SUPREME COURT PENDING CASES

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

STATE *v.* JOSHUA COUNCIL, SC 20513
Judicial District of New Haven

Murder; Criminal Possession of a Firearm; Whether Trial Court Deprived Defendant of Right to Present Defense by Precluding Expert Testimony Based on Data From Cellular Carrier; Whether State Required to Prove that Defendant Had Actual Knowledge of Previous Felony Conviction. The victim, Kenneth Cooper, had participated in a murder trial brought against the defendant's cousin, and, as a result, he was in the witness protection program. At approximately 3 a.m. on January 12, 2018, the victim picked up his girlfriend, Simone Watson, in New Haven and drove to a local convenience store, where he went inside to get a soda while Watson stayed in the car. Upon exiting the convenience store, the victim and the defendant met briefly before the defendant fired eight shots, striking the victim multiple times in his torso and extremities. Watson found herself face-to-face with the defendant, whom she had known for at least ten years, before he fled in a waiting vehicle. Watson drove the victim to the hospital, and he died from the wounds. She identified the defendant to the police as the shooter, showed them a picture of him, and, at trial, she reaffirmed that identification. The defendant testified that, on the night of the murder, he had been elsewhere in the city selling drugs, and the state called an FBI agent who testified as to the defendant's movements. Based on an analysis of the location data stored in the defendant's cell phone, the agent testified that the defendant made a phone call at 3:07 a.m. in the area of the murder and that, at approximately 4:35 a.m., he had returned to the scene. The defendant sought to call his own expert, a private investigator and certified cell phone forensic examiner who had analyzed "network location system" data from the defendant's cellular carrier, which did not verify the data's accuracy, and concluded that the defendant was elsewhere at the time of the crime. The trial court sustained the state's objection to the testimony as irrelevant because the expert failed to sufficiently explain his familiarity with and reliance on the network location system data and because he failed to demonstrate a connection between that data and his conclusions. Furthermore, the court found that the expert's testimony was not sufficiently reliable given that the data was unverified and there was no showing that other courts have previously admitted similar data into evidence. The jury

found the defendant guilty of murder and criminal possession of a firearm, and he appealed directly to the Supreme Court pursuant to General Statutes § 51-199 (b) (3), claiming that the trial court erroneously excluded his expert's testimony and improperly failed to instruct the jury, with respect to the possession charge, that the state must prove that the defendant actually knew that he had previously been convicted of a felony. On appeal, the defendant argues that the expert's testimony was admissible under § 7-2 of the Connecticut Code of Evidence because he possessed specialized knowledge and training in cell phone analysis and the testimony would have assisted the jury, and any lack of knowledge went to the weight of that testimony and not its admissibility. The state argues that this claim is moot because, regardless of if the testimony was admissible under § 7-2, the defendant fails to challenge the court's other findings that the testimony was irrelevant or not sufficiently reliable. In the alternative, the state argues that the expert testimony was properly precluded, and, if not, then the error was harmless. The state also argues that the defendant's unpreserved instructional error claim is meritless or, in the alternative, that it was waived.

STATE *v.* WAYNE A. KING, SC 20588
Judicial District of Waterbury at G.A. 4

Criminal; Driving Under the Influence; Whether Appellate Court Correctly Concluded That Elements of Florida Offenses of Which Defendant Previously Had Been Convicted Were Substantially the Same as Elements of General Statutes § 14-227a (a) for Enhancement Purposes Under § 14-227a (g) (3). In 2016, the defendant was convicted of driving while under the influence of intoxicating liquor or drugs (DUI) in violation of General Statutes §§ 14-227a (a) (1) and 14-227a (a) (2) and of being a third time offender in violation of § 14-227a (g) based upon his DUI convictions in Florida in 2000 and 2006. Following his 2016 conviction, the defendant was sentenced to three years of imprisonment, execution suspended after eighteen months, twelve months of which is mandatory, followed by three years of probation pursuant to § 14-227a (g), which imposed enhanced penalties for third time offenders. On appeal, the defendant challenged whether the trial court correctly concluded that his Florida convictions could serve as prior offenses for sentence enhancing purposes pursuant to § 14-227a (g). The defendant claimed that the trial court should not have sentenced him as a third time offender because the essential elements of Connecticut's DUI statute are not substan-

tially the same as the essential elements of Florida's DUI statute. The defendant also claimed that *State* v. *Burns*, 236 Conn. 18 (1996), and *State* v. *Mattioli*, 210 Conn. 573 (1989), should be overruled because those cases contravene the plain language of § 14-227a (g), which requires that a defendant's prior convictions occur less that ten years before the current conviction for enhancement purposes. The Appellate Court affirmed (204 Conn. App. 1) the judgment of the trial court that enhancement was appropriate because Connecticut's DUI statute was substantially similar to Florida's DUI statute. In so concluding, the Appellate Court reasoned that application of the current revision of § 14-227a rather than the revision that was in existence at the time of the Florida convictions did not violate the ex post facto clause because the application of the current revision did not enhance the defendant's punishment for his Florida convictions and did not punish him for conduct that was not criminal in Connecticut at the time he committed the Florida offenses. The Appellate Court further noted that application of the current revision merely enhanced his sentence for his current illegal conduct because it was considered more serious in light of his earlier offenses in Florida. The Appellate Court rejected the defendant's second claim seeking to overturn *Burns* and *Mattioli* on the basis that, as an intermediary appellate court, it is unable to overrule the decisions of the Supreme Court. The defendant was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the elements of the Florida offenses of which the defendant previously had been convicted were substantially the same as the elements of General Statutes § 14-227a (a) for enhancement purposes under § 14-227a (g) (3).

LINDA YOFFE SOLON *v.* JOSEPH SLATER et al., SC 20597
Judicial District of Stamford-Norwalk at Stamford

Torts; Collateral Estoppel; Whether Plaintiff's Tort Claims Collaterally Estopped by Probate Court's Admission of Will; Whether Claims Barred by Res Judicata. The plaintiff, Linda Yoffe Solon, entered into a prenuptial agreement with Michael Solon, which provided that, in the event of his death, she would be given a life estate interest in his home in Stamford and his estate would be responsible for paying the expenses associated with the home. Six months after they were married, Michael was diagnosed with terminal cancer. He then executed a will prepared by his attorney and longtime friend, defendant Joseph Slater. The plaintiff claims that she and Michael

discussed amending the prenuptial agreement to provide that certain of his assets would be transferred to her at the time of his death and that Michael memorialized the intended changes in a handwritten note the day after he signed the will. The prenuptial agreement was, however, never amended. Michael later executed another will prepared by a different attorney, which did not reflect any modifications to the prenuptial agreement and instead left his residuary estate to a trust benefitting his two adult children from a prior marriage, including defendant Joshua Solon (the 2014 will). Following Michael's death, attorney Slater applied to the Probate Court for admission of the 2014 will. The plaintiff objected, claiming that, at the time of execution, Michael lacked testamentary capacity and was under the undue influence of the defendants. The Probate Court found that there was insufficient evidence to support the plaintiff's claims and admitted the will. The plaintiff then filed the present action, in which she claimed that the defendants tortiously interfered with contractual relations regarding the prenuptial agreement and with her right of inheritance from Michael's estate. The trial court rendered summary judgment in favor of the defendants on the ground that the claims were barred by collateral estoppel. The Appellate Court affirmed (204 Conn. App. 647), holding that the trial court properly found that the claims were barred by collateral estoppel because they presented issues identical to those actually litigated and necessarily determined by the Probate Court. The Appellate Court noted that (1) following a full evidentiary hearing, the Probate Court admitted the 2014 will over the plaintiff's objection because it determined that there was insufficient evidence to show that the disposition of the estate was the result of undue influence; (2) the claims raised by the plaintiff in the trial court relied on the same factual predicate offered in support of her undue influence claim in the Probate Court, namely, whether the defendants' alleged conduct rose to a level of impropriety sufficient to support a finding of tortious conduct; and (3) because the plaintiff did not appeal from the Probate Court decree, it was considered a final judgment for the purposes of collateral estoppel. The plaintiff filed a petition for certification to appeal, which the Supreme Court granted as to the issue of whether the Appellate Court properly upheld the trial court's finding that her claims are barred by collateral estoppel. The defendants claim as an alternative ground for affirmance that the plaintiff's claims are barred by the doctrine of res judicata.

STATE *v.* ONAJE RODNEY SMITH, SC 20600
Judicial District of Stamford-Norwalk at Stamford

Criminal; Search and Seizure; Whether Trial Court Should Have Granted Defendant's Motion to Suppress Evidence of Cell Phone Contents and Cell Site Location Information as Not Supported by Probable Cause, Lacking in Particularity, and Overbroad. The defendant was charged under five criminal docket numbers of multiple crimes in connection with a car arson and several robberies and shootings in Stamford and Norwalk in January 2017. The Bridgeport police seized the defendant's cell phone from him incident to his arrest on January 25, 2017, and turned it over to the Stamford police for their investigation of a shooting for which the defendant was later charged with attempted murder and conspiracy to commit murder. On February 16, 2017, the trial court signed a search warrant for the extraction of the entire contents of the defendant's cell phone. On September 19, 2018, the trial court signed a search warrant for service provider records pertaining to the defendant's cell phone for the time period between January 7, 2017, and January 25, 2017. The evidence obtained from the cell phone extraction and the service provider records included text messages in which the defendant discussed the crimes with a codefendant and location information that placed the defendant in the area of the crimes. The defendant filed a Motion to Suppress Cell Phone Extraction and Cell Site Location Information (CSLI) on December 19, 2018, and argued that the search warrants issued to obtain the extraction data and the CSLI were not supported by probable cause and were not sufficiently particular for purposes of his fourth amendment rights. After a hearing, the trial court denied the motion. It found that the February 16, 2017 warrant "was as specific as it could be" and that the September 19, 2018 warrant was "specific as to the phone, phone number, dates, as I mentioned and the contents to be searched." The trial court also concluded that both warrants were supported by probable cause in light of the underlying affidavits, which described the incidents that gave rise to the defendant's charges and the defendant's involvement therewith. The defendant was tried before a jury, which found him guilty as charged, and he was sentenced to thirty-five years of incarceration and ten years of special parole. He filed an appeal from his conviction to the Appellate Court, and the Supreme Court transferred the appeal to its docket thereafter. The defendant makes two claims, both of which pertain to his motion to suppress. His first claim is that the trial court should have granted the motion to suppress as to the February 16, 2017 warrant pertaining to the contents of his cell phone because the warrant was not supported

by probable cause, did not particularly describe the places to be searched and the things to be seized, and was overbroad. He makes the same arguments in his second claim in the context of the September 19, 2018 warrant pertaining to the CSLI.

HARTFORD FIRE INSURANCE COMPANY *v.* MODA LLC, et al., SC 20678

Complex Litigation Docket, Judicial District of Waterbury

Insurance; Declaratory Judgment; Whether Trial Court Erred in Holding Virus Exclusions Bar Coverage for Losses; Whether Trial Court Erred in Finding That Insured's Losses Resulting from COVID-19 Pandemic Did Not Constitute "Direct Physical Loss or Direct Physical Damage" to Property Under "All Risk Policy"; Whether Trial Court Erred in Applying New York Law to Marine Policy. The plaintiff insurance company brought this action seeking a declaratory judgment that it has no obligation under two policies it issued to the defendants, related companies that design and sell footwear, to cover claimed losses they sustained due to government orders issued to limit or close businesses to prevent the spread of COVID-19. One of the policies covered the defendants' physical locations (the package policy), and the other covered its inventory while in transit and storage (the marine policy). The defendants filed counterclaims alleging breach of contract, breach of the implied covenant of good faith and fair dealing and violations of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. (CUTPA), based on violations of the Connecticut Unfair Insurance Practices Act, General Statutes § 38a-815 et seq. (CUIPA). The plaintiff filed a motion for summary judgment, both on its claim for declaratory relief and the defendants' counterclaims. The trial court rendered summary judgment in favor of the plaintiff on all of the defendants' counterclaims. In so doing, the trial court concluded that coverage under the package policy was barred by two virus exclusions found in that policy. The first exclusion, which applied to New York related losses, provides in pertinent part: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism . . . ." The second exclusion, which applies to non-New York related losses, provides in pertinent part: "We will not pay for loss or damage caused directly or indirectly by any of the following. . . . Presence, growth, proliferation, spread or any activity of 'fungus,' wet ret, dry rot, bacteria or virus." With respect to the marine policy, the trial court concluded that the words "risk of direct physical loss or direct physical damage"

contained in the policy language limited the plaintiff's coverage obligations to physical damage to the property itself, such that the defendants' claim that they were entitled to coverage based on loss of access to their property and the fact that their inventory became outdated or diminished in value was insufficient to trigger coverage. The trial court also rendered judgment in favor of the plaintiff on its complaint based upon its conclusion that neither policy covered the defendants' losses. The defendants filed this appeal in the Appellate Court, and the Supreme Court thereafter transferred the appeal to itself. On appeal, the defendants claim, inter alia, that the trial court erred (1) in concluding that the virus exclusions barred coverage for the defendants' losses, (2) in applying New York law rather than federal maritime law to the marine policy, (3) in concluding that the defendants were not entitled to coverage under the marine policy because "risk of direct physical loss or direct physical damage" to property did not include loss of intended use of property and property becoming unmerchantable, and (4) in holding that coverage was not available under the marine policy's "Ocean Cargo Form" without first establishing direct physical loss or damage to their property.

DAVID GRANT *v.* COMMISSIONER OF CORRECTION, SC 20679
Judicial District of Tolland at G.A. 19

Habeas; Sixth Amendment Right to Autonomy; Ineffective Assistance of Counsel; Whether Petitioner's Right to Autonomy Was Violated by Defense Counsel's Concession of Guilt as to Lesser Included Offense; Whether Defense Counsel Rendered Ineffective Assistance by Conceding Guilt as to Lesser Included Offense. After a fatal shooting at a restaurant, the petitioner was charged with murder, among other offenses. During pretrial negotiations, the petitioner rejected an offer by the state to plead guilty to first-degree manslaughter and instead asserted a claim of self-defense and proceeded to trial. During closing arguments, the petitioner's trial counsel asserted that the petitioner had acted recklessly in discharging his firearm but had been drunk and scared and never intended to kill anyone. Counsel further argued that the evidence "goes towards either [the petitioner] . . . defending himself or to manslaughter charges . . . not murder charges." The jury was instructed on both intentional and reckless first-degree manslaughter with a firearm, as well as second-degree reckless manslaughter with a firearm. The petitioner was convicted, inter alia, of intentional first-degree manslaughter with a firearm; the conviction was affirmed on direct appeal. The petitioner

then commenced the present habeas corpus action. The petitioner alleged that his criminal trial counsel violated his constitutional right to personal autonomy by conceding, without his consent, that he had acted recklessly and was guilty of manslaughter. The petitioner claimed that such concession constituted structural error requiring automatic reversal of his conviction pursuant to *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018), which held that it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection. The petitioner also asserted a claim of ineffective assistance of counsel based on the same underlying conduct. The habeas court held that *McCoy* did not apply to the present case because (1) the petitioner had not vociferously objected to his counsel's proposed concession and (2), to the extent defense counsel made any concession of guilt, it was to the lesser included offense of manslaughter and not to the charged offense of murder. The court further held that such concession constituted sound trial strategy and that, given the strength of the state's case, there was no prejudice. Accordingly, the court rendered judgment denying the petition. The petitioner appealed to the Appellate Court, and the Supreme Court subsequently transferred the appeal to itself. On appeal, the petitioner claims that the habeas court improperly rejected his client autonomy claim. He argues that, because his counsel did not adequately inform him of his counsel's intention to concede recklessness and did not explain how such concession would affect his self-defense claim, it was not possible for him to vociferously object to the planned concession. He further argues that, under such circumstances, his prior rejection of the state's plea offer and insistence on maintaining a self-defense claim should be deemed an adequate objection for purposes of *McCoy*. Alternatively, the petitioner contends that the Supreme Court should exercise its supervisory powers to require defense counsel to obtain a defendant's written consent before conceding guilt and should apply this rule in the present case to reverse the habeas court's judgment. Finally, the petitioner claims that the habeas court improperly rejected his claim of ineffective assistance of counsel.

The following appeal is pending on the Supreme Court's docket and is in the process of being briefed.

MARIE FAIN *v.* BETHANY BENAK et al., SC 20629
Judicial District of New London

Negligence; Unavoidable Accident; Whether Unavoidable Accident Doctrine Applied to Preclude Finding of Negligence

Where Defendant Allegedly Had Lost Control of Her Vehicle due to Unexpected Tire Blowout. The plaintiff and the defendant Bethany Benak were driving in opposite directions on the same road when Benak's vehicle crossed into the plaintiff's lane, the southbound lane, and struck the plaintiff's vehicle. Just prior to the collision, Benak heard a popping sound, and her vehicle pulled to the left, toward the southbound lane. It was later discovered that there was a tear in Benak's front left tire, which appeared to have blown out. At the time the tire burst, Benak did not know the speed at which she was traveling, whether she had applied her vehicle's brakes, or how far she was from the plaintiff's vehicle. The plaintiff subsequently commenced the present action against the defendant Department of Administrative Services (defendant), alleging that Benak was negligent and claiming that the defendant, as Benak's employer and the owner of the vehicle that Benak had been operating, was liable for the plaintiff's damages pursuant to General Statutes § 52-556. In her operative complaint, the plaintiff alleged that Benak was negligent in a number of ways, almost all of which relate to Benak's actions after her tire blew out, including failing to remain in her lane, failing to brake, and general inattentiveness while driving. After a bench trial, the defendant submitted a posttrial brief arguing, inter alia, that the tire blowout was unforeseeable and that, therefore, a finding of negligence was precluded by the "unavoidable accident" doctrine as recognized by our Supreme Court in *Shea* v. *Tousignant*, 172 Conn. 54 (1976), which held that liability cannot be imposed on the operator of a vehicle who has a sudden medical emergency resulting in the loss of control of the vehicle. In its memorandum of decision, the trial court determined that the plaintiff proved that Benak had "negligently operated her vehicle and caused the collision with the plaintiff's vehicle in one or more of the ways set forth in the operative complaint." The court therefore declined to apply the unavoidable accident doctrine to the facts of the case. The court further noted that there was "no claim that Benak [had] experienced a sudden medical emergency which prevented her [from] maintain[ing] control of the vehicle," and it declined to extend "by analogy . . . the doctrine to a mechanical issue with the vehicle." Accordingly, the court rendered judgment in favor of the plaintiff. The defendant appealed, claiming that the unavoidable accident doctrine precluded a finding of negligence in the absence of proof that Benak had known of the impending blowout or had negligently caused it to occur. The Appellate Court (205 Conn. App. 734) affirmed the trial court's judgment. In rejecting the defendant's claim, the Appellate Court observed that "[t]he concept of unavoidable accident does not excuse a defend-

ant from liability," but, "[r]ather, it contextualizes the question of whether an actor has been negligent." The Appellate Court therefore concluded that, "because the [trial] court found that Benak was negligent, the accident cannot be considered unavoidable or inevitable as a matter of law." The defendant was granted certification to appeal, and the Supreme Court will decide if the Appellate Court correctly determined that the trial court had properly held that the unavoidable accident doctrine did not apply to the facts of this case.

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
Chief Staff Attorney
