STATE OF CONNECTICUT *v.* RICHARD BUSH
(AC 34886)

DiPentima, C. J., and Sheldon and Dupont, Js.

Argued September 15, 2014—officially released April 7, 2015

(Appeal from Superior Court, judicial district of Fairfield, Thim, J.)

Pamela S. Nagy, assigned counsel, for the appellant (defendant).

Adam E. Mattei, deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *C. Robert Satti, Jr.*, supervisory assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Richard Bush, appeals from the judgment of conviction, rendered after a jury trial, of six counts of sale of narcotics by a person who is drug-dependent in violation of General Statutes § 21a-277 (a), six counts of sale of narcotics within 1500 feet of a school by a person who is drug-dependent in violation of General Statutes §§ 21a-277 and 21a-278a (b), one count of conspiracy to sell narcotics in violation of General Statutes §§ 53a-48 and 21a-278 (b), and one count of racketeering, based upon two of the six sales of narcotics of which he was convicted, in violation of the Corrupt Organizations and Racketeering Activity Act (CORA), General Statutes § 53-395 (c).[1] On appeal, the defendant claims: (1) that there was insufficient evidence to establish that, while associated with an enterprise, he conducted or participated in the enterprise through a pattern of racketeering activity, as required to support his conviction for racketeering; and (2) that the trial court violated his constitutional right to represent himself at trial by denying his request for a reasonable continuance to review his attorney's case file before the start of evidence at trial.[2] We agree with the defendant on both of his claims. Accordingly, we reverse the judgment and remand this case to the trial court with direction to render a judgment of acquittal on the charge of racketeering and for a new trial on all of the other charges of which the defendant was convicted.

The charges upon which the defendant was brought to trial were all based upon his alleged involvement in seven separate sales of cocaine to a police informant, David Hannon, during an undercover police investigation of illegal drug activity in the area of Pembroke and Ogden Streets in Bridgeport between late June through early November, 2010. In an amended long form information dated January 3, 2012, the state charged the defendant, more particularly, with: one count each of sale of narcotics by a person who is not drug-dependent and sale of narcotics within 1500 feet of a school by a person who is not drug-dependent in connection with each such alleged sale; and one count each of conspiracy to sell narcotics and racketeering based upon his alleged involvement in all seven such alleged sales, as specially pleaded both in the conspiracy count, as overt acts in furtherance of the alleged conspiracy, and in the racketeering count, as incidents of racketeering activity claimed to prove his involvement in a pattern of racketeering activity, as required by General Statutes § 53-396 (a). The jury found the defendant guilty of the lesser included offenses of sale of narcotics by a person who is drug-dependent and sale of narcotics within 1500 feet of a school by a person who is drug-dependent based upon his proven involvement in sales of cocaine to Hannon on six of the seven dates specified in the infor-

mation, particularly June 30, July 14, July 16, August 6, August 24, and November 9, 2010. It found him not guilty, however, of all charges based upon the alleged sale of drugs to Hannon on June 25, 2010, the first date specified in the information. The jury also found the defendant guilty of both conspiracy to sell narcotics and racketeering, specifying as to the latter charge, in a special verdict rendered pursuant to § 53-396 (b),[3] that the sole basis for its finding that the defendant had engaged in a pattern of racketeering activity as a member of an enterprise was his involvement in the sale of cocaine on two of the seven dates specified in the information, June 30 and November 9, 2010, which it found to have constituted "incidents of racketeering activity." The trial court later sentenced the defendant on all charges of which he was convicted to a total effective sentence of twenty years incarceration. Thereafter, the defendant filed this appeal. Additional facts pertaining to the defendant's claims on appeal will be set forth in the separate parts of this decision in which those claims are addressed.

I

We begin with the defendant's challenge to the sufficiency of the evidence to support his conviction for racketeering. "In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . [W]e do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 778, 99 A.3d 1130 (2014).

It is axiomatic that in order to determine whether there is a reasonable view of the evidence that supports the jury's verdict, we must first know upon which theory or theories of liability that verdict was returned. That, in turn, depends initially upon the particular theory or theories of liability on which the jury was instructed, for those are the only theories upon which the jury could logically and lawfully have based its verdict. Where, moreover, the verdict includes answers to interrogatories specifying the particular factual or legal bases upon which the verdict was based, the court must evaluate the sufficiency of the evidence to support that verdict under the theories so specified. *Cole* v. *Arkansas*, 333 U.S. 196, 202, 68 S. Ct. 514, 92 L. Ed. 644 (1948) ("[t]o

conform to due process of law, [defendants are] entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court").

To reiterate, in the count here challenged for evidentiary insufficiency, the defendant was charged with racketeering under § 53-395 (c). Section 53-395 (c) provides in relevant part: "It is unlawful for any person . . . associated with . . . any enterprise to knowingly conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity . . . ." The term "enterprise," as used in this and other parts of CORA, is defined in General Statutes § 53–394 (c) to mean "any . . . association or group of individuals associated in fact although not a legal entity, and includes illicit as well as licit enterprises and governmental, as well as other entities." Interpreting this definition in a manner consistent with its identical counterpart in the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 (c), upon which CORA was modeled, our Supreme Court has held that proof of an "association in fact enterprise," under CORA as under RICO, "requires evidence of (1) a purpose, (2) relationships among those associated with the enterprise and (3) longevity sufficient to permit the associates to pursue the purpose of the enterprise . . . but does not require evidence of an ascertainable structure that exists for a purpose [b]eyond that inherent in the pattern of racketeering activity. . . . [T]he requirements for proving an association in fact enterprise do not include a hierarchical structure, fixed roles for its members, a name, regular meetings, dues, established rules and regulations, disciplinary procedures and induction or initiation ceremonies." (Citations omitted; internal quotation marks omitted.) *State* v. *Rodriguez-Roman*, 297 Conn. 66, 81–83, 3 A.3d 783 (2010). Section 53-394 (e), in turn, defines a "pattern of racketeering activity" as "engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, participants, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, including a nexus to the same enterprise, and are not isolated incidents . . . ." See also *United States* v. *Burden*, 600 F.3d 204, 216 (2d Cir. 2010) (to establish pattern of racketeering activity under RICO, prosecution must prove at least two predicate acts that are related and amount to or pose threat of continued criminal activity).

Between the dates of the two cocaine sales upon which the defendant's racketeering conviction was expressly predicated, June 30 and November 9, 2010, the defendant was involved in four other sales of cocaine to Hannon in connection with which he was convicted as stated previously. Because, however, the jury found that only the June 30 and November 9, 2010 sales of cocaine constituted incidents of racketeering

activity,[4] we confine our detailed factual discussion and analysis to the events of those two days.

On June 30, 2010, Hannon met with members of a task force of officers from the Bridgeport Police Department and the Connecticut State Police Department to arrange for a controlled buy of cocaine from Jason Ortiz at the defendant's home on Pembroke Street in Bridgeport. To that end, Hannon telephoned Ortiz before arriving at the defendant's home, and also telephoned the defendant's home phone number. Prior to Hannon's arrival at the defendant's home, Ortiz, who was then under surveillance by other members of the task force, went to the rear of the home, then returned to the front porch with a small blue bag in his hand, which he later put in his mouth.[5] When Hannon arrived at the defendant's home, the defendant emerged from his backyard, walked past Hannon's vehicle while looking inside it, then continued to the street corner, where he gestured to Ortiz by raising his hand in the air. Ortiz then approached Hannon's vehicle and opened the door, whereupon the defendant came up behind Ortiz, reached inside the vehicle, and tapped hands with Hannon. Hannon gave Ortiz money, in exchange for which Ortiz gave Hannon the blue bag of cocaine that had been in his mouth. Meanwhile, another man approached the defendant. After completing the transaction with Hannon, when the defendant gestured to him once again, Ortiz handed something to the other man in exchange for money. Ortiz and the defendant then walked together toward the defendant's backyard.[6]

On November 9, 2010, Hannon met once again with task force members to prepare to buy drugs from the defendant. This time Hannon called the defendant, using the same cell phone number he had called on June 30, 2010, and told the defendant that he was on his way to meet him. When Hannon arrived at the defendant's home, the defendant was standing on the street corner with a man named Willie Brazil. The defendant got into Hannon's vehicle, and he and Hannon drove off. During their ride, the defendant made a phone call in an apparent attempt to procure cocaine, which Hannon had requested. After the call, Hannon and the defendant drove back to the defendant's home. On the way back, Hannon told the defendant that he also wanted to buy a gun, which the defendant said was "doable." When they returned, Hannon dropped off the defendant to speak to Brazil, then pulled around the corner onto Pembroke Street, as the defendant had directed. Once he did so, another man, David Moreland, approached Hannon's vehicle. When Hannon told Moreland that he had given money to the defendant, Moreland gave Hannon a quantity of cocaine. The defendant later called Hannon to confirm that Moreland had given him the cocaine and to discuss further his stated interest in purchasing a gun.

The defendant claims that there was insufficient evidence to support his racketeering conviction because the state failed to prove either the existence of an enterprise formed for the common purpose of selling narcotics or that he was associated with such an enterprise. We agree.

Although our Supreme Court has held that proof of an association in fact enterprise of the kind here alleged does not require evidence of an ascertainable structure that exists for a purpose beyond that inherent in its members' pattern of racketeering activity, it nonetheless "requires evidence of (1) a purpose, (2) relationships among those associated with the enterprise and (3) longevity sufficient to permit the associates to pursue the purpose of the enterprise . . . ." *State* v. *Rodriguez-Roman*, supra, 297 Conn. 82. The combination of these essential features distinguishes an enterprise from any number of individuals who, acting separately from one another, commit disconnected, if similar, criminal acts. The forging of long-term relationships among persons associated with one another in an enterprise for the common purpose of engaging in particular types of criminal activity is what gives the enterprise the special potential to carry on such criminal activity, with greater resources, skill, and efficiency than other disconnected individuals, over time. What is critical is "that a group of persons entered into an association in fact for the common purpose of engaging in a course of conduct"; id., citing *Boyle* v. *United States*, 556 U.S. 938, 947, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009); and that group "function[ed] as a continuing unit" and remained in existence long enough to pursue that course of conduct. Id.

In the present case, there is no question that the defendant was personally involved in both sales of cocaine that the jury specially found to have been incidents of racketeering activity. The question presented on appeal, however, is whether those two sales, as alleged and proved at trial, were committed by the defendant and his confederate as members of a single enterprise, whose members had joined together with one another in a web of interlocking relationships to pursue a common criminal purpose, or as separate groups of individuals who had joined together on the occasions in question to commit separate, though similar, crimes. Although the defendant's evident purpose on both occasions was to sell cocaine and thereby make an illegal profit—a purpose he impliedly shared with Ortiz on June 30, 2010, and with Moreland on November 9, 2010—there was no evidence either that the defendant had a long-term relationship with either of his confederates for the common purpose of selling drugs or that his two confederates had any relationship at all with each other. Thus, the first of the defendant's proven sales of cocaine that was found by the jury to

have constituted an incident of racketeering activity was alleged and proved to have been committed by him solely with the aid of one confederate, Ortiz, who was not claimed or proved to have been involved in the only other incident of racketeering activity upon which the jury based its verdict. Similarly, the second of the defendant's proven sales of cocaine that the jury found to have constituted an incident of racketeering activity was alleged and proved to have been committed by him solely with the aid of a different confederate, Moreland, who likewise was not claimed or proved to have played any role at all in the first proven incident of racketeering activity on which the jury based its verdict. There was thus no evidence that the defendant and either or both of his confederates, while acting with the common purpose of selling and profiting from the sale of cocaine, had ever "functioned as a continuing unit"; (internal quotation marks omitted) *State* v. *Rodriguez-Roman*, supra, 297 Conn. 82; as required to prove their membership in an "association in fact" enterprise under § 53-395 (c).

In fact, the only plausible basis for claiming the existence of any structure in the separate relationships between the defendant and each of his two confederates is to suggest, by analogy to the law of criminal conspiracy, that those relationships were parts of a so-called "hub-and-spokes" association or conspiracy. See, e.g., *Kotteakos* v. *United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946). In such an association or conspiracy, a single central figure, the "hub," maintains separate relationships with two or more confederates, the "spokes," who, although they all engage with the hub in common criminal activities in furtherance of a common purpose, deal only with the hub, but not with each other. The federal courts, however, when interpreting the provisions of RICO upon which the parallel provisions of CORA here at issue are based, have held that proof of a hub-and-spokes association is generally insufficient to establish an enterprise within the meaning of RICO. See *City of New York* v. *Chavez*, 944 F. Supp. 2d 260, 272 (S.D.N.Y. 2013) ("[t]he insufficiency of 'hub-and-spokes' associations to constitute RICO 'enterprises' has long been recognized") The court in *Chavez*, after giving a detailed analysis of controlling federal case law on this issue[7] in a case involving multiple acts of fraud by and between the named defendants and several separate "Supplier Defendants," offered the following conclusions as to "what is required to prove the existence of a RICO enterprise specifically in the context of what appears to be a 'hub-and-spokes' association. RICO is meant to punish the illegal racketeering activity of *enterprises*—groups of persons acting *together* in *collaborative*, *concerted*, *coordinated*, and *cooperative manners*. Thus, as the cases repeatedly emphasize, the individuals and/or entities a civil plaintiff or criminal prosecutor seeks to paint as an 'enter-

prise' must have 'ongoing organization'; the enterprise must 'function as a continuing unit'; it must 'have a common purpose of engaging in a course of conduct'; its members must be in certain ways 'dependent' on one another; its members must be in certain ways 'joined together as a group'; its members must act in certain ways to 'benefit' one another; its members must contribute to the association's goals and purpose in some 'necessary and symbiotic' manner; its members' activities must in some manner 'rely' on other members' activities. Contrawise, when all the evidence shows a series of similar but essentially separate frauds carried out by related entitites—when those frauds are independent of one another; can be effective without the perpetration of any of the other frauds proven; and in no way require coordination or collaboration between the actors perpet[rating] the fraud—then no RICO enterprise exists." (Emphasis in original.) Id., 275.

Applying those requirements to the evidence before it on the motion for summary judgment of the defendant Wells—one of several "Supplier Defendants" who had allegedly conspired, as a spoke, with the named defendant, Chavez, as the hub, to evade paying state cigarette taxes—the court in *Chavez* ruled as follows that such evidence was insufficient to raise a genuine issue of material fact that the hub-and-spokes association there at issue constituted a RICO enterprise, as the plaintiff city had claimed: "[T]here is no evidence, at all, that any of the illegal acts genuinely in dispute in any way required the existence of any other defendant's illegal act in order to be effective in bringing profits to Wells. There is no evidence that Wells acted in a symbiotic manner with any other defendant . . . . There is no evidence that Wells collaborated or cooperated with any other Supplier Defendant. There is no evidence that any Supplier Defendant ever had any meeting, discussion, or understanding with any other Supplier Defendant for the purposes of discussing how to, with Israel Chavez, evade cigarette taxes. There is no evidence that the defendants as a whole operated as a continuing unit. There is no evidence that any Supplier Defendant acted to benefit any other Supplier Defendant. There is no evidence that any Supplier Defendant's benefits from the overall scheme relied on, or were dependent on, in any way the participation of any other Supplier Defendant." Id., 276.

In the present case, the state's evidence suffers from the same deficiencies as did the city's evidence in *Chavez*. Here, as in *Chavez*, there is no evidence that either of the cocaine sales found to have been an incident of racketeering activity required the existence of any other illegal act in order to consummate it. Similarly, there is no evidence that the defendant's consummation of either sale with one confederate present and assisting him involved, much less required, the collaboration or cooperation of any other confederate, or relied on or

benefitted from the actions of the other confederate in any way. In short, here, as in *Chavez*, there is absolutely no evidence that the defendant and his two confederates ever operated as a continuing unit pursuant to an overall scheme in which they depended upon each other for the accomplishment of a common, mutually beneficial purpose.

Because the two separate cocaine sales that the jury found to have been incidents of racketeering activity were not shown to have been anything other than isolated crimes, carried out independently of one another by small groups of men of whom the defendant was the only common member, without coordination or collaboration between the two groups in order to commit them, then here, under CORA, as in *Chavez* under RICO, "no [association in fact] enterprise exists." Id., 275.

II

The defendant's claim that his constitutional right to represent himself was violated is twofold. First, he argues that his right to self-representation was violated when he was allegedly forced to proceed with jury selection with the representation of his then current lawyer, Vicki Hutchinson, after he had unequivocally requested the court's permission to represent himself. Second, he contends that, although the court eventually granted his request to represent himself, it undermined and rendered meaningless his right to self-representation when it subsequently denied his request for a continuance in order that he might prepare to defend himself. Because we agree with the defendant that the trial court effectively denied his unequivocal request to represent himself by denying his request for a continuance, and determine on that basis that the defendant is entitled to a new trial, we need not address his first argument on this claim.

On the first day of voir dire, March 12, 2012, the defendant told the court that he and Hutchinson "don't connect at all," and that he was "very uncomfortable" with her. In response, the court told the defendant: "Sir, this case is over a year old . . . approximately a year old, you were arrested about a year ago, around July. You were brought to this courthouse in July of [2011], you plead[ed] not guilty, and . . . Attorney Hutchinson has represented you since then. This is . . . and we're ready to start picking the jury, and this is the first request, [a] request to have someone other than Attorney Hutchinson represent yourself. Attorney Hutchinson is an extremely well experienced defense attorney, we're going forward with the trial at this time."

The next day, March 13, 2012, the defendant again voiced his dissatisfaction with Hutchinson's representation. The defendant also complained that he had not had the opportunity to review with his attorney various documents and videotapes she had procured through

discovery. In response, the court reiterated that the defendant's trial had already begun and that Hutchinson was a very experienced attorney. The court explained that the trial would proceed with jury selection that morning, but that the defendant would be given the afternoon to meet with Hutchinson. At that point, the state suggested to the court that the court may have an obligation, pursuant to *State* v. *Flanagan*, 293 Conn. 406, 978 A.2d 64 (2009), to canvass the defendant as to his request to represent himself. The court responded, "We're not at that point yet." Voir dire resumed.

Shortly thereafter, when the defendant interrupted the voir dire proceedings, the court asked him if he wanted to represent himself. When the defendant responded in the affirmative, the court canvassed him both to determine if he had the desire and the capacity to represent himself, and to warn him of the dangers and disadvantages of self-representation. After asking the defendant several questions on these subjects, the court proposed to the defendant that he agree to have Hutchinson pick the jury, and then it would revisit the issue of whether he should be allowed to represent himself going forward. The defendant initially agreed to that proposal. Voir dire thus continued until 1:15 p.m., with Hutchinson still representing the defendant. Thereafter, as promised, the defendant was afforded the rest of the day to meet with Hutchinson to review the state's disclosure.

The next day, March 14, 2012, the defendant notified the court that technical difficulties prevented him from being able to watch certain of the videotapes that he had sought to watch on the previous afternoon. Following an exchange with the defendant and a discussion with counsel, the court decided not to proceed with voir dire that day so as to give the defendant another opportunity to view the videotapes that he had not been able to view the day before.

After the defendant reviewed the videotapes, the court revisited the defendant's request to represent himself, and the defendant reiterated his desire to do so. The court then thoroughly canvassed the defendant and determined that he validly waived his right to counsel. The court asked Hutchinson to remain present as standby counsel for the defendant, and then adjourned for the day.

On the next day, March 15, 2012, Hutchinson asked the court what she should do with all of the disclosure, approximately 900 pages of documents, that she had received from the state. She asked, more particularly, whether she should turn everything over to the defendant, which would be problematic because there was a protective order in effect that prevented the defendant from bringing those documents back to prison with him because other codefendants were also being held there. The following colloquy ensued:

"The Defendant: I'm gonna have to ask the court for time to look over because, Your Honor . . . I believe that it was fair that the prosecutor was admitted the amount of time that he needed. They had almost eight months, you understand, to put all this together, Your Honor. . . . They had time to do what they had to do. Why I can't get time to go over these? . . . I had asked her to do—my attorney to do many things in this case, they haven't been done, like the lab report.

"You understand why I'm just getting knowledge of these things. Like things to the nature of documents on . . . on the . . . documents on the . . . I'm sorry. All the dockets—the discoveries that I asked for. I asked her for discovery of dismissal; she told me she did that. I need to . . . you know what I'm saying go over . . . that and find out . . . what's going on.

"The Court: Mr. Bush, if you had hired another lawyer to come in at this moment, the case would still go forward. The case is on trial, so the case is going forward.

"The Defendant: Your Honor, if I had money to hire a lawyer, I would have hired in the first place. It's just I was—

"The Court: Sir . . . the case is on trial, we're going forward.

"The Defendant: Why do you think I'm asking to stop the trial?

"The Court: Pardon?

"The Defendant: I was asking you to stop the trial in the first place—

"The Court: Sir, sir, no, that's up to Judge Devlin, he's the assigning judge. The case is assigned here for trial. It goes forward to trial, and each day we're going forward a little bit—

"The Defendant: What I'm sayin' to you, Your Honor, maybe you don't understand what I'm sayin' to you. It's when I came into this courtroom, I asked for the proper repepitation . . . repretation . . . you understand, I told you my attorney wasn't doing her job, and I asked you, and I told you I wouldn't go on with this case because I was uncomfortable with the conversations we was having about the case, and I wasn't gonna go no further. . . . But you told me—

"The Court: That's water over the dam. We've already ruled upon that, sir. We are going forward.

"The Defendant: So, you tellin' me that—

"The Court: We're going to cont—

"The Defendant: —I don't have the right to, you know, to go over these documents and try to put them—

"The Court: You'll have time during—

"The Defendant: —how to defend my case?

"The Court: —you'll have time during the trial and after the jury is selected sir, but at this time we're going to complete the jury selection.

"[Attorney] Hutchinson: Your Honor, if I could suggest something. I understand that this courtroom is not in session tomorrow because of other things. Perhaps Mr. Bush can come here and spend the day going through these without me.

"The Defendant: There's too much work to be done. I need to find—

"[Attorney] Hutchinson: It's just a suggestion.

"The Defendant: —I need to find my witnesses.

"The Court: Mr. Bush, you have made the decision to represent yourself in the middle of a trial. We do not get a continuance.

"The Defendant: This is part of the reason why I asked you—

"The Court: Sir . . . you may not like that ruling, sir, but that is the ruling. Now, we are going to take a recess shortly, and we are going to go . . . the jury panel will be brought down, and we will proceed and pick the jury. . . .

"The Defendant: Your Honor, I really feel like you're putting too much pressure on me right now, man, you know what I'm sayin'? Because I explained to you from day one that, you understand, I don't have full knowledge, full understanding of all this. Now you puttin' everything at me at once, Your Honor, you understand what I'm sayin', and you're trying to make me go, you understand what I'm sayin', on things I don't have no nature about . . . that I have to talk to people to get a better understandin' . . . you understand. I don't have a problem with you know, addressin'—

"The Court: Sir, I'm not making, you are electing to represent yourself, so you know—

"The Defendant: And I'm asking—

"The Court: —this is your choice.

"The Defendant: You're denying me all my rights though, Your Honor. I mean, I think I have a right, you understand what I'm saying, to defend myself properly, man. I mean, I can't just do something here that's, you know, unpredictable.

"The Court: Sir, you've decided—

"The Defendant: So what you basically telling me, Your Honor, is you don't care. And I'm . . . I mean, I'm very uncomfortable with that.

"The Court: Well, I care very much sir, but you—

"The Defendant: That's what I'm saying, then show me that you care, Your Honor.

"The Court: Sir, you've elected to represent yourself.

"The Defendant: Because—

"The Court: This is your choice.

"The Defendant: Because—

"The Court: We're not arguing the point.

"The Defendant: I'm not arguing, Your Honor.

"The Court: We're—

"The Defendant: I'm talking to you.

"The Court: We're going forward with the jury selection. This is what you have elected to do. I suggested before that you let counsel select the jury, but you did not want to do that.

"The Defendant: Yeah, but you're rushing me to do something, Your Honor, you're rushing me to do—I'm asking you for time to go over things. You're denying me time, you understand what I'm saying? I mean how am I gonna defend myself properly?

"The Court: Well, sir—

"The Defendant: You understand what I'm saying, if I don't understand something?

"The Court: Sir, we're going forward with the jury selection."

The jury panel was brought into the courtroom and, as the court began to address the panel, the defendant stated that he wanted to be taken downstairs. The court admonished the defendant that he would waive his right to represent himself if he refused to participate in the proceedings. The defendant explained that he did not study or practice law and that there were a lot of complicated things that he needed to go through. The defendant repeated that he wanted to go downstairs. The court responded as follows: "Okay. Now, we're going to resume this case in courtroom 3A. There's a room down there where Mr. Bush may sit in a glassed in room and hear the proceedings. Mr. Bush . . . a short while ago elected to represent himself. He has a constitutional right to represent himself, provided he is properly advised that he is giving up his right to be represented by counsel. At this moment there is a standby counsel, Attorney Hutchinson seated in the back of the room. If Mr. Bush decides to give up his right to represent himself, which he can do by electing to be removed from the courtroom, then Miss Hutchinson will stand in and represent him. And if that's the way we're going to proceed, then I would like to proceed in a courtroom where Mr. Bush can sit aside and hear what is going on.

"So what we will do is, I'll ask you to step into the room behind me, and then in a short while you'll be escorted downstairs to another courtroom. Could you please step into the room behind me?"

The jury then exited the courtroom, and the following colloquy ensued:

"The Court: Now, courtroom 3A is available at this moment since Judge Devlin either has left, or is leaving the building for a meeting elsewhere in the state, so we will proceed today in that courtroom. And Mr. Bush, if you elect to sit outside the courtroom, then you have elected to give up your right to—

"The Defendant: I'm not giving up no right.

"The Court: —represent yourself. Sir, you can't—

"The Defendant: I'm not giving up my rights.

"The Court: —have it both ways. You can't make a mockery of the situation, so—

"The Defendant: I'm not trying to make a mockery of it.

"The Court: Mr. Bush, do you want to be in the courtroom, yes or no?

"The Defendant: I want proper—

"The Court: Do you want to be in a courtroom?

"The Defendant: You're asking me what I want, Your Honor, I'm trying to explain to you what I want.

"The Court: Okay, 3A and please bring Mr. Bush down to the glassed in anteroom in 3A—

"The Defendant: If I'm innocent until proven guilty, Your Honor, please, man—

"The Court: And then we'll proceed down in that courtroom.

"The Defendant: I'm asking for proper counsel.

"The Marshal: Yes, Your Honor.

"The Court: Okay, we'll stand in recess."

After a brief recess, the proceedings resumed in courtroom 3A, and the following colloquy ensued:

"The Court: Okay, we're back in session. Let's have Mr. Bush brought into the courtroom please. The jury panel is behind me out in the voir dire room. Okay, we're now in courtroom 3A and this is the only courtroom in the house which has an anteroom with not only a glass partition where someone could sit and observe, but also a speaker system where someone can sit and hear while they observe. This is usually the arraignment room, which is used all day by Judge Devlin. Mr. Bush, I hear from the marshals that you don't want to be in the anteroom either. Is that correct, sir?

"The Defendant: That's correct, Your Honor. Why would I be sittin' around watchin' something go down that, you know what I'm sayin', yo? I feel like I'm not being treated fairly, man.

"The Court: You have the right to represent yourself, if that's what you want to do. We've gone through that.

"The Defendant: This . . . like I explained to you before—

"The Court: Now, sir—

"The Defendant: —I don't want to represent myself. I want the proper representation, man.

"The Court: No, no, you told me you wanted to represent yourself. If you—

"The Defendant: That's not what I told you.

"The Court: If you don't want to represent yourself then Attorney Hutchison—

"The Defendant: No—

"The Court: —will stand forward—

"The Defendant: —she's not helping me, Your Honor. Please understand, she's not helping me.

"The Court: Sir, you—

"The Defendant: She haven't been helping me from day one.

"The Court: Sir, you're not getting a different attorney. So, either your election is to go forward with Attorney Hutchinson, we've gone through this, or to represent yourself. Which do you want to do? There's not a third choice at this time. What do you want to do, sir?

"The Defendant: Do what you gotta do, lock me up, Your Honor, if that's what you wanna do. Put me in jail, I mean you know what I'm sayin', yo? But, I feel like I deserve the proper—

"The Court: Sir—

"The Defendant: You understand what I'm sayin', yo? To be treated, you know, fairly. I'm innocent until proven guilty, Your Honor. You understand? Nine tenths of the law. There is nothing in here, nothing in here stating this case, Your Honor. You understand what I'm sayin'? I'm not a gang member. . . .

"The Court: . . . Now the choice is representing yourself or having Attorney Hutchinson represent you.

"The Defendant: Like I explained to you, and I'm going to explain to you—

"The Court: There's . . . I've explained to you there's not a third—

"The Defendant: I like Mrs. Hutchinson.

"The Court: There's not a third—

"The Defendant: I don't have a problem with her, but listen, me and her don't click. . . . That's oil and water right there, Your Honor.

"The Court: There's not a third choice.

"The Defendant: How am I have to jeopardize my life . . . well then you know, I might as well be just . . . you might as well just convict me right now. You might as well as just find me guilty because, I mean, you're putting me under all this pressure here of trying to defend myself. And, Your Honor, I'm pretty sure you'd know for a fact that I didn't go to law school. So, I'm gonna have to use all the wisdom that I got to try to do the best that I could to represent myself because I'm not going with Mrs. Hutchinson if I can't see eye to eye with her, and I feel like she's not going to represent me properly. You understand? I've been through that before where I had . . . I went to trial and I was young and ignorant to the fact of a crime I didn't commit. I don't want that to happen again.

"The Court: Sir, what are we doing now? Are we going to—you know, are you going to represent yourself and select a jury, or are you going to elect to be outside of the courtroom? . . .

"The Defendant: I don't know what to do, Your Honor. I—all I want to do is cooperate, man, but I don't want to be railroaded, man. I don't want to be railroaded, man.

"The Court: I want to see that you have a fair trial, and now is the time for trial.

"The Defendant: Before I go through all that, Your Honor, I was explain by Mrs. Hutchinson that these papers right here, all I need is, Your Honor, these papers.

"[Attorney] Hutchinson: Your Honor, out of 900 pages, I have separated the six distinct sale charges against this particular defendant, and they are at the beginning of the books. So, it's maybe fifty pages that pertain to just his six sale charges. And I would suggest that he take those pages out of the binder, and take them back with him to review. And I would also advise the court that whether he's pro se or there's an attorney, whoever is defending the case would be looking at these papers all weekend long. And I know the state is concerned about all the other defendants who are in the rest of the book. . . .

"The Court: Okay, I'm listening to you, but right now we have the jury selection issue. But by these papers you meant the fifty . . . how many pages were in the front?

"[Attorney] Hutchinson: Your Honor, the six sales, the six alleged sales—

"The Court: How many?

"[Attorney] Hutchinson: I'm going to say it's—

"The Defendant: Matter of fact you know what, Your Honor? We don't even need them. Let's just start with Mrs. Hutchinson then. I'll go with Mrs. Hutchinson.

"The Court: You'll go with Miss Hutchinson?

"The Defendant: Yes, I will.

"The Court: Well okay, you know, I'll tell you, I think that's a—

"The Defendant: I already know, Your Honor.

"The Court: —wise decision.

"The Defendant: You know what, what am I gonna do, man? I don't wanna do this, but you know what I'm sayin', man? . . . I mean, I want to go over the stuff itself, man, and try to figure out, you know what I'm saying, because like I explained to you on many occasions, and you know what I explained to you.

"The Court: Okay. Now you want to go forward with Miss Hutchinson?

"The Defendant: Yes, yes, I'm going to go forward with Miss Hutchinson, man."

On the basis of the foregoing exchange, and our review of the full transcript of the entire proceedings, beginning with the commencement of voir dire, the defendant expressed his dissatisfaction with Hutchinson and repeatedly sought to have her replaced with different counsel. When the court refused to appoint new counsel to represent him, the defendant expressed his desire to represent himself. That desire, although almost always stated as an alternative to the appointment of replacement counsel—that if the court refused to replace Hutchinson, he would have no choice but to represent himself—was expressed unequivocally. After affording the defendant ample opportunity to consider his options, the court thoroughly canvassed him and determined that he had waived his right to counsel and had the capacity and the right to represent himself. Hutchinson stayed in attendance in the capacity of standby counsel.

When the court thereafter refused to grant the defendant's request for time to review the state's voluminous disclosure, the defendant stated that he had always wanted proper representation, but that he did not feel as though Hutchinson had been providing such representation to him, and thus he had been forced to ask to represent himself. With the court steadfast in its refusal to continue the trial, the defendant protested the court's denial of his request for a continuance by refusing to participate in the trial. When informed that his absence from the courtroom would result in the forfeiture of his right to represent himself, he reiterated that he did not wish to represent himself, but, rather,

wanted proper representation. The defendant ultimately agreed to proceed with Hutchinson's representation.

The issue of whether the defendant's request to represent himself was unequivocal is not before us. To provide context for our analysis of the defendant's claim that the trial court effectively denied his unequivocal request to represent himself when it denied his request for a continuance, we begin by setting forth the legal principles regarding the invocation of a defendant's right to self-representation.

"The sixth amendment to the United States constitution provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense. The sixth amendment right to counsel is made applicable to state prosecutions through the due process clause of the fourteenth amendment. . . . In *Faretta* v. *California*, [422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)] the United States Supreme Court concluded that the sixth amendment [also] 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. . . . In short, forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so. . . .

"It is well established that [t]he right to counsel and the right to self-representation present mutually exclusive alternatives. A criminal defendant has a constitutionally protected interest in each, but since the two rights cannot be exercised simultaneously, a defendant must choose between them. When the right to have competent counsel ceases as the result of a sufficient waiver, the right of self-representation begins. . . . Put another way, a defendant properly exercises his right to self-representation by knowingly and intelligently waiving his right to representation by counsel . . . .

"State and federal courts consistently have discussed the right to self-representation in terms of invoking or asserting it . . . and have concluded that there can be no infringement of the right to self-representation in the absence of a defendant's proper assertion of that right. . . . The threshold requirement that the defendant clearly and unequivocally invoke his right to proceed pro se is one of many safeguards of the fundamental right to counsel. . . . Accordingly, [t]he constitutional right of self-representation depends . . . upon its invocation by the defendant in a clear and unequivocal manner. . . .

"[T]he context of [a] reference to self-representation is important in determining whether the reference itself was a clear invocation of the right to self-representation. . . . The inquiry is fact intensive and should be

based on the totality of the circumstances surrounding the request . . . which may include, inter alia, whether the request was for hybrid representation . . . or merely for the appointment of standby or advisory counsel . . . the trial court's response to a request . . . whether a defendant has consistently vacillated in his request . . . and whether a request is the result of an emotional outburst . . . ." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Pires*, 310 Conn. 222, 230–32, 77 A.3d 87 (2013). Moreover, "a defendant is not deemed to have equivocated in his desire for self-representation merely because he expresses that view in the alternative, simultaneously requests the appointment of new counsel, or uses it as a threat to obtain private counsel." (Internal quotation marks omitted.) *State* v. *Jordan*, 305 Conn. 1, 19, 44 A.3d 794 (2012). "A violation of the sixth amendment right to self-representation is structural error that requires automatic reversal of the defendant's conviction and a new trial . . . ." Id., 23.

As noted, the state does not argue that the defendant did not unequivocally request to represent himself. Rather, the state contends that the defendant reasserted his right to counsel, thus waiving his right to represent himself, following the court's denial of his request for a continuance. The defendant does not appear to take issue with this characterization of what transpired at trial, but claims that he was forced to do so, and that the court rendered meaningless its prior permission for him to represent himself by denying his request for time to review the state's 900 page disclosure, effectively denying him the opportunity to effectively represent himself.

"The determination of whether to grant a request for a continuance is within the discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. . . .

"A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . To prove an abuse of discretion, an appellant must show that the trial court's denial of a request for a continuance was arbitrary. . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, *particularly in the reasons presented to the trial judge at the time the request is denied.* . . . In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis. . . .

"Among the factors that may enter into the court's exercise of discretion in considering a request for a continuance are the timeliness of the request for continuance; the likely length of the delay; the age and com-

plexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; the defendant's personal responsibility for the timing of the request; [and] *the likelihood that the denial would substantially impair the defendant's ability to defend himself* . . . ." (Citations omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Davis*, 135 Conn. App. 385, 393–94, 42 A.3d 446, cert. denied, 305 Conn. 916, 46 A.3d 171 (2012).

Here, the record reflects that the defendant sought a continuance, inter alia, to review 900 pages of documents that he had just acquired and previously had not seen, which he would be unable to review over the weekend due to the protective order precluding him from bringing the documents back to prison with him, and that evidence was scheduled to begin the following Monday.[8] In that regard, the court told the defendant only that he would "have time during the trial and after the jury is selected" to prepare his defense.[9] Between the Thursday when the court denied the defendant's request for a continuance and the following Monday, the trial participants still needed to select the remaining members of the jury. It is thus doubtful that there would have been any meaningful period of time after jury selection and prior to the commencement of the trial when the defendant would have had the opportunity to review the state's disclosure at the courthouse. Nor are we persuaded that any review of those documents "during trial," as suggested by the trial court, would have afforded the defendant a meaningful opportunity to review and understand the documents, let alone prepare his defense in light of their contents. Because it is probable that the denial of the defendant's request for a continuance would have substantially impaired his ability to defend himself at trial, we conclude that the trial court abused its discretion in denying the defendant's request for a continuance.

Although a trial court's denial of a request for a continuance ordinarily is subject to harmless error analysis, a fair reading of the transcripts of the proceedings in this case reveals that the court's denial of the defendant's request for a continuance to review the state's disclosure and to prepare his defense effectively negated its earlier ruling granting the defendant's unequivocal request to represent himself. The court's denial of the defendant's request for a continuance forced the defendant to surrender his right to self-representation and to accept representation by Hutchinson instead of proceeding to trial without a continuance, uninformed and unprepared. In other words, although the defendant ultimately agreed to go forward with Hutchinson's representation, that choice was not a choice at all; the defendant was forced to do so by the court's denial of his request for a continuance. Because the denial of

the defendant's request for a continuance effectively undermined his right to self-representation, we need not engage in an analysis as to whether the denial of the continuance was harmful. The resulting violation of his constitutional right to self-representation was structural error, and the defendant is thus entitled to a new trial.

The judgment is reversed and the case is remanded with direction to render a judgment of acquittal on the charge of racketeering and for a new trial on all of the other charges of which the defendant was convicted.

In this opinion the other judges concurred.

[1] The defendant was acquitted of six counts of sale of narcotics by a person who is not drug-dependent in violation of § 21a-278 (b).

[2] The defendant also alleges various instructional errors and challenges the legality of the sentence imposed on the conspiracy charge. Because we reverse the judgment as set forth herein, we need not address the defendant's additional claims of error.

[3] General Statutes § 53-396 (b) provides: "In any prosecution under this chapter the court or the jury, as the case may be, shall indicate by special verdict the particular incidents of racketeering activity that it finds to have been proved by the state beyond a reasonable doubt."

[4] The jury was provided with a verdict form to complete and submit to the court upon rendering its verdict. The form first asks whether the jury finds the defendant guilty or not guilty of the racketeering charge. It then goes on to direct the jury, if it finds the defendant guilty, to "indicate which two or more incidents of racketeering activity that you have found beyond a reasonable doubt were committed by the defendant . . . ." The form lists the dates of the seven alleged cocaine sales in connection with which the defendant was charged, with a blank line next to each date on which the jury was to place a check mark if it determined that that alleged sale, if committed by the defendant, constituted an incident of racketeering activity. The jury submitted the completed form to the court, indicating that it found the defendant guilty of racketeering based upon the following incidents of racketeering activity:

"1. Sale of cocaine on June 25, 2010 _____
"2. Sale of cocaine on June 30, 2010 X
"3. Sale of cocaine on July 14, 2010 _____
"4. Sale of cocaine on July 16, 2010 _____
"5. Sale of cocaine on August 6, 2010 _____
"6. Sale of cocaine on August 24, 2010 _____
"7. Sale of cocaine on November 9, 2010 X"

[5] Detective Jason Amato testified that drug dealers routinely keep contraband in their mouths.

[6] There is no claim that the transaction with this other man was part of the pattern of racketeering activity charged in this case.

[7] See also *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 374–76 (3d Cir. 2010) (although each "spoke" had deals with each "hub," and each "spoke" knew identity of other "spokes" with whom each "hub" dealt, those allegations implied parallel conduct, not concerted action of component parties functioning as unit; where, however, another part of the operation required "spokes" to collaborate amongst themselves, creating an "expectation of reciprocity and cooperation" among the "spokes," the requirements of RICO enterprise are satisfied); *Elsevier, Inc.* v. *W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 306–307 (S.D.N.Y. 2010) ("hub and spokes" structure insufficient to prove RICO enterprise absent proof of something more than parallel conduct of same nature in same time frame by different actors in different locations); *Ceder Swamp Holdings, Inc.* v. *Zaman*, 487 F. Supp. 2d 444, 451 (S.D.N.Y. 2007) (allegation that perpetrator of series of independent fraudulent transactions used different accomplice to aid each transaction insufficient to justify conclusion that perpetrator and accomplices functioned as continuing unit; "hub and spokes" association can be RICO enterprise, but must present evidence of "each defendant's necessary and symbiotic contribution to the overall scheme"); *First Nationwide Bank* v. *Gelt Funding, Corp.*, 820 F. Supp. 89, 98 (S.D.N.Y. 1993) (court rejected allegation of existence of enterprise where "several [spokes] each committed

a similar but independent fraud with the aid of a particular [hub], and each such [spoke] acted on a particular occasion to benefit himself or herself and not to assist any other [spoke]").

[8] March 15, 2012, was a Thursday.

[9] Although the court had previously suggested to the defendant that he should have asked to represent himself earlier, prior to the commencement of jury selection, perhaps at one of the other times that he was in court for various pretrial proceedings, the court, nevertheless, ultimately granted his request for self-representation, implicitly suggesting that his request was not untimely. Indeed, at no time did the state argue to the trial court that the defendant's request to represent himself was untimely.