victim spoke with the defendant at the supermarket. He again instructed her to wait in an empty room located in the store's upper level. The defendant entered the room and kissed the victim on the mouth. He instructed her to sit on a chair and reached inside of her shirt, placing his hand on her stomach. He proceeded to remove her pants and underwear, locked his hands behind her head, straddled the chair she was sitting on and forced her to perform oral sex on him. That lasted for a few minutes, after which the defendant penetrated her vagina with his

finger.

"The victim reported this incident to the police department, which commenced an investigation. The defendant, in an interview at the police station, initially denied having any sexual contact with the victim but then recanted and stated that any sexual activity between them was consensual." *State* v. *DeJesus*, supra, 91 Conn. App. 50–52. Thereafter, the defendant was charged with two counts of sexual assault in the first degree in violation of § 53a-70 (a) (1), and two counts of kidnapping in the first degree in violation of § 53a-92 (a) (2) (A).

During the defendant's jury trial, "[t]he state sought to introduce into evidence the testimony of N, a young woman who had worked at the same store as the victim and who alleged that she also had been sexually assaulted by the defendant. The state proffered N's testimony on the issues of intent and a common scheme or plan. The defendant objected on the grounds that the testimony was not relevant and that its probative value did not outweigh its prejudicial impact.

"The court held a hearing outside of the presence of the jury during which N testified and was cross-examined by defense counsel. At the conclusion of her testimony and after listening to argument by counsel, the court ruled that it would permit N to testify before the jury. The court stated that it would give a limiting instruction at the conclusion of N's testimony and during the charge to the jury.

"N then testified before the jury. She had been hired by the defendant in February, 2000, as a cashier and bagger. N attended special education classes as a result of her learning disability and told the defendant that she was concerned about working in a crowded store. According to N, the defendant paid 'a lot of attention' to her. The excessive attention made N feel uncomfortable.

"In April, 2000, the defendant was on the upper level of the store, and N asked him to get her a new name tag and shirt after her shift had concluded. The defendant signaled her to follow him into a dark room, and, after she arrived, he proceeded to kiss and to touch her. He then grabbed her by the arms, turned her around and pressed his penis into her. The defendant restrained N so that she could not move while he rubbed against her. At some point, the defendant stopped and N turned around. She observed the defendant masturbating and declined his invitation to touch his penis. She recalled that the entire episode, from the time she entered the dark room until the defendant left, took approximately ten minutes. Following N's testimony, the court gave the jury a limiting instruction." Id., 52–53.

The jury found the defendant guilty of all of the offenses with which he was charged, and the trial court

rendered judgment in accordance with the jury's verdict. The trial court subsequently sentenced the defendant to a total effective term of imprisonment of twenty years, execution suspended after sixteen years, and ten years of special probation. Id., 52.

The defendant appealed from the judgment of the trial court to the Appellate Court, claiming, inter alia, that: (1) § 53a-92 (a) (2) (A) is unconstitutionally vague as applied to the defendant's conduct, which consisted of restraining the victim during the course of a sexual assault only;[7] id., 83; and (2) the trial court improperly admitted evidence of the defendant's uncharged sexual misconduct with N to establish the defendant's intent and common scheme or plan. Id., 52–65. With respect to the defendant's first claim, the Appellate Court concluded that § 53a-92 (a) (2) (A) was not unconstitutionally vague as applied to the defendant's conduct in June, 2001, because the defendant's "restraint [of the victim] was neither minor nor an essential part of the crime of sexual assault in the first degree." Id., 96. The Appellate Court concluded that the statute was unconstitutionally vague as applied to the second sexual assault in 2000, however, because the defendant had restrained the victim only to the extent necessary to accomplish the crime of sexual assault.[8] Id., 96–97. In light of the minimal amount of restraint imposed on the victim, the Appellate Court concluded that the defendant's kidnapping conviction on count four of the information, which stemmed from his conduct in 2000, was "absurd and unconscionable." Id., 97. The Appellate Court reversed his conviction on that count and remanded the case to the trial court with direction to render judgment of not guilty as to that count only. Id., 98.

With respect to the defendant's second claim, the Appellate Court concluded that the trial court properly had admitted evidence of the defendant's uncharged sexual misconduct with N under the intent and common scheme or plan exceptions to the prohibition on the admission of uncharged misconduct evidence because: (1) the charged crimes and uncharged misconduct had occurred within the same limited time period; id., 57, 60; (2) the charged crimes and uncharged misconduct had been perpetrated in a similar manner, in that the defendant had "used his supervisory authority to lure the women into an isolated, empty room on the upper level of the store while they were in the store pursuant to their employment duties"; id., 61; and (3) both victims were similar in age, appearance and limited mental ability. Id., 57, 60. Although the defendant urged the Appellate Court to reconsider the liberal rule of admission for evidence of uncharged sexual misconduct under the common scheme or plan exception in sexual assault cases; see *State* v. *Merriam*, 264 Conn. 617, 661–64, 835 A.2d 895 (2003); *State* v. *Kulmac*, 230 Conn. 43, 59–63, 644 A.2d 887 (1994); the Appellate Court declined to do so, noting that "[a]s an intermediate appellate court,

[it could not] reconsider and revise precedent set by [the] Supreme Court." *State* v. *DeJesus*, supra, 91 Conn. App. 60 n.5; see also id., 58 n.4. These certified appeals followed.

I

We first address the state's claim that a reasonable person would know that restraining a victim during the course of a sexual assault violates § 53a-92 (a) (2) (A) and, therefore, the Appellate Court improperly concluded that the kidnapping statute is unconstitutionally vague as applied to the second sexual assault in 2000. We conclude that the Appellate Court properly reversed the defendant's conviction, but our reasoning differs from that of the Appellate Court. We conclude that the state's appeal is governed by the statutory principles recently articulated by this court in *State* v. *Salamon*, supra, 287 Conn. 542, wherein we determined that the crime of kidnapping requires an intent "to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit [an underlying] crime." Accordingly, we conclude that the defendant is entitled to a new trial on the charge of kidnapping in the first degree wherein the jury properly is instructed on the element of intent.

We begin our analysis with the nature and scope of the state's claim on appeal. The state claims that the Appellate Court improperly concluded that the kidnapping statute is void for vagueness as applied to a restraint that is limited in duration and incidental to the crime of sexual assault. Specifically, the state contends that the Appellate Court's construction of § 53a-92 (a) (2) (A) is inconsistent with this state's long-standing jurisprudence holding that the kidnapping statute does not impose any minimal "time requirement[s] for . . . restraint, nor any distance requirement for . . . asportation"; *State* v. *Chetcuti*, 173 Conn. 165, 170, 377 A.2d 263 (1977); and encompasses conduct that is "integral or incidental" to the commission of a separate underlying crime. (Internal quotation marks omitted.) *State* v. *Vass*, 191 Conn. 604, 614, 469 A.2d 767 (1983). In *Salamon*, however, we recently reconsidered and reversed our long-standing jurisprudence holding that the crime of kidnapping encompasses restraints that are necessary or incidental to the commission of a separate underlying crime; see, e.g., *State* v. *Luurtsema*, 262 Conn. 179, 201–203, 811 A.2d 223 (2002); concluding that "[o]ur legislature, in replacing a single, broadly worded kidnapping provision with a gradated 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."

State v. *Salamon*, supra, 287 Conn. 542. We therefore resolve the state's claim in accordance with the statutory principles elucidated in *Salamon*.[9]

In *Salamon*, we reconsidered our prior interpretation of the kidnapping statutes, General Statutes § 53a-91 et seq. Id., 528. The female victim in *Salamon* had been assaulted by the defendant when he approached the victim from behind at a train station in Stamford late at night. Id., 515. As the victim was ascending a flight of stairs, the defendant grabbed her by the back of the neck, causing her to fall, and held her down by her hair when she attempted to get up. When the victim began to scream, the defendant punched her in the mouth and attempted to insert his fingers into her throat. Id. The victim eventually freed herself, and the defendant fled. Ultimately, the defendant was charged with kidnapping in the second degree in violation of General Statutes § 53a-94, unlawful restraint in the first degree in violation of General Statutes § 53a-95, and risk of injury to a child in violation of General Statutes (Rev. to 2001) § 53-21 (a) (1). Id., 512–13, 516. At trial, the defendant requested a jury instruction that, "if [the jury] found that the restraint involved in the alleged kidnapping was incidental to the defendant's assault of the victim, then it was required to find the defendant not guilty of kidnapping in the second degree." Id., 516. The trial court declined to give that instruction.

In *Salamon*, at the defendant's request, we reexamined our long-standing interpretation of the kidnapping statutes to encompass even restraints that merely were incidental to the commission of another crime, such as assault or robbery. Id., 528–48. Although the state relied on the doctrines of stare decisis and legislative acquiescence in support of its contention that we should not revisit our prior holdings, we were persuaded, after careful consideration of both doctrines, "that [they were] not sufficiently weighty to bar reconsideration of our prior precedent interpreting the kidnapping statutes." Id., 519. In our analysis, we recognized that "all of our prior cases [had] relied on a literal application of the language of our kidnapping statutes," and concluded that we were not bound to adhere to the literal application of the language when it would lead to "unconscionable, anomalous or bizarre results." Id., 524. Moreover, we noted that, "since 1977, when this court first rejected a claim that a kidnapping conviction could not be based on conduct involving a restraint that is merely incidental to the commission of another crime, the courts of many other states have reached a contrary conclusion in interpreting their kidnapping statutes." Id., 526–27. As a result, we determined that *Salamon* was an appropriate case to undertake "an extensive analysis of whether our kidnapping statutes warrant the broad construction that we have given them." Id., 524.

Our inquiry in *Salamon* revealed that since 1977, our case law consistently has concluded that the offense of kidnapping requires proof of the element of intent only, and "does not require proof that the victim was confined for any minimum period of time or moved any minimum distance." Id., 532. Our holdings were premised on the literal application of the statutory definitions of the terms " 'restrain,' "[10] and " 'abduct,' "[11] neither of which contain a time or distance requirement. Id., 531–32. Under this literal application, we consistently held that "a defendant may be convicted of kidnapping upon proof that he restrained a victim when that restraint is accompanied by the requisite intent." Id., 534. Closer examination of the statutory language in *Salamon*, however, revealed that "previous decisions . . . [had] 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. Certainly, when an individual intends to interfere substantially with another person's liberty, he also intends to keep that person from escaping . . . [but] the point at which an intended interference with liberty crosses the line to become an intended prevention of liberation is not entirely clear." *State* v. *Salamon*, supra, 287 Conn. 534.

As we stated in *Salamon*, that "point" is particularly significant "in a case not involving the secreting of a victim in a place that he or she is unlikely to be found . . . ." Id. In such cases, "it is the intent element only that differentiates an abduction—the sine qua non of the crime of kidnapping—from a mere unlawful restraint, and the relatively minor penalties attendant to the latter offense." Id.

To resolve the ambiguity created by § 53a-91, we turned to "the common law of kidnapping, the history and circumstances surrounding the promulgation of our current kidnapping statutes and the policy objectives animating those statutes, [and] we . . . conclude[d] the following: Our legislature, in replacing a single, broadly worded kidnapping provision with a gradated 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." Id., 542. We

clarified that our holding did not refute the long-standing rule that no minimum period of restraint or degree of movement is necessary to establish a kidnapping, but established that, when confinement or movement is merely incidental to the commission of another crime, "[t]he guiding principle is whether the [confinement or movement] was so much a part of another substantive crime that the substantive crime could not have been committed without such acts . . . ." (Internal quotation marks omitted.) Id., 546.[12]

"Whether the movement or confinement of the victim is merely incidental to and necessary for another crime will depend on the particular facts and circumstances of each case. Consequently, when the evidence reasonably supports a finding that the restraint was not merely incidental to the commission of some other, separate crime, the ultimate factual determination must be made by the jury. For the purposes of making that determination, the jury should be instructed to consider the various relevant factors, including the nature and duration of the victim's movement or confinement by the defendant, whether that movement or confinement occurred during the commission of the separate offense; whether the restraint was inherent in the nature of the separate offense, whether the restraint prevented the victim from summoning assistance, whether the restraint reduced the defendant's risk of detection, and whether the restraint created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense." Id., 547–48.

Applying this standard to the facts of *Salamon*, we concluded that "a juror reasonably could find that the defendant's restraint of the victim was not merely incidental to his assault of the victim. The victim testified that the defendant, after accosting her, forcibly held her down for five minutes or more. Although the defendant punched the victim once and shoved his fingers into her mouth, that conduct was very brief by contrast to the extended duration of the defendant's restraint of the victim. In light of the evidence, moreover, a juror reasonably could find that the defendant pulled the victim to the ground primarily for the purpose of restraining her, and that he struck her and put his fingers in her mouth in an effort to subdue her and to prevent her from screaming for help so that she could not escape. In such circumstances, we cannot say that the defendant's restraint of the victim necessarily was incidental to his assault of the victim. Whether the defendant's conduct constituted a kidnapping, therefore, is a factual question for determination by a properly instructed jury." Id., 549–50. Accordingly, we reversed the defendant's kidnapping conviction and remanded the case for a new trial wherein the jury properly is instructed on the element of intent. Id., 550.

Indeed, our research has revealed that the appro-

priate remedy for the instructional impropriety identified in *Salamon* is to reverse the defendant's kidnapping conviction and to remand the case to the trial court for a new trial. It is well established that instructional impropriety constitutes "trial error" for which the appropriate remedy is a new trial, rather than a judgment of acquittal. As the United States Supreme Court observed in *Burks* v. *United States*, 437 U.S. 1, 15, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), "reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished."

The decision of the United States Court of Appeals for the Fourth Circuit in *United States* v. *Ellyson*, 326 F.3d 522 (4th Cir. 2003), also is instructive on this point. In *Ellyson*, the defendant was tried and convicted of possessing child pornography in violation of 18 U.S.C. § 2252A (a) (5) (B) (b) (2) (2002), which prohibited the possession of an image that "appears to be of a minor engaging in sexually explicit conduct . . . ." 18 U.S.C. § 2256 (8) (B) (2000); *United States* v. *Ellyson*, supra, 525. Following the defendant's conviction, the United States Supreme Court issued its decision in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002), wherein it determined that § 2256 (8) (B) "abridges the freedom to engage in a substantial amount of lawful speech" and, therefore, "is overbroad and unconstitutional." Id., 256. In light of *Free Speech Coalition*, the Fourth Circuit Court of Appeals vacated the defendant's conviction because the jury had been instructed improperly on the definition of child pornography. *United States* v. *Ellyson*, supra, 530 ("Of course, the district court did not have the benefit of *Free Speech Coalition* at the time it issued its instructions to the jury. Indeed, at the time of trial, the court's instructions were consistent with circuit precedent rejecting a constitutional challenge to the 'appears to be' language [of § 2256 (8) (B)]."). In *Ellyson*, the court noted that "[t]his conclusion does not end the matter because we must determine whether the government may retry [the defendant] or whether he is entitled to an outright reversal and judgment of acquittal." Id., 531–32. The court also rejected the defendant's claim that he was entitled to a judgment of acquittal because a new trial would violate the double jeopardy clause of the federal constitution. The court

reasoned that, "[u]nder circuit law at the time of trial, the government presented more than sufficient evidence to support a guilty verdict against [the defendant]. Prior to *Free Speech Coalition*, the government could satisfy its burden by showing that [the defendant's] child pornography 'appear[ed] to be of a minor' under § 2256 (8) (B), and it was unnecessary for the government to offer evidence that a minor depicted in a given image was an actual child and not a computer-generated image." Id., 532. "Thus, the double jeopardy concerns that preclude the government from having a second opportunity to build a case against a defendant when it failed to do so the first time are not present here. Any insufficiency in proof was caused by the subsequent change in the law under *Free Speech Coalition*, not the government's failure to muster evidence." Id., 533; see also *United States* v. *Pearl*, 324 F.3d 1210, 1214 (10th Cir.) ("[b]ecause the government cannot be held responsible for failing to muster evidence sufficient to satisfy a standard [actual minors] which did not exist at the time of trial, and because this is trial error rather than pure insufficiency of evidence, [the defendant] may be retried without violating double jeopardy" [internal quotation marks omitted]), cert. denied, 539 U.S. 934, 123 S. Ct. 2591, 156 L. Ed. 2d 616 (2003).

We recognize that in *State* v. *Sanseverino*, 287 Conn. 608, 625, 949 A.2d 1156 (2008), we reversed the defendant's conviction of kidnapping in the first degree and remanded the case to the trial court with direction to render a judgment of acquittal, reasoning that "no reasonable jury could have convicted the defendant of a kidnapping in light of our holding in *Salamon*." Furthermore, we acknowledge that we explicitly rejected the dissent's assertion that the defendant was entitled to a new trial before a properly instructed jury, rather than a judgment of acquittal, because the state "had no knowledge when presenting its case to the jury that it was necessary to [establish that the defendant had intended to restrain the victim for a longer period of time or to a greater degree than was necessary to accomplish the underlying crime]." Id., 654 (*Zarella, J.*, dissenting). In light of the foregoing analysis, however, 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.[13] Accordingly, our conclusion in *Sanseverino* hereby is overruled.[14]

Turning to the present case, we note that the jury was not instructed that, to find the defendant guilty of the crime of kidnapping in the first degree, it must find that the defendant had intended "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 underlying] crime." *State* v. *Salamon*, supra, 287 Conn. 542. The defendant therefore could have been convicted on the basis of conduct which, under *Salamon*, does

not violate the kidnapping statute. Accordingly, we conclude, on this alternate ground, that the Appellate Court properly reversed the defendant's conviction of kidnapping in the first degree.[15]

We next address the appropriate remedy. The defendant does not challenge the sufficiency of the evidence to support his kidnapping conviction under the law as it existed prior to *Salamon*. Indeed, such a claim would fail because, under *State* v. *Luurtsema*, supra, 262 Conn. 201–203, the defendant's restraint of the victim is sufficient to support a kidnapping conviction as long as it is accompanied by the requisite intent, even if such restraint is "integral or incidental to the crime of sexual assault . . . ." (Internal quotation marks omitted.) Id., 202; see also id., 202–203 ("[T]he proper inquiry is not whether the kidnapping was incidental to [other offenses], but whether the restraint was accomplished with the requisite intent to constitute kidnapping, as well as the state of mind required for [the other offenses]. Whether the essential elements of kidnapping are proved beyond a reasonable doubt is a question for the jury. . . . The analysis, therefore, is not simply transactional. A defendant may be convicted of two crimes that derive from the same conduct as long as the state [is] able to prove, beyond a reasonable doubt, all of the essential elements of each crime." [Internal quotation marks omitted.]). Therefore, any insufficiency in proof was caused by the subsequent change in the law under *Salamon*, rather than the government's failure to muster sufficient evidence. Accordingly, the proper remedy is a new trial wherein the jury properly is instructed on the element of intent in accordance with the dictates of *Salamon*.

II

We next address the defendant's claim that this court has the authority to reconsider the liberal standard for the admission of uncharged sexual misconduct evidence in sexual assault cases despite the adoption of the code by the judges of the Superior Court codifying the common-law rules of evidence. The defendant claims 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. 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, in light of our recent clarification of the nature and scope of the common scheme or plan exception in *State* v. *Randolph*, supra, 284 Conn. 328, evidence of uncharged misconduct admitted under the liberal standard ordinarily does not reflect the existence of a genuine plan in the defen-

dant'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."

Before addressing the merits of the defendant's claim, we review our jurisprudence regarding the admissibility of evidence of uncharged misconduct. "As a general rule, evidence of prior misconduct is inadmissible to prove that a criminal defendant is guilty of the crime of which the defendant is accused. . . . Such evidence cannot be used to suggest that the defendant has a bad character or a propensity for criminal behavior. . . . On the other hand, evidence of crimes so connected with the principal crime by circumstance, motive, design, or innate peculiarity, that the commission of the collateral crime tends directly to prove the commission of the principal crime, is admissible. The rules of policy have no application whatever to evidence of any crime which directly tends to prove that the accused is guilty of the specific offense for which he is on trial. . . . We have developed a two part test to determine the admissibility of such evidence. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. . . . Second, the probative value of the evidence must outweigh its prejudicial effect. . . . Because of the difficulties inherent in this balancing process, the trial court's decision will be reversed only whe[n] abuse of discretion is manifest or whe[n] an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial court's ruling. . . .

"The standard by which the admissibility of evidence of uncharged misconduct is measured generally will depend on two factors: the purpose for which the evidence is offered, and the type of crime with which the defendant has been charged. For example, when a defendant is charged with a sex crime and evidence of uncharged sexual misconduct is offered to establish that the defendant had a common scheme or plan to engage in sex crimes, the admissibility of the proffered evidence is evaluated pursuant to a liberal standard." (Citations omitted; internal quotation marks omitted.) *State* v. *Randolph*, supra, 284 Conn. 340–41. Thus, in sexual assault cases "[e]vidence of prior sex offenses committed with persons other than the prosecuting witness is admissible to show a common design or plan [when] the prior offenses (1) are not too remote in time; (2) are similar to the offense charged; and (3) are committed upon persons similar to the prosecuting witness." (Internal quotation marks omitted.) *State* v.

Jacobson, 283 Conn. 618, 631, 930 A.2d 628 (2007).

"In cases that do not involve sex crimes . . . however, we apply a more stringent standard to determine whether evidence of uncharged misconduct is admissible to establish a common scheme or plan." *State* v. *Randolph*, supra, 284 Conn. 341. Uncharged misconduct evidence is admissible in nonsex crime cases "only if *it supports a permissive inference that both crimes were related to an overall goal in the defendant's mind*." (Emphasis added; internal quotation marks omitted.) Id., 356.

With this background in mind, we turn first to the predicate question of whether the code codified the foregoing common-law standards of admissibility for uncharged misconduct evidence in sex crime versus nonsex crime cases. The proper construction of the code presents us with a question of law over which our review is plenary. See, e.g., *State* v. *Whitford*, 260 Conn. 610, 640, 799 A.2d 1034 (2002). In construing the code, we apply well established principles of statutory interpretation. See id. We first consider the text and accompanying commentary of the section of the code at issue, and its relationship to other sections.[16] "If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the [code] shall not be considered." (Internal quotation marks omitted.) *State* v. *John F.M.*, 285 Conn. 528, 546, 940 A.2d 755 (2008).

Subsection (a) of § 4-5 of the code provides that "[e]vidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character or criminal tendencies of that person." Subsection (b) of § 4-5 of the code provides, however, that "[e]vidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, *common plan or scheme*, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony." (Emphasis added.) The code does not articulate a particular standard or standards to be used in ascertaining whether uncharged misconduct evidence is probative of the existence of a common scheme or plan. Section 4-5 must be construed, however, in conjunction with § 1-2 (a) of the code, which provides that one of "[t]he purposes of the [c]ode [is] to adopt Connecticut case law regarding the rules of evidence as rules of court . . . ." Cf. *In re William D.*, 284 Conn. 305, 313, 933 A.2d 1147 (2007) ("[T]he legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires [this court] to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute

. . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction." [Internal quotation marks omitted.]). The official commentary to § 1-2 (a) of the code explains that "the [c]ode was intended to maintain the status quo, i.e., preserve the common-law rules of evidence as they existed prior to adoption of the [c]ode, [and] its adoption is not intended to modify any prior common-law interpretation of those rules." Consistent with the stated purpose of the code, we conclude that § 4-5 codified the common-law jurisprudence of this state concerning the admission of uncharged misconduct evidence under the common scheme or plan exception, including the liberal standard by which such evidence is admitted in sex crime cases and the stringent standard by which such evidence is admitted in nonsex crime cases. See *State* v. *Pierre*, 277 Conn. 42, 60, 890 A.2d 474 (§ 8-5 [1] [C] of code codified common-law jurisprudence concerning rule allowing admission of prior inconsistent statements for substantive purposes under certain circumstances), cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006); *State* v. *Whitford*, supra, 260 Conn. 638 (§ 4-4 of code codified common-law jurisprudence concerning character evidence); *Harlan* v. *Norwalk Anesthesiology, P.C.*, 75 Conn. App. 600, 606, 816 A.2d 719 (§ 8-3 [8] of code codified common-law jurisprudence concerning admission of statements in learned treatises), cert. denied, 264 Conn. 911, 826 A.2d 1155 (2003).

Having concluded that the liberal standard for the admission of uncharged sexual misconduct evidence in sex crime cases has been codified in the code, we next address whether we have the authority to reconsider this standard. As previously explained, one purpose of the code, as stated in the commentary to § 1-2 (a), is to codify the common law and certain identified statutory rules of evidence as rules of court and to place them "into a readily accessible body of rules to which the legal profession conveniently may refer." Section 1-2 (a) of the code provides that a second stated purpose is "*to promote the growth and development of the law of evidence through interpretation of the* [c]*ode and through judicial rule making* to the end that the truth may be ascertained and proceedings justly determined." (Emphasis added.) Although it is clear that the judges of the Superior Court intended the law of evidence to grow and develop in the future through "interpretation of the [c]ode" and through "judicial rule making," the meaning of these two terms in § 1-2 (a) is unclear.

We begin our analysis with the term interpretation. On the one hand, because the process of interpretation commonly is understood to mean to explain or to construe; American Heritage Dictionary of the English Language (3d Ed. 1992); it could be argued that this term was intended to limit the common-law authority of the courts to explaining and construing the code in a man-

ner similar to that in which they explain and construe statutes enacted by the legislature. See, e.g., *State* v. *Sawyer*, 279 Conn. 331, 373–74, 904 A.2d 101 (2006) (*Borden, J.*, dissenting and concurring). On the other hand, because "interpretation" is intended "to promote the growth and development of the law of evidence," and the terms "growth" and "development" both denote change, evolution and progress, it appears that the judges of the Superior Court may have intended the term to be construed broadly as descriptive of the common-law adjudicative function pursuant to which evidentiary law historically has grown and developed, rather than as a prescriptive limitation on that function. The commentary to § 1-2 (a) bolsters the latter interpretation by stating that "[c]*ase-by-case adjudication is integral to the growth and development of evidentiary law and*, thus, future definition of the [c]ode will be effected primarily through interpretation of the [c]ode and through judicial rule making." (Emphasis added.) The emphasis that the commentary places on the importance of "[c]ase-by-case adjudication" in the growth and development of evidentiary law, a phrase synonymous with the development of legal principles through the traditional method of case-by-case common-law adjudication, supports a broad, rather than a narrow, construction of the term.

Likewise, the meaning of the term "judicial rule making" in § 1-2 (a) is equally unclear. Although the term reasonably may be construed to refer to codified rules of court adopted by vote of the judges of the Superior Court, the commentary to § 1-2 (a) indicates that the term should be construed broadly to include all evidentiary law developed by the judicial branch, regardless of whether it derives from an administrative or an adjudicative source. For example, the commentary to § 1-2 provides that "[b]ecause the [c]ode was intended to maintain the status quo, i.e., preserve the *common-law rules of evidence* as they existed prior to adoption of the [c]ode, its adoption is not intended to modify any prior common-law interpretation of *those rules*." (Emphasis added.) Because the commentary to § 1-2 refers to evidentiary law developed via case-by-case common-law adjudication as "rules of evidence," it appears that the judges of the Superior Court intended the term "judicial rule making" to include evidentiary law developed through case-by-case common-law adjudication. At the very least, it is unclear from § 1-2 (a) and its accompanying commentary whether the judges of the Superior Court intended to abrogate the authority of the appellate courts to develop and change the law of evidence via case-by-case common-law adjudication and, accordingly, we turn to the history and purpose of the code to resolve this ambiguity.[17]

Prior to the adoption of the code, "the law of evidence applied in Connecticut courts was found [solely] in decisions and rules of the court and in enactments

of the legislature." C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) p. xlix. Because both attorneys and judges lacked a concise and authoritative resource summarizing the applicable rules of evidence, "[d]isputes about evidentiary rules [contributed] to time consuming arguments both at the trial court level and on appeals." Biennial Report of the Connecticut Judicial Department: July 1, 1982–June 30, 1984, p. 57. To ameliorate this problem, former Chief Justice Ellen A. Peters suggested in the 1984 biennial report of the judicial department that "it would be of great benefit to judges and practitioners if the General Assembly, after a thorough study of the principles of evidence, enacted a code of evidence." Id.

"By letter dated October 24, 1991, the co-chairmen of the Judiciary Committee of the General Assembly requested that the Connecticut Law Revision Commission (commission), study 'the feasibility of the legislative enactment of an evidence code' and that the study 'include a draft bill for an evidence code.' "[18] C. Tait & E. Prescott, supra, § 1.1.2, p. 6. The foreword to the code explains that "[then] Supreme Court Justice David M. Borden was asked to chair [the] committee of the [commission] charged with drafting a proposed code of evidence for Connecticut. The members of [the] drafting committee included: Professor Colin C. Tait of the University of Connecticut School of Law; Supreme Court Justice Joette Katz; Appellate Court Judge Paul M. Foti; Superior Court Judges Julia L. Aurigemma, Samuel Freed and Joseph Q. Koletsky; attorneys Robert B. Adelman, Jeffrey Apuzzo, Joseph G. Bruckmann, William Dow III, David Elliot, Susann E. Gill, Donald R. Holtman, Houston Putnam Lowry, Jane S. Scholl, and Eric W. Wiechmann; Law Revision Commission members Jon P. FitzGerald, [State] Representative Arthur J. O'Neill, Superior Court Judge Elliot N. Solomon, and [State] Senator Thomas F. Upson; and [commission] senior attorney Jo A. Roberts and [commission] staff attorney Eric M. Levine.

"The drafting committee completed its work in September, 1997. After receiving public comment, the drafting committee submitted its work product to the . . . [c]ommission, which voted to adopt the proposed code and commentary in December, 1997. Thereafter, the proposed code and commentary were submitted to the Judiciary Committee of the General Assembly for consideration during the 1998 legislative session. Before commencement of the session, however, certain members of the General Assembly had suggested that, for various reasons, a code of evidence should be adopted, if at all, by the judges of the Superior Court pursuant to their rule-making authority rather than by legislation. Thus, the Judiciary Committee urged then Supreme Court Chief Justice Robert J. Callahan to have the judges of the Superior Court consider adopting the proposed code as rules of court."[19] "Their thought, with

which the Rules Committee of the Superior Court ultimately agreed, was that it would be easier to amend the [c]ode from time to time, as the need arose, by rule rather than legislation, and that adopting the [c]ode as a set of rules of court rather than as legislation would insulate such changes from the political arena." D. Borden, "The New Code of Evidence: A (Very) Brief Introduction and Overview," 73 Conn. B.J. 210, 211 (1999).

As the foreword to the code explains, "[i]n response, Chief Justice Callahan appointed a committee to consider and review the proposed code and its commentary for adoption by the judges of the Superior Court. This committee was chaired by Justice Katz and included Appellate Court Judge Barry R. Schaller, Superior Court Judges Aurigemma, Thomas A. Bishop, Thomas J. Corradino, Freed, John F. Kavanewsky, Jr., Koletsky, and William B. Rush, Professor Tait, and attorneys Roberts and Levine. This committee reviewed the proposed code and commentary from June, 1998, until September, 1998, made changes to various parts thereof and then submitted its final work product to the Rules Committee for approval. The Rules Committee unanimously approved the proposed code and commentary. Thereafter, the proposed code and commentary were subject to a public hearing in June, 1999, and finally were adopted by the judges on June 28, 1999.

"An oversight committee was created by the judges of the Superior Court when they adopted the [c]ode, for the purpose of monitoring the development of the [c]ode and making recommendations for future revision and clarification. The current membership of the committee includes: Justice Katz (chair), Superior Court Judges Bishop, Corradino, Beverly J. Hodgson, Kavanewsky, Koletsky, and Michael R. Sheldon, attorneys Adelman, Bruckmann, Gill, Jack G. Steigelfest, Wiechmann, and Levine . . . and Professor Tait. The oversight committee convened in October, 1999, and recommended minor changes to the [c]ode and commentary based primarily on recent developments in the law. Those recommended changes were approved by the Rules Committee in October, 1999, then by the judges of the Superior Court in November, 1999, and ultimately were incorporated into the final version of the [c]ode," which became effective on January 1, 2000.

The foregoing history reflects that the code was intended to provide the bench and the bar with a concise and authoritative restatement of the state's common law and identified statutory rules of evidence so that disputes over the application of evidentiary rules could be resolved quickly and efficiently. See D. Borden, supra, 73 Conn. B.J. 212 ("The rationale for having a [code] is that it will be easier and more efficient for all of the relevant actors in the litigation process—judges and lawyers—to have a code, stated in concise and familiar black letter form, to which to refer. It will be

printed in a separate paperback volume, like the new Practice Book format, that every judge will have with him or her on the bench, and each practitioner will be able to bring to court with him or her. Thus, everyone will be on the same page, to coin a phrase." [Internal quotation marks omitted.]); J. Turner, "Uniform or Straightjacketed Justice?" 26 Conn. L. Trib. No. 3, January 17, 2000, p. 10 (quoting Superior Court Judge John J. Langenbach: "There are no losers with the new code . . . . It's helpful to me and the attorneys . . . . You can have a five-minute argument and discussion, as opposed to those that go on for a long time." [Internal quotation marks omitted.]).

The foregoing history does not support the conclusion, however, that the code was intended to divest *this court* of its inherent authority to change and develop the law of evidence through case-by-case common-law adjudication. The transcript of the June 28, 1999 annual meeting of the judges of the Superior Court, at which the code was adopted, indicates that Justice Borden explained the purpose of the code as follows: "the rationale behind the [c]ode is, that it will be more efficient for all in the litigation process to have a [c]ode stated in a concise and familiar form to which to refer." 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.

Indeed, the transcript of the annual meeting reveals that the sole reference to the manner in which adoption of the code would affect the future development of evidentiary law in this state was made in connection with the creation of the Code of Evidence Oversight Committee (committee), the proposed purpose of which was to "make periodic recommendations for revision and clarification" of the code. Although the judges of the Superior Court voted to approve the creation of the committee, which is composed of judges, members of the bar and law school faculty, the intended scope of the committee's authority to recommend revisions and clarifications of the code is unclear. 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, 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.

In the absence of *any discussion* at the meeting of the judges of the Superior Court concerning the impact that adoption of the code would have on the future

development of evidentiary law, it is illogical to conclude that, by adopting the code for the purposes of ease and convenience, the judges intended to divest this court of its long-standing inherent common-law adjudicative authority over evidentiary law. Cf. *State* v. *Skakel*, 276 Conn. 633, 779, 888 A.2d 985 (2006) (*Katz, J.*, concurring) ("[i]t simply runs counter to reason to conclude that the legislature intended to impose, for the first time in the state's history, a statute of limitations on all murders except those committed under the five limited circumstances constituting capital felonies—rendering all class A felony murders subject to a five year statute of limitations—without a discussion or any expression of opposition"), cert. denied, U.S. , 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006); *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn. 232, 244, 558 A.2d 986 (1989) ("[a] major change in legislative policy, we believe, would not have occurred without some sort of opposition or at least discussion in the legislature" [internal quotation marks omitted]). Stated simply, we believe that such a radical departure from the method by which evidentiary law has grown and developed over the past 200 hundred years would have generated at least a minimal amount of discussion or opposition among the judges of the Superior Court. The silence of the record on this point therefore speaks volumes.[20]

In light of the ambiguous language of the code, the dearth of extratextual evidence indicating the intent of the judges of the Superior Court,[21] and the rule of strict construction applicable to rules promulgated in derogation of the common law,[22] we conclude that the code was not intended to divest this court of its inherent authority to change and develop the rules of evidence through case-by-case common-law adjudication.[23] Similarly, we conclude that the judges of the Superior Court did not intend for the committee to recommend substantive changes to the common-law evidentiary rules codified in the code, but, rather, intended for the committee simply to recommend revisions reflecting common-law developments in evidentiary law, clarifications of the code to resolve ambiguities and additions to the code in the absence of governing common-law rules. Stated simply, we conclude that the code was not intended to displace, supplant or supersede common-law evidentiary rules or their development via common-law adjudication, but, rather, simply was intended to function as a comprehensive and authoritative restatement of evidentiary law for the ease and convenience of the legal community.[24]

Moreover, our construction of the code is consistent with our duty to interpret statutes in a manner that avoids placing them in constitutional jeopardy; see, e.g., *State* v. *Metz*, 230 Conn. 400, 422–23, 645 A.2d 965 (1994); *State* v. *Floyd*, 217 Conn. 73, 88, 584 A.2d 1157 (1991); because it is questionable whether the judges of the Superior Court have the authority under article

fifth, § 1, of the state constitution to codify a code of evidence that strips the appellate courts of their common-law adjudicative function.[25]

Article fifth, § 1, of the constitution of Connecticut, as amended by article twenty, § 1, of the amendments provides: "The judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law." "It is especially significant that unlike the judicial articles of most state constitutions and that of the United States constitution (article III), the powers and jurisdiction of the two courts [originally] specifically named in the Connecticut constitution (the Supreme and Superior Courts) are not specified. The reason is obvious. The 1818 constitution neither created nor provided for the creation of a new judicial system of new courts. Rather, it adopted and gave permanence in the constitution to the existence of the Supreme Court as the state's highest court of appellate jurisdiction and to the Superior Court as the trial court of general jurisdiction."[26] *Szarwak* v. *Warden*, 167 Conn. 10, 32, 355 A.2d 49 (1974); see also *Walkinshaw* v. *O'Brien*, 130 Conn. 122, 127, 32 A.2d 547 (1943) ("[t]here can be no doubt that it was the intent of the [1818] constitution that [the Superior Court] should continue, with the essential characteristics it had previously possessed"); *Styles* v. *Tyler*, 64 Conn. 432, 449, 30 A. 165 (1894) ("[t]he [c]onstitution of 1818 must be read in connection with [the] peculiar development and existing condition of our judicature, and in view of the special defects it was adopted to remedy").

Accordingly, under article fifth, § 1, the Superior Court is a court of general jurisdiction with ultimate authority over the trial of causes, whereas the Supreme Court is a court of limited appellate jurisdiction with ultimate authority over the correction of errors of law. See, e.g., *State* v. *Nardini*, 187 Conn. 109, 126, 445 A.2d 304 (1982) ("[t]his court as a constitutional appellate court is limited to resolving errors of law . . . and the legislature is precluded from conferring upon it discretionary factual authority" [citation omitted]); *Dudley* v. *Deming*, 34 Conn. 169, 174 (1867) ("It was the intention of the framers of the constitution that the Supreme Court of Errors should be a court for the correction of errors *in law*. The language used clearly imports this, and such has ever been the understanding of the legislature, of the courts, and of the people of the state." [Emphasis in original.]); *Styles* v. *Tyler*, supra, 64 Conn. 450 ("The 'Superior Court' is a 'Superior Court of Judicature over this State' with a supreme jurisdiction original and appellate over the trial of causes not committed to the jurisdiction of inferior courts. The 'Supreme Court of Errors' is not a supreme court for all purposes, but a supreme court only for the correction of errors in

law . . . .”).

Under the common law of this state prior to 1818, as under the common law of England, the ultimate authority over the rules and standards governing the admissibility of evidence rested with the highest court of the state. See, e.g., *Chapman* v. *Chapman*, 2 Conn. 347–50, 349 (1817) (trial court improperly admitted hearsay evidence); *Townsend* v. *Bush*, 1 Conn. 260 (1814) (trial court improperly excluded testimony of competent witness); *Phelps* v. *Yeomans*, 2 Day (Conn.) 227 (1806) (trial court properly excluded evidence in action for ejectment); see also Z. Swift, A Digest of the Law of Evidence in Civil and Criminal Cases and a Treatise on Bills of Exchange, and Promissory Notes (1810), p. viii. (“decisions of [c]ourts of dernier resort in this [s]tate” are “binding authority”). Although the Superior Court possessed broad discretion in determining the admissibility of evidence under the facts and circumstances of each individual case, this discretion necessarily was constrained by the law of evidence developed by this court, which the Superior Court was required to apply. See, e.g., *Townsend* v. *Bush*, supra, 270 (“The question whether a party to a negotiable instrument, who is divested of his interest, is a competent witness to [show] it void in its creation, now comes for the first time before this [c]ourt for decision. We are [unshackled] by any precedent, and are at liberty to decide it on the principle.”); see also *Jolly, Inc.* v. *Zoning Board of Appeals*, 237 Conn. 184, 195, 676 A.2d 831 (1996) (“[i]t is axiomatic that a trial court is bound by Supreme Court precedent”). As we recently explained in *State* v. *Saucier*, 283 Conn. 207, 219, 926 A.2d 633 (2007), “only after a trial court has made the legal determination” regarding the admissibility of evidence, “is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought.”[27] See also 1 J. Wigmore, Evidence (Tillers Rev. 1983) § 16, p. 751 (“discretion in the strict sense is by our law not conceded to the trial judge on points of evidence” because “[t]he whole spirit of our law requires the observance of precedents”); see also id., § 16, p. 754 (“Finality as to the tenor of the law is in our system never conceded to the trial judge. The very constitution of courts of appeal is of itself a demonstration.”).

Because this court had final and binding authority over the law of evidence prior to 1818, and because the common-law authority of the Supreme Court and the Superior Court was codified in article fifth, § 1, of the constitution of 1818, we question whether the judges of the Superior Court have the constitutional authority to adopt a code of evidence that is inconsistent with the legal principles promulgated by this court, or to divest this court of its power to develop and change the law of evidence via case-by-case adjudication. See

Walkinshaw v. *O'Brien*, supra, 130 Conn. 127 ("[t]here can be no doubt that it was the intent of the [1818] constitution that [the Superior Court] should continue, with the essential characteristics it had previously possessed"); *Styles* v. *Tyler*, supra, 64 Conn. 451 ("[t]here is no escape from the conclusion that the [c]onstitution vested in this court a portion of the judicial power, that it specified the power so vested, and that the power so specified is a supreme and final jurisdiction for the correction of errors in law"). 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.[28] To reiterate, 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."[29]

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. Unlike evidentiary law, over which this court has exercised final and binding adjudicative authority since its inception more than 200 years ago, our research has revealed that, prior to 1818, the judges of the Superior Court had the authority to adopt rules governing pleading, practice and procedure in the trial court, known as "regulae generales."[30] Regulae generales, like the rules of practice, simply govern the manner in which a trial progresses and, as such, are intended to ensure the uniform, predictable and efficient trial of causes. By contrast, the rules of evidence govern the quality and type of evidence presented to the trier of fact and, as such, their purpose is to ensure the reliability, dependability and integrity of the trier's verdict. As § 1-2 (a) of the code states: "The purposes of the [c]ode are to adopt Connecticut case law regarding rules of evidence as rules of court and to promote the growth and development of the law of evidence through interpretation of the [c]ode and through judicial rule making *to the end that the truth may be ascertained and proceedings justly determined.*" (Emphasis added.) Because the rules of evidence facilitate the court's core judicial truth-seeking function, they necessarily are, and always have been, subject to the oversight and supervision of this court both under the common law and under article fifth, § 1, of the state constitution.[31]

Having concluded that we have the authority to modify the common-law rules of evidence codified in the code, we next address whether we should exercise our authority under the circumstances of the present case. The defendant claims that the liberal standard by which evidence of uncharged misconduct is admitted in sexual

assault cases under the common scheme or plan exception should be reconsidered and rejected because it fails to establish the existence of a genuine plan in the defendant's mind. Additionally, the defendant claims that evidence of uncharged misconduct should not be admitted more liberally in sex crime cases than in nonsex crime cases because crimes of a sexual nature are neither more secretive, aberrant nor compulsive than crimes of a nonsexual nature. In light of this court's recent clarification of the nature and scope of the common scheme or plan exception in *State* v. *Randolph*, supra, 284 Conn. 328, we conclude that evidence of uncharged misconduct admitted under the liberal standard ordinarily does not reflect the existence of a genuine common scheme or plan in the defendant's mind. Nonetheless, we recognize that crimes of a sexual nature are unique and distinct from crimes of a nonsexual nature because they often are "committed surreptitiously, in the absence of any neutral witnesses" and exhibit an "unusually aberrant and pathological nature . . . ." *State* v. *Merriam*, supra, 264 Conn. 669–70. Accordingly, we conclude that evidence of uncharged misconduct properly may be admitted in sex crime cases under the liberal standard, provided its probative value outweighs its prejudicial effect, to establish that the defendant had a tendency or a propensity to engage in certain aberrant and compulsive sexual behavior. We therefore adopt the liberal standard of admission of evidence of uncharged misconduct in sex crime cases 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."

We begin our analysis with the general purpose and scope of the common scheme or plan exception, as recently clarified in *State* v. *Randolph*, supra, 284 Conn. 342. "Evidence of uncharged misconduct, although inadmissible to prove a defendant's bad character or propensity to engage in criminal behavior, is admissible [t]o prove the existence of a larger plan, scheme, or conspiracy, of which the crime on trial is a part. . . . *To prove the existence of a common scheme or plan, each crime must be an integral part of an overarching plan explicitly conceived and executed by the defendant or his confederates*. . . . Evidence of such a plan is relevant to the charged crime because it bears on the defendant's motive, and hence the doing of the criminal act, the identity of the actor, and his intention, where any of these is in dispute." (Citations omitted; emphasis added; internal quotation marks omitted.) Id.

In *Randolph*, we identified two categories of cases in which evidence of uncharged misconduct properly may be admitted in *nonsex* crime cases to prove the existence of a common scheme or plan. "In the first category, which is composed of true common scheme or plan cases, the nature of the uncharged misconduct

and the charged crime, or the existence of connecting evidence, reveal a genuine connection between the crimes in the defendant's mind. . . . As Professor Edward J. Imwinkelried explains in his treatise entitled Uncharged Misconduct Evidence: The [uncharged] act can be probative of a true plan even when it is dissimilar to the charged crime. There need not be exact correspondence between all crimes involved in the plan. The defendant's burglary of a pawn shop can be used to show the defendant's plan to obtain weapons for a robbery. The defendant's theft of a car can be employed to show the defendant's plan to use the car as a getaway vehicle in a kidnapping or robbery. The defendant's theft of a uniform is evidence of the defendant's plan to masquerade as a guard in order to rob an armored car. The dissimilarity between the charged and uncharged crimes does not negate the value of the uncharged crime as evidence of the existence of the plan including the charged crime." (Citation omitted; internal quotation marks omitted.) Id., 343–45, quoting 1 E. Imwinkelried, Uncharged Misconduct Evidence (Rev. Ed. 1999) § 3:22, p. 118.

"In the second category, which consists of signature cases, this court concluded that evidence of uncharged misconduct was admissible to establish the existence of a common scheme or plan because the factual characteristics shared by the charged and uncharged crimes were sufficiently distinctive and unique as to be like a signature and, therefore, it logically could be inferred that if the defendant is guilty of one [crime] he must be guilty of the other." (Internal quotation marks omitted.) *State* v. *Randolph*, supra, 284 Conn. 347. In *Randolph*, we took the opportunity to explain "why we employ the 'signature test,' which is probative of the identity of the defendant as the perpetrator of the crime charged, to ascertain the existence of a common scheme or plan." Id., 350; see, e.g., *State* v. *Ibraimov*, 187 Conn. 348, 354, 446 A.2d 382 (1982). "The signature test is pertinent to the common scheme or plan inquiry . . . when the state seeks to establish the existence of an overall plan in the defendant's mind based *solely* on the similarities shared by the charged and uncharged crimes. This is because, when evidence of uncharged misconduct is sufficiently similar to the charged crime so as to rise to the level of a signature, modus operandi, or logo, it also is likely to exhibit such a concurrence of common features . . . [as] naturally to be explained as caused by a general plan of which [the charged and uncharged crimes] are the individual manifestations. . . . Stated another way, when the charged and uncharged crimes exhibit the same modus operandi, it is likely that both crimes had been committed in furtherance of an overall plan or scheme in the defendant's mind. It is the existence of this permissive inference that an overall plan existed that explains our use of the signature test in the second category of cases."

(Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Randolph*, supra, 352.

We cautioned, however, that "[a]lthough this permissive inference may arise in some, if not many [signature] cases . . . it will not arise in *all* cases. As the Washington Court of Appeals aptly observed, [s]omething more than the doing of similar acts is required in evidencing design, as the object is not merely to negative an innocent intent, but to prove the existence of *a definite project*, directed toward the completion of the crime in question. . . . Thus, when seeking to admit evidence pursuant to the common scheme or plan exception, it is not enough to show mere similarity between the [charged and uncharged] crimes . . . because [s]tanding alone, a series of similar acts does not establish the existence of a true plan. A series of similar robberies could be the result of separate decisions to rob. . . . Accordingly, to establish the existence of a true plan in the defendant's mind based *solely* on the marked similarities shared by the charged and uncharged crimes, the state must produce sufficient evidence to: (1) establish the existence of a signature, modus operandi, or logo; *and* (2) support a permissive inference that both crimes were related to an overall goal in the defendant's mind." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 354–55.

It is clear that, pursuant to *Randolph*, the touchstone of the common scheme or plan exception is the existence of an overall scheme or plan in the defendant's mind that encompasses the commission of both the charged and uncharged crimes. Thus, "it is not enough to show mere similarity between the [charged and uncharged] crimes . . . because [s]tanding alone, a series of similar acts does not establish the existence of a true plan." (Citation omitted; internal quotation marks omitted.) Id., 355.

With these principles in mind, we turn to the liberal standard by which evidence of uncharged misconduct is admitted to establish the existence of a common scheme or plan in *sex crime* cases. It is well established that, in such cases, "[t]here is a greater liberality . . . in admitting evidence of other criminal acts to show a common scheme, pattern or design . . . ." (Internal quotation marks omitted.) *State* v. *Sawyer*, supra, 279 Conn. 349. Evidence of uncharged misconduct is admissible "if the offense is proximate in time, *similar* to the offense charged, and committed with persons *similar* to the prosecuting witness." (Emphasis added; internal quotation marks omitted.) Id.; see, e.g., *State* v. *Jacobson*, supra, 283 Conn. 633 (trial court properly admitted uncharged misconduct evidence to prove common scheme or plan in relevant part because of "important similarities" between defendant's relationship and conduct with victims); *State* v. *McKenzie-Adams*, 281 Conn. 486, 525, 915 A.2d 822 (trial court

properly admitted uncharged misconduct evidence to prove common scheme or plan because victims similarly were situated and "defendant's sexual misconduct with [victims] was sufficiently similar"), cert. denied, U.S. , 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007); *State* v. *Ellis*, 270 Conn. 337, 358, 852 A.2d 676 (2004) (trial court improperly admitted evidence of uncharged misconduct under common scheme or plan exception because "there were few similarities" between defendant's abuse of victims and relationship with victims); *State* v. *James G.*, 268 Conn. 382, 393, 844 A.2d 810 (2004) (trial court properly admitted evidence of uncharged misconduct under common scheme or plan exception in relevant part because "defendant's sexual abuse of [victim] was similar to the offense charged" and was "committed upon [a person] similar to the prosecuting witness" [internal quotation marks omitted]). It is apparent that, under this liberal standard, it is the similarity shared by the charged and uncharged crimes, rather than the existence of a genuine plan in the defendant's mind, that is the focus of the court's inquiry. Moreover, under the liberal standard, the similarities shared by the charged and the uncharged crimes need not be "so unusual and distinctive as to be like a signature"; (internal quotation marks omitted) *State* v. *Merriam*, supra, 264 Conn. 666; and, consequently, need not "exhibit such a concurrence of common features [as] naturally to be explained as caused by a general plan of which [the charged and uncharged crimes] are the individual manifestations." *State* v. *Randolph*, supra, 284 Conn. 352; id. (in nonsex crime cases, evidence of uncharged misconduct only is sufficiently similar to prove common scheme or plan if it rises to level of signature, modus operandi or logo).

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. See, e.g., *State* v. *Whittaker*, 138 N.H. 524, 528, 642 A.2d 936 (1994) ("five-year-old sexual assault committed in a somewhat similar manner on another person, does not constitute evidence of a plan to commit an assault on the victim here"); see also 1 E. Imwinkelried, supra, § 4:13, p. 47 (Criticizing "jurisdictions [that] allow the prosecutor to introduce evidence of the defendant's other crimes similar to the charged crimes; these courts treat a showing of similarity as sufficient evidence of the existence of a plan. The courts' tendency to do so has been especially pronounced in sex offense prosecutions."); C. Tait & E. Prescott, supra, § 4.19.13, p. 170 (Criticizing liberal rule because "the prosecution need not offer any proof that the defendant had any scheme or plan

that might conceivably tie the uncharged misconduct with the charged misconduct. Isolated, unrelated misconduct is sufficient if sexual in nature. However, if the misconduct charged is not sexual but merely violent in nature, the rule does not apply and prior misconduct is not admissible unless rationally part of a common plan or scheme.").

Nonetheless, we recognize that strong public policy reasons continue to exist to admit evidence of uncharged misconduct more liberally in sexual assault cases than in other criminal cases. As we observed in *State* v. *Merriam*, supra, 264 Conn. 669–71, "[f]irst, in sex crime cases generally, and in child molestation cases in particular, the offense often is committed surreptitiously, in the absence of any neutral witnesses. Consequently, courts allow prosecutorial authorities greater latitude in using prior misconduct evidence to bolster the credibility of the complaining witness and to aid in the obvious difficulty of proof. See, e.g., *United States* v. *Castillo*, 140 F.3d 874, 883 (10th Cir. 1998); *People* v. *Covert*, 249 Cal. App. 2d 81, 88, 57 Cal. Rptr. 220 (1967); *People* v. *Donoho*, [204 Ill. 2d 159, 177–78, 788 N.E.2d 707 (2003)]; *Commonwealth* v. *King*, 387 Mass. 464, 472, 441 N.E.2d 248 (1982); *State* v. *Forbes*, 161 Vt. 327, 331, 640 A.2d 13 (1993); *Daniel* v. *State*, 923 P.2d 728, 735 (Wyo. 1996). Second, because of the unusually aberrant and pathological nature of the crime of child molestation, prior acts of similar misconduct, as opposed to other types of misconduct, are deemed to be highly probative because they tend to establish a necessary motive or explanation for an otherwise inexplicably horrible crime; see, e.g., *Ward* v. *State*, 236 Ark. 878, 883, 370 S.W.2d 425 (1963); *Acuna* v. *State*, 332 Md. 65, 75, 629 A.2d 1233 (1993); *State* v. *Forbes*, supra, 331; see also 140 Cong. Rec. 24,799 (1994), remarks of Senator Robert Dole in support of adoption of rules 413 through 415 of the Federal Rules of Evidence[32] ('[i]n child molestation cases, for example, a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sado-sexual interest in children—that simply does not exist in ordinary people'); and assist the jury in assessing the probability that a defendant has been falsely accused of such shocking behavior. See, e.g., *State* v. *Forbes*, supra, 332–33; see also 137 Cong. Rec. 6033 (1991) (United States Department of Justice summary of § 801 of proposed Comprehensive Violent Crime Control Act of 1991, which incorporated proposed rules 413 through 415 of Federal Rules of Evidence) ('[i]t is inherently improbable that a person whose prior acts show that he is in fact a rapist or child molester would have the bad luck to be later hit with a false accusation of committing the same type of crime or that a person would fortuitously be subject to multiple false accusations by a number of different victims')." As this court previously has recog-

nized, "when human conduct involves sexual misconduct, people tend to act in generally consistent patterns of behavior, and . . . it is unlikely (although, of course, not impossible) that the same person will be falsely accused by a number of different victims." *State* v. *Sawyer*, supra, 279 Conn. 383.

We conclude that these 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.[33] We therefore join the federal courts, as well as a multitude of our sister states, that recognize a similar propensity exception in sexual assault cases. See, e.g., *State* v. *Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635 (en banc) ("Arizona courts have recognized another specific exception to the general rule: other bad acts involving 'sexual aberration' are admissible to show the defendant's propensity to commit a similar crime"), cert. denied, 519 U.S. 854, 117 S. Ct. 150, 136 L. Ed. 2d 96 (1996); *Hamm* v. *State*, 365 Ark. 647, 661, 232 S.W.3d 463 (2006) (Hannah, C. J., dissenting) ("This [c]ourt has recognized a 'pedophile exception' to rule 404 [b], where the court has approved allowing evidence of similar acts with the same or other children when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship. . . . The rationale for recognizing this exception is that such evidence helps to prove the depraved sexual instinct of the accused." [Citation omitted.]); *State* v. *Tobin*, 602 A.2d 528, 531 (R.I. 1992) ("[i]n cases involving sexual assault, this court [has] expanded [the] list of exceptions [to the general prohibition against admission of uncharged misconduct] to allow evidence of prior acts to show the defendant's 'lewd disposition or . . . intent' "); *State* v. *Edward Charles L.*, 183 W. Va. 641, 651, 398 S.E.2d 123 (1990) ("collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition to children generally, or a lustful disposition to specific other children, provided such acts occurred reasonably close in time to the incident[s] giving rise to the indictment"); Fed. R. Evid. §§ 413, 414; Alaska R. Evid. § 404 (b) (West 2007); Ariz. R. Evid. § 404 (c) (West 2007); Cal. Evid. Code § 1108 (Deering 2004); 725 Ill. Comp. Stat. Ann. § 5/115-7.3 (West 2002); Ind. Code Ann. § 35-37-4-15 (Michie 1998); Iowa Code Ann. § 701.11 (West Sup. 2008); La. Code Evid. Ann. art. 412.2 (2006); Tex. Code Crim. Proc. Ann. art. 38.37 (Vernon 2005); see also *State* v. *Reyes*, 744 N.W.2d 95, 101 (Iowa 2008) ("[a]bout half the states have developed a 'lustful disposition' or 'depraved sexual instinct' exception which allows evidence of prior sexual misconduct involving children to be admitted into evidence"); *Peo-*

ple v. *Donoho*, supra, 204 Ill. 2d 175 (noting that "courts in [twenty-five] additional states have broadened the exceptions to the ban on other-crimes evidence in sexual offense cases").[34]

We caution, however, that "our approach does not vest trial courts with carte blanche to allow the state to introduce any prior sexual misconduct evidence against an accused in sex crime cases." *State* v. *Merriam*, supra, 264 Conn. 671. First, evidence of uncharged sexual misconduct is admissible 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. Relevancy is established by satisfying the liberal standard pursuant to which evidence previously was admitted under the common scheme or plan exception. Accordingly, evidence of uncharged misconduct is relevant to prove that the defendant had a propensity or a tendency to engage in the crime charged only if it is: "(1) . . . not too remote in time; (2) . . . similar to the offense charged; and (3) . . . committed upon persons similar to the prosecuting witness."[35] (Internal quotation marks omitted.) *State* v. *McKenzie-Adams*, supra, 281 Conn. 522; see also *State* v. *Romero*, 269 Conn. 481, 498, 849 A.2d 760 (2004) ("[w]e have indicated that this inquiry should focus upon each of the three factors, as a single factor will rarely be dispositive").

Second, evidence of uncharged misconduct is admissible only if its probative value outweighs "the prejudicial effect that invariably flows from its admission." *State* v. *Merriam*, supra, 264 Conn. 671; cf. *United States* v. *LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001) (evidence of uncharged misconduct admitted under rule 414 of Federal Rules of Evidence subject to probative versus prejudicial balancing under rule 403 of Federal Rules of Evidence), cert. denied, 534 U.S. 1166, 122 S. Ct. 1181, 152 L. Ed. 2d 124 (2002). In balancing the probative value of such evidence against its prejudicial effect, however, trial courts must be mindful of the purpose for which the evidence is to be admitted, namely, "to permit the jury to consider a defendant's prior bad acts in the area of sexual abuse or child molestation for the purpose of showing propensity." *United States* v. *Benais*, 460 F.3d 1059, 1063 (8th Cir. 2006).

Lastly, to minimize the risk of undue prejudice to the defendant, the admission of evidence of uncharged sexual misconduct under the limited propensity exception adopted herein must be accompanied by an appropriate cautionary instruction to the jury.[36]

Turning to the facts of the present case, we conclude that, 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 defen-

dant'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. As the Appellate Court properly determined, the defendant's misconduct with N was proximate in time to the charged crime because both offenses occurred in 2000 and 2001. *State* v. *DeJesus*, supra, 91 Conn. App. 60. Additionally, "the similarities between the assault on the victim and the assault on N were sufficient to warrant the introduction into evidence of the uncharged misconduct. The women were similar in age and appearance. Both suffered from a mental disability and had a difficult time learning new skills. The defendant had hired both the victim and N and was aware of their mental limitations. The defendant's assaults of the two women occurred in a similar manner as well. He used his supervisory authority to lure the women into an isolated, empty room on the upper level of the store while they were in the store pursuant to their employment duties. He then proceeded to assault them."[37] Id., 60–61.

Because the uncharged misconduct evidence was admitted pursuant to the common scheme or plan exception, rather than the propensity exception, we must address the issue of harm.[38] The defendant claims that the admission of this evidence was harmful solely because of the risk that the jury would use the evidence to infer that the defendant had a propensity or a tendency to commit the crime of sexual assault. As we have explained in the body of this opinion, however, this is the precise purpose for which the jury properly could have considered the evidence. Accordingly, we conclude that the evidentiary impropriety was harmless.

In sum, evidence of uncharged sexual misconduct properly may be admitted in sex crime cases to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive criminal sexual behavior if: (1) the trial court finds that such evidence is relevant to the charged crime in that it is not too remote in time, is similar to the offense charged and is committed upon persons similar to the prosecuting witness; and (2) the trial court concludes that the probative value of such evidence outweighs its prejudicial effect. In assessing the relevancy of such evidence, and in balancing its probative value against its prejudicial effect, the trial court should be guided by this court's prior precedent construing the scope and contours of the liberal standard pursuant to which evidence of uncharged misconduct previously was admitted under the common scheme or plan exception. Lastly, prior to admitting evidence of uncharged sexual misconduct under the propensity exception adopted herein, the trial court must provide the jury with an appropriate cautionary instruction regarding the proper use of such evi-

dence. See footnote 36 of this opinion.

The judgment of the Appellate Court is reversed with respect to the direction to render judgment of not guilty of kidnapping in the first degree under count four of the information and the case is remanded to that court with direction to remand the case to the trial court for a new trial on that count; the judgment is affirmed in all other respects.

In this opinion NORCOTT and VERTEFEUILLE, Js., concurred.

[1] General Statutes § 53a-92 provides in relevant part: "(a) A person is guilty of kidnapping in the first degree when he abducts another person and . . . (2) he restrains the person abducted with intent to (A) inflict physical injury upon him or violate or abuse him sexually . . . ."

[2] We granted the state's petition for certification to appeal from the judgment of the Appellate Court limited to the following issue: "Did the Appellate Court properly conclude that no reasonable person could have known that the defendant's conduct would violate the statute defining kidnapping in the first degree?" *State* v. *DeJesus*, 279 Conn. 912, 912–13, 903 A.2d 658 (2006).

[3] General Statutes § 53a-70 provides in relevant part: "(a) A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person . . . ."

[4] We granted the defendant's petition for certification to appeal from the judgment of the Appellate Court limited to the following issue: "Does this court, or any court, have the authority in light of the Connecticut Code of Evidence, to reconsider the rule that the introductions of prior sexual misconduct of the defendant in sexual assault cases, is viewed under a relaxed standard?" *State* v. *DeJesus*, 279 Conn. 912, 903 A.2d 658 (2006).

[5] In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[6] "Counts three and four of the information charged the defendant with sexual assault and kidnapping stemming from his conduct that occurred in 2000. The court instructed the jury that it could convict the defendant on the basis of either incident but that it was required to agree unanimously on the same incident." *State* v. *DeJesus*, supra, 91 Conn. App. 51 n.2.

[7] The defendant also claimed that the trial court improperly had: (1) denied him due process of law by providing "the jury with an incorrect statement of the common scheme or plan exception during its charge and improperly [allowing] the state to refer to N and the victim as 'borderline retarded' and 'intellectually limited' "; *State* v. *DeJesus*, supra, 91 Conn. App. 65–66; (2) "refused to conduct an in camera review of the victim's confidential records from a rape crisis center to determine if they contained any evidence concerning her testimonial capacity and ability to perceive, to recall and to relate the events at issue"; id., 70; and (3) denied the defendant's motion to suppress certain statements made to the police because these statements had been made during the course of a custodial interrogation and the defendant had not been informed of his *Miranda* rights. Id., 77–83; see *Miranda* v. *Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The Appellate Court rejected each of these claims, concluding that: (1) the defendant's unpreserved instructional claim was not of constitutional magnitude and, therefore, the defendant could not prevail under the second prong of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989); *State* v. *DeJesus*, supra, 65–70; (2) the trial court had not abused its discretion by denying the defendant's request for an in camera review of the victim's confidential records because the defendant failed to establish "through the testimony of those persons with knowledge of the records, a factual basis from which the court could conclude that the records would reveal that, at the relevant time, the victim's testimonial capacity was affected so as to warrant further inquiry"; id., 75; and (3) the trial court properly denied the defendant's suppression motion because "as a matter of law . . . the defendant's interview . . . at the police station cannot be construed as having been custodial at any point." Id., 81. The Appellate Court's resolution of these claims is not at issue in the present appeal.

[8] The Appellate Court noted that, "[c]ount four of the information charged the defendant with kidnapping in the first degree stemming from events that occurred in 2000. There was evidence adduced at trial concerning two sexual assaults and two kidnappings that occurred during this time period. . . . [T]he [trial] court instructed the jury that it could convict on count four as long as it agreed on the same kidnapping. Of course, the defendant is unable to clarify a general verdict, and, therefore, it is unknown specifically which 2000 events formed the basis of the conviction with respect to count four. . . . Accordingly, the defendant would be wrongly convicted if he was convicted under an alternative basis for which there was no evidence, and a conviction cannot stand unless both of the alternate bases for the conviction are constitutional. . . . A conviction must be set aside if one of the alternate grounds supporting the verdict is unconstitutional or if one is not sufficiently supported by the evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *DeJesus*, supra, 91 Conn. App. 95 n.18. In light of the Appellate Court's conclusion that § 53a-92 (a) (2) (A) is unconstitutionally vague as applied to the defendant's conduct during the second sexual assault in 2000, it did not determine "whether the facts concerning the first assault in 2000 could also support a kidnapping conviction." Id., 98.

[9] The rule announced in *Salamon* applies here because the present case was pending when this court articulated a new construction of the kidnapping statutes in *Salamon*. *Marone* v. *Waterbury*, 244 Conn. 1, 10–11, 11 n.10, 707 A.2d 725 (1998) (citing cases recognizing long-standing presumption that rule enunciated in case applies retroactively to pending cases).

[10] General Statutes § 53a-91 (1) defines the term " '[r]estrain' " as "to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent. As used herein 'without consent' means, but is not limited to, (A) deception and (B) any means whatever, including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and the parent, guardian or other person or institution having lawful control or custody of him has not acquiesced in the movement or confinement."

[11] General Statutes § 53a-91 (2) defines the term " '[a]bduct' " as "to restrain a person with intent to prevent his liberation by either (A) secreting or holding him in a place where he is not likely to be found, or (B) using or threatening to use physical force or intimidation."

[12] In *State* v. *Salamon*, supra, 287 Conn. 532 n.21, we also noted that "[a] challenge to a kidnapping conviction predicated on such miniscule movement or duration of confinement remains viable on constitutional grounds under the [void for] vagueness doctrine."

[13] We note, as of the date of the release of this decision, a motion for reconsideration of our decision in *Sanseverino* was pending before this court. We will consider the merits of that motion in due course.

[14] The dissent contends that, by overruling our determination in *Sanseverino* that the appropriate remedy was a judgment of acquittal, rather than a new trial, we violate the doctrine of stare decisis. We disagree. Stare decisis "is not an end in itself. . . . Experience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better. . . . The flexibility and capacity of the common law is its genius for growth and adaptation. . . . Indeed, [i]f law is to have current relevance, courts must have and exert the capacity to change a rule of law when reason so requires. . . . [Thus] [t]his court . . . has recognized many times that there are exceptions to the rule of stare decisis." (Citations omitted; internal quotation marks omitted.) *State* v. *Skakel*, 276 Conn. 633, 691, 888 A.2d 985, cert. denied, U.S. , 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006). In light of the inescapable logic and persuasive reasoning of *Burks* v. *United States*, supra, 437 U.S. 15, *United States* v. *Ellyson*, supra, 326 F.3d 532–33, and *United States* v. *Pearl*, supra, 324 F.3d 1214, we are compelled to conclude that *Sanseverino* was wrongly decided.

Indeed, the dissent appears to concede that the nature of the defendant's claim in *Sanseverino* was not truly one of insufficiency of the evidence because, as the dissent notes, the double jeopardy clause of the federal constitution would not have precluded this court from remanding that case for a new trial. Rather, the dissent claims that "we applied [the insufficiency of the evidence] framework in . . . *Sanseverino* due more to jurisprudential concerns" because "it was clear that the state could not prevail on retrial under the new rule set forth in *Salamon*." We agree with the dissent that, given the facts adduced at trial in *Sanseverino*, it was unlikely that the state would have been able to proffer sufficient additional evidence on retrial to

satisfy the *Salamon* rule. Nonetheless, it is not the function of this court, as an appellate tribunal, to deprive the state of that opportunity. See *State* v. *Lawrence*, 282 Conn. 141, 156, 920 A.2d 236 (2007) (function of appellate tribunal is "to review, and not to retry, the proceedings of the trial court" [internal quotation marks omitted]).

[15] In light of the statutory principles recently articulated by this court in *Salamon*, we need not address the state's claim that the Appellate Court improperly concluded that the kidnapping statute is void for vagueness as applied to restraints that are necessary for or incidental to the commission of a separate underlying crime. See *State* v. *DeJesus*, supra, 91 Conn. App. 97.

[16] As we previously have observed, the code "cannot be properly understood without reference to the accompanying [c]ommentary. The [c]ommentary provides the necessary context for the text of the [c]ode, and the text of the [c]ode expresses in general terms the rules of evidence that the cases cited in the [c]ommentary have established. . . . Additionally, the [j]udges took an unusual step when they formally adopted the [c]ode. Unlike other situations, in which the [j]udges, when voting on rules, are guided by but do not formally adopt the commentary submitted by the [r]ules [c]ommittee that normally accompanies proposed rule changes, in adopting the [c]ode the [j]udges formally adopted the [c]ommentary as well. This is the first time that the [j]udges have done so. Thus, the [c]ode must be read together with its [c]ommentary in order for it to be fully and properly understood." (Citation omitted; internal quotation marks omitted.) *State* v. *Pierre*, 277 Conn. 42, 60, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006); see also *Daley* v. *McClintock*, 267 Conn. 399, 408, 838 A.2d 972 (2004); D. Borden, "The New Code of Evidence: A (Very) Brief Introduction and Overview," 73 Conn. B.J. 210, 212 (1999).

[17] Subsection (b) of § 1-2 of the code, entitled "[s]aving clause," also supports a broad construction of subsection (a). Subsection (b) of § 1-2 of the code provides: "Where the [c]ode does not prescribe a rule governing the admissibility of evidence, the court shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience, except as otherwise required by the constitution of the United States, the constitution of this state, the General Statutes or the Practice Book. The provisions of the [c]ode shall not be construed as precluding any court from recognizing other evidentiary rules not inconsistent with such provisions." The commentary to § 1-2 (b) of the code explains that "[s]ubsection (b) addresses the situation in which courts are faced with evidentiary issues not expressly covered by the [c]ode. Although the [c]ode will address most evidentiary matters, it cannot possibly address every evidentiary issue that *might arise during trial*. Subsection (b) sets forth the standard by which courts are to be guided in *such instances*.

"Precisely because it cannot address every evidentiary issue, the [c]ode is not intended to be the exclusive set of rules governing the admissibility of evidence. Thus, subsection (b) makes clear that a court is not precluded from recognizing other evidentiary rules not inconsistent with the [c]ode's provisions." (Emphasis added.)

First, subsection (b) of § 1-2 governs "evidentiary issue[s] that might arise *during trial*" and, therefore, is applicable exclusively to the Superior Courts, rather than to the Appellate Court or to this court. (Emphasis added.) Conn. Code Evid. § 1-2 (b), commentary. As § 1-1 (b) of the code specifies, "[t]he [c]ode applies to all proceedings in the superior court in which facts in dispute are found, except as otherwise provided by the [c]ode, the General Statutes or the Practice Book." Second, subsection (b) of § 1-2 clarifies that, despite the adoption of the code, the Superior Court retains the authority to promulgate rules of evidence in the absence of a prevailing common-law rule codified in the code and, as such, it simply preserves the long-standing constitutional and common-law adjudicative function of the Superior Court vis-à-vis the law of evidence. See, e.g., *American Oil Co.* v. *Valenti*, 179 Conn. 349, 356, 426 A.2d 305 (1979) ("[t]he admissibility of evidence generated by computers" was issue of first impression for trial court subject to appellate review); *State* v. *Vaughn*, 171 Conn. 454, 459, 370 A.2d 1002 (1976) ("whether evidence as to the mental capacity of a confessor at the time of the giving of the confession is admissible to be weighed by the jury" was issue of first impression for trial court subject to appellate review); *Evans* v. *Warden*, 29 Conn. App. 274, 279–81, 613 A.2d 327 (1992) (whether expert testimony required to establish ineffective assistance of counsel under *Strickland* was matter of first impression for habeas court subject to appellate review).

[18] The commission is a part of the legislative branch and is composed of representatives from the General Assembly, the judiciary, members of the bar and the faculty of accredited law schools within the state. See General

Statutes §§ 2-85 and 2-86. The duties of the commission include, but are not limited to, studying and recommending proposed changes to the law of this state. See General Statutes § 2-87.

[19] "By letter dated March 3, 1998, the then co-chairs of the Judiciary Committee wrote to Chief Justice . . . Callahan, as follows:

"Dear Justice Callahan,

"As I am sure you are aware, since 1993 a drafting committee of the . . . [c]ommission has been preparing a code of evidence to codify existing Connecticut case law. The drafting committee was chaired by Associate Justice . . . Borden and included a highly distinguished panel of Connecticut legal scholars and practitioners, including Justice . . . Katz, Judges . . . Aurigemma . . . Freed, and . . . Koletsky, and Professor . . . Tait, co-author of Handbook of Connecticut Evidence. The drafting committee completed its work in December 1997 and the proposed code has now been approved for promulgation by the . . . [c]ommission.

"As [c]ochairmen of the [j]udiciary [c]ommittee, we believe that the proposed code accurately encompasses Connecticut's rules of evidence in a form that will be most useful to litigating attorneys and presiding judges. We also believe that the code would more appropriately be promulgated as rules of court rather than as legislation of the Connecticut General Assembly. The code reflects existing court-made law and must, in the future, remain responsive to judicial concerns. We are, therefore, submitting the proposed code for consideration and possible adoption of the Judicial Department.

"Because adoption of an appropriate code, whether by rule of court or by legislation, is of vital importance, we have a continuing interest in any action that is taken with respect to this proposal. Would you, therefore, kindly advise us prior to the 1999 legislative session of any action that the Judicial Department may be taking or intending to take with respect to the code at that time? We are, of course, available to discuss this matter further. . . .

"Sincerely,

"Senator Donald E. Williams, Jr.

"Representative Michael P. Lawlor

"Cochairmen, Connecticut Judiciary Committee . . . ." C. Tait & E. Prescott, supra, § 1.1.3, pp. 8–9.

[20] The dissent states that "it is well-known that, as chair of both the evidence code drafting committee and the Practice Book rules committee, Justice Borden spent many hours at judges' association meetings explaining the code prior to his official presentation. Thus, his statements at the official meeting reasonably should be viewed as a summation, not a comprehensive discussion of all of the ramifications of adoption of the code." First, such information hardly can be characterized as "well-known," given that there is no public record of Justice Borden's appearance at any judges' association meetings. Second, divesting this court of its inherent common-law and constitutional adjudicative authority over evidentiary law, an authority which this court has enjoyed since its inception, is not a minor or picayune detail. One would assume that, at a minimum, such a sweeping consequence would merit a brief mention in Justice Borden's summation concerning the purpose and impact of the code.

[21] Anecdotal extratextual evidence reflects that the judges of the Superior Court, all of whom voted to adopt the code, may have had conflicting understandings of the impact that adoption of the code would have on the future development of evidentiary law. Shortly after the code became effective, several attorneys expressed concern that the code will "[freeze] the common law" and "slow the growth of evidentiary law . . . ." J. Turner, supra, 26 Conn. L. Trib. 10. Although "both attorneys and judges" expressed their views at that time that "judges no longer will be free to develop the law on a case-by-case basis using the common law," then Supreme Court Justice Borden opined that "the benefits [of the code] outweigh the costs." Id.; see also General Statutes § 51-198 (a) (Justices of Supreme Court also are judges of Superior Court). Judge Langenbach, however, expressed his view that, "[a]ttorneys worried about the code's impact should relax . . . because the code is only a guide for judges and attorneys in interpreting the law. . . . [It is] a very good guideline. [It is] very helpful. [It is] a good, quick reference *but our Supreme Court can make changes*." (Emphasis added.) J. Turner, supra, 26 Conn. L. Trib. 10. This conflicting evidence supports our conclusion that the judges of the Superior Court did not express a clear and plain intent to divest this court of its inherent common-law adjudicative authority over evidentiary law by adopting the code.

[22] "[W]hen a statute is in derogation of common law . . . it should receive a strict construction and is not to be extended, modified, repealed or enlarged in its scope by the mechanics of [statutory] construction. . . . In determin-

ing whether or not a statute abrogates or modifies a common law rule the construction must be strict, and the operation of a statute in derogation of the common law is to be limited to matters clearly brought within its scope. . . . Although the legislature may eliminate a common law right by statute, the presumption that the legislature does not have such a purpose can be overcome only if the legislative intent is clearly and plainly expressed. . . . The rule that statutes in derogation of the common law are strictly construed can be seen to serve the same policy of continuity and stability in the legal system as the doctrine of stare decisis in relation to case law." (Internal quotation marks omitted.) *Viera* v. *Cohen*, 283 Conn. 412, 426–27, 927 A.2d 843 (2007).

[23] We recognize that, in *State* v. *Sawyer*, supra, 279 Conn. 331–32 n.1, we stated in dicta and without analysis that, "since 2000, the year in which the [code] was adopted, the authority to change the rules of evidence lies with the judges of the Superior Court in the discharge of their rule-making function. Of course, prior to that date, changes to substantive evidentiary rules were accomplished by our courts in the exercise of their common-law authority. To the extent that our evidentiary rules may be deemed to implicate substantive rights, we believe that it is unclear whether those rules properly are the subject of judicial rule making rather than the subject of common-law adjudication. Because that question raises an issue on which we did not request briefing by the parties, however, we leave it for another day." Because our statement in *Sawyer* was dicta, it is not binding precedent and, therefore, does not dictate the outcome of the present appeal. See, e.g., *Tele Tech of Connecticut Corp.* v. *Dept. of Public Utility Control*, 270 Conn. 778, 810, 855 A.2d 174 (2004). To the extent that we indicated in *Sawyer*, however, that "the authority to change the rules of evidence lies with the judges of the Superior Court in the discharge of their rule-making function," rather than in the appellate courts of this state "in the exercise of their common-law [adjudicative] authority," our conclusion hereby is overruled. *State* v. *Sawyer*, supra, 332 n.1.

[24] Because the code merely restated the prevailing common-law evidentiary rules, which the judges of the Superior Court already were bound to apply, and was intended to expedite and streamline judicial proceedings by serving as a shorthand reference to those rules, the code clearly was intended to be binding authority in the Superior Court. Section 1-1 (b) of the code specifically states that "[t]he [c]ode applies to all proceedings in the superior court in which facts in dispute are found, except as otherwise provided by the [c]ode, the General Statutes or the Practice Book." The code therefore differs fundamentally from a treatise or handbook, which has persuasive value only. The question presented in this appeal, however, is not whether the code is binding authority in the Superior Court, but, rather, whether it is binding authority in *this court* such that we are precluded from reconsidering our own prior precedent codified in the code. For the reasons explained in the body of this opinion, we conclude that the judges of the Superior Court did not intend their adoption of the code to divest this court of its inherent authority to change and develop the law of evidence via case-by-case common-law adjudication.

[25] The dissent repeatedly analogizes the evidentiary rules codified in the code to statutes promulgated by the legislature and maintains that this court's authority to modify or overrule the code necessarily is commensurate with its authority to modify or overrule a statute. The dissent's analogy is inapt, however. First, this court's authority to modify or overrule a statute is limited by the separation of powers provisions of the state and federal constitutions. See, e.g., *State* v. *Courchesne*, 262 Conn. 537, 580, 816 A.2d 562 (2003) (under separation of powers provisions of state and federal constitutions "the task of the legislative branch is to draft and enact statutes, and the task of the judicial branch is to interpret and apply them in the context of specific cases"). Because the present case involves the allocation of authority within a single branch of government, rather than the division of authority between two or more branches of government, however, the limitations imposed by those provisions are inapplicable. Second, in claiming that the code is inviolate simply because it is a code, the dissent engages in a tautological exercise that presupposes the answer to the question with which we are presented, namely, in enacting the code, did the judges of the Superior Court intend to divest this court of its inherent authority to change and develop the law of evidence through case-by-case common-law adjudication? Because we answer this predicate question in the negative, our analysis necessarily ends where the dissent's analysis begins.

[26] Article fifth, § 1, as codified in the state constitution of 1818 provided

that: "The judicial power of the state shall be vested in a supreme court of errors, a superior court, and such inferior courts as the general assembly shall, from time to time, ordain and establish: the powers and jurisdiction of which courts shall be defined by law." "The 1965 constitution changed this provision by deleting the words 'of errors' in the title of the Supreme Court, by changing the word 'inferior' to 'lower' in defining what courts could be established by the General Assembly, and by replacing the colon after 'establish' with a period and the word 'which' by the word 'these.' " *Szarwak* v. *Warden*, 167 Conn. 10, 29, 355 A.2d 49 (1974). These changes were technical in nature and were not intended to alter, or in any way materially change, the jurisdiction or composition of the "constitutional courts," the Supreme Court and the Superior Court. Id., 34–36; see also *Adams* v. *Rubinow*, 157 Conn. 150, 156, 251 A.2d 49 (1968). In 1982, article fifth, § 1, was amended by article twenty, § 1, of the amendments, which created a third constitutional court, the Appellate Court.

[27] Nothing in this opinion should be construed to restrict the trial court's broad discretion to admit or exclude evidence "if premised on a correct view of the law . . . ." *State* v. *Saucier*, supra, 283 Conn. 218. We conclude only that, under article fifth, § 1, of the state constitution, it is the province of this court, rather than the Superior Court, ultimately to determine what the correct view of the law is.

[28] Likewise, we question whether the judges of the Superior Court have the constitutional authority to adopt a code of evidence that is inconsistent with the legal principles promulgated by the Appellate Court, to the extent that such principles are consistent with the decisions of this court, or to divest the Appellate Court of its power to develop and change the law of evidence via case-by-case adjudication. Accordingly, we conclude that the evidentiary rules delineated in the code are subject to change, modification, alteration or amendment by the Appellate Court in the exercise of its constitutional and common-law adjudicative authority, to the extent that such a change, modification, alteration or amendment is not inconsistent with the prior decisions of this court. See *Hopkins* v. *Commissioner of Correction*, 95 Conn. App. 670, 672, 899 A.2d 632 ("[a]s an intermediate appellate court," the Appellate Court is "bound by Supreme Court precedent and [is] unable to modify it"), cert. denied, 279 Conn. 911, 902 A.2d 1071 (2006).

[29] The dissent speculates that "the result in this case may motivate the legislature to follow through on previously contemplated action to bring the rules of evidence under the supervision of that body, which the majority acknowledges has authority to adopt rules of evidence that would bind this court." We see no reason why the legislature would seek to preempt the code, which was duly adopted by the judges of the Superior Court and is binding authority in that court. Indeed, in March, 1998, it was the then cochairmen of the Connecticut Judiciary Committee, Donald E. Williams, Jr. and Michael P. Lawlor, who noted that "the code would more appropriately be promulgated as rules of court rather than as legislation of the Connecticut General Assembly. The code reflects existing court-made law and must, in the future, remain responsive to judicial concerns." Thus, our decision today comports with the intent of the legislature, as well as the intent of the judges of the Superior Court.

[30] See 3 Day (Conn.) 28–29 (1808) (adopting rules pertaining to jury instructions, bills of exceptions and motions for new trial); 4 Day (Conn.) 119 (1809) (adopting rules pertaining to attorneys seeking admission to practice law and specifying that motion for new trial must state facts on which motion is grounded); 5 Day (Conn.) 180 (1811) (ordering certain limitations to rule established in June, 1809, regarding admission of attorneys to practice of law).

[31] We recognize, however, that "the rules of evidence . . . have never in this state been regarded as exclusively within the judicial domain. Over a period of many years, the legislature has enacted various statutes modifying the rules of evidence prevailing at common law . . . . These changes have been accepted by our courts and have never been challenged as violating the principle of separation of powers." *State* v. *James*, 211 Conn. 555, 560, 560 A.2d 426 (1989); see also *State* v. *Kulmac*, supra, 230 Conn. 52 ("[t]he rules pertaining to the admissibility of evidence in Connecticut are subject to the exercise of both judicial and legislative authority").

[32] Rule 413 (a) of the Federal Rules of Evidence provides: "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."

Rule 414 (a) of the Federal Rules of Evidence provides: "In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant."

[33] The defendant claims, however, that "many heinous crimes take place out of sight" and that "the use of special rules of evidence for sexual assault victims is a form of paternalism that only serves to perpetuate sexist stereotypes that a woman's testimony alone is an insufficient basis for a sexual assault conviction." The defendant fails to cite any authority or to provide any analysis in support of this claim and, therefore, we decline to review it. See *State* v. *T.R.D.*, 286 Conn. 191, 213–14 n.18, 942 A.2d 1000 (2008) ("We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." [Internal quotation marks omitted.]).

The defendant further claims that evidence of uncharged misconduct should not be admitted more liberally in sex crime cases because "mass hysteria" concerning "would-be child predators [has] resulted in innocent persons unjustly accused, convicted and spending years in prison." In support of this claim, the defendant relies on *State* v. *Michaels*, 264 N.J. Super. 579, 616–35, 625 A.2d 489 (App. Div. 1993), aff'd, 136 N.J. 299, 642 A.2d 1372 (1994), wherein the Appellate Division of the Superior Court of New Jersey reversed the defendant's conviction of 115 counts of sexual assault because the child victims had been questioned in a coercive, leading and suggestive manner. We conclude that the defendant's reliance on *Michaels* is misplaced because the propriety of admitting evidence of uncharged misconduct was not at issue in that case. Moreover, evidence of uncharged misconduct only is admissible "once all other requirements [for admissibility] have been satisfied—relevancy, materiality, and probative value outweighs prejudice—[and] the trial court . . . determine[s] that there is sufficient evidence for the jury to find that the defendant committed the prior act." *State* v. *Aaron L.*, 272 Conn. 798, 827, 865 A.2d 1135 (2005). In a case such as *Michaels*, wherein it was undisputed that the victims' testimony had been coerced by "extremely leading and/or suggestive questions"; *State* v. *Michaels*, supra, 621; evidence of uncharged misconduct properly would be excluded either because its prejudicial effect outweighs its probative value, or because it is insufficient to establish that the defendant committed the prior act. Accordingly, we conclude that "adequate protection against unfair prejudice . . . is afforded by the existing structures of our rules of evidence." *State* v. *Aaron L.*, supra, 824.

[34] We clarify that the exception we adopt today, like the liberal standard pursuant to which uncharged misconduct evidence formerly was admitted under the common scheme or plan exception, applies to *all* sexual misconduct, regardless of the age of the victim.

[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.

[36] The precise content of such an instruction is beyond the scope of the present appeal. We note, however, that the following instruction regarding the admission of evidence of uncharged misconduct under rule 413 of the Federal Rules of Evidence; see footnote 32 of this opinion; has been approved by the Tenth Circuit Court of Appeals: "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]. Bear in mind as you consider this evidence [that] at all times, the government has the burden of proving that the defendant committed each of the elements of the offense charged in

the [information]. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the [information].'' (Internal quotation marks omitted.) *United States* v. *McHorse*, 179 F.3d 889, 903 (10th Cir.), cert. denied, 528 U.S. 944, 120 S. Ct. 358, 145 L. Ed. 2d 280 (1999); see also 1 L. Sand, J. Siffert & W. Loughlin et al., Modern Federal Jury Instructions-Criminal (Matthew Bender 2007) § 5-27.

[37] The trial court minimized the risk of undue prejudice to the defendant by issuing the following cautionary instruction to the jury: ''Remember, I told you that certain evidence might be admitted for one purpose but not another. This evidence has been admitted; first, to demonstrate or show a characteristic method or pattern in the commission of criminal acts; and second, on the issue of the defendant's intent. The evidence of alleged prior misconduct by the defendant toward [N] is not part of the offense charged in this case. It is for you and you alone, ladies and gentlemen, to evaluate the testimony in this case, all of the testimony, including this testimony and to determine whether you credit it in whole, in part, or not at all. You are expressly prohibited from using this evidence that you have just heard of prior alleged misconduct as evidence of the bad character of the defendant or as evidence of a tendency to commit criminal acts in general or as proof that he committed the acts charged in this case for which he is being prosecuted. The weight, if any, that you choose to give to this evidence is up to you. That is your job as jurors, to evaluate the evidence.

''If you find this evidence of prior alleged misconduct credible you may consider it for the sole and limited purpose of assisting you in determining whether the defendant has engaged in a characteristic method or pattern in the commission of criminal acts of which the charged conduct is a part and on the issue of the defendant's intent.''

[38] ''When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . As we recently have noted, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . [W]hether [the improper admission of evidence] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative . . . the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial. . . . Because the present case involves the improper admission of uncharged misconduct evidence, the most relevant factors to be considered are the strength of the state's case and the impact of the improperly admitted evidence on the trier of fact.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Randolph*, supra, 284 Conn. 363–64.