

SUPREME COURT PENDING CASES

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

STATE *v.* ULISES ROBLES, SC 20452

Judicial District of Hartford

Criminal; Whether Confrontation Rights Violated by Testimony of Chief Medical Examiner Concerning Autopsy He Did Not Perform; Whether There Was Sufficient Evidence to Support Possession of Weapon in Vehicle Conviction. The defendant was convicted of manslaughter in the first degree with a firearm, criminal possession of a firearm and possession of a weapon in a vehicle for fatally shooting a woman as she sat in her car on a street in Hartford. The defendant appeals directly from his conviction to the Supreme Court under General Statutes § 51-199 (b) (3). On appeal, the defendant claims that the trial court violated his confrontation rights by allowing Chief Medical Examiner James Gill to testify as to an autopsy that he did not perform. Gill testified that the autopsy was performed by an associate medical examiner who no longer worked at his office but that he had the opportunity to review her report. Gill further testified that the autopsy determined that the victim died of a gunshot wound to the chest and that the condition of the skin around the entry wound suggested that the gun was shot at close range. The defendant also claims on appeal that there was insufficient evidence to support his conviction of possession of a weapon in a vehicle. Specifically, he argues that the state presented no evidence to establish the element of the crime that he lacked a permit for the gun that he possessed at the time of the crime. The trial court found that the element was satisfied because the defendant stipulated that he had felony convictions dating back to 2006, and, as a result, he would have been ineligible to obtain a pistol permit under the governing statutes and any permit that he may have had prior to his first felony conviction would have expired. The defendant argues that, in the absence of a request by the state, the trial court could not properly take judicial notice of those statutes and infer from them that he lacked a pistol permit on the date of the charged crimes because of his status as a convicted felon.

STATE OF CONNECTICUT *v.* DWAYNE SAYLES, SC 20575

Judicial District of New Haven

Criminal; Search and Seizure; Whether Data Stored on Cell Phone Constitutes Physical Evidence that Need Not Be Sup-

pressed if Seized as Result of *Miranda* Violation; Whether State Constitution Requires Suppression of Physical Evidence Seized as Result of Violation of State Constitutional Rights. During a robbery of a convenience store, the defendant shot and killed Sanjay Patel, a store employee. After the police conducted a search of the defendant's residence pursuant to a warrant, the defendant came to the police station, accompanied by his mother, and was interviewed by detectives. Before questioning began, the defendant was informed of his *Miranda* rights, at which point he invoked his rights to remain silent and to counsel. Before terminating the interview, Detective Christopher Perrone asked the defendant where his cell phone was located. The defendant responded that he had given it to his mother, who was waiting outside the interview room. Perrone obtained the cell phone from the defendant's mother and later secured a warrant for the data contained therein. The defendant was subsequently arrested and charged with felony murder, conspiracy to commit robbery, and two firearm offenses. Before trial, the defendant filed two motions to suppress the contents of his cell phone and any cellular data because of violations of both the federal and state constitutions. The trial court denied the motions to suppress, and the defendant was subsequently convicted on all counts. On appeal to the Appellate Court (202 Conn. App. 736), the defendant claimed, inter alia, that the evidence found in his cell phone had been obtained after the detectives violated his *Miranda* rights and his rights pursuant to article first, § 8, of the Connecticut constitution, and, therefore, should have been suppressed. He argued that the detectives violated his rights to remain silent and to have counsel present by continuing to question him regarding the location of his cell phone after he had invoked those rights and that, therefore, the contents of his phone constituted "fruit of the poisonous tree." As to the defendant's claim under the United States constitution, the Appellate Court concluded that, even if a *Miranda* violation had occurred, the cell phone and its contents were not subject to suppression under the fruit of the poisonous tree doctrine because, under *United States v. Patane*, 546 U.S. 630 (2004), and *State v. Mangual*, 311 Conn. 182 (2014), a violation of *Miranda* does not require the suppression of physical evidence resulting from that violation. The Appellate Court also rejected the defendant's claim that the state constitution affords greater protections than the federal constitution, noting that the defendant had failed to present a comprehensive analysis of this claim in his appellate brief. The Supreme Court granted the defendant's petition for certification to appeal and will decide whether the Appellate Court properly (1) upheld the trial court's denial of the

defendant's motion to suppress the contents of his cell phone in reliance on *Patane* and *Mangual*, when the seizure of those contents was the result of questioning after he had invoked his *Miranda* rights, on the basis that a cell phone and its stored data constitute "physical" (i.e., nontestimonial) evidence that need not be suppressed if seized as the result of a *Miranda* violation; and (2) rejected the defendant's claim that the holding in *Patane* does not comport with the broader protections against compelled self-incrimination afforded under the state constitution.

NATIONWIDE MUTUAL INS. CO. et al. v. JEFFREY PASIAK et al.,
SC 20617

Judicial District of Stamford-Norwalk

Insurance; Whether "Business Pursuits" Exclusion Barred Claim; Whether Trial Court Applied Proper Standard of Review; Whether Trial Court Properly Considered Public Policy Concerns in Deciding Whether Exclusion Applied. Sara Socci worked as a part-time office manager for Pasiak Construction Services, LLC, which was owned and operated by Jeffrey Pasiak. Socci had begun working alone in the company's office in Pasiak's home around 9:30 a.m. when a masked intruder tied, gagged and blindfolded her, pointed a gun at her head, and threatened to kill her family if she did not open Pasiak's safe. Pasiak arrived during the incident, and the intruder was revealed to be his friend, Richard Kotulsky. Initially, Pasiak refused to allow Socci to leave or to call the police due to both business and personal concerns. Pasiak took Socci to consult with Denise Taranto, a friend and business advisor, about how to handle the situation. Pasiak eventually allowed Socci to leave around 2:30 p.m., after being advised by Taranto that they should contact the police. Socci subsequently prevailed in an action against Pasiak in which she alleged false imprisonment. The plaintiff insurance companies (Nationwide) brought this action seeking a declaratory judgment that they had no duty to indemnify Pasiak under a personal umbrella policy above his homeowners' insurance policy for the damages awarded to Socci by operation of a "business pursuits" exclusion in the policy. The exclusion provides that "[e]xcess liability and additional coverages do not apply to . . . [a]n occurrence arising out of the business pursuits . . . of an insured." The trial court concluded that the exclusion did not apply, but the Appellate Court (161 Conn. App. 86) disagreed and reversed. The Supreme Court (327 Conn. 225) reversed the Appellate Court's decision, concluding that both lower courts misapplied the exclusion.

The Supreme Court explained that, for purposes of the exclusion, an occurrence arises out of a business pursuit where the occurrence is connected with, grows out of, flows from, or is incident to the business pursuit. The Supreme Court also determined that further factual findings would be necessary to determine whether the exclusion applies here and, accordingly, remanded the matter to the trial court for a trial de novo on that issue. On remand, the trial court found that Nationwide satisfied its burden of proving by a preponderance of the evidence that Socci's false imprisonment arose out of Pasiak's business pursuits such that the exclusion applied to bar his claim. Pasiak appealed to the Appellate Court, and the Supreme Court transferred the appeal to itself. On appeal, Pasiak claims that the trial court applied the wrong legal standard by failing to determine whether the policy clearly and unambiguously excludes Pasiak's claim. Pasiak further claims that the trial court improperly found that Nationwide satisfied its burden of proving that the exclusion applied where he argues that Nationwide failed to produce any new evidence as required by the remand order. Pasiak also claims that the trial court improperly relied on public policy grounds as further support for its conclusion that the exclusion applied to bar his claim. Pasiak additionally claims that the trial court improperly failed to consider statements given by Socci and Pasiak to the police on the day of the subject incident and that the trial court's conclusion that Kotulsky's actions constituted an attack on Pasiak's business is not supported by any evidence in the record.

STATE OF CONNECTICUT *v.* CONN. STATE UNIVERSITY
ORGANIZATION OF ADMINISTRATIVE FACULTY,
AFSCME, CO.4, LOCAL 2836, AFL-CIO, SC 20628
Judicial District of Hartford

Arbitration; Whether Trial Court Erred in Finding Arbitration Award Violated Public Policy; Whether Trial Court Improperly Substituted Its Findings of Facts for That of Arbitrator. This matter arises from the termination of Christopher Dukes (Dukes), Director of Student Conduct for Central Connecticut State University (CCSU), following a domestic disturbance incident. On the evening of April 24, 2018, the police responded to a 911 call from Dukes' wife claiming that he had threatened to kill her and himself. She further explained that she was concerned for the safety of her children who were still in the house with Dukes. A standoff ensued between Dukes and the police for several hours. During the standoff, Dukes disclosed that he had a gun and told the police not to breach his house. Dukes

eventually surrendered and was taken into custody. The plaintiff, State of Connecticut (State) and the defendant, Connecticut State University Organization of Administrative Faculty, AFSCME, Council 4, Local 2836, AFL-CIO (Union), are parties to a collective bargaining agreement (CBA) that provides for arbitration of grievances. Following this incident, CCSU sent Dukes a termination letter that stated, in pertinent part, “[y]our dismissal is for off-duty behavior on the night and early morning of April 24-25, 2018, which . . . created a hazardous situation, placing your spouse, children, police personnel, and yourself at risk for grave harm. The seriousness of the misconduct renders you unsuitable to discharge your professional responsibilities . . . and forms the just cause basis for your termination.” The Union filed a grievance challenging Dukes’ termination, claiming that the charges presented by CCSU lacked sufficient specificity and that CCSU had failed to prove just cause for the termination. The arbitrator found in favor of Dukes on the claim that CCSU had failed to prove just cause for the termination. As a result, the State was directed to restore Dukes to his former position, purge the discipline record from his personnel file and make him whole for the loss of pay and benefits that resulted from his termination. The State thereafter filed an application to vacate the arbitration award on the basis that the award violates public policy. The Union filed an application to confirm the award, asserting that the award was within the rights and powers agreed to by the parties in the CBA. The trial court found that the arbitration award violated well-defined and dominant public policies concerning the protection of children, preserving the peace, preventing interference with police personnel in the performance of their duties and endangering police officers and vacated the award. The Union filed this appeal in the Appellate Court, and the Supreme Court thereafter transferred the appeal to itself. On appeal, the Union claims that the trial court’s decision extends the public policy exception to the rule of deference to an arbitrator’s decision so far that it eliminates the very purpose of the rule. The Union further claims that the trial court substituted its own factual findings for those of the arbitrator. The Union also claims that there was no clear public policy implicated in this matter. Lastly, the Union claims that, even if there were dominant public policies implicated in this matter, the award does not violate any of those policies.

JOHN DRUMM, CHIEF OF POLICE, et al.*v.* FREEDOM OF
INFORMATION COMMISSION et al., SC 20656
Judicial District of New Britain

**Freedom of Information Act; Whether Trial Court Erred
in Adopting “Reasonable Probability” Standard in Determining**

That Requested Police Records Were Not Exempt From Disclosure Under General Statutes § 1-210 (b) (3) (D); Whether Trial Court Erred in Concluding That Substantial Evidence in Record Supported FOIC’s Findings. Barbara Beach Hamburg (“Hamburg”) was murdered outside her home in Madison, Connecticut, on March 3, 2010. Her murder remains unsolved. In October 2019, Anike Niemeyer submitted a request under the Freedom of Information Act (“FOIA”) to the Madison Police Department (“MPD”) on behalf of herself and Hamburg’s son, Madison Hamburg, seeking permission to inspect or obtain copies of the records the MPD had compiled during the course of its investigation of Hamburg’s murder. General Statutes § 1-210 (b) (3) (D) of the FOIA permits the police to refuse to disclose records that contain “information to be used in a prospective law enforcement action if prejudicial to such action.” The MPD denied the request, citing § 1-210 (b) (3) (D), and Niemeyer and Madison filed a complaint with the FOIC. After a hearing, the FOIC concluded that the requested records were not exempt from disclosure pursuant to § 1-210 (b) (3) (D) because the MPD failed to establish (1) that the requested records were “to be used in a prospective law enforcement action” and (2) that the disclosure of the requested records would be “prejudicial to such action.” The FOIC ordered the disclosure of the requested records, and the plaintiffs appealed to the trial court. That court concluded that, where a law enforcement agency claims exemption from disclosure under § 1-210 (b) (3) (D), it must establish that there is a “reasonable possibility” that a “prospective law enforcement action,” i.e., an arrest and prosecution, will occur, and noted that it was unclear whether the FOIC had used that standard in rendering its decision. The court, however, determined that the FOIC’s possible failure to apply the “reasonable possibility” standard constituted harmless error because substantial evidence in the record supported the FOIC’s finding that a “prospective law enforcement action” in the Hamburg case was speculative. The trial court accordingly affirmed the FOIC’s decision. The plaintiffs appealed to the Appellate Court, and the Supreme Court transferred the appeal to itself. The plaintiffs claim that it is fundamentally unfair to them for the trial court to adopt a new legal standard, i.e., the “reasonable probability” standard, and then retroactively apply it to the facts of this case to their detriment. They also challenge the court’s adoption of the “reasonable possibility” standard and claim that the appropriate standard for the disclosure exemption under § 1-210 (b) (3) (D) should be that a criminal action is “reasonably anticipated.” Alternatively, the plaintiffs contend that the trial court erred in not finding that they met the newly adopted standard. In

addition, they claim that the trial court erred in concluding that the substantial evidence in the record supported the FOIC's finding that a "prospective law enforcement action" was purely speculative. Finally, the plaintiffs claim that the trial court erred in not finding that the FOIC acted arbitrarily and capriciously in violation of General Statutes § 4-183 (j) of the UAPA when, in its decision, it required the plaintiffs to provide (a) evidence that an actual law enforcement action was pending and (b) multiple witnesses to testify about any prospective law enforcement action resulting from the murder investigation.

CONNECTICUT DERMATOLOGY GROUP, PC, et al. v. TWIN CITY
FIRE INS. CO., et al., SC 20695
Judicial District of Hartford

Insurance; Contract Construction; Whether Trial Court Erred in Concluding that Insureds' Claims for Business Income Losses Resulting from COVID-19 Pandemic Were Barred by Virus Exclusion Provision in All Risk Policies Covering Insureds' Real Property. The plaintiffs, operators of healthcare facilities in Connecticut, each had identical all-risk commercial insurance policies issued by the defendants. After the defendants denied coverage for losses incurred by the plaintiffs as a result of the COVID-19 pandemic, the plaintiffs brought the present action seeking a declaratory judgment and asserting claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of CUTPA/CUIPA. The defendants Twin City Fire Insurance Company and Sentinel Insurance Company Limited (insurers) moved for summary judgment on the plaintiffs' complaint, and the plaintiffs filed a cross motion for partial summary judgment. The plaintiffs argued that they were entitled to coverage under a provision in the policies that provided for payment for the loss of income resulting from the suspension of business operations if such suspension was caused by "direct physical loss of or physical damage to" the covered property. According to the plaintiffs, the suspension of and/or reduction in their business operations due to the effects of the pandemic amounted to a physical loss of the plaintiffs' business properties, and, therefore, they were entitled to recover for the resultant loss of income. The plaintiffs also argued that they were entitled to coverage under a provision in the policies permitting recovery of lost income when access to the covered property "is specifically prohibited by order of a civil authority as the direct result of a [c]overed [c]ause of [l]oss to property in the immediate area of" the covered property. The insurers countered that the plaintiffs

were not entitled to coverage because there was no physical loss to the properties and access to the properties was not specifically prohibited by a civil authority. They further argued that coverage for the plaintiffs' losses was excluded under a provision barring payment for loss or damage caused by the "[p]resence, growth, proliferation, spread or any activity of 'fungi,' wet rot, dry rot, bacteria or virus." The trial court granted the insurers' motion for summary judgment and denied the plaintiffs' cross motion, concluding that the virus exclusion provision clearly and unambiguously excluded the plaintiffs' claimed losses from coverage. The plaintiffs appealed to the Appellate Court, and the appeal was subsequently transferred to the Supreme Court. The plaintiffs claim on appeal that the trial court's grant of summary judgment in favor of the insurers was improper because the virus exclusion provision can reasonably be interpreted as only barring recovery for losses stemming from the actual, on-site presence of viral contamination and not losses attributable to a pandemic. The insurers counter that the plaintiffs' interpretation of the policy language is unreasonable. They further argue, as an alternative ground for affirmance, that pandemic-related business-interruption losses are not compensable because, under the plain language of the policies, loss of business income is recoverable only if caused by a tangible alteration to the property.

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*
