ROGERS, J., with whom DiPENTIMA and McLACHLAN, Js., join, dissenting. I respectfully disagree with the conclusion of the majority that the trial court's failure to canvass the defendant, Maurice Flanagan, pursuant to Practice Book § 44-3 was proper because the defendant did not clearly and unequivocally assert his right to self-representation. For the reasons more fully explained by Chief Judge Flynn in part I A of his dissent, I believe it is incongruous for this court to conclude that the defendant did not invoke that right effectively enough even though the trial court recognized, and ruled on, the defendant's request to represent himself for the remainder of the proceedings.[1] Regardless of whether the defendant's request, standing alone, may be characterized by an appellate tribunal reviewing a cold record as ambiguous or equivocal, the fact that the trial judge, who had the opportunity to observe and interact with the defendant firsthand over the course of several days, acknowledged and addressed that request compels the conclusion that the request was communicated adequately. Moreover, the defendant cannot be faulted for declining to pursue his request more vigorously after the trial court informed him, in response to his initial query, that he did not have the right to continue without counsel.[2]

Once the court recognized that the defendant was asserting the right to represent himself, the court, given the late stage of the proceedings, had the discretion to deny the request but acted improperly in doing so summarily and pursuant to an "exceptional circumstances" test. As explained by Chief Judge Flynn in part I B of his dissent, that test applies to untimely requests for new counsel and not to requests to proceed pro se. In the case of a defendant's request to represent himself after trial already has commenced, the proper inquiry is to conduct the balancing test developed in case law establishing the contours of the right to self-representation under the federal constitution. Stated succinctly, "[a]fter trial has begun, a trial court faced with [a request to proceed pro se] must balance the legitimate interests of the defendant in self-representation against the potential disruption of the proceedings already in progress. . . . In exercising this discretion, the appropriate criteria for a trial judge to consider are the defendant's reasons for the self-representation request, the quality of counsel representing the party, and the party's prior proclivity to substitute counsel."[3] (Citation omitted.) *Williams* v. *Bartlett*, 44 F.3d 95, 99–100 n.1 (2d Cir. 1994). If, after consideration of these factors, the court determines that the balance tips in favor of the defendant's interests in self-representation, it then should proceed to canvass the defendant in accordance with § 44-3 to ensure that the defendant's choice to proceed

without counsel has been made in a knowing and intelligent fashion.[4]

I part company with Chief Judge Flynn at part II of his dissent. In particular, I disagree that the portion of § 44-3 providing that a defendant shall be permitted to represent himself "at any stage of the proceedings" operates to eliminate considerations of timeliness from the court's assessment of whether a particular defendant should be permitted to proceed pro se. To interpret the rule in that manner amounts to holding that a rule of practice enlarges the substantive right of self-representation beyond its bounds as currently established by the text of the relevant constitutional provisions[5] and the cases interpreting them. I believe such an interpretation is untenable.

General Statutes § 51-14 (a) authorizes the judges of the Superior Court to promulgate rules "regulating pleading, practice and procedure in judicial proceedings" but provides further that "[s]uch rules shall not abridge, *enlarge* or modify *any substantive right* . . . ." (Emphasis added.) Our Supreme Court repeatedly has explained: "[T]he courts lack the power to promulgate rules governing substantive rights and remedies. . . . [T]he court rules themselves are expressly limited in scope to practice and procedure in the Superior Court; Practice Book § [1-1]; and do not purport to reach beyond such limits." (Citation omitted; internal quotation marks omitted.) *In re Samantha C.*, 268 Conn. 614, 639, 847 A.2d 883 (2004); see also *Pesino* v. *Atlantic Bank of New York*, 244 Conn. 85, 85 n.1, 709 A.2d 540 (1998); *State* v. *King*, 187 Conn. 292, 297, 445 A.2d 901 (1982). In regard to § 44-3 specifically, our Supreme Court has made clear that the rule "and the constitutional requirements for permitting a defendant to waive his right to counsel and, thereby, assert his constitutional right to represent himself, are synonymous." *State* v. *Wolff*, 237 Conn. 633, 653–54, 678 A.2d 1369 (1996); see also *State* v. *D'Antonio*, 274 Conn. 658, 710, 877 A.2d 696 (2005) ("the provisions of [§ 44-3] cannot be construed to require anything more than is constitutionally mandated" [internal quotation marks omitted]). Indeed, this court previously has been faulted for basing a "conclusion on the effect of [Practice Book] § 961 (3) [now § 44-3 (3)] solely as a mandatory rule of practice, *apart from its constitutional underpinnings* . . . ." (Emphasis added.) *State* v. *Wolff*, supra, 653–54.

Accordingly, we are obligated to interpret § 44-3 so as not to enlarge the right to self-representation, but rather to mirror its scope as established by the jurisprudence concerning that right. Because I am unaware of any controlling case law interpreting either our state or federal constitution to provide for a right of self-representation unfettered by any consideration of when it is asserted, I would conclude that the portion of § 44-3 allowing for exercise of the right *at any stage of the*

proceedings cannot be interpreted literally.[6] Instead, I would construe the rule consistently with the federal case law holding that the right, if asserted after the commencement of trial, "is sharply curtailed"; (internal quotation marks omitted) *Sapienza* v. *Vincent*, 534 F.2d 1007, 1010 (2d Cir. 1976); in other words, that timeliness is an appropriate consideration for a court in determining whether exercise of the right ought to be permitted. For the foregoing reasons, I respectfully dissent.

[1] In my view, the majority's characterization of the trial court as having made an "implicit" factual finding that the defendant's request was not clear and unequivocal is questionable. To the extent it may be assumed that the court made an implicit factual finding as to the clarity of the defendant's request, it is at least equally plausible to assume that the court found that request clear, given that the court issued a ruling in response. Indeed, the difficulty with "implicit" factual findings is that their content often is difficult to discern. I note that the court gave an *explicit* reason for denying the defendant's request, namely, that the requisite "exceptional circumstances" were lacking and not that the request was equivocal.

[2] On this point, I agree with Chief Judge Flynn that this case is not "particularly similar" to *United States* v. *Light*, 406 F.3d 995 (8th Cir. 2005), as the majority asserts. In *Light*, the United States District Court, in response to a defendant's question about the rule on self-representation, explained, inter alia, that the defendant had the option of proceeding pro se. Id., 999. In contrast, the court here, by stating, "In a word, no," indicated to the defendant that he did *not* have the option of self-representation. The majority characterizes this response as imprecise; I believe it is more aptly described as inaccurate.

[3] Apparently, this federal constitutional inquiry has yet to be adopted formally by Connecticut's appellate courts, and it also has not been endorsed explicitly by the United States Supreme Court. Our Supreme Court has acknowledged, however, that the United States Supreme Court, in deciding *Faretta* v. *California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), the case first recognizing the right to self-representation under the federal constitution, intimated that that right was not without limits. Specifically, our Supreme Court observed that the United States Supreme Court in *Faretta* "suggested three grounds for denying a defendant his right to self-representation: (1) he makes the request in untimely fashion such that granting it would disrupt the proceedings; id., 807; (2) the defendant engages in serious obstructionist misconduct; id., 834 n.46; and (3) the defendant has not knowingly and intelligently waived his right to counsel. Id., 835; see 2 W. LaFave & J. Israel, Criminal Procedure (1984) § 11.5 (d), pp. 47–49." (Internal quotation marks omitted.) *State* v. *Townsend*, 211 Conn. 215, 221 n.4, 558 A.2d 669 (1989). I note that the first two grounds correspond with aspects of the federal balancing test; the third ground is the proper focus of a § 44-3 inquiry.

[4] Conversely, if the court's discretionary assessment of the balancing test factors weighs against the defendant's interest in self-representation, the defendant's request should be denied. In this circumstance, a canvass pursuant to § 44-3 would be unnecessary.

[5] See U.S. Const., amend. VI; Conn. Const., art. I, § 8. Neither provision states that a right to self-representation applies at any stage of criminal proceedings.

[6] I emphasize that I do not intend in this matter to express any opinion as to the scope of the right to self-representation under the state constitution but merely to observe that no decision to date has construed that right as having no timeliness limitations. Although it is conceivable that in the future, the state constitutional right may be held to be broader than the federal one in regard to timeliness, § 44-3 cannot be read, at this time, as effectuating an aspect of the state constitutional right that has yet to be recognized.