

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* GARY S., SC 20438
Judicial District of Middlesex

Criminal; Whether Defendant’s Convictions for Sexual Assault and Risk of Injury to a Child Were Supported by Sufficient Evidence; Whether Defendant Was Deprived of His Right to a Fair Trial by Prosecutorial Impropriety During Closing Argument. The defendant was convicted on multiple charges related to the alleged sexual assault and attempted sexual assault of his daughter, S., and step-granddaughter, A. The incidents at issue allegedly occurred during various years over the course of the two marriages and subsequent divorces of the defendant and D., his ex-wife and the mother of S. and grandmother of A. During the first separation and divorce, the defendant and D. stayed in contact and eventually resumed their relationship, which ultimately resulted in the second marriage. After about a year, they separated again and eventually divorced. In the spring of 2017, S. and A. disclosed to D. the various alleged incidents of sexual assault and attempted sexual assault by the defendant. D. reported these incidents to the police, which led to an investigation and arrest of the defendant. After a jury trial, the defendant was convicted on all the charges. The defendant directly appealed from the judgment of conviction to the Supreme Court pursuant to General Statutes § 51-199 (b) (3). On appeal, the defendant claims that the evidence at trial was insufficient to support the convictions on the charges of (1) sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (4), which required proof that the sexual assaults happened while the defendant was responsible for the general supervision of the welfare of S., and (2) risk of injury to a child in violation of General Statutes § 53-21 (a) (2), which required proof that the defendant subjected A. to contact with his intimate parts. The state concedes that there was insufficient evidence to support the conviction as to the risk of injury charge because the state had failed to prove A. had contact with an intimate part of the defendant. With respect to the sexual assault convictions, the defendant contends that the evidence was insufficient to establish that he was responsible for the general supervision of S.’s welfare at the time of the alleged assaults. The defendant argues that the evidence indicated that, during the time the alleged assaults occurred, he was not responsible for the general supervision of the welfare of S. because the defendant and D.

were separated and/or divorced. Accordingly, the defendant contends that the state needed to present evidence establishing that the alleged assaults coincided with the time period when the defendant was a fixture in the household rather than just passing through. The defendant also claims on appeal that, during closing arguments, the state committed uninvited improprieties by vouching for witnesses' credibility, referring to matters not in evidence and emphasizing vulgar alleged statements by the defendant that sought to play to the emotions and prejudices of the jurors, all of which deprived the defendant of a fair trial.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

STATE *v.* DEONDRE BOWDEN, SC 20488
Judicial District of Fairfield

Criminal; Search and Seizure; Whether Search Warrant was Invalid Because It Failed to Satisfy the Particularity Requirement of the Fourth Amendment; Whether Search Warrant Was Invalid Because There Was Not Sufficient Probable Cause to Support the Breadth of the Warrant. The victim, Lawane Toles, was shot to death. A few days after the shooting, the defendant was arrested for larceny when he was found driving the victim's car and in possession of two of the victim's credit cards. While the defendant was being questioned, he admitted to the police that he was with the victim just prior to his death and that he had communicated with the victim via his smartphone just prior to the shooting. One of the investigating detectives swore out an affidavit in support of a search warrant for the smartphone and "all contents stored within this cellular phone, to include incoming and outgoing calls, text messages, communication applications, call identifier lists, contact lists, address book, pictures, videos and any information relative to the user's location during calls . . . [which] constitutes evidence of the following offense or that a particular person participated in the commission of the offense of: Murder." The affidavit explained that when the police found the victim, he had no possessions on him, and upon investigation, the police learned that the victim owned a red car and had used his cell phone shortly before his death. This led the police to believe that the person who killed the victim had taken his car. Based upon this affidavit, the police obtained a warrant allowing them to conduct a forensic extraction and search of all the data on the defendant's phone. The

defendant was ultimately charged with, inter alia, felony murder, robbery in the first degree, and three firearms-related charges. The defendant filed a pretrial motion challenging the validity of the smartphone search warrant and moved to suppress all the smartphone data evidence, arguing that the warrant was invalid because (1) it failed to satisfy the particularity requirement of the fourth amendment and (2) the warrant was unconstitutionally overbroad. The trial court denied the motion to suppress, reasoning that the smartphone warrant was not so overbroad as to render it unconstitutional. The trial court explained that, in construing the terms of a warrant, the circumstances and nature of the activity dictate a practical margin of flexibility and that the descriptions of the items to be seized need only be as specific as the circumstances and the nature of the activity under investigation, in this case, a homicide investigation. After a jury trial, the defendant was convicted of, inter alia, felony murder, robbery in the first degree and various other offenses. The defendant directly appealed from the judgment of conviction to the Supreme Court pursuant to General Statutes § 51-199 (b) (3). On appeal, the defendant claims that the trial court improperly denied his motion to suppress the smartphone search warrant because the warrant failed to satisfy the particularity requirement of the fourth amendment. He also argues that there was insufficient probable cause to support the breadth of the warrant.

STATE *v.* NASIR R. HARGETT, SC 20517
Judicial District of Fairfield

Criminal; Whether Defendant Entitled to Jury Instruction on Self-Defense; Whether Evidence of Victim’s Character Was Relevant; Whether Sanctions Against State for Late Disclosure of Murder Weapon and Firearms Evidence Warranted. The defendant was convicted of murder in connection with the shooting death of Davon Robertson. On the day of the crime, the defendant was on the porch of his house with Kaishon McAllister and two of his friends when the victim approached. McAllister claimed that the victim was acting “weird” and appeared to be “high.” He further claimed that he became nervous when the victim reached into his pocket, believing that he was going to start shooting, so he and his two friends retreated into the house. The defendant, however, remained outside. The victim took a soda bottle that was left on the porch and walked away. McAllister and his two friends then left the house, and the defendant retrieved a gun. As the defendant approached the victim, he called out to him and the two men “locked eyes” and exchanged words. The defendant

then shot the victim, who was found to be unarmed. The defendant appealed, and the Appellate Court (196 Conn. App. 228) affirmed the conviction. The Appellate Court rejected the defendant's claim that the trial court improperly failed to give a jury instruction on self-defense, concluding that no reasonable juror could have believed that the defendant was in imminent or immediate danger so as to warrant the use of deadly physical force. The Appellate Court also rejected the defendant's claim that the trial court improperly precluded as irrelevant a toxicology report showing that the victim had phencyclidine (PCP) in his body at the time of his death and a statement allegedly made by an unidentified woman near the defendant's home shortly before the shooting that the victim had just robbed her at knifepoint. The Appellate Court found that there was no causal relationship between the victim having PCP in his body and the defendant having shot him and that the defendant failed to establish the relevancy of evidence of the victim's alleged propensity for violence by laying a foundation for a claim that he acted in self-defense and establishing that the evidence was relevant to the self-defense claim. The Appellate Court also rejected the defendant's claim that the trial court improperly failed to sanction the state for its late disclosure of the murder weapon and certain firearms evidence. The Appellate Court noted that the late disclosure of the murder weapon did not constitute bad faith, the firearms evidence was disclosed during jury selection and before the firearms expert testified, the defendant declined the trial court's offer for a continuance and to continue plea negotiations before evidence began, and the defendant failed to explain how a firearms expert could have assisted his theory of self-defense. The Supreme Court granted the defendant certification to appeal as to the issues of whether the Appellate Court correctly concluded that (1) the evidence was insufficient to warrant a jury instruction on self-defense, (2) the trial court properly excluded as irrelevant the toxicology report and the unidentified woman's statement that the victim robbed her at knifepoint, and (3) the trial court properly declined to sanction the state for its late disclosure of the murder weapon and related materials.

STATE *v.* SHAILA M. CURET, SC 20521
Judicial District of Waterbury

Criminal; Whether Appellate Court Correctly Concluded That Warrantless Entry by Police Into Defendant's Apartment Was Not Justified Under Exigent Circumstances Doctrine or Emergency Doctrine. Officer Raim Zulali responded to a 911 call of

an attempted burglary and report of gunshots made by Anthony Cruz, a resident of the defendant's apartment building. Cruz reported seeing two men enter the building and then heard loud knocking on the door of the defendant's apartment, followed by an altercation that started in front of the defendant's apartment and moved to the laundry room. Cruz informed the 911 dispatcher that the two men had later fled in two separate vehicles. After arriving at the apartment building, Zulali found evidence that someone had attempted to break into the defendant's apartment. In the laundry room, Zulali found, inter alia, a spent shell casing on the floor and a bullet hole in the doorframe of the laundry room exit door. He also found what appeared to be a small, fresh blood like stain on the wall adjacent to the laundry room exit door. Further, Zulali received no response when he knocked on the door of the defendant's apartment. Based on his investigation, Zulali believed that someone might be injured inside the defendant's apartment. As a result, the police decided to enter the defendant's apartment without a warrant. A search revealed that no one was in the apartment but, while searching, Zulali observed in plain view evidence of a drug sale operation. The police then obtained a search warrant and seized, inter alia, numerous plastic bags containing cocaine. The defendant subsequently entered a plea of nolo contendere to the charge of possession of narcotics with intent to sell, conditioned on her right to appeal the trial court's denial of her motion to suppress evidence. On appeal, the defendant claimed that the trial court improperly denied her motion to suppress the evidence seized from her apartment because there were no exigent or emergency circumstances that permitted the police officers to enter her apartment without a warrant. A majority of the Appellate Court (200 Conn. App. 13) determined that the warrantless search of the defendant's apartment was not justified by the exigent circumstances exception to the warrant requirement because there was no objective basis for the officers to conclude that they had probable cause to enter the defendant's apartment. In support of its ruling, the court noted, inter alia, that Zulali knew that the two men involved in the altercation had exited the building without entering the defendant's apartment, all the evidence of the altercation was found in the laundry room, and the door to the defendant's apartment was locked. The majority also concluded that the entry into the defendant's apartment was not justified under the emergency doctrine, explaining that there was no objectively reasonable basis for the police to believe that someone in the defendant's apartment was seriously injured. Accordingly, the majority reversed the trial court's judgment denying the motion to suppress and remanded with direction to dismiss

the criminal charge. The dissent to the majority opinion concluded that, under the totality of the facts, the officers reasonably could have believed that an emergency situation existed that justified their warrantless entry into the defendant's apartment. The state was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the warrantless entry by the police into the defendant's apartment was not justified under the exigent circumstances doctrine or the emergency doctrine.

STATE *v.* MUHAMMAD A. QAYYUM, SC 20552
Judicial District of Litchfield

Criminal; Whether Evidence of Defendant's Lack of Income Improperly Admitted; Whether Expert Testimony Regarding Whether Defendant Intended to Sell Narcotics Improperly Admitted. The defendant was convicted of conspiracy to sell narcotics and possession of narcotics with intent to sell in connection with his role in the sale of drugs out of an apartment in Torrington occupied by Oscar Pugh. On appeal, the defendant argued that the trial court improperly permitted a state Department of Labor representative to testify that he had no reportable wages in the year prior to his arrest. The defendant claimed that the evidence impermissibly suggested that he earned a living selling drugs and, thus, that its admission violated his due process rights by placing the burden on him to prove that he had a legitimate source of income. The Appellate Court (201 Conn. App. 864) found that the defendant's claim presented an evidentiary, rather than constitutional, issue and that the trial court did not abuse its discretion in determining that the probative value of the evidence was not outweighed by its prejudicial effect. The Appellate Court found that the fact that the defendant had access to money, as evidenced by his expenditure of approximately \$2,500 on rental cars in the months leading to his arrest, despite having no reportable wages made it more likely that he was engaged in drug trafficking to procure that money. The Appellate Court further found that the disputed testimony was not presented in a manner that would have improperly aroused the emotions of the jury. The Appellate Court noted that the witness' testimony was brief, the witness conceded that the defendant could have other legitimate sources of income that would not have been reported to the department and the evidence pertained to a limited period of time. The Appellate Court also found that, even if the evidence was improperly admitted, any error was harmless, as the state's case was strong. The Appellate Court noted that Pugh testified extensively

at trial about an arrangement that he had with the defendant whereby the defendant gave him a reduced price for drugs in exchange for using his apartment to sell them. Moreover, when the defendant was arrested, he had on his person \$267 in small denominations, seven wax folds of heroin and two “dubs” of cocaine, and a canine officer indicated a residual odor of narcotics on the defendant’s rental car. The Appellate Court also rejected the defendant’s claim that the trial court erred in admitting expert opinion testimony from a police detective on the ultimate issue of whether the defendant intended to sell narcotics. The Appellate Court noted that the testimony concerned only general factors that the detective would consider when deciding to charge a person with possession of narcotics with intent to sell, including the general behavior of drug users and drug traffickers, and that the prosecutor did not ask the detective for his specific opinion about whether the defendant possessed narcotics with intent to sell. The Supreme Court granted the defendant certification to appeal as to the issues of whether the Appellate Court correctly concluded that the trial court (1) did not err in admitting evidence of the defendant’s lack of income and (2) did not abuse its discretion in permitting expert testimony regarding the defendant’s intent to sell narcotics.

USSBASY GARCIA *v.* ROBERT COHEN ET AL., SC 20585
Judicial District of Hartford

Negligence; Jury Instructions; Whether Trial Court Committed Reversible Error by Failing to Give Jury Instruction on Non-delegable Duty Doctrine. While descending an exterior staircase from her second floor rental apartment in the middle of winter, the plaintiff slipped on a sandy step and fell. Subsequently, the plaintiff brought a premises liability action alleging, in relevant part, that her landlords, the defendants, negligently failed to keep the steps free of dirt and sand. At the jury trial, one of the defendants, Robert Cohen, testified that, during the winter months, he, together with several hired hands, would customarily remove snow after a snowstorm and spread salt and sand on the stairs. Cohen further testified that, after spreading salt and sand on the stairs, no one would return in the winter to remove it. In light of this testimony, the plaintiff submitted a proposed jury instruction on the nondelegable duty doctrine, which creates a form of vicarious liability pursuant to which a property owner may be liable to an invitee for the negligence of its independent contractors in their performance of the owner’s nondelegable duty to maintain the safety of the premises. The trial court declined to give the proposed

instruction or to otherwise instruct the jury on the defendant's nondelegable duty. Instead, the court charged the jury on the duties that are owed by a landlord to a tenant-invitee. In response to a question from the jury during deliberations, the court further instructed the jury that if it found neither party negligent, it would have to return a verdict in favor of the defendants. The jury then returned a defendants' verdict. The plaintiff appealed to the Appellate Court (188 Conn. App. 380) claiming that the trial court improperly had rejected her request to charge and improperly failed to instruct the jury on the defendants' nondelegable duty. The court declined to review the plaintiff's claims on the ground that the general verdict rule applied. The Supreme Court (335 Conn. 3) reversed the Appellate Court's judgment and remanded the case to that court with direction to review the plaintiff's claim of instructional error. On remand, the Appellate Court (204 Conn. App. 25) concluded that the trial court should have instructed the jury on the nondelegable duty doctrine because the proposed charge was relevant to the issue in the case, was an accurate statement of the law, and was reasonably supported by Cohen's testimony, which raised, by implication, the issue of whether he or his hired hands may have been responsible for the claimed defect. In so concluding, the court held that it was immaterial that the defendants had never explicitly attempted to shift blame to their contractors or employees. The court further concluded that the trial court's refusal to give the requested charge constituted harmful error because the failure to give the charge, coupled with its instruction that the defendants could be relieved of liability if some other cause so powerfully caused the plaintiff's injury that it trivialized the defendants' negligence, resulted in actual prejudice to the plaintiff. Consequently, the court reversed the trial court's judgment and remanded the case for a new trial. In this certified appeal by the defendants, the Supreme Court will now determine whether the Appellate Court correctly concluded that the trial court had committed reversible error by not giving the nondelegable duty charge.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

*Jessie Opinion
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