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PALMER, J., with whom KATZ, J., joins, dissenting. I agree with the defendant, Ronald M. Singleton, that the Appellate Court correctly concluded that the trial court had violated his constitutional right to present a defense by failing to instruct the jury on the defendant's primary theory of defense. See *State v. Singleton*, 97 Conn. App. 679, 680, 696–97, 905 A.2d 725 (2006). I also agree with the defendant and the Appellate Court that the instructional impropriety constituted harmful error requiring a new trial. *Id.*, 697–98. Accordingly, I respectfully dissent.

The majority opinion sets forth the facts that the jury reasonably could have found. The following additional facts and procedural history, however, also are relevant to the issue on appeal. At trial, the defendant testified that the victim came to his apartment to pay him for a quantity of drugs that the defendant had provided to the victim. After the two men spoke for a few minutes, and without mentioning his drug debt, the victim indicated that he was leaving. The defendant told the victim that he wanted to be paid for the drugs. The victim began “babbling,” and the defendant moved toward the victim, stating that he was “going to fuck [him] up.” The victim then removed a screwdriver from his pocket, prompting the defendant to back away. The victim continued toward the defendant and stabbed him in the chest with the screwdriver. The defendant then grabbed the victim, causing him to drop the screwdriver. The physical altercation between the defendant and the victim continued, but, eventually, they separated. At that time, the victim grabbed a knife from the defendant's kitchen counter. The defendant then told the victim that he was “going to jail,” at which point the victim came at the defendant with the knife. According to the defendant, he “grabbed” and “bent” the victim's wrist in an effort to take the knife away from him. The defendant further testified that the two men struggled over the knife, but that, at some point, the victim stopped resisting. The victim staggered, sat down on the defendant's bed and then rolled onto the floor. When the victim did not move, the defendant approached him and observed that the knife had entered his body. The defendant insisted that he had intended only to disarm the victim and that he otherwise had not intended to cause him any harm.

The defendant raised a claim of self-defense predicated on his version of how the victim was killed. In particular, the defendant sought an instruction on the use of nondeadly physical force against the victim based on his claim that he was justified in using the degree of force necessary to disarm the victim. The defendant also sought an instruction on the use of deadly physical

force in self-defense, presumably to account for the possibility of a jury finding that, contrary to the testimony of the defendant, he had stabbed the victim with the intent to do so. In light of the defendant's trial testimony, however, it is apparent that the defendant's principal claim involved his use of *nondeadly* force against the victim, which, according to the defendant, resulted in his altercation with the victim that led to the victim's accidental stabbing death.¹ The trial court, however, did not instruct the jury on the defendant's claim that he had used, and was justified in using, non-deadly force against the victim; the court instructed the jury only on the use of deadly force in self-defense.² The jury found the defendant not guilty of murder but found him guilty of the lesser included offense of manslaughter in the first degree under General Statutes § 53a-55 (a) (1).³

On appeal to the Appellate Court, the defendant maintained, *inter alia*, that the trial court improperly had failed to instruct the jury on his claim of the justified use of nondeadly force against the victim. See *State v. Singleton*, *supra*, 97 Conn. App. 687. The Appellate Court agreed with the defendant that, because he had requested such a charge, and because the evidence supported the instruction, he was entitled to it. See *id.*, 692, 696–97. The Appellate Court also determined that the trial court's instructions on self-defense were constitutionally deficient and, further, that the state could not establish that the instructions were harmless beyond a reasonable doubt. *Id.*, 697–98. Accordingly, the Appellate Court reversed the judgment of the trial court and remanded the case for a new trial. *Id.*, 680.

Upon the granting of certification to appeal, the state contends that the Appellate Court improperly concluded that the trial court was required to instruct the jury, in accordance with the defendant's request, on his claimed use of nondeadly force in self-defense. The majority agrees with the state, concluding that “the trial court correctly instructed that the defendant had used deadly physical force in defending himself against the victim because his claim of self-defense required a jury determination as to whether he was justified in killing the victim with a knife, thus making his theoretical use of nondeadly force during the preceding struggle irrelevant.” I disagree with the conclusion of the majority, including its characterization of the defendant's claimed use of nondeadly force as “theoretical”

Before explaining my disagreement with the majority, I note that certain well established principles govern this court's analysis of the issue presented by this appeal. “A fundamental element of due process is the right of a defendant charged with a crime to establish a defense.” (Internal quotation marks omitted.) *State v. Davis*, 261 Conn. 553, 573, 804 A.2d 781 (2002); see also *State v. Wright*, 273 Conn. 418, 424, 870 A.2d 1039

(2005) (“[t]he sixth amendment to the United States constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense” [internal quotation marks omitted]). Thus, “[i]f [a] defendant asserts a recognized legal defense and the evidence indicates the availability of that defense . . . the defendant is entitled, as a matter of law, to a theory of defense instruction.” (Internal quotation marks omitted.) *State v. Lynch*, 287 Conn. 464, 470, 948 A.2d 1026 (2008). Moreover, “[a] defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible” (Internal quotation marks omitted.) *State v. Davis*, *supra*, 573.

With respect to the adequacy of the instructions, “[t]he test of a court’s charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, we must determine whether the charge as a whole presents the case to the jury so that no injustice will be done. . . . [The] [j]ury instructions need not be exhaustive, perfect, or technically accurate. . . . Nevertheless, the trial court must correctly adapt the law to the case in question and must provide the jury with sufficient guidance in reaching a correct verdict. . . . In determining whether the trial court’s instructions meet this standard, we review the jury charge in the context of the factual issues raised [in each case].” (Citations omitted; internal quotation marks omitted.) *Daley v. Aetna Life & Casualty Co.*, 249 Conn. 766, 786, 734 A.2d 112 (1999). It therefore has been stated that, “[t]o pass constitutional muster, jury instructions must be correct in law, adapted to the issues in the case and sufficient to guide the jury in arriving at a verdict.” (Internal quotation marks omitted.) *State v. Bailey*, 82 Conn. App. 1, 8, 842 A.2d 590, cert. denied, 269 Conn. 913, 852 A.2d 744 (2004). Finally, when, as in the present case, the instruction implicates an issue of constitutional magnitude, the question to be resolved on appeal is whether it is reasonably possible that the jury was misled by the court’s instructions. *State v. Davis*, *supra*, 261 Conn. 564.

I now turn to the reason for my disagreement with the majority, which stems primarily from the fact that the trial court, in instructing the jury, repeatedly explained, in clear and unequivocal language, that the defendant’s *sole* claim was that *he had, in fact, used deadly physical force* against the victim, that is, he had intentionally stabbed the victim, but that he was justified in doing so. As I have indicated, however, that was *not* the defendant’s primary claim. Indeed, it was not the claim that the defendant raised in his trial testimony. At trial, the defendant steadfastly maintained

that he had used nondeadly force in attempting to wrest the knife away from the victim, that he was justified in using such force, and that the victim accidentally was stabbed to death during the ensuing altercation. The trial court, however, *never instructed the jury on this primary theory of defense*, that is, that the victim was killed accidentally when the defendant justifiably used nondeadly force in defending himself against what he reasonably believed was the victim's imminent knife attack against him. Instead, the trial court repeatedly asserted in its jury instructions that the defendant's claim was predicated on his contention that his use of *deadly* force was justified. By instructing the jury in this manner, the trial court effectively removed the defendant's principal defense from the jury's consideration.

The contrary conclusion of the majority is flawed because that conclusion is founded on the state's argument that, "once the jury found that the defendant had the requisite intent to commit the charged offense, it necessarily would have rejected his claim of accident, or unintended consequences, thus, completely removing from the jury's consideration the issue of whether the defendant used deadly or nondeadly force during the preceding struggle." This contention ignores the import of the trial court's instructions on the defendant's claimed use of deadly force in self-defense. The court *repeatedly* instructed the jury that the defendant was claiming to have used deadly force in self-defense, and the court did so *before* instructing the jury on the elements of homicide. In other words, the court first explained to the jury that "[t]he defendant claims [that] he acted in self-defense. *In claiming that he acted in self-defense, the defendant is claiming that his use of deadly physical force was justified.*"

" 'Deadly physical force' means physical force which can be reasonably expected to cause death or serious physical injury. . . . 'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of any bodily organ." (Emphasis added.) The court further explained that, "[a]lthough the defendant raised the defense of justification, the state has the burden to prove beyond a reasonable doubt that *the defendant was not justified in using deadly physical force.*" (Emphasis added.)

Thereafter, and before instructing the jury on what the state was required to prove to establish the elements of the crime of intentional first degree manslaughter, the trial court repeatedly underscored for the jury that the defendant affirmatively was asserting that he had used deadly physical force against the victim in self-defense. In light of these instructions, the jury necessarily was led to believe that the defendant's *sole* claim

was predicated on his acknowledgement that he had, in fact, used deadly force against the victim, that is, he intentionally had stabbed the victim, but was justified in doing so. For example, the court explained: (1) “a person is not justified in using deadly physical force when, *at the time he uses deadly physical force*, he does not reasonably believe [that] the other person is about to use deadly physical force against him or about to inflict great bodily harm to him”; (emphasis added); (2) “[i]n deciding whether or not the state has proved beyond a reasonable doubt *that the defendant was not justified in using deadly physical force*, you will first focus on the defendant”; (emphasis added); (3) “[y]ou first focus on what he, in fact, believed *at the time he used deadly physical force . . .* [and] then . . . focus on whether the defendant’s belief was reasonable under all the circumstances that existed *when he used deadly physical force*”; (emphasis added); (4) “[t]he act of [the victim] *leading to the defendant’s use of deadly physical force* need not be an actual threat or assault”; (emphasis added); (5) “you must . . . decide whether *the defendant reasonably believed that deadly physical force as opposed to a lesser degree of force was necessary* to repel [the victim’s] attack”; (emphasis added); (6) “you must decide whether, on the basis of all the evidence presented . . . *the defendant, in fact, believed that he needed to use deadly physical force as opposed to some lesser degree of force* in order to repel the [victim’s] attack”; (emphasis added); (7) “[i]f you decide [that] *the defendant did not . . . believe [that] he needed to use deadly physical force to repel the [victim’s] attack*, your inquiry ends, and the defendant’s self-defense claim must fail”; (emphasis added); (8) “[i]f . . . you find [that] *the defendant . . . did believe that the use of deadly physical force was necessary*, you must then decide whether that belief was reasonable under the circumstances”; (emphasis added); (9) “[i]f you find [that] the state has proved . . . that the defendant was the initial aggressor and [that] the defendant did not effectively withdraw from the encounter or abandon it in such a way that [the victim] knew he was no longer in any danger from the defendant, you shall then find [that] *the defendant was not justified in using deadly physical force*”; (emphasis added); and (10) “the state has the burden to prove . . . [that] . . . *the defendant did not . . . believe he needed to use deadly physical force to repel the [victim’s] attack . . . or . . . [that] the defendant did not have a reasonable basis for his belief that he needed to use deadly physical force to repel the [victim’s] attack.*” (Emphasis added.)

Following these instructions on the defendant’s use of deadly physical force in self-defense—instructions that comprised six full pages of transcript—the trial court finally explained the elements of the crime of intentional manslaughter. In doing so, however, the court again expressly repeated the state’s burden of

disproving the defendant's claim that he justifiably had used deadly force against the victim. Thus, the court instructed the jury that, "[i]n order to prove the defendant guilty of intentional manslaughter in the first degree, the state has the burden to prove beyond a reasonable doubt [that], one, the defendant had the specific intent to cause serious physical injury to a person, and, two, acting with that specific intent, the defendant caused the death of [the victim] by stabbing him with a knife, and, three, the defendant was not justified in using deadly physical force." By this point in the instructions, the jury already had been instructed repeatedly that the defendant himself was claiming that he had used deadly force against the victim by stabbing him with the knife, but that his use of such force was justified. In other words, the court effectively had instructed the jury that the defendant had *conceded* the elements of the crime of intentional manslaughter—that is, he had stabbed the victim, thereby causing his death, with the specific intent to cause serious physical injury to the victim—and that his sole claim was that he was justified in doing so because he reasonably believed that the victim intended to kill him with the knife or to cause him serious bodily injury with it.⁴

The majority contends that the defendant's real claim is one of accident, and that such a claim does not warrant a special instruction. According to the majority, a defense theory of accident is adequately covered by the court's instructions on intent. It may be true that it is not always necessary for a court to instruct the jury expressly on a defendant's claim of accident because such a theory generally will be explained adequately by the court's instructions on intent. That certainly is not the case here, however, because, as I previously explained in detail, by the time the trial court instructed the jury on the element of intent, the jury already had been apprised, on numerous occasions, of the defendant's own contention that he did indeed engage in conduct *intended to cause the defendant to suffer serious physical injury*, but that he was justified in doing so. Consequently, for purposes of the present case, it is manifestly unreasonable to presume that the trial court's instructions on intent were sufficient to provide the jury with a fair and understandable explanation of the defendant's principal theory of defense, that is, that the victim was stabbed accidentally in the altercation arising out of the defendant's justified use of nondeadly force against the victim. In other words, the majority is misguided in concluding that the court's instructions on intent were sufficient to inform the jury of the defendant's primary theory of defense because those instructions unambiguously informed the jury that the defendant *was not contesting the element of intent* in light of his claim that he intentionally had used deadly physical force against the victim in self-defense.

It therefore is unfair for the majority to assert that the

defendant's primary theory of defense was adequately addressed by the trial court's instructions on the element of intent. Without question, the trial court's repeated instructions concerning the defendant's claim that he intentionally had used deadly physical force against the victim made it clear to the jury that the defendant was conceding the elements of intentional manslaughter, but that his use of deadly force was justified. In light of these instructions—and in light of the court's complete failure to instruct the jury on the theory of defense raised by the defendant's testimony at trial—it cannot reasonably be maintained that the court's charge on intent was sufficient to guide the jury as to the defendant's claim concerning the manner in which the victim had been killed.⁵

It is true, of course, that the defendant's claimed use of nondeadly force in self-defense is not a *complete* defense to the crime of intentional manslaughter under § 53a-55 (a) (1). This is so because an element of that offense is the intentional infliction of "serious physical injury," a term that is defined as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of a bodily organ" General Statutes § 53a-3 (4). There can be no doubt that the defendant's claimed attempt to disarm the victim by grabbing the victim's wrist did not constitute conduct intended to cause "serious physical injury." In contrast, "deadly physical force" is defined as "physical force which can be reasonably expected to cause death *or serious physical injury*" (Emphasis added.) General Statutes § 53a-3 (5). Thus, it is the justified use of *deadly force*, rather than the use of nondeadly force, that serves as a defense to the crime of intentional manslaughter. Consequently, when the state alleges that a defendant has committed intentional manslaughter, a claim by that defendant that he used only nondeadly physical force in self-defense cannot *alone* serve to relieve him of responsibility for that crime. In the present case, the defendant raised a justification defense—that is, he claimed that he was justified in forcibly attempting to take the knife away from the advancing victim—*along with* the claim that the victim was killed when, wholly by accident, the knife entered the victim's body during the altercation between the victim and the defendant.⁶

This claim represented the defendant's theory of defense, and there was ample evidence to support it, namely, the defendant's own testimony. The trial court therefore was obligated to instruct the jury on that defense theory. In failing to do so, the court effectively removed that defense from the jury's consideration. Instead, the court instructed the jury only on the defendant's use of deadly physical force. Because the defendant expressly testified that he had used nondeadly force and *not* deadly force, the court's failure to explain

to the jury the significance of the defendant's claim that he justifiably had used nondeadly force, coupled with the court's initial instructions, in which it repeatedly characterized the defendant as acknowledging his use of deadly force, necessarily was prejudicial. In fact, the court provided the jury with no guidance for evaluating the version of the facts set forth by the defendant in his testimony.⁷

Thus, contrary to the majority's assertion, the defendant's claimed use of nondeadly force was not "theoretical" at all because the defendant expressly testified to the use of nondeadly force. Moreover, the defendant had a constitutionally protected right to have a properly instructed jury consider his claim that he had used nondeadly force in attempting to disarm the victim inasmuch as his alleged use of such force was essential to his theory of defense.⁸ Because the jury was not so instructed, the Appellate Court was correct in concluding that the defendant is entitled to a new trial.⁹ I therefore dissent.

¹ Although the defendant's request to charge contained a proposed instruction on the use of deadly physical force, it is not clear why the defendant sought such a charge in light of his testimony explaining that he had used only nondeadly force in attempting to disarm the victim. In any event, because the defendant sought such an instruction, and defense counsel did not object to the instruction when given, the trial court cannot be faulted for charging the jury on the use of deadly force. As I explain more fully hereinafter, the issue presented by this case is not whether the trial court improperly instructed the jury on deadly force but, rather, whether the court improperly failed to instruct the jury on the use of nondeadly force and, if so, whether the court's instructions on the defendant's claimed use of deadly force compounded the harm resulting from that impropriety.

² The trial court's charge on self-defense, in which the court explains when the use of deadly force may be justified but does not explain the use of nondeadly force, is set forth at footnote 10 of the majority opinion.

³ General Statutes § 53a-55 provides in relevant part: "(a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person"

⁴ To reiterate, that was *not* the defendant's sole claim, or even his principal claim. Most importantly, it was not the claim that the defendant raised on the basis of his own trial testimony. As I previously discussed, the defendant testified that he was justified in engaging the victim physically—that is, he was justified in using *nondeadly* force against the victim—in an effort to take the knife away from the victim as the victim approached him. The court's failure to instruct the jury on the defendant's primary theory of defense, as the defendant had requested, was improper, and undoubtedly was confusing to the jury in light of the defendant's testimony that his use of force was limited to *nondeadly* force.

⁵ The majority asserts that there is no merit to the defendant's claim that the trial court's instructions on the justified use of deadly force, without more, "improperly influenced the jury's consideration of intent because the trial court's repeated instructions regarding the order in which the jury was to decide the elements of the charged crimes ensured that it would not consider justification prior to considering the elements of intent and causation." Footnote 17 of the majority opinion. I disagree that the court's enumeration of the three elements that the state was required to prove, namely, intent, causation and lack of justification, was sufficient to inform the jury that it could not predicate a finding of intent on the defendant's own acknowledgement that he had used deadly physical force against the victim. In the absence of such an instruction, the jury was free to conclude that the defendant had formed the intent necessary to commit the crime of intentional manslaughter merely on the basis of the defendant's claim that he did, in fact, intend to use deadly force on the victim. Thus, the mere enumeration of the elements of the offense of intentional manslaughter was not a substi-

tute for an instruction on the defendant's primary theory of defense—a theory predicated on the defendant's claim that he did *not* use deadly force—because of the court's repeated instructions concerning the defendant's own assertion that he had used such force.

⁶ The majority asserts that the defendant's contention that he was justified in using nondeadly force is not a legitimate claim of self-defense because, “[i]n Connecticut, self-defense is a justification for engaging in *otherwise criminal conduct*”; (emphasis in original); and, according to the majority, the defendant is claiming that the victim was killed accidentally and not as a result of the defendant's criminal conduct. Thus, the majority asserts that, “[a]lthough the defendant cloaks his claim in the language of self-defense, he does not seek justification for engaging in *otherwise criminal conduct*” (Emphasis in original; internal quotation marks omitted.) The majority misses the point. The defendant's theory of defense is predicated, in part, on the claim that he did, in fact, engage in conduct that otherwise would have been criminal, namely, grabbing the victim's wrist in an effort to take the knife away from him. In other words, the defendant's conduct in seizing the victim's wrist would have constituted a criminal assault against the victim if the defendant had not reasonably believed that it was necessary to engage in that conduct to defend himself against the victim's attack. It therefore is clear that the defendant's conduct toward the victim would be criminal if it were not found to be justified, and that that conduct constituted an integral component of the defendant's theory of defense. Consequently, the defendant was entitled to an instruction on his claim that he was justified in using nondeadly force against the victim.

⁷ I note that the majority views claims of justification and accident as inconsistent. As the Appellate Court correctly observed; see *State v. Singleton*, supra, 97 Conn. App. 697 n.17; those claims are not necessarily inconsistent, and they do not conflict in the present case. On the contrary, they are fully compatible with one another. Under the defendant's theory, he justifiably used nondeadly physical force against the victim in an effort to take the knife away from him, and, while doing so, the victim accidentally was stabbed and killed. There is nothing inconsistent about the defendant's version of how the victim died. Indeed, even if the defendant had raised inconsistent defenses, he still would have been entitled to an instruction on them. See *Mathews v. United States*, 485 U.S. 58, 64, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988).

⁸ In addition to asserting that the trial court's instructions on intent were adequate to inform the jury of the defendant's principal theory of defense, the majority contends that the defendant's testimony provided a satisfactory basis on which the jury could find that the victim was killed accidentally after the defendant had used nondeadly force in attempting to disarm the victim. I disagree with the majority that the defendant's testimony excuses the trial court's failure to instruct the jury on the defendant's theory of accident because a defendant is constitutionally entitled both to *present* his or her defense *and* to have the court *instruct the jury* as to the legal basis on which that defense is founded. See, e.g., *State v. Lynch*, supra, 287 Conn. 470 (defendant is constitutionally entitled to “a theory of defense instruction”). As I have explained, in the present case, the court failed to provide the jury with such an instruction.

⁹ Because I would uphold the Appellate Court's reversal of the defendant's conviction, I need not address the defendant's alternative grounds for affirming the Appellate Court's judgment. See, e.g., *Sterns & Wheeler, LLC v. Kowalsky Bros., Inc.*, 289 Conn. 1, 7 n.9, 955 A.2d 538 (2008).
