****

The "officially released" date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the "officially released" date appearing in the opinion. In no event will any such motions be accepted before the "officially released" date.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest print version is to be considered authoritative.

The syllabus and procedural history accompanying the opinion as it appears on the Commission on Official Legal Publications Electronic Bulletin Board Service and in the Connecticut Law Journal and bound volumes of official reports are copyrighted by the Secretary of the State, State of Connecticut, and may not be reproduced and distributed without the express written permission of the Commission on Official Legal Publications, Judicial Branch, State of Connecticut.

****

STATE OF CONNECTICUT *v.* MAURICE FLANAGAN
(AC 24539)

Flynn, C. J., and Schaller, Bishop, DiPentima, McLachlan, Gruendel, Harper, Rogers and Lavine, Js.

Argued June 7, 2006—officially released July 3, 2007

(Appeal from Superior Court, judicial district of New Britain, Shortall, J.)

Richard W. Callahan, special public defender, for the appellant (defendant).

Nancy L. Chupak, assistant state's attorney, with whom, on the brief, were *Scott J. Murphy*, state's attorney, and *Kevin J. Murphy*, senior assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Maurice Flanagan, appeals from the judgment of conviction, rendered after a jury trial, of conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-59 (a) (1) and 53a-48 (a).[1] On October 24, 2005, the appeal was argued before a panel of three members of this court, which, with one judge dissenting, affirmed the judgment of conviction. *State* v. *Flanagan*, 93 Conn. App. 458, 890 A.2d 123 (2006). Thereafter, this court granted the defendant's motion for reconsideration and reargument en banc, in which the defendant challenged this court's rejection of his claim that the trial court had violated his right to self-representation. We affirm the judgment of the trial court.[2]

The following facts are relevant to our resolution of the defendant's appeal. At trial, the defendant was represented by a special public defender. On several occasions during the trial, the defendant expressed his dissatisfaction with his attorney's performance. Prior to jury selection, the defendant filed a motion to dismiss his attorney. The defendant claimed that his attorney was not investigating the case adequately. The defendant's attorney acknowledged the existence of problems with investigating matters related to the case and made representations to the court concerning his investigative efforts. The court thereafter denied the defendant's motion, noting that the defendant's attorney had been a "great advocate" for the defendant.

On March 18, 2003, just before the state rested its case, the court conducted an in-chambers conference with the prosecutor and the defendant's attorney. The defendant's attorney informed the court that he did not intend to call any witnesses and that the defendant disagreed with this aspect of his trial strategy. The court subsequently stated to the defendant in open court that it was aware of the proposed strategy of the defendant's attorney as well as the defendant's dissatisfaction with it. The court stated: "Did you want to tell me anything about that? You don't need to tell me anything about it, but I just wanted to give you an opportunity, if you did, to be heard yourself. It's [your attorney's] decision, but I understand sometimes that counsel and their clients can have different points of view, and [your attorney] told me that you and he do have a different point of view. I just want to give you an opportunity, if you wish to, to make me aware of what your point of view is. Did you want to say anything?"

The defendant replied that he viewed his attorney's strategy as being "too narrow" and that he believed that, if the defense called witnesses to testify, the jury would be able to evaluate the case "from a different angle." The defendant expressed his view that for the defense not to present any evidence would afford the

jury only "one option," which would lead to a finding of guilt. The defendant analogized his attorney's strategy to one used in the game of chess and opined that it was inappropriate. The defendant also recalled that, in a prior trial, the jury found him guilty after the attorney representing him in that case did not present any evidence in his defense.

The court informed the defendant that "these kind of tactical decisions" were for his attorney to make after consulting with the defendant. The court asked the defendant's attorney if he had discussed this strategy with the defendant; the defendant's attorney represented that he had done so. The defendant's attorney added that, after additional consideration, he had become "even more solid in [his] position" to forgo the presentation of any evidence.

The court then addressed the defendant as follows: "I can't fully appreciate your feelings because I'm not in your place. I certainly understand, I think, your reservations, having gone through this experience once. At the same time, these are [your attorney's] decisions. He's a very experienced attorney. He has tried many cases. I've had the opportunity to observe his performance in this case from . . . January 8, 2003, when we had some hearings on motions. As far as I'm concerned, his performance has been beyond competent and been superior. If these are his decisions, I'm sure he has given them ample consideration. I'm sure he has taken into consideration your feelings about it, and those are decisions that are left to the attorney for good reason, sir."

Once again, the defendant addressed the court, stating that he disagreed with his attorney's decision not to present the testimony of an alibi witness, described as an informant for the Federal Bureau of Investigation. The defendant stated that he did not understand his attorney's decision not to present this witness' testimony. The defendant stated: "So, I feel before I get convicted with all this time for a crime I didn't commit, I should have some say so. And . . . if we rested right now, I feel I'll be convicted." The court replied: "I understand your position. As I've indicated before . . . these are [your attorney's] decisions to make. He's got a good track record in making these decisions and although that may not give you any more confidence, it makes his decisions in this case understandable to me, and I'm satisfied that he has consulted adequately with you."

After the court discussed other matters with the prosecutor, it canvassed the defendant concerning his decision to waive his right to testify. The court thereafter informed the defendant's attorney and the prosecutor that, absent a request to the contrary from the defendant's attorney, it would deliver the standard instruction informing the jury that it could draw no adverse inference from the defendant's decision not to testify.

The following colloquy between the defendant and the court then took place:

"[The Defendant]: Excuse me, Your Honor. Don't I have the right to finish this case myself without him there?

"The Court: In a word, no. But are you making that request to represent yourself in the remainder of the case?

"[The Defendant]: I mean, if he's not going to do what I feel is in my best interest, I don't think that he should be my attorney. I mean, this is my life. Like I explained to him, when this is over, if I lose, he just goes on to another case. I'm the one who has to go to jail. And he's not doing what I feel is in my best interest. He's doing what he feels is in his best interest, not mine. So, I don't understand how his interest comes before my interest.

"The Court: Well, it doesn't appear to me, Mr. Flanagan, based on my observations of [your attorney's] performance from January 8, 2003, to today, which is March 18, 2003, that his decisions and his actions have been in his interest as opposed to yours. So, I'm—and I can't imagine why he'd be changing courses now. I mean, [your attorney's] decisions, as best as I have observed, have been solely in your interest. And his performance has been beyond competent and, in my view, superior over the last two and one-half months. So, while you may disapprove of his trial tactics, and I understand your feelings, his obligation is to consult with you and then to make his best professional decisions. The fact that you disagree with him over trial tactics does not, at this stage of the case where the state is about to rest, after we have been on trial essentially for about two and one-half months, does not constitute the kind of exceptional circumstances that I would have to find in order for me to allow you either to have a new lawyer or to represent yourself at this point in time. So, if you're making a request of me that you be allowed to represent yourself or that you be allowed to retain or have new counsel appointed for you, that request is denied." The defendant did not address the court further, the defendant's attorney did not address the court with regard to the defendant's statements and the court thereafter turned its attention to other matters. The defendant's attorney did not present any evidence on the defendant's behalf.

At the commencement of court proceedings two days later, on March 20, 2003, the court addressed the defendant's attorney with regard to whether it should continue to permit the defendant to remain unshackled in the courtroom during the proceedings. The court explained that it asked the defendant's attorney to speak to him with regard to this issue, as follows: "I asked [your attorney] to do that, Mr. Flanagan, because

I know you're angry and disappointed the other day at the turn things took about resting and my not permitting you to represent yourself." The defendant's attorney related to the court that "strategic differences" between himself and the defendant continued to exist. After the court addressed other matters before it, the defendant's attorney informed the court that the defendant desired to state something "on the record for his own sake at [that] point because we do have the disagreement." With the court's permission, the defendant stated, "I just want to put it on the record that I wanted to call witnesses and that I feel that this is being done against my will and it's not what I want." The court noted that the defendant's comments were reflected in the record.

On appeal, the defendant claims that he "requested to waive counsel and proceed pro se" and that the court, in the manner that it responded to and analyzed his request, violated his right to self-representation afforded by the federal constitution.[3] The defendant argues that the court should have canvassed him in accordance with Practice Book § 44-3 and then, on the basis of such canvass, exercised only limited discretion in ruling on his request. The defendant argues that the court improperly considered only whether exceptional circumstances justified his request. According to the defendant, one of the consequences of the court's failure to conduct the proper inquiry is that the record is devoid of the facts necessary to evaluate the merits of his request. The defendant asks that his conviction be reversed and the case be remanded for a new trial.

The state takes issue with the defendant's characterization of what transpired at trial. The state argues that the defendant did not make a definitive request of any nature but merely inquired about his rights. The state argues: "[T]he defendant at most was only inquiring about his right to waive counsel and proceed pro se. Indeed, he did not even answer affirmatively when the court asked if he was making such request. Instead, [the defendant] simply continued on to criticize his attorney's performance." According to the state, in the absence of the defendant's clear and unequivocal assertion of the right to self-representation, the court was not required to conduct a canvass in accordance with § 44-3 or to permit the defendant to exercise his right to self-representation.[4]

The defendant seeks review of his unpreserved claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), or reversal under the plain error doctrine codified in Practice Book § 60-5. We will review the claim under *Golding* because the record is adequate for review and the claim is of constitutional magnitude.

The sixth amendment to the United States constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." In *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268 (1942), the United States Supreme Court recognized that, as applied in criminal cases in the federal courts, the sixth amendment embodies "[t]he right to assistance of counsel and the correlative right to dispense with a lawyer's help . . . ." The court stated: "An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open." Id. The court reasoned that "an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel." Id., 275. The court cautioned that "to deny [a defendant] in the exercise of his free choice the right to dispense with some of [the safeguards guaranteed by the constitution] . . . is to imprison a man in his privileges and call it the Constitution." (Citations omitted.) Id., 280.

In *Faretta* v. *California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), the United States Supreme Court held that the sixth amendment embodies a right to self-representation and that "a defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so." (Emphasis in original.) The court stated: "The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' *Illinois* v. *Allen*, 397 U.S. 337, 350–351 [90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)] (*Brennan*, *J.*, concurring)." *Faretta* v. *California*, supra, 834.

The *Faretta* court stated: "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits. . . . Although

a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." (Citations omitted; internal quotation marks omitted.) Id., 835.

The Supreme Court in *Faretta* also addressed the concern that some defendants might exercise their right to self-representation solely to disrupt criminal trials. The court deemed it constitutional for a trial court to terminate the exercise of the right to self-representation if it was exercised for such ends. The court stated: "[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. . . . Of course, a state may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. . . . The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." (Citations omitted.) Id., 834–35 n.46.

In *McKaskle* v. *Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984), the Supreme Court discussed the scope of the right to self-representation recognized in *Faretta*: "A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial." (Emphasis in original.) Id., 174. Likewise, the Connecticut Supreme Court has "asserted the inviolability of the right of self-representation." *State* v. *Brown*, 256 Conn. 291, 302, 772 A.2d 1107, cert. denied, 534 U.S. 1068, 122 S. Ct. 670, 151 L. Ed. 2d 584 (2001).

Following *Faretta*, state and federal courts have addressed issues related to the right to self-representation. "[C]ourts consistently have discussed the right to self-representation in terms of invoking or asserting it"; *Munkus* v. *Furlong*, 170 F.3d 980, 983 (10th Cir. 1999); and it is well settled that there can be no infringement of the right to self-representation absent a defendant's proper assertion of the right. See *Daniels* v. *Lee*, 316 F.3d 477, 490 (4th Cir.), cert. denied, 540 U.S. 851, 124 S. Ct. 137, 157 L. Ed. 2d 93 (2003). The right to self-representation, unlike the right to representation by counsel in a criminal proceeding, is not self-executing; "the right to counsel is preeminent over the right to self-representation because the former attaches auto-

matically and must be waived affirmatively to be lost, while the latter does not attach unless and until it [i]s *asserted*." (Emphasis in original; internal quotation marks omitted.) *Marshall* v. *Dugger*, 925 F.2d 374, 376 (11th Cir. 1991).

In *State* v. *Gethers*, 197 Conn. 369, 377–78, 497 A.2d 408 (1985), our Supreme Court noted that courts in other jurisdictions have required that defendants assert any request to proceed pro se in a clear and unequivocal manner. The following year, in *State* v. *Carter*, 200 Conn. 607, 612, 513 A.2d 47 (1986), our Supreme Court adopted what is commonly known as the "clear and unequivocal" test: "The constitutional right of self-representation depends . . . upon its invocation by the defendant in a clear and unequivocal manner." The *Carter* court further stated: "In the absence of a clear and unequivocal assertion of the right to self-representation, a trial court has no independent obligation to inquire into the defendant's interest in representing himself, because the right of self-representation, unlike the right to counsel, is not a critical aspect of a fair trial, but instead affords protection to the defendant's interest in personal autonomy. . . . When a defendant's assertion of the right to self-representation is not clear and unequivocal, recognition of the right becomes a matter entrusted to the exercise of discretion by the trial court. . . . In the exercise of that discretion, the trial court must weigh into the balance its obligation to indulge in every reasonable presumption against waiver of the right to counsel." (Citations omitted; internal quotation marks omitted.) Id., 613–14. Our Supreme Court further explained: "By contrast, once there has been an unequivocal request for self-representation, a court must undertake an inquiry, on the record, to inform the defendant of the risks of self-representation and to permit him to make a knowing and intelligent waiver of his right to counsel." Id., 613 n.9. The court also stated: "A trial court, faced with the responsibility of reconciling a defendant's inherently inconsistent rights to self-representation and to counsel, is entitled to await a definitive assertion of a request to proceed pro se. Any other ruling would permit a defendant on appeal to claim a violation of his rights whether he defended himself or was represented by an attorney." Id., 614.

Courts from around the country have echoed these concerns. The United States Court of Appeals for the Tenth Circuit summarized the relevant considerations as follows: "A defendant's waiver of his right to representation and his concomitant election to represent himself must be clearly and unequivocally asserted. . . . The reason that a defendant must make an unequivocal demand for self-representation is that otherwise convicted criminals would be given a ready tool with which to upset adverse verdicts after trials at which they had been represented by counsel. . . . It follows that if a defendant in a criminal proceeding

makes an *equivocal* demand on the question of self-representation, he has a potential ground for appellate reversal no matter how the [trial] court rules. If the [trial] court denies [the] defendant's equivocal demand to represent himself, the defendant, on appeal will argue that his constitutional right to self-representation has been denied. And if the [trial] court grants [the] defendant's demand for self-representation, the defendant, on appeal, will argue that his waiver of the right to counsel was not intelligent, knowing and unequivocal." (Citations omitted; emphasis in original; internal quotation marks omitted.) *United States* v. *Treff*, 924 F.2d 975, 978–79 (10th Cir.), cert. denied, 500 U.S. 958, 111 S. Ct. 2272, 114 L. Ed. 2d 723 (1991); see also *United States* v. *Tarantino*, 846 F.2d 1384, 1420 (D.C. Cir.) (noting that equivocal requests may be made by defendants solely to create issue on appeal), cert. denied sub nom. *Burns* v. *United States*, 488 U.S. 840, 109 S. Ct. 108, 102 L. Ed. 2d 83 (1988).

"The requirement that a request for self-representation be clear and unequivocal . . . prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation. A defendant who vacillates at trial places the trial court in a difficult position because it must traverse . . . a thin line between improperly allowing the defendant to proceed *pro se*, thereby violating his right to counsel, and improperly having the defendant proceed with counsel, thereby violating his right to self-representation. . . . In ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a constitutional primacy to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self-representation." (Citations omitted; emphasis in original; internal quotation marks omitted.) *United States* v. *Frazier-El*, 204 F.3d 553, 559 (4th Cir.), cert. denied, 531 U.S. 994, 121 S. Ct. 487, 148 L. Ed. 2d 459 (2000).

The clear and unequivocal requirement is also one of many safeguards of the fundamental right to counsel. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of convic-

tion because he does not know how to establish his innocence." *Powell* v. *Alabama*, 287 U.S. 45, 68–69, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

"The particular requirement that a request for self-representation be clear and unequivocal is necessary to protect against an inadvertent waiver of the right to counsel by a defendant's occasional musings on the benefits of self-representation. . . . This protection against an inadvertent waiver of the right to counsel is especially important because representation by counsel does not merely tend to ensure justice for the individual criminal defendant, it marks the process as fair and legitimate, sustaining public confidence in the system and in the rule of law." (Citations omitted; internal quotation marks omitted.) *United States* v. *Frazier-El*, supra, 204 F.3d 558–59. "The importance of the right to counsel is reflected in the precautions required when a defendant seeks to relinquish it." *United States* v. *Proctor*, 166 F.3d 396, 401 (1st Cir. 1999). As stated previously, our Supreme Court has determined that a trial court must " 'indulge in every reasonable presumption against waiver' of the right to counsel." *State* v. *Carter*, supra, 200 Conn. 614, quoting *Brewer* v. *Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). Our Supreme Court has stated: "[W]e harbor no illusions that a defendant's decision to waive counsel and [to] proceed pro se generally will lead to anything other than disastrous consequences . . . ." (Internal quotation marks omitted.) *State* v. *Jones*, 281 Conn. 613, 647, 916 A.2d 17 (2007). Additionally, our rules of practice require that a court accept a waiver of the right to counsel only after it is satisfied that the defendant "[h]as been made aware of the *dangers and disadvantages of self-representation*." (Emphasis added.) Practice Book § 44-3 (4).

"To exercise the right to self-representation . . . a criminal defendant must negotiate a number of procedural obstacles." *Adams* v. *Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989). The first of these obstacles is that a defendant must clearly and unequivocally assert the right to self-representation. As our Supreme Court in *Carter* stated, once a defendant clearly and unequivocally asserts the right to self-representation, his assertion or request triggers an inquiry by the court to determine whether he has, in fact, exercised his right. *State* v. *Carter*, supra, 200 Conn. 613 n.9. "To invoke his Sixth Amendment right under *Faretta* a defendant does not need to recite some talismanic formula hoping to open the eyes and ears of the court to his request. Insofar as the desire to proceed pro se is concerned, [a defendant] must do no more than state his request, either orally or in writing, unambiguously to the court so that no reasonable person can say that the request was not made. . . . [T]he court must then conduct a hearing on the waiver of the right to counsel to determine whether the accused understands the risks of

proceeding pro se." *Dorman* v. *Wainwright*, 798 F.2d 1358, 1366 (11th Cir. 1986), cert. denied sub nom. *Dugger* v. *Dorman*, 480 U.S. 951, 107 S. Ct. 1616, 94 L. Ed. 2d 801 (1987).

The second obstacle is that a defendant must demonstrate to the court that he has knowingly, voluntarily and intelligently exercised the right. "While a defendant has an absolute right to self-representation, that right is not self-executing. A trial court in this state must satisfy itself that several criteria have been met before a criminal defendant properly may be allowed to waive counsel and proceed pro se." *State* v. *Day*, 233 Conn. 813, 822, 661 A.2d 539 (1995). In Connecticut, Practice Book § 44-3 "was adopted in order to implement the right of a defendant in a criminal case to act as his own attorney in defending himself . . . ." (Citation omitted.) *State* v. *Gethers*, 193 Conn. 526, 532–33, 480 A.2d 435 (1984). Our Supreme Court has observed that "[Practice Book] § 961 [now § 44-3] and the constitutional requirements for permitting a defendant to waive his right to counsel and, thereby, assert his constitutional right to represent himself, are synonymous." *State* v. *Wolff*, 237 Conn. 633, 653–54, 678 A.2d 1369 (1996). Section 44-3 provides: "A defendant shall be permitted to waive the right to counsel and shall be permitted to represent himself or herself at any stage of the proceedings, either prior to or following the appointment of counsel. A waiver will be accepted only after the judicial authority makes a thorough inquiry and is satisfied that the defendant: (1) [h]as been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when so entitled; (2) [p]ossesses the intelligence and capacity to appreciate the consequences of the decision to represent oneself; (3) [c]omprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case; and (4) [h]as been made aware of the dangers and disadvantages of self-representation."

The canvass codified in § 44-3 "cannot be construed to require anything more for an effective waiver of counsel than is constitutionally mandated, because such a waiver triggers the constitutional right of an accused to represent himself. . . . The multifactor analysis of [Practice Book] § 961 [now § 44-3], therefore, is designed to assist the court in answering two fundamental questions: first, whether a criminal defendant is minimally competent to make the decision to waive counsel, and second, whether the defendant actually made that decision in a knowing, voluntary and intelligent fashion." (Citations omitted; internal quotation marks omitted.) *State* v. *Day*, supra, 233 Conn. 822; see also *Godinez* v. *Moran*, 509 U.S. 389, 400, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993).[5] A court may, however, accept a waiver of the right to counsel without

canvassing a defendant in accordance with § 44-3 "if the record is sufficient to establish that the waiver is voluntary and knowing." *State* v. *Webb*, 238 Conn. 389, 429, 680 A.2d 147 (1996), aff'd after remand, 252 Conn. 128, 750 A.2d 448, cert. denied, 531 U.S. 835, 121 S. Ct. 93, 148 L. Ed. 2d 53 (2000). Thus, after a defendant initially asserts his right to self-representation in a clear and unequivocal manner, he "properly exercises his right to self-representation by knowingly and intelligently waiving his right to representation by counsel." (Internal quotation marks omitted.) *State* v. *Townsend*, 211 Conn. 215, 220, 558 A.2d 669 (1989).

Having set forth the general legal principles that apply, we turn to our standard of review. The defendant's claim, in part, presents an issue of fact in that we must determine what the defendant conveyed to the trial court with regard to his right to self-representation. See *Spencer* v. *Ault*, 941 F. Sup. 832, 842 (N.D. Iowa 1996), and cases cited therein. To the extent, however, that we must determine whether the court violated his right to self-representation in the manner claimed, the claim presents an issue of law. Thus, the claim presents a mixed question of law and fact subject to plenary review by this court. See *State* v. *Peeler*, 271 Conn. 338, 399, 857 A.2d 808 (2004) (mixed questions of law and fact subject to plenary review), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005).

We begin our analysis by examining the findings of the trial court. The court did not expressly find that the defendant clearly and unequivocally had asserted his right to self-representation. The defendant argues, and we agree, that this case necessarily revolves around the following question that he asked of the court: "Don't I have the right to finish this case myself without him there?" The court's response to the defendant's question, as well as his subsequent statements related thereto, reflects the court's implicit understanding that the defendant had not clearly and unequivocally asserted his right to self-representation. See *United States* v. *Hernandez*, 203 F.3d 614, 621 (9th Cir. 2000) (noting it is appropriate to examine trial court's response to claimed self-representation request to determine whether request unequivocal); *Reese* v. *Nix*, 942 F.2d 1276, 1280–82 (8th Cir. 1991) (same), cert. denied, 502 U.S. 1113, 112 S. Ct. 1220, 117 L. Ed. 2d 457 (1992).

Initially, the court responded to the defendant's question as follows: "In a word, no. But are you making that request to represent yourself in the remainder of the case?" Following the court's initial and direct reply in the negative, it asked the defendant to clarify his question.[6] Importantly, the court plainly asked the defendant whether he was making a request to represent himself during the remainder of the trial. It is reasonable to infer that the court recognized that the

defendant had *inquired* about his right to self-representation but had neither clearly nor unequivocally requested to represent himself during the remainder of the trial.

The defendant did not respond affirmatively when the court asked him whether he had requested that he be allowed to "represent [him]self" but went on to make statements concerning his disapproval of his attorney's representation. For example, the defendant stated in part: "I don't think that he should be my attorney." The defendant's reply prompted the court to discuss once again the efforts of the defendant's attorney, apparently to assuage the defendant's lingering doubts as to his attorney's abilities. The court also stated that the defendant's expressions of disagreement with his attorney's trial strategy were not a sufficient basis on which to permit him to obtain a new attorney or to represent himself. The court ultimately stated: "So, if you're making a request of me that you be allowed to represent yourself or that you be allowed to retain or have new counsel appointed for you, that request is denied." The court's use of the phrase, "if you're making a request," is telling; it indicates that the court had not found that the defendant clearly had requested anything. Likewise, that the court ruled in the alternative, denying requests for self-representation or for the appointment of new counsel, further reflects that the court did not consider the defendant's question or his subsequent reply to the court's inquiry as a clear and unequivocal assertion of the right to self-representation.[7]

The court asked the defendant, in the most basic terms, whether he was requesting to represent himself. This inquiry reflects that the court had not determined that such a request had been made. At the same time, it also provided the defendant an opportunity to make such a request. It is noteworthy that the court did not canvass the defendant in accordance with Practice Book § 44-3 or further inquire into the defendant's interest in self-representation. Although it is by no means dispositive, the fact that the court did not engage in such conduct supports our conclusion that the court did not determine that such a request had been made.

The court's reference, on March 20, 2003, to its ruling on March 18, 2003, does not indicate any finding to the contrary or shed any additional light on the issue. The court mentioned to the defendant that it was aware that he was "angry and disappointed" because it did not permit him to represent himself. The court's statement was made days after its initial response to the defendant's inquiry. Neither the defendant nor his attorney had asked the court to revisit its earlier ruling or to articulate the factual or legal basis for the ruling. The record reflects that the court made this comment in the context of a wholly unrelated matter, whether the defendant would remain unshackled during the pro-

ceedings. Thus, it appears to be a spontaneous remark unrelated to the subject matter at hand and an attempt to manage the trial by calming the defendant, not a finding that the defendant had clearly and unequivocally requested to represent himself on March 18, 2003. Further, the court's remark is entirely consistent with a finding that the defendant, two days earlier, had not clearly and unequivocally requested to represent himself.[8]

Having concluded that the court implicitly found that the defendant had not clearly and unequivocally asserted his right to self-representation, we next determine whether the court's finding was proper. First, we must discuss briefly the "clear and unequivocal" requirement and, second, examine the defendant's representations to the court to determine whether the court's finding is supported by the record.

In *Carter*, our Supreme Court equated a clear and unequivocal assertion of the right to self-representation with "a definitive assertion of a request to proceed pro se." *State* v. *Carter*, supra, 200 Conn. 614. This court recently stated: "[M]ere expressions of dissatisfaction with counsel's performance do not constitute a clear and unequivocal assertion of the right to self-representation. . . . Neither does vacillation between the options of proceeding pro se or with counsel suffice." (Citations omitted.) *Quint* v. *Commissioner of Correction*, 99 Conn. App. 395, 404–405, 913 A.2d 1120 (2007). Courts in other jurisdictions likewise have held defendants to a "stringent standard for judging the adequacy of an assertion of the right to self-representation . . . ." *United States* v. *Weisz*, 718 F.2d 413, 425–26 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027, 104 S. Ct. 1285, 79 L. Ed. 2d 688 (1984). Thus, a clear and unequivocal assertion has been defined as the expression of a "purposeful choice reflecting an unequivocal intent to forgo the assistance of counsel." (Internal quotation marks omitted.) *Williams* v. *Bartlett*, 44 F.3d 95, 100 (2d Cir. 1994). Other courts have defined a clear and unequivocal request simply as a statement that would convey to a reasonable person that a defendant wanted to conduct his or her own defense. See, e.g., *Buhl* v. *Cooksey*, 233 F.3d 783, 793 (3d Cir. 2000); *Stano* v. *Dugger*, 921 F.2d 1125, 1143 (11th Cir. 1991); *Dorman* v. *Wainwright*, supra, 798 F.2d 1366–67.

We turn to the defendant's own statements to the court, on which his claim ultimately falters. As set forth previously and discussed briefly, the defendant asked the court: "Don't I have the right to finish this case myself without him there?" To a reasonable listener, this question was an inquiry concerning the right to self-representation. The defendant asked this question following a colloquy with the court concerning his dissatisfaction with his attorney's performance, specifically, his attorney's decision not to present an alibi

witness on the defendant's behalf. The court initially answered in the negative but explicitly asked the defendant if he was "making that request to represent [himself] in the remainder of the case." *The defendant did not reply that he had made such a request.* Instead, the defendant expressed his dissatisfaction with the performance of his attorney, stating that he did not "think" his attorney should represent him. The defendant's initial question and subsequent complaints in this regard cannot reasonably be viewed as a purposeful declaration or a definitive assertion that he intended to conduct his own defense. The defendant did not make any other statements relevant to our inquiry, nor did he make any further inquiries concerning his right to self-representation at a later time during the proceedings.

Thus, we hold that the trial court properly determined that the defendant's statements had not risen to the level of a clear and unequivocal request for self-representation. In so holding, we are guided by numerous decisions, both from this state and other jurisdictions, in which courts have considered whether statements made by defendants have constituted clear and unequivocal assertions of the right. When examined in light of these decisions, the defendant's statements in the present case fall significantly short of the mark. We especially are guided by our Supreme Court's holding in *Carter*. During his criminal trial, the defendant in *Carter* expressed dissatisfaction with the representation he had received from his attorney. *State* v. *Carter*, supra, 200 Conn. 611. In the course of a colloquy with the trial court, the defendant stated: "I am misrepresented and now I have to misrepresent myself." (Internal quotation marks omitted.) Id. Moments later, the defendant stated: "I'll have to represent myself." (Internal quotation marks omitted.) Id. The defendant claimed on appeal that the trial court, which did not inquire into his interest in self-representation or permit him to represent himself, violated his right to self-representation. Id., 607. Our Supreme Court held that the record "fail[ed] to establish a clear and unequivocal invocation of the defendant's right to represent himself." Id., 614.

We also are persuaded by our holding in *State* v. *Williams*, 64 Conn. App. 512, 781 A.2d 325, cert. granted, 258 Conn. 911, 782 A.2d 1251 (2001) (appeal dismissed April 24, 2003). During his criminal trial, the defendant in *Williams* expressed his dissatisfaction with his attorney's representation. Id., 525. During a colloquy with the court, the defendant stated: "Can I defend myself?" (Internal quotation marks omitted.) Id., 528. The defendant later repeated that request: "Can I defend myself?" (Internal quotation marks omitted.) Id. On appeal, the defendant argued that the trial court, which neither inquired into the basis for his request to represent himself nor permitted him to represent himself, violated

his right to self-representation. Id., 525. This court rejected the defendant's claim that his right to self-representation had been violated, holding that "the defendant never clearly and unequivocally *asserted* that right." (Emphasis in original.) Id., 531; see also *Reese* v. *Nix*, supra, 942 F.2d 1281 (holding that defendant's statement, " '[w]ell, I don't want no counsel then,' " not clear and unequivocal assertion); *Jackson* v. *Ylst*, 921 F.2d 882, 889 (9th Cir. 1990) (holding that defendant's statements, " 'I want to fight in pro per then,' " and " '[r]elieve him and I do this myself,' " not clear and unequivocal assertion).

This case is similar to *United States* v. *Light*, 406 F.3d 995 (8th Cir. 2005). During a colloquy with a United States District Court judge in his criminal trial, the defendant in *Light* asked: "What's the rule on representing yourself?" (Internal quotation marks omitted.) Id., 999. The court informed the defendant that he had the option of representing himself, explained the negatives of pursuing such option and instructed the defendant that his attorney would speak on his behalf. Id. On appeal, the defendant argued that the District Court had "foreclosed his ability to represent himself." Id. The United States Court of Appeals for the Eighth Circuit rejected the claim: "In the instant case, [the defendant] asked the district court, 'What's the rule on representing yourself?' Because [the defendant] only asked the district court for information about 'the rule' on self-representation and manifested no intention to actually represent himself, this is an . . . equivocal statement . . . . [T]he right to self-representation could not have been denied improperly because [the defendant] did not clearly and unequivocally invoke it." Id.[9]

Like the defendants in *Williams* and *Light*, the defendant in the present case inquired about his right to self-representation rather than clearly manifesting an intent to represent himself. It is obvious from the context of the defendant's question that he was frustrated with his attorney. His expressions of dissatisfaction did not constitute a clear assertion of the right to self-representation, the court did not find them to be such, and its finding was reasonable and amply supported by the record.[10]

In the absence of a clear and unequivocal assertion of the right to self-representation, a trial court has no duty to inquire into a defendant's interest in self-representation. *State* v. *Jones*, supra, 281 Conn. 648; *State* v. *Carter*, supra, 200 Conn. 613; *State* v. *Quint*, supra, 99 Conn. App. 407; *State* v. *Williams*, supra, 64 Conn. App. 531; *State* v. *Casado*, 42 Conn. App. 371, 381, 680 A.2d 981, cert. denied, 239 Conn. 920, 682 A.2d 1006 (1996). Thus, the court did not improperly fail to canvass the defendant in accordance with Practice Book § 44-3. The defendant has not demonstrated that a constitutional violation clearly exists and clearly deprived him of a

fair trial. Accordingly, his claim fails under *Golding*'s third prong.[11]

The judgment is affirmed.

In this opinion SCHALLER, BISHOP, GRUENDEL and LAVINE, Js., concurred.

[1] The jury found the defendant not guilty of two counts of murder in violation of General Statutes §§ 53a-54a (a) and 53a-8, two counts of attempt to commit murder in violation of General Statutes §§ 53a-54a (a), 53a-8 and 53a-49 (a) (2), and one count of conspiracy to commit murder in violation of General Statutes §§ 53a-54a (a) and 53a-48 (a).

[2] This opinion supersedes in part this court's opinion in *State* v. *Flanagan*, supra, 93 Conn. App. 458. Specifically, this opinion supersedes this court's prior analysis of the defendant's self-representation claim. See id., 468–79. We leave undisturbed this court's analysis of the defendant's other claim raised on appeal, which is that the evidence was insufficient to sustain his conviction. See id., 464–67.

[3] Our Supreme Court "generally [has] interpreted the state and federal constitutions as providing essentially equivalent protections with respect to a defendant's right to self-representation." *State* v. *Shashaty*, 251 Conn. 768, 780, 742 A.2d 786 (1999), cert. denied, 529 U.S. 1094, 120 S. Ct. 1734, 146 L. Ed. 2d 653 (2000). Although the defendant, in his brief, references the right to self-representation explicitly afforded under article first, § 8, of our state constitution, the defendant did not brief separately a claim under the Connecticut constitution or argue that he was entitled to greater rights thereunder by means of an analysis in accordance with the standard enunciated in *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992). The defendant has analyzed his claim exclusively under the federal constitution. The appellate courts of this state consistently have declined to review state constitutional claims when such claims are unaccompanied by a separate and sufficient analysis pursuant to *Geisler*. See, e.g., *State* v. *Colon*, 272 Conn. 106, 154 n.26, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); *State* v. *Lindo*, 75 Conn. App. 408, 410 n.2, 816 A.2d 641, cert. denied, 263 Conn. 917, 821 A.2d 771 (2003). Accordingly, our review is limited to the federal constitution.

[4] The state also argues that the court's response to the defendant's inquiry was proper because, even if the defendant had asserted his right to self-representation, such an assertion was untimely because it occurred after the start of the trial. Because we conclude that the defendant did not clearly and unequivocally assert his right to self-representation, we need not and do not address this issue.

Chief Judge Flynn, in his dissenting opinion, asserts that the majority "decides for the first time on appeal that the defendant's request was equivocal, effectively ignoring the fact that the trial court ruled on the request, and thereby avoiding the substantial questions the defendant raises on appeal." Although it is unspecified which "substantial questions" the majority has "avoid[ed]," it suffices to respond that sound principles of judicial restraint and judicial economy counsel us to resolve only those issues that are necessary to the proper determination of this appeal. It is well settled that "[c]onstitutional issues are not considered *unless absolutely necessary to the decision of a case*." (Emphasis added; internal quotation marks omitted.) *State* v. *Cofield*, 220 Conn. 38, 49–50, 595 A.2d 1349 (1991).

[5] In *Godinez*, the United States Supreme Court explained what process is due when a defendant seeks to waive his right to counsel. The court explained that a trial court should determine, first, whether the defendant is competent and, second, whether the waiver of his constitutional right is knowing and voluntary. *Godinez* v. *Moran*, supra, 509 U.S. 400. "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings. . . . The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." (Citation omitted; emphasis in original.) Id., 401 n.12. The competency standard for waiving the right to counsel is no higher than the competency standard for standing trial. Id., 391. Further, a trial court is required to make a competency determination only when it "has reason to doubt the defendant's competence." Id., 401 n.13.

[6] Although it would have been better practice for the court to have responded to the defendant's inquiry in a more precise manner, the colloquy

between the defendant and the court, when viewed in its entirety, reflects that the court courteously afforded the defendant an opportunity to explain his question and to speak his mind. The defendant does not claim that the court misled or misinformed him with regard to his right to self-representation. Nor does he claim that the court discouraged him from asserting his right to self-representation. Rather, he claims that he clearly and unequivocally asserted the right and that the court improperly failed to canvass him in accordance with Practice Book § 44-3.

[7] A somewhat analogous situation existed in *State* v. *Sheppard*, 172 W. Va. 656, 672–73, 310 S.E.2d 173 (1983), in which a trial court expressly denied a defendant the right to represent himself without first conducting an extensive inquiry into his statements that he would prefer to represent himself. The West Virginia Supreme Court of Appeals held that the defendant's statements concerning self-representation, which nonetheless prompted an adverse ruling from the court, could not "be characterized as an unequivocal demand." Id., 672. The court rejected the defendant's claim that his statements warranted an inquiry into his request for self-representation, stating: "[W]here a defendant does not make a[n] . . . unequivocal demand to exercise the right of self-representation, the trial court need not conduct a detailed hearing on the issue of whether the demand was knowingly and intelligently made." Id., 673.

[8] Chief Judge Flynn, in his dissenting opinion, asserts that the majority "would have us ignore the court's statement made on the record two days after the defendant first made the request to represent himself" and that those statements "should not be ignored." Our analysis and discussion of the court's statements to the defendant on March 20, 2003, plainly belies the assertion that we either ignore these statements or suggest that they should be ignored. After we set forth and carefully examine the statements at issue, we conclude that they do not reflect a determination by the trial court that the defendant had clearly and unequivocally asserted his right to self-representation and that they do not shed any light on the issue before us. For the rationale set forth in our discussion of these statements, and mindful of the purpose of and legal significance of articulations, we likewise disagree that the court's statements to the defendant constitute an articulation of any earlier ruling.

[9] Noting that the trial court's response to the statements of the defendant in the present case is distinguishable from the District Court's response to the statements of the defendant in *Light*, both dissenting opinions disagree with our characterization that *Light* is similar to the present case. We cite and discuss *Light* for a different proposition, however, one that should be evident from our opinion, yet will be set forth again here. *Light* is cited and discussed along with *Carter*, *Williams* and other decisions, as one of "numerous decisions, both from this state and other jurisdictions, in which courts have considered whether statements made by defendants have constituted clear and unequivocal assertions of the right." In the present case, the defendant asked the court, "[d]on't I have the right to finish this case myself without him there?" In *Light*, the defendant asked the court, "[w]hat's the rule on representing yourself?" *United States* v. *Light*, supra, 406 F.3d 999. These statements concerning the right to self-representation are similar, and we therefore do not hesitate to look to the holding of the United States Court of Appeals for the Eighth Circuit that the defendant in *Light* had merely inquired about his right to self-representation and had not asserted such right.

[10] Chief Judge Flynn, in his dissenting opinion, states in relevant part: "Whatever others might say about the initial dialogue [between the defendant and the court], it is unquestionable that the court viewed this request as one of self-representation, and it clearly articulated its position." Two panels of this reviewing court have not agreed unanimously as to either the nature of the defendant's statements or the significance of the court's response to the defendant. This fact alone undermines Chief Judge Flynn's definitive assessment of what transpired during trial and reflects the ambiguous nature of the defendant's inquiry concerning the right to self-representation.

[11] In light of our *Golding* analysis, we likewise reject the defendant's resort to relief under the doctrine of plain error. "The plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) *State* v. *Alston*, 272 Conn. 432, 456, 862 A.2d 817 (2005).