EVELEIGH, J., with whom VERTEFEUILLE, J., joins, dissenting. I respectfully dissent. Although I agree with part II of the majority opinion, which concludes that the trial court's evidentiary rulings were proper, I disagree with part I of the opinion, in which the majority concludes that the defendant, Victor L. Jordan, "clearly and unequivocally asserted his right to represent himself, thereby triggering the trial court's responsibility to inquire further and to canvass him pursuant to Practice Book § 44-3 . . . ." I further disagree with the majority's position that our analysis in *State* v. *Flanagan*, 293 Conn. 406, 427, 978 A.2d 64 (2009), controls the present case, because there are important differences between the manner and context of the requests of the defendant in *Flanagan*, and the requests of the defendant in the present case. In my view, we must analyze any claim of a violation of the right to self-representation on the basis of all of the surrounding circumstances before making a determination that a defendant's statement was a clear and unequivocal request to exercise that right.

At the outset, I note that I agree with the facts as presented by the majority and recited by the Appellate Court. *State* v. *Jordan*, 118 Conn. App. 628, 629–32, 984 A.2d 1160 (2009). There is no need to repeat them herein. I will only reiterate certain facts as they pertain to the discussion. I also agree with the majority that a defendant certainly has a right, under the state and federal constitutions, to represent himself at his criminal trial. *State* v. *Carter*, 200 Conn. 607, 513 A.2d 47 (1986).[1] I further agree that, in order for the right to self-representation to be invoked, the defendant must do so in a "clear and unequivocal manner," and there is no independent requirement that the court make an inquiry to clear up any ambiguity. Id., 611–13. "The clear and unequivocal request formulation has been said to have developed primarily as a standard designed to minimize abuses by criminal defendants who might be inclined to manipulate the system. . . . If an unequivocal request were not required, convicted criminals would be given a ready tool with which to upset adverse verdicts after trials at which they had been represented by counsel." (Citation omitted; internal quotation marks omitted.) *State* v. *Gethers*, 197 Conn. 369, 377 n.8, 497 A.2d 408 (1985). In my view, this is precisely what happened in the present case.

The United States Court of Appeals for the Fourth Circuit has previously recognized the dilemma of the trial judge in these circumstances. In *United States* v. *Frazier-El*, 204 F.3d 553, 559–60 (4th Cir.), cert. denied, 531 U.S. 994, 121 S. Ct. 487, 148 L. Ed. 2d 459 (2000), that court stated: "A defendant who vacillates at trial

places the trial court in a difficult position because it must traverse . . . a thin line between improperly allowing the defendant to proceed pro se, thereby violating his right to counsel, and improperly having the defendant proceed with counsel, thereby violating his right to self-representation. . . . In ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a constitutional primacy to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right to self-representation. . . . The right of self-representation exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. . . . The right does not exist, however, to be used as a tactic for delay . . . for disruption . . . for distortion of the system . . . or for manipulation of the trial process . . . . A trial court must be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel." (Citations omitted; internal quotation marks omitted.)

The United States Court of Appeals for the Ninth Circuit has arrived at the same conclusion. "A defendant must make an explicit choice between exercising the right to counsel and the right to self-representation so that a court may be reasonably certain that the defendant wishes to represent himself." *United States* v. *Arlt*, 41 F.3d 516, 519 (9th Cir. 1994). "This requirement is necessary to prevent defendants from waiving their right to counsel either inadvertently or impulsively, and also to prevent them from manipulating the mutually exclusive rights to counsel and self-representation." *United States* v. *Hernandez*, 203 F.3d 614, 621 (9th Cir. 2000), overruled on other grounds by *United States* v. *Ferguson*, 560 F.3d 1060 (9th Cir. 2009).

The record before us in the present case reveals that the defendant's purported request was equivocal for three reasons. First, the request was merely an alternative form of relief for his request seeking a speedy trial. Second, the requested relief was for new counsel or self-representation with standby counsel, not to proceed pro se. Third, the trial court learned that the defendant was merely "willing" to self-represent if necessary to receive a speedy trial. The record shows that the trial court determined that it could provide a speedy trial without dismissing the defendant's counsel, and that any other form of relief was rendered unnecessary as a result.

I agree with the Appellate Court that Practice Book § 44-3[2] was implemented to ensure that a defendant's request to represent himself is actually voluntary, willing and intelligent by requiring the court to conduct an inquiry into the defendant's awareness of the consequences of his request before allowing a defendant to

represent himself. "The requirement that a court canvass a defendant is not triggered, however, until it has been established that the defendant clearly and unequivocally requested to represent himself. . . . The first piece of the analysis, therefore, is whether the defendant's request to represent himself was clear and unequivocal." (Citation omitted; internal quotation marks omitted.) *State* v. *Jordan*, supra, 118 Conn. App. 633. Even where a clear and unequivocal request is found, however, I do not believe that the canvass requirement is inviolate, where the defendant has previously been canvassed and allowed to represent himself.

On March 15, 2005, the defendant had a public defender appointed to represent him in the present case. Thus, his constitutional right to counsel was preserved at the outset. On November 2, 2005, the defendant and David Abbamonte, his public defender, were in court to address discovery motions. During the discussion on the motions, the defendant began speaking. The trial court, *Fasano*, *J.*, who was considering the motions at the time, then stated: "I'm not going to be talking to both of you at the same time. If your intention is to go pro se, just indicate that to the court because that is a matter that requires you to be canvassed. And I would ask you a number of questions to make sure it's appropriate under the circumstances, that you're capable of carrying on your own defense, in which case counsel would no longer be the spokesperson, you would be the spokesperson." That court then canvassed the defendant and allowed him to represent himself with Abbamonte as standby counsel. On November 15, 2005, the defendant filed a pro se appearance. Thus, at that time, the defendant was allowed to exercise his constitutional right to represent himself. In fact, on November 23, 2005, the defendant, representing himself, argued more discovery motions. He also appeared in court, again representing himself, and argued motions on December 14, 2005, and May 31, 2006. Unfortunately, during the pendency of the proceedings, Abbamonte passed away. On May 22, 2006, the defendant again enforced his constitutional right to self-representation and filed another pro se appearance. On May 31, 2006, William Schipul was appointed standby counsel. Thereafter, during the course of the proceedings on that date, Schipul was appointed as regular counsel. Therefore, the defendant was again afforded his constitutional right to counsel. On December 13, 2006, the defendant moved for a speedy trial.

Subsequently, on January 23, 2007, the defendant personally filed a motion to dismiss counsel. The defendant's motion to dismiss counsel reads in relevant part: "The defendant respectfully moves this [c]ourt to grant this motion to remove [Schipul] from the above entitled case. (1) The defendant believes a conflict of interest has arisen; [Schipul] represented a co-defendant of the

defendant in a prior case, [wherein] the co-defendant was advised by [Schipul who] was biased to the defendant at the time . . . . (2) Counsel has failed to perform his responsibilities that are unequivocally stated in both the American Bar Association and the Connecticut Bar Association [s]tandard of profession[al] ethics governing the conduct of attorneys. (3) Counsel has failed to retain the assistance of forensic experts required for the above entitled case. (4) Also the defendant has filed a speedy trial motion on December 7, 2006, and expects to be tried in the appropriate time mandated. Counsel has informed [the] defendant that his services are required else[where], therefore making him unavailable to the defendant for his pending trial. I conclude that the court should either dismiss [Schipul] as [the] defendant's counsel and allow [the] defendant to file pro se [Practice Book § 44-3] or appoint a special public defender as counsel or standby counsel [Practice Book § 44-4]."[3]

Schipul asked the court to grant the motion to dismiss counsel at the hearing on January, 24, 2007, although not for the reasons given by the defendant. At the hearing, there was a discussion about the defendant's motion for a speedy trial. The court, *Commerford, J.*, asked the defendant how Schipul was going to represent him in his trial while he was presently on trial in another case. The defendant then informed the court: "Then [Schipul] could step down. And I also made clear to you, Your Honor, that day I would handle my case pro se, which *I'm willing to do under the circumstances at this moment and time*. I have the file. I'd file probably a couple of more motions, a costs and waive fees which I filed with [Judge Fasano], which he denied without prejudice until I find an expert witness I was trying to obtain for the past year and a half. And I informed my counsel, [Abbamonte and Schipul], to turn over to the state's attorney a witness list, et cetera. . . . So *I'm willing to handle my case, and have this case brought to trial*." (Emphasis added.) The court then proceeded to review each reason presented in the motion to dismiss counsel and eventually denied the motion. That court carefully reviewed the entire history of both the case and the defendant's representation in this matter before denying the motion. It issued a ruling after it was determined that the case could start in a few weeks, and also indicated that it had heard no substantive reason to grant the motion. No appeal was taken from the denial of the motion to dismiss counsel. On February 6, 2007, jury selection commenced before the trial court, *Blue, J.* Thus, the defendant's request for a speedy trial was, in fact, honored within the statutory time period.[4]

I recognize that, "[t]o invoke his [s]ixth [a]mendment right [to self-representation] . . . a defendant does not need to recite some talismanic formula hoping to open the eyes and ears of the court to his request. Insofar as

the desire to proceed pro se is concerned, [a defendant] must do no more than state his request, either orally or in writing, unambiguously to the court so that no reasonable person can say that the request was not made." (Citation omitted; internal quotation marks omitted.) *State* v. *Flanagan*, supra, 293 Conn. 423–24. As we have observed previously, "[t]he right to counsel and the right to self-representation present mutually exclusive alternatives. A criminal defendant has a constitutionally protected interest in each, but since the two rights cannot be exercised simultaneously, a defendant must choose between them. When the right to have competent counsel ceases as the result of a sufficient waiver, the right of self-representation begins. . . . Put another way, a defendant properly exercises his right to self-representation by knowingly and intelligently waiving his right to representation by counsel . . . . When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must knowingly and intelligently [forgo] those relinquished benefits." (Internal quotation marks omitted.) *State* v. *Connor*, 292 Conn. 483, 508, 973 A.2d 627 (2009).

I agree with the Appellate Court that "[t]he defendant did not clearly choose the right to represent himself over the right to be represented by counsel. Rather, he requested, in his motion to dismiss counsel, that he either be permitted to represent himself or be appointed new counsel or standby counsel. Though the defendant stated that he was willing to represent himself, his motion filed with the court suggests that he was open to various forms of representation. In essence, the defendant was attempting to exercise the right to counsel and the right to self-representation simultaneously. Precedent instructs us that absent evidence that the defendant has made a clear choice between the two rights, a court cannot determine that the defendant clearly and unequivocally has requested to represent himself. . . . We, therefore, conclude that the defendant did not clearly and unequivocally request self-representation." (Citation omitted.) *State* v. *Jordan*, supra, 118 Conn. App. 635.

I further note that the defendant indicated that he was "willing" to represent himself under these circumstances, but did not express an unequivocal preference to do so. My reading of the phrase "these circumstances" is that the defendant would represent himself if the court determined that self-representation would be necessary to permit the desired speedy trial. The transcript suggests that the trial court concluded that this was certainly not a realistic request because, first, the defendant wanted to file additional motions and continue looking for a forensic expert, and second, Schipul was prepared to represent the defendant in a trial to commence within two weeks. Additionally, after

the adverse ruling on the motion to dismiss counsel, the defendant's request was not pursued. I understand that, under certain circumstances, the fact that a defendant did not renew his request to represent himself, where it is reasonable for a defendant to believe that a further request would be futile, obviates any such requirement that the defendant renew his request to represent himself. *United States* v. *Hernandez*, supra, 203 F.3d 622. In the present case, however, I suggest that the request was not renewed because the defendant understood that he would receive a trial in a few weeks and the continued representation by Schipul would not, as he feared, delay his trial. The relief requested in the motion was simply unnecessary given the defendant's satisfied desire for a speedy trial. Further, the relief requested was suggested in an either/or form that demonstrated a preference for representation. The defendant's request for replacement counsel was not couched in terms of willingness, while the alternative relief was so presented. Accordingly, the defendant's willingness to represent himself was, in my view, contingent on the trial court providing a speedy trial only upon the defendant's willingness to represent himself. I conclude that the purported request to exercise his right of self-representation was not clear and unequivocal and, further, that the trial court did not need to consider either form of relief requested given that the defendant's request for a speedy trial was granted without the need for him to dismiss his present counsel. I would, accordingly, affirm the judgment of the Appellate Court.

I further disagree with what is, in my view, an extension by the majority of the rule stated in *State* v. *Flanagan*, supra, 293 Conn. 427. In *Flanagan*, we held that the defendant therein had made an unequivocal request to represent himself during the course of a trial and, therefore, the trial court must consider: "(1) the defendant's reasons for the self-representation request; (2) the quality of the defendant's counsel; and (3) the defendant's prior proclivity to substitute counsel. If, after a thorough consideration of these factors, the trial court determines, in its discretion, that the balance weighs in favor of the defendant's interest in self-representation, the court must then proceed to canvass the defendant in accordance with Practice Book § 44-3 to ensure that the defendant's choice to proceed pro se has been made in a knowing and intelligent fashion." Id., 433. We emphasized that the trial court, in response to the defendant's inquiry concerning "the right to finish this case [himself] without [his attorney] there," had stated: "if you're making a request of me that you be allowed to represent yourself or that you be allowed to retain or have a new counsel appointed for you, that request is denied." (Internal quotation marks omitted.) Id., 412–13.[5] We rejected the state's claim that, because the trial court mentioned the possibility of alternate rulings, the request was equivocal. Id., 427. As the United States

Court of Appeals for the Second Circuit has noted, "[t]o the extent one may view [a request] as conditional . . . a defendant is not deemed to have equivocated in his desire for self-representation merely because he expresses that view in the alternative, simultaneously requests the appointment of new counsel, or uses it as a threat to obtain private counsel." *Williams* v. *Bartlett*, 44 F.3d 95, 100 (2d Cir. 1994); see also *United States* v. *Hernandez*, supra, 203 F.3d 622. Today, this court extends the language in *Flanagan*, which I consider to be pure dicta, to this case, which clearly does involve a different request made in the alternative. In *Flanagan*, the defendant never made a request that was granted, as in the present matter, for a speedy trial. The trial court in the present matter determined that the defendant's motion to dismiss present counsel and represent himself or to have counsel appointed was motivated by a desire for a speedy trial—a desire that was satisfied without resort to dismissing present counsel. In *Flanagan*, the defendant's midtrial request to dismiss counsel and to represent himself was motivated by disagreement with counsel's trial strategy to forgo presenting a defense. *State* v. *Flanagan*, supra, 412. The circumstances would be analogous only if the trial court had first determined that it could compel defense counsel to honor the defendant's desire to present a defense. Of course, the court could not make such an order.

In addition, there was no alternative to the current representation presented *by the defendant* to the trial court in *Flanagan* other than self-representation. Rather, it was the trial court that introduced the possibility of alternative ruling, not, as in the present matter, the defendant. Therefore, in my view, any scenario suggesting that the court in *Flanagan* overturned our holding in *State* v. *Connor*, supra, 292 Conn. 508, that a *defendant* must make an unequivocal choice to exercise his right of self-representation rather than his right to counsel, and any discussion commenting on the same, is pure dicta.

Further, I should note that both *Bartlett* and *Hernandez*, cited in support of our reasoning in *Flanagan*, involved situations wherein one of the alternative requests had previously been denied, where there was not a single request in the alternative, and where the requests were not couched as relief for a purported problem already addressed by the court to the defendant's satisfaction. In *Bartlett*, the defendant's request to represent himself during the course of trial was denied; *Williams* v. *Bartlett*, supra, 44 F.3d 98; and in *Hernandez*, the defendant's pretrial request for new counsel was denied, at which point the defendant requested that he be allowed to represent himself. *United States* v. *Hernandez*, supra, 203 F.3d 617–18. In my view, the pretrial request in the present matter—to dismiss counsel to permit a speedy trial and therefore to appoint new counsel or accept the defendant's will-

ingness to represent himself—is inherently ambiguous and plainly distinguishable from the requests in *Bartlett*, *Hernandez* and *Flanagan*. Today's majority opinion places the trial court in the untenable position of having to choose between two competing constitutional rights for the defendant, where either choice could be attacked on appeal, even after the basis for the assertion of the rights has been resolved in the defendant's favor. Although, as the majority states, "the defendant did not seek to delay the proceedings but, rather, to expedite them," in my view, his fluctuation between self-representation and representation by counsel suggests a potential tactical decision to inject the issue, which we currently consider, into the trial. This fact may be especially true when the defendant had previously filed a motion to dismiss prior counsel, which contained wording similar to the motion that the majority now considers.

Finally, in one of the cases we cited for the rule in *Flanagan*, the Second Circuit further noted: "Of course, when a defendant changes his mind after trial begins, or does so repeatedly at any stage, a court may find that the conduct is manipulative or abusive in some other way. If so, the conduct can be considered vacillation, and a trial judge may find the request equivocal." *Williams* v. *Bartlett*, supra, 44 F.3d 101. It is undisputed that the defendant in the present matter had repeatedly exercised his sixth amendment rights—first to counsel, then to self-representation, and later again to counsel. Accordingly, the defendant's conduct in filing the motion to dismiss counsel could have been considered vacillation, and the trial court properly could have found the request equivocal. Therefore, in my view, the request for counsel was not clear and unequivocal. I would affirm the judgment of the Appellate Court.

Accordingly, I respectfully dissent.

[1] Although the defendant also refers in his brief to the right to self-representation afforded under our state constitution, he has not provided any independent analysis concerning whether the protections under article first, § 8, of our state constitution are greater than those afforded under the federal constitution. In *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992), we set forth six elements that should be considered in examining state constitutional claims: (1) the text of the state constitutional provision; (2) holdings and dicta of this court and the Appellate Court; (3) federal precedent; (4) sister state decisions; (5) the history of the provision, including the historical constitutional setting and the debates of the framers; and (6) economic and sociological considerations. We have consistently emphasized that "we expect counsel to employ [the *Geisler* analysis] [i]n order to [allow us to] construe the contours of our state constitution and [to] reach reasoned and principled results . . . ." (Internal quotation marks omitted.) *State* v. *Joyce*, 229 Conn. 10, 16 n.7, 639 A.2d 1007 (1994). When a party fails to analyze these factors separately and distinctly, "[w]e have made clear that . . . we are not bound to review the state constitutional claim." Id., 16. Accordingly, I limit my review to the defendant's right to self-representation under the sixth amendment to the federal constitution. See, e.g., *State* v. *Flanagan*, supra, 293 Conn. 409 n.3; *State* v. *Colon*, 272 Conn. 106, 154 n.26, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005).

[2] Practice Book § 44-3 provides: "A defendant shall be permitted to waive the right to counsel and shall be permitted to represent himself or herself at any stage of the proceedings, either prior to or following the appointment

of counsel. A waiver will be accepted only after the judicial authority makes a thorough inquiry and is satisfied that the defendant:

"(1) Has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when so entitled;

"(2) Possesses the intelligence and capacity to appreciate the consequences of the decision to represent oneself;

"(3) Comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case; and

"(4) Has been made aware of the dangers and disadvantages of self-representation."

[3] I note that on June 30, 2005, the defendant had moved to dismiss Abbamonte for similar reasons. He had stated in the previous motion that there was a conflict of interest, that Abbamonte had failed to live up to the professional standards of the American Bar Association and the Connecticut Bar Association, and that he had refused to pursue a bail reduction hearing and to allow the defendant to aid in his own defense. There was no ruling on that particular motion.

[4] In the present matter, the defendant, represented by counsel throughout the trial, was ultimately found guilty of reckless endangerment in the first degree. The jury was deadlocked on the more serious charges of manslaughter in the first degree and misconduct with a motor vehicle, and a mistrial was declared on those charges.

[5] The entire exchange between the trial court and the defendant in *Flanagan* was as follows:

"[The Defendant]: Excuse me, Your Honor. Don't I have the right to finish this case myself without [the attorney] there?

"The Court: In a word, no. But are you making that request to represent yourself in the remainder of the case?

"[The Defendant]: I mean, if he's not going to do what I feel is in my best interest, I don't think that he should be my attorney. I mean, this is my life. Like I explained to him, when this is over, if I lose, he just goes on to another case. I'm the one who has to go to jail. And he's not doing what I feel is in my best interest. He's doing what he feels is in his best interest, not mine. So, I don't understand how his interest comes before my interest." (Internal quotation marks omitted.) *State* v. *Flanagan*, supra, 293 Conn. 412.

The court then suggested that if the request is to be self-represented, that request was denied. If the request was for a new attorney, that request was denied. The only question, however, that the defendant asked, was: "Don't I have the right to finish this case myself without [the attorney] there?" (Internal quotation marks omitted.) Id.