# IN RE ANNESSA J.*
## (SC 20614)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

*Syllabus*

Pursuant to statute (§ 46b-121 (b) (1)), "[i]n juvenile matters, the Superior Court shall have the authority to make and enforce such orders directed to parents . . . as the court deems necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child subject to the court's jurisdiction or otherwise committed to or in the custody of the Commissioner of Children and Families."

Pursuant further to this court's decision in *In re Ava W.* (336 Conn. 545), a trial court has the authority to consider, at the time it determines whether to terminate a parent's parental rights, the parent's motion for posttermination visitation with the parent's child or children, and this

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

Furthermore, in accordance with our policies of protecting the privacy interests of victims of family violence or sexual assault, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

authority originates from the trial court's authority to make and enforce orders pursuant to § 46b-121 (b) (1).

The petitioner, the Commissioner of Children and Families, sought to terminate the respondents' parental rights with respect to their minor child, A. Because of the COVID-19 pandemic, the trial on the termination petition was held remotely via Microsoft Teams. During that trial, the respondents filed motions seeking visitation with A in the event the trial court terminated their parental rights. At the conclusion of the trial, the trial court rendered judgment terminating the respondents' parental rights and denied the respondents' motions for posttermination visitation. In ruling on the respondents' motions, the trial court determined that the best interest of the child standard was not the correct standard under § 46b-121 (b) (1) and that posttermination visitation was not required for A's well-being, welfare, protection, proper care or suitable support. The respondents appealed to the Appellate Court, which upheld the trial court's termination of the respondents' parental rights but reversed the trial court's denial of the respondents' motions for posttermination visitation. The Appellate Court concluded that the trial court had failed to apply the correct standard under § 46b-121 (b) (1) and this court's holding in *In re Ava W.* when it ruled on the respondents' motions for posttermination visitation. Specifically, the Appellate Court determined that this court's decision in *In re Ava W.* did not purport to reject the best interest of the child standard and that the trial court had failed to consider whether posttermination visitation was necessary or appropriate to secure the welfare, protection, proper care and suitable support of A, taking into account, inter alia, the traditional best interest analysis. On the granting of certification, the respondent mother appealed and the petitioner cross appealed to this court. *Held*:

1. The respondent mother's unpreserved state and federal constitutional claims relating to the virtual nature of the termination of parental rights trial were unavailing, and, accordingly, this court upheld the Appellate Court's judgment insofar as it affirmed the trial court's judgment terminating the respondents' parental rights:

   a. The Appellate Court correctly concluded that the respondent mother had failed to establish that she had a fundamental right under article first, § 10, and article fifth, § 1, of the Connecticut constitution to an in person courtroom trial on the petition to terminate her parental rights: the text of those constitutional provisions was silent as to whether trials must be conducted in person, our courts have never had occasion to interpret either provision as imposing such a requirement, and the respondent mother did not cite any authority or provide any historical analysis to support the proposition that those constitutional provisions require an in person trial for the termination of parental rights; moreover, the open courts provision of article first, § 10, does not relate to the right of physical appearance but was intended to preserve the common-law rights of litigants to obtain redress for injuries to their persons, property,

or reputation, to prohibit the state from imposing unreasonable charges on litigants for using the courts, and to end the corrupt practice of demanding gratuities for the giving or withholding of decisions in pending cases; furthermore, prior case law generally references article fifth, § 1, for the proposition that the legislature is responsible for establishing certain lower courts and defining their jurisdiction, and does not support the proposition that a termination of parental rights trial must be conducted in person, and this court had previously held in *In re Juvenile Appeal (Docket No. 10155)* (187 Conn. 431) that the trial court in that case did not violate the respondent's constitutional rights by conducting a termination of parental rights trial while the respondent participated via telephone instead of in person.

b. The Appellate Court correctly concluded that the record was inadequate to review the respondent mother's unpreserved claim that she was denied the right to physically confront the witnesses against her at the virtual termination of parental rights trial, in violation of the due process clause of the fourteenth amendment to the United States constitution: even if this court agreed with the respondent mother that she had a constitutional right to confront the petitioner's witnesses in person in the absence of a compelling governmental interest sufficient to curtail that right, this court had no factual record or factual findings on which to base a determination of whether that right was violated or whether the trial court had correctly concluded that the government's interests were sufficiently great to warrant conducting the trial virtually; moreover, because the respondent mother objected to the trial being conducted virtually on the basis that doing so would interfere with her ability to present evidence and the trial court's ability to weigh such evidence, the trial court was not alerted to the right to confrontation issue and did not have occasion to make findings of fact regarding the threat posed by the COVID-19 pandemic and whether that threat was sufficiently compelling to curtail any constitutional right to confrontation, and it would be unfair to the petitioner for this court to reach the merits of the respondent mother's claim by assuming that the factual predicates to her claim have been met.

2. The Appellate Court improperly expanded the standard set forth in *In re Ava W.* for deciding motions for posttermination visitation and improperly reversed the trial court's rulings on the respondents' motions for posttermination visitation on the ground that the trial court had failed to comply with that standard: although one sentence in the court's decision in *In re Ava W.* may have suggested that trial courts, in ruling on a motion for posttermination visitation, must decide whether such visitation is in the best interest of the child, the court did not intend that sentence, in isolation, to broaden the applicable standard to include a best interest of the child analysis, and this court read the entire decision in *In re Ava W.* to hold that trial courts must adhere to the necessary or appropriate standard set forth in § 46b-121 (b) (1) rather than the best

interest of the child standard when ruling on motions for posttermination visitation; moreover, contrary to the respondent mother's claim that this court must presume that the legislature intended to incorporate the best interest of the child standard into § 46b-121 (b) (1) by virtue of that statute's use of the word "welfare," insofar as the legislature enacted § 46b-121 (b) (1) against the backdrop of common-law history equating the child's welfare with the child's best interest, the legislature frequently has used the term "best interest of the child" and similar terms in statutes that appear in the same chapter as § 46b-121, and, therefore, if the legislature had intended to incorporate the best interest of the child standard into the necessary or appropriate standard set forth in § 46b-121 (b) (1), it would have used the words "best interest of the child" instead of, or in addition to, "welfare"; furthermore, this court concluded that the necessary or appropriate standard is purposefully more stringent than the best interest of the child standard, as, under the former standard, a trial court must find that posttermination visitation is necessary or appropriate, meaning "proper," to secure the child's welfare; in the present case, the Appellate Court incorrectly concluded that the trial court had held the respondents to a more exacting legal standard than the one set forth in *In re Ava W.*, as the trial court's specific references to the standard set forth in *In re Ava W.*, made throughout the relevant portion of its memorandum of decision, and its explicit consideration of at least one factor, enumerated in *In re Ava W.*, that a trial court may consider in determining whether posttermination visitation is necessary or appropriate for the child's well-being, indicated that the trial court applied the correct legal standard in ruling on the respondents' motions for posttermination visitation, and, because the trial court correctly articulated the necessary or appropriate standard and stated that posttermination visitation was "not required" only after it determined that the respondents had not satisfied their burden of proving that such visitation was necessary or appropriate to secure A's welfare, the trial court understood that it was required to determine whether posttermination visitation was either necessary (i.e., required) or appropriate.

(*Three justices concurring separately in two opinions*)

Argued November 18, 2021—officially released June 20, 2022**

*Procedural History*

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, and tried to the court, *Olear, J.*; judgment terminat-

** June 20, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

ing the respondents' parental rights and decisions denying the respondents' motions for posttermination visitation; thereafter, the respondents filed separate appeals with the Appellate Court, *Bright*, *C. J.*, and *Alexander* and *Norcott*, *Js.*, which affirmed the judgment terminating the respondents' parental rights and reversed the trial court's decisions denying the respondents' motions for posttermination visitation; subsequently, on the granting of certification, the respondent mother appealed and the petitioner cross appealed to this court. *Reversed in part*; *judgment directed.*

*Albert J. Oneto IV*, assigned counsel, for the appellant-cross appellee (respondent mother).

*Evan O'Roark*, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare Kindall*, solicitor general, and *Nisa Khan*, assistant attorney general, for the appellee-cross appellant (petitioner).

*Joshua Michtom*, assistant public defender, for the cross appellee (respondent father).

*Opinion*

McDONALD, J. The Appellate Court reversed the trial court's denial of the respondent parents' motions for posttermination visitation on the ground that the trial court applied an incorrect legal standard when it considered those motions. See *In re Annessa J.*, 206 Conn. App. 572, 575–76, 260 A.3d 1253 (2021). The Appellate Court, however, did affirm the trial court's judgment terminating the respondents' parental rights, rejecting the respondent mother's claims relating to the virtual nature of the termination of parental rights trial. See id., 575. From these determinations, we are presented with a certified appeal and cross appeal.

In her appeal, the respondent mother, Valerie H., claims that the Appellate Court improperly rejected her

unpreserved claim that the trial court had violated her rights under article fifth, § 1, and article first, § 10, of the Connecticut constitution by conducting the termination of parental rights trial virtually, via Microsoft Teams,[1] rather than in person. She also claims that the Appellate Court incorrectly determined that the record was inadequate to review her unpreserved claim that she was denied her right to physically confront the witnesses against her at the virtual trial, in violation of the due process clause of the fourteenth amendment to the United States constitution. In the cross appeal, the petitioner, the Commissioner of Children and Families, claims that the Appellate Court improperly expanded the standard for deciding motions for posttermination visitation and improperly reversed the trial court's rulings on those motions for failing to comply with that new standard.[2]

The record and the Appellate Court's decision set forth the pertinent facts and procedural history; see id., 576–80; which we summarize in relevant part. Valerie and the respondent father, Anthony J., first became involved with the Department of Children and Families in 2009, when their daughter, Annessa J., was three years old. The department removed Annessa from the care of her parents because it was concerned about intimate partner violence between the respondents and because they had provided inadequate supervision of Annessa. The trial court subsequently adjudicated Annessa neglected and ordered that she be committed to the care and custody of the petitioner. Thereafter, in 2010, the department reunified Annessa with the

[1] Microsoft Teams is "collaborative meeting [computer software] with video, audio, and screen sharing features." Connecticut Judicial Branch, Connecticut Guide to Remote Hearings for Attorneys and Self-Represented Parties (November 23, 2021) p. 5, available at https://jud.ct.gov/HomePDFs/ConnecticutGuideRemoteHearings.pdf (last visited June 15, 2022).

[2] The attorney for the minor child, Annessa, adopted the petitioner's brief and all of her legal arguments.

respondents. At that time, the respondents also reunited and began living together with Annessa.

In November, 2017, the department received a report alleging that Anthony had sexually abused Annessa and that Valerie had physically neglected her. Valerie recounted that she was unaware of the sexual abuse until July, 2017, when Anthony admitted to her that "he had touched Annessa's genitals over her underpants in order to teach her a lesson." (Internal quotation marks omitted.) Id., 577. As a result, Valerie asked Anthony to leave the apartment. After the department was informed about the alleged sexual assault, it made efforts to have Valerie place Annessa in therapy. Valerie, however, would not commit to doing so.

Several weeks after leaving Valerie's apartment, Anthony returned and kicked in the door to the apartment, for which he was arrested. Thereafter, one of several protective orders was issued against Anthony, and he subsequently pleaded guilty to numerous charges as a result of this arrest. He received a sentence of one year of incarceration, execution suspended, and two years of probation.

Annessa later reported that Valerie would leave her alone for days at a time, that she would not know where Valerie was during those times, and that the apartment had no heat or electricity. During a forensic interview in December, 2017, Annessa also confirmed that Anthony had "touched her 'bikini area' over her underwear." Id.

Throughout the course of the department's investigation, Valerie refused to cooperate with the department to provide services for Annessa. As a result, in January, 2018, the petitioner filed a petition alleging that Annessa had been neglected. After invoking a ninety-six hour administrative hold on Annessa, the petitioner filed an ex parte motion for an order of temporary custody. The trial court issued the order of temporary custody, and

it was thereafter sustained. In July, 2018, Annessa was adjudicated neglected and committed to the custody of the petitioner. Annessa was placed in foster care with the woman who had been Valerie's foster mother years earlier. Annessa has bonded with the foster mother and has expressed a desire to remain in the custody of the foster mother.

The respondents "were given specific steps to facilitate reunification with Annessa, including addressing mental health issues, parenting deficiencies, and intimate partner violence . . . ." Id., 578. Anthony was also ordered to address the sexual abuse of Annessa through counseling. Valerie failed to cooperate with the department throughout its investigation. For his part, Anthony missed several administrative case review appointments but otherwise participated in counseling. He was not, however, initially cooperative about discussing the sexual abuse of Annessa with his therapist.

Given the respondents' lack of progress, in November, 2019, the petitioner filed a petition seeking to terminate their parental rights as to Annessa. Trial on the termination petition was originally scheduled for March, 2020, but was delayed due to the COVID-19 pandemic and the temporary suspension of most trials. In light of the pandemic, a virtual trial was ultimately held in September and October, 2020, via Microsoft Teams. During the trial, the respondents both filed motions asking that, in the event the trial court terminated their parental rights, the court order visitation to continue with Annessa posttermination.

In its memorandum of decision, the trial court found that the department had made reasonable efforts to reunify each of the respondents with Annessa and that neither parent was able or willing to benefit from reunification efforts. The court also determined that such efforts at reunification were no longer appropriate. In

accordance with General Statutes § 17a-112 (j) (3) (B), the court also found that the petitioner had "proven by clear and convincing evidence the 'failure to rehabilitate' ground for termination of the respondents' parental rights." Id., 579. The court also considered the seven statutory factors enumerated in § 17a-112 (k) and concluded that termination of the parental rights of both respondents was in Annessa's best interest.

In its memorandum of decision, the trial court also considered the respondents' motions for postermination visitation. The court found that "neither [Valerie] nor [Anthony] . . . met their burden [of] prov[ing] [that] posttermination visitation for such parent is necessary or appropriate to secure the welfare, protection, proper care and suitable support of [Annessa]." The court noted that Anthony and Annessa had a good visiting relationship but found that posttermination visitation with Valerie or Anthony was "not required for [Annessa's] well-being, welfare, protection, proper care or suitable support." Accordingly, the court denied both of the respondents' motions.

Thereafter, the respondents separately appealed to the Appellate Court. Valerie raised several unpreserved claims of error pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Specifically, she claimed, among other things, that the trial court "(1) violated her right to a 'public civil trial at common law' by conducting proceedings over the Microsoft Teams platform, rather than in court and in person, in violation of article fifth, § 1, and article first, § 10, of the Connecticut constitution, [and] (2) violated her right to due process of law by precluding her from confronting witnesses in court and in person when it conducted proceedings over the Microsoft Teams plat-

form . . . .”[3] (Footnote omitted.) *In re Annessa J.*, supra, 206 Conn. App. 575. Additionally, both respondents argued that the trial court applied an incorrect legal standard when it considered their motions for posttermination visitation with Annessa. Id., 575–76.

The Appellate Court rejected each of Valerie's constitutional claims. See id., 575. The court explained that Valerie failed to establish that a party possesses a fundamental right under the Connecticut constitution to an in-court, in person termination of parental rights trial, rather than a trial conducted over a virtual platform, such as Microsoft Teams. Id., 585. Accordingly, the court concluded that Valerie's state constitutional claim was not reviewable because it failed under the second prong of *Golding*. Id. The Appellate Court also concluded that, because Valerie did not ask the trial court to hold an evidentiary hearing on the need for a virtual trial, the record was inadequate to review Valerie's unpreserved federal due process claim. Id., 587. The Appellate Court, however, agreed with the respondents that the trial court had “failed to consider the appropriate standard under [General Statutes] § 46b-121 (b) (1) and *In re Ava W.* [336 Conn. 545, 589, 248 A.3d 675 (2020)], namely, whether posttermination visitation is ‘*necessary or appropriate* to secure the welfare, protection, proper care and suitable support of [the] child,’ taking into account the traditional best interest analysis and the type of additional factors identified in *In re Ava W.*” (Emphasis in original.) *In re Annessa J.*, supra, 206 Conn. App. 603. Accordingly, the Appellate Court reversed the trial court's denial of the respondents'

[3] On appeal before the Appellate Court, Anthony did not take issue with the virtual format of the trial but, instead, raised claims relating to the merits of the trial court's termination judgment. The Appellate Court affirmed the trial court's judgment with respect to these claims. See *In re Annessa J.*, supra, 206 Conn. App. 590–98. Anthony did not file a petition for certification to appeal from the Appellate Court's judgment, and, as a result, those claims are not at issue in this appeal.

motions for posttermination visitation and affirmed the trial court's judgment terminating the respondents' parental rights. Id.

Thereafter, Valerie filed a petition for certification to appeal, which we granted, limited to the following issues: (1) "Did the Appellate Court, in affirming the judgment of the trial court terminating the parental rights of [Valerie] following a trial conducted via the Microsoft Teams platform over [Valerie's] objection, incorrectly determine that [Valerie's] unpreserved claim that article first, § 10, and article fifth, § 1, of the Connecticut constitution guaranteed her the right to an in person courtroom trial of the kind that existed at common law in 1818 was not of constitutional magnitude under the second prong of *State* v. *Golding*, [supra, 213 Conn. 233]?" And (2) "[d]id the Appellate Court, in affirming the trial court's judgment, incorrectly determine, under the first prong of *Golding*, that the record was inadequate to review [Valerie's] unpreserved claim that she was denied the right to physically confront the witnesses against her at the virtual trial on the petition to terminate her parental rights, in violation of the due process clause of the fourteenth amendment to the United States constitution?" *In re Annessa J.*, 338 Conn. 904, 904–905, 258 A.3d 674 (2021). The petitioner filed a petition for certification to cross appeal, which we granted, limited to the following issue: "Did the Appellate Court properly expand the standard set forth in *In re Ava W.*, [supra, 336 Conn. 545], for deciding motions for posttermination visitation beyond the question of whether, under . . . § 46b-121 (b) (1), such visitation is 'necessary or appropriate' to secure the welfare of the child?" *In re Annessa J.*, 338 Conn. 905, 258 A.3d 675 (2021). We address each of these three claims in turn. Additional facts and procedural history will be set forth as necessary.

I

We begin with Valerie's unpreserved state and federal constitutional claims relating to the virtual nature of the termination of parental rights trial. The following additional facts and procedural history are relevant to our review of these claims. As we previously noted, due to the COVID-19 pandemic, the trial on the termination petition was held virtually, via Microsoft Teams. Before the presentation of evidence on the first day of trial, Anthony's counsel objected to the trial court's conducting the trial via Microsoft Teams instead of in person, and Valerie's counsel joined in the objection. The basis for the objection by Anthony's counsel was that "[t]he standard of proof is higher [in a termination of parental rights case], the inability for the court to see the parties and the witnesses . . . as would be [the case] in live trials—you know, the inability to see [whether] someone else is in the room giving answers, or [whether] a document is in front of the witness to help [the witness] testify." Anthony's counsel also noted that "the fact finder has to be able to assess . . . the witnesses, their demeanor, and, again, we're on little squares, and I'm having a hard time seeing what people are doing." Similarly, Valerie's counsel argued that "[i]t is very important that [the trial court] is able to, as a fact finder—able to look in the eyes of the person and, you know, make an assessment whether or not they are being truthful, and whether or not, what they are saying, they really mean it."

Annessa—who was fourteen years old at the time—argued, through her counsel, that the trial should proceed via Microsoft Teams. Annessa's counsel explained that "[Annessa] would like permanency. She's in support of the [termination of parental rights] and adoption, and we really don't know how long this pandemic will last." Similarly, the petitioner's counsel also argued that the trial could proceed and that the virtual nature of

the proceeding would not disadvantage any of the parties. The petitioner's counsel also emphasized that "this case was supposed to be tried at the very beginning of March, [2020], and [Annessa] has been in limbo for over two years at this point and has been waiting for [the] trial for quite some time."

After a brief recess, the trial court denied the respondents' oral motion objecting to the virtual format of the trial. The court explained that, during the recess, it "talked to the chief administrative judge for juvenile [matters], and she confirmed that there is nothing precluding the court from going forward. And, in fact, the court has been directed by the chief court administrator's office to proceed, whenever possible, to go forward with matters that are necessary, important, and appropriate. I do believe that the matter can be conducted appropriately virtually. We do have the Connecticut Guide to Remote Hearings [for Attorneys and Self-Represented Parties] that was promulgated by the Judicial Branch.[4] I intend to follow it." (Footnote added.) The trial court also rejected the respondents' claim that the virtual format would interfere with its ability to properly weigh the evidence. Specifically, the court explained: "I think that there is sufficient eye contact with people. If—frankly, if they were in court, we might have less . . . visual contact because they'd have to have masks on. This way, hopefully, they don't have to have one on because they should be alone in a room.

[4] Due to the COVID-19 pandemic, the Judicial Branch began holding virtual hearings using Microsoft Teams in 2020. The Judicial Branch created the Connecticut Guide to Remote Hearings for Attorneys and Self-Represented Parties to "assist anyone who is preparing to participate in a remote court hearing through Connecticut's 'Remote Justice Virtual Courtroom.' This includes counsel, self-represented parties, and other necessary hearing participants, such as witnesses." Connecticut Judicial Branch, Connecticut Guide to Remote Hearings for Attorneys and Self-Represented Parties (November 23, 2021) p. 4, available at https://jud.ct.gov/HomePDFs/ConnecticutGuideRemoteHearings.pdf (last visited June 15, 2022).

And I think that's important in terms of evaluating credibility. I feel confident that I will be able to make the appropriate findings. If, at some point, I'm concerned that that is not the case, I will raise it. And I always have the ability to do something in the future, during this trial, if I feel that it's gone awry or that I'm not able to perform my judicial duties, but, at this point, I'm comfortable that I can, given the parameters of where we are today. I think, given the pandemic, it's important that we do try to go forward in the best manner possible. I think this is the best manner possible."

After denying the respondents' motion, the trial court proceeded with the virtual trial. Over the course of trial, the court admitted nine full exhibits offered by Valerie, two by Anthony, and eighteen by the petitioner. The petitioner also presented the testimony of five witnesses, Valerie called three witnesses, Valerie testified on her own behalf, and Anthony called one witness. There were several technical issues throughout trial, such as background noise interrupting the audio of a witness and video "freezing" during an expert's testimony. In each instance, the trial court took corrective measures, including directing that a witness stop testifying until the background noise abated, directing an attorney to reposition her camera, and sending a new Microsoft Teams link when technical difficulties persisted. In keeping with its offer at the start of trial, the court also regularly paused the proceedings so that the parties could confer with their counsel. Additionally, at no time did the respondents ask for technical assistance or accommodations from the court. Relevant to Valerie's claims on appeal, in the trial court's memorandum of decision, the court noted that, "[d]ue to the COVID-19 . . . pandemic, the trial [on the termination of parental rights petition] was conducted virtually. The court made every reasonable effort to allow counsel and the parties to confer with each other during the

proceedings and to address technical issues that arose from time to time. Using the virtual technology, the court was able to assess the demeanor and credibility of the witnesses."

A

We turn first to Valerie's claim that the Appellate Court incorrectly determined that her "unpreserved claim that article first, § 10, and article fifth, § 1, of the Connecticut constitution guaranteed her the [unqualified] right to an in person courtroom trial of the kind that existed at common law in 1818 was not of constitutional magnitude under the second prong of . . . *Golding* . . . ."[5] (Citation omitted.) The petitioner disagrees with Valerie and contends, among other things, that the Appellate Court correctly concluded that Valerie failed to establish that she had a fundamental right under article first, § 10, and article fifth, § 1, to an in person trial. We agree with the petitioner.

Although she objected to the virtual format of the trial, Valerie concedes that she did not raise this claim before the trial court and, therefore, seeks review under *State* v. *Golding*, supra, 213 Conn. 239–40. Pursuant to *Golding*, "a [respondent] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the viola-

[5] Unlike her federal due process claim; see part I B of this opinion; Valerie's state constitutional claim is based on an alleged unqualified right to an in person trial. Specifically, she claims that the trial court violated her state constitutional rights by conducting a virtual trial, regardless of its reason for doing so. As a result, the record is adequate to review this claim because it does not require any factual predicates, and it is clear from the record that the trial was held virtually via Microsoft Teams. As we explain in part I B of this opinion, Valerie does not claim an unqualified right to physically confront the witnesses against her under the fourteenth amendment to the federal constitution.

tion of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the [petitioner] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) Id.; see *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding*). "The first two steps in the *Golding* analysis address the reviewability of the claim, [whereas] the last two steps involve the merits of the claim." (Internal quotation marks omitted.) *In re Azareon Y.*, 309 Conn. 626, 634–35, 72 A.3d 1074 (2013).

In support of her claim, Valerie relies on article first, § 10, and article fifth, § 1, of the Connecticut constitution. Article first, § 10, provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Article fifth, § 1, provides: "The judicial power of the state shall be vested in a supreme court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law." The text of these constitutional provisions says nothing about whether trials must be conducted in person. Our courts have never had occasion to interpret either provision as imposing such a requirement. Nevertheless, Valerie contends that "article first, § 10, creates a right of the citizenry to a public civil trial of the kind that existed at common law in 1818," and "article fifth, § 1, creates a duty on the part of the Superior Court to find facts by observing firsthand the parties and witnesses in physical proximity to each other . . . ." Valerie, however, does not cite any authority or provide any historical analysis that supports the proposition that these constitutional provi-

sions require an in person trial for the termination of parental rights.

With respect to article first, § 10, we note that Valerie's counsel conceded at oral argument before the Appellate Court that "a public trial is not constitutionally required in juvenile matters . . . ." *In re Annessa J.*, supra, 206 Conn. App. 586. With this concession, Valerie is left to argue that the "open courts" provision of article first, § 10, was intended to enshrine the right to appear physically and in person for trial, yet she provides no authority in support of that claim.[6] We find no suggestion in our prior cases or historical sources indicating that the provision has anything to do with a right of physical appearance. Instead, the rights preserved by that provision are a litigant's common-law rights to obtain redress "for an injury done to him in his person, property or reputation . . . ." Conn. Const., art. I, § 10; see, e.g., *Kelley Property Development, Inc.* v. *Lebanon*, 226 Conn. 314, 331, 627 A.2d 909 (1993) ("we have consistently interpreted article first, § 10, to prohibit the legislature from abolishing a right that existed at common law prior to 1818"); *Gentile* v. *Altermatt*, 169 Conn. 267, 286, 363 A.2d 1 (1975) ("[s]imply stated, all rights derived by statute and the common law extant at the time of the adoption of article first, § 10, are incorporated in that provision by virtue of being established by law as rights the breach of which precipitates a recognized injury, thus being exalted beyond the status of common-law or statutory rights of the type created subsequent to the adoption of that provision"), appeal dismissed, 423 U.S. 1041, 96 S. Ct. 763, 46 L. Ed. 2d 631 (1976). The provision also guarantees that any such remedy be provided "by due course of law, and right and justice administered without sale, denial or delay." Conn. Const., art. I, § 10. That language

[6] Valerie does not allege any procedural due process violation with regard to this claim.

has been construed "as prohibiting the state from selling justice by imposing unreasonable charges on the litigants in the courts . . . and as ending the practice by a corrupt judiciary of demanding gratuities for giving or withholding decisions in pending cases." (Citation omitted.) *Doe* v. *State*, 216 Conn. 85, 97, 579 A.2d 37 (1990). Valerie points to no authority in which this court has interpreted article first, § 10, as imposing any requirements on how courts adjudicate cases, such as requiring that courts conduct trials in person, and we decline to do so.

The cases that Valerie relies on to support her claim with respect to article fifth, § 1, address the separation of powers among the three branches of government and stand for the proposition that it is the duty of the trial court—not an appellate court—to find facts.[7] See *Styles* v. *Tyler*, 64 Conn. 432, 449–50, 30 A. 165 (1894) ("The whole judicial power of the [s]tate is vested in the courts . . . . The 'Supreme Court of Errors' is not a supreme court for all purposes, but a supreme court only for the correction of errors in law . . . ."); see also *Nolan* v. *New York, New Haven & Hartford Railroad Co.*, 70 Conn. 159, 173–77, 39 A. 115 (1898) (discussing distinction between questions of fact and questions of law). Far from mandating the form a trial must take, *Styles* focused on explaining that "the evil which the people sought to prevent by article [fifth] of our [c]onstitution" was judicial power residing in the General Assembly. *Styles* v. *Tyler*, supra, 449. Case law generally references article fifth, § 1, for the proposition

[7] We recognize that "the ultimate decision [as to whether termination is justified] is intensely human. It is the judge in the courtroom who looks the witnesses in the eye, interprets their body language, listens to the inflections in their voices and otherwise assesses the subtleties that are not conveyed in the cold transcript." (Internal quotation marks omitted.) *In re Nevaeh W.*, 317 Conn. 723, 740, 120 A.3d 1177 (2015). Valerie, however, does not explain how the virtual format of the trial prevents a trial judge from finding facts and making credibility assessments.

that the legislature is responsible for establishing certain lower courts and defining their jurisdiction. See, e.g., *Adams* v. *Rubinow*, 157 Conn. 150, 155–56, 251 A.2d 49 (1968); see also, e.g., *State* v. *Gomes*, 337 Conn. 826, 842–43, 256 A.3d 131 (2021). None of the cases Valerie relies on stands for the proposition that a termination of parental rights trial must be conducted in person.

Finally, we note that Valerie does not address the impact of this court's holding in *In re Juvenile Appeal (Docket No. 10155)*, 187 Conn. 431, 446 A.2d 808 (1982), on her claim. In *In re Juvenile Appeal (Docket No. 10155)*, this court held that, as applied to the facts of that case, the trial court did not violate the respondent father's constitutional rights by conducting a termination of parental rights trial while the respondent participated via telephone instead of in the physical presence of the judge deciding the case. See id., 435–41. We explained that "[w]e cannot . . . say that the lack of a visual image seriously disadvantaged the trial court in making its determination. . . . [L]imiting the opportunity to assess the respondent's demeanor to its auditory component seems to us to entail only the most marginal risk that the [trial court] would be misled in evaluating the respondent's credibility." Id., 438.

In light of the foregoing, we agree with the Appellate Court that Valerie failed to establish that there exists a fundamental right under article first, § 10, and article fifth, § 1, of the Connecticut constitution to an in person termination of parental rights trial.[8] Accordingly, we

[8] Other state appellate courts have concluded that trial courts may conduct termination of parental rights trials virtually or by telephone, as long as the court ensures that the technology functions properly and the parent can meaningfully participate. See, e.g., *People ex rel. R.J.B.*, 482 P.3d 519, 524–25 (Colo. App. 2021), cert. denied, Colorado Supreme Court, Docket No. 21SC115 (March 15, 2021); *In re T.J.*, Docket No. 1-21-0740, 2021 WL 4941511, *7–9 (Ill. App. October 21, 2021); *In re M.M.*, Docket No. 21A-JT-840, 2021 WL 4839067, *3–4 (Ind. App. October 18, 2021) (decision without published opinion, 176 N.E.3d 589); *In re A.H.*, 950 N.W.2d 27, 36 (Iowa App. 2020); *In re TJH*, 485 P.3d 408, 413–16 (Wyo. 2021).

conclude that Valerie's claim fails under the second prong of *Golding*.

B

We turn next to Valerie's claim that the Appellate Court incorrectly determined that "the record was inadequate to review [her] unpreserved claim that she was denied the right to physically confront the witnesses against her at the virtual trial on the petition to terminate her parental rights, in violation of the due process clause of the fourteenth amendment to the United States constitution." The petitioner contends, among other things, that the Appellate Court correctly concluded that the record was inadequate to review this unpreserved claim. We agree with the petitioner.

Valerie again concedes that she did not raise this claim before the trial court and, therefore, seeks review under *State* v. *Golding*, supra, 213 Conn. 239–40. See part I A of this opinion. Unlike her state constitutional claim, which did not require any factual predicates because she claimed an unqualified right to an in person trial, Valerie's federal constitutional claim is not based on an alleged unqualified right to confront the petitioner's witnesses in person under the fourteenth amendment to the United States constitution. Rather, Valerie claims that she had the right to do so "in the absence of evidence demonstrating the existence of a compelling governmental interest sufficient to curtail the right." Valerie thus acknowledges that there are certain countervailing governmental interests that may be sufficient to justify curtailing any constitutional right to in person confrontation. Indeed, to address the merits of Valerie's claim, this court would apply the three part test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The third part of that test requires us to consider the governmental interests at stake. Id. In the present case, the trial court explained

that, "[d]ue to the COVID-19 . . . pandemic, the trial [on the termination of parental rights petition] was conducted virtually." As a result, we would need to consider the specific factual circumstances surrounding the trial and the COVID-19 pandemic to properly evaluate Valerie's claim. As Valerie concedes, "[a]lthough the trial court referenced the COVID-19 public emergency as the reason for conducting the trial virtually, there was no actual evidence before the court that [SARS-CoV-2, the virus that causes COVID-19], threatened the health or safety of any of the persons involved in this particular case." It is for this reason that the record is inadequate to review Valerie's unpreserved federal due process claim. Even if this court were to assume that Valerie had a right to in person confrontation in the absence of compelling countervailing interests, this court has no factual record or factual findings on which to base a determination of whether that right was violated or whether the trial court correctly concluded that the government's interests were sufficiently great to warrant conducting the trial virtually. See, e.g., *In re Azareon Y.*, supra, 309 Conn. 637 (reviewing court was unable to determine whether trial court deprived respondent mother of her alleged right to less restrictive permanency plan in absence of factual record demonstrating that less restrictive permanency plan existed).

Valerie nevertheless argues that the lack of evidence in the record regarding "whether there was a compelling reason to curtail her right [to] physical confrontation was not her burden to overcome under the first prong of . . . *Golding*." We disagree.

During the trial, the petitioner and the trial court were never put on notice that Valerie objected to the virtual nature of the termination of parental rights trial on the basis that it violated her right to confront the petitioner's witnesses. Rather, the respondents objected to the trial being conducted virtually on the basis that

doing so would interfere with their ability to present evidence and the trial court's ability to weigh that evidence. Because the trial court was not alerted to this right to confrontation issue, it did not have occasion to make findings of fact regarding the threat posed by the COVID-19 pandemic and whether that threat was sufficiently compelling to curtail any constitutional right to in person confrontation. "In such circumstances, the [petitioner] bears no responsibility for the evidentiary lacunae, and, therefore, it would be manifestly unfair to the [petitioner] for this court to reach the merits of the [respondent's] claim upon a mere assumption that [the factual predicate to her claim has been met]." (Emphasis omitted.) *State* v. *Brunetti*, 279 Conn. 39, 59, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007).

Not only would such an assumption be improper, but, because, "under the test in *Golding*, we must determine whether the [appellant] can prevail on his [or her] claim, a remand to the trial court would be inappropriate. The first prong of *Golding* was designed to avoid remands for the purpose of supplementing the record." (Emphasis omitted.) *State* v. *Stanley*, 223 Conn. 674, 689–90, 613 A.2d 788 (1992). The parties agree that there is an inadequate basis in the record for the trial court to determine whether the government's interests warrant conducting a virtual trial. Thus, in order to make the requisite findings, the trial court, on remand, would have to open the evidence. "In cases of unpreserved constitutional claims, this court consistently has refused to order a new trial when it would be necessary to elicit additional evidence to determine whether the constitutional violation exists." *In re Azareon Y.*, supra, 309 Conn. 639, citing *State* v. *Dalzell*, 282 Conn. 709, 721–22, 924 A.2d 809 (2007) (overruled in part on other grounds by *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123,

84 A.3d 840 (2014)), *State* v. *Canales*, 281 Conn. 572, 582, 916 A.2d 767 (2007), *State* v. *Brunetti*, supra, 279 Conn. 59, 64, *State* v. *Daniels*, 248 Conn. 64, 80, 726 A.2d 520 (1999) (overruled in part on other grounds by *State* v. *Singleton*, 274 Conn. 426, 876 A.2d 1 (2005)), and *State* v. *Medina*, 228 Conn. 281, 301–302, 636 A.2d 351 (1994). Therefore, we agree with the Appellate Court that the record is inadequate for review of this claim.

II

We turn next to the petitioner's claim, raised on cross appeal, that the Appellate Court improperly expanded the standard set forth in *In re Ava W.*, supra, 336 Conn. 588–90, for deciding motions for posttermination visitation and improperly reversed the trial court's rulings on the respondents' motions for failing to comply with that standard. The respondents disagree with the petitioner and contend that the Appellate Court correctly concluded that the trial court had improperly applied a more exacting standard to their motions for posttermination visitation than was required. We agree with the petitioner.

The record and the Appellate Court's opinion set forth the following additional facts and procedural history relevant to our review of this claim. See *In re Annessa J.*, supra, 206 Conn. App. 598–600. During the termination of parental rights trial, the respondents timely filed motions for posttermination visitation with Annessa, citing this court's decision in *In re Ava W.* In ruling on the respondents' motions, the trial court concluded in relevant part that "neither [Valerie] nor [Anthony] . . . met their burden [of] prov[ing] [that] posttermination visitation for such parent is necessary or appropriate to secure the welfare, protection, proper care and suitable support of [Annessa]. [Valerie] avers that it is in the best interest of Annessa for visitation to continue. That

is not the standard under . . . § 46b-121 (b) (1). . . . Posttermination visitation by [Valerie] with Annessa is not required for [Annessa's] well-being, welfare, protection, proper care or suitable support. [Valerie's] motion is denied. . . . [Anthony] likewise avers [that] it is in the best interest of Annessa for visitation to continue. [Anthony] and Annessa do have a good visiting relationship. However, that does not equate to a finding that posttermination [visitation] is required for Annessa. . . . Posttermination visitation by [Anthony] with Annessa is not required for her well-being, welfare, protection, proper care or suitable support. [Anthony's] motion is denied."

Thereafter, the respondents appealed to the Appellate Court, claiming that the trial court employed an incorrect legal standard in ruling on their motions for posttermination visitation. *In re Annessa J.*, supra, 206 Conn. App. 598. The Appellate Court agreed, concluding that the trial court had failed to consider the appropriate standard, as set forth in *In re Ava W.* Id., 603. The Appellate Court reasoned that our decision in *In re Ava W.* did not purport to reject the "best interest of the child" standard but, instead, held that, "when [a trial court rules on] a motion for posttermination visitation during a termination of parental rights case, the . . . court's consideration of the traditional best interest of the child is only part of the consideration of whether such visitation is 'necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the] child.' " Id., 601. Consistent with this conclusion, the Appellate Court determined that the trial court applied an incorrect legal standard in ruling on the respondents' motions for posttermination visitation because it (1) "improperly required [the respondents] to establish that posttermination visitation was required for Annessa's well-being"; (emphasis omitted) id., 602; and (2) failed to consider "whether posttermination visitation is 'necessary or appropriate to secure the

welfare, protection, proper care and suitable support of [the] child,' taking into account *the traditional best interest analysis* and the type of additional factors identified in *In re Ava W.*" (Emphasis altered.) Id., 603. Accordingly, the Appellate Court reversed the trial court's denial of the motions for posttermination visitation and remanded the case for further proceedings on the respondents' motions. Id.

On cross appeal to this court, the petitioner argues that the Appellate Court improperly reversed the trial court's denial of the respondents' motions on the ground that the respondents had failed to prove that an order of posttermination visitation was "necessary or appropriate" to secure Annessa's welfare. Specifically, the petitioner contends that the Appellate Court improperly expanded the *In re Ava W.* standard by concluding that trial courts " 'should take a broader view of best interest' " in ruling on motions for posttermination visitation, "rather than adhering to the language set forth [in] § 46b-121 (b) (1)." The petitioner further argues that the Appellate Court incorrectly concluded that the trial court held the respondents to a more exacting standard than the "necessary or appropriate" standard insofar as the trial court had found that an order of posttermination visitation was "not required" after first finding that such an order was not "necessary or appropriate" for Annessa's welfare. According to the petitioner, the trial court applied the proper legal standard, and she, therefore, asks this court to reverse the judgment of the Appellate Court on this issue.

The respondents disagree with the petitioner, although they have differing interpretations of the Appellate Court's opinion.[9] Valerie argues that the Appellate Court

[9] Anthony argues that the Appellate Court based its reversal solely on the trial court's purportedly erroneous application of a "required" standard, *not* on whether the trial court erroneously rejected the best interest of the child standard. We disagree.

properly expanded the standard set forth in *In re Ava W.*, as it recognized that the "best interest of the child" standard is incorporated into a trial court's overall consideration of whether posttermination visitation is "necessary or appropriate" for the child's welfare. By contrast, Anthony argues that the Appellate Court did not purport to broaden the "necessary or appropriate" standard but, instead, correctly understood that, pursuant to *In re Ava W.*, the standard was already broad and inclusive. Notwithstanding these differing interpretations, both of the respondents claim that the Appellate Court correctly concluded that the trial court had applied an unduly narrow legal standard in ruling on their motions for posttermination visitation.

We begin our analysis with the relevant standard of review and legal principles. The petitioner challenges the Appellate Court's application of the legal standard for deciding motions for posttermination visitation, and, therefore, her claim raises an issue of law over which we exercise plenary review. See, e.g., *Fish* v. *Fish*, 285 Conn. 24, 37, 939 A.2d 1040 (2008) ("[t]he . . . determination of the proper legal standard in any given case is a question of law subject to our plenary review").

Our recent decision in *In re Ava W.* squarely governs our analysis in the present case. In *In re Ava W.*, we held, for the first time, that a trial court has the authority to consider a motion for posttermination visitation

In reversing the trial court's denial of the respondents' motions for posttermination visitation, the Appellate Court specifically took issue with the trial court's use of the "not required" language, as well as its explicit rejection of the "best interest of the child" standard. See *In re Annessa J.*, supra, 206 Conn. App. 602–603 (noting that "the [trial] court went on to explain that the best interest standard was 'not the standard under . . . § 46b-121 (b) (1)' *and* that posttermination visitation was 'not required for the child's well-being, welfare, protection, proper care or suitable support,' " and concluding that, "[o]n the basis of *these statements* by the court, we are persuaded that the court failed to consider the appropriate standard" (emphasis altered)).

when the court considers termination of parental rights pursuant to § 17a-112 (j).[10] *In re Ava W.*, supra, 336 Conn. 548–49, 577. This authority, we explained, originates from the trial court's broad authority in juvenile matters, codified at § 46b-121 (b) (1), "to make and enforce such orders . . . necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child," including orders impacting parental rights, such as termination and visitation. See *In re Ava W.*, supra, 572–76.

Having determined that trial courts possess such authority, we next considered the legal standard and potential factors for trial courts to consider when evaluating motions for posttermination visitation. See id., 588–90. Ultimately, we "derive[d] the standard for evaluating posttermination visitation from the authority granted to trial courts under § 46b-121 (b) (1)"; id., 588–89; and concluded that "the mo[st] prudent approach when evaluating whether posttermination visitation should be ordered is to adhere to the standard that the legislature expressly adopted [in § 46b-121 (b) (1)]—'necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the] child . . . .' " Id., 589, quoting General Statutes § 46b-121 (b) (1). In adopting the "necessary or appropriate" standard, we considered and explicitly rejected the respondent mother's argument that trial courts should employ the "best interest of the child" standard when ruling on motions for posttermination visitation. See *In re Ava W.*, supra, 336 Conn. 589. Specifically, we wrote: "Although the respondent . . . [mother] contends that any posttermination visitation should be evaluated on

[10] In a case that was argued on the same day as the present case, this court was asked to address whether, posttermination, biological parents have "a legally cognizable interest to support a right to intervene in [a] juvenile case for the purpose of seeking visitation." *In re Riley B.*, 342 Conn. 333, 336, 269 A.3d 776 (2022).

the basis of the child's best interest, we conclude that the mo[st] prudent approach . . . is to adhere to the standard that the legislature expressly adopted [in § 46b-121 (b) (1)] . . . ." Id. We went on to explain that whether to order posttermination visitation is a question of fact for the trial court, and trial courts should consider various factors when evaluating whether to order posttermination visitation. Id. These factors may include, but are not limited to, "the child's wishes, the birth parent's expressed interest, the frequency and quality of visitation between the child and birth parent prior to the termination of the parent's parental rights, the strength of the emotional bond between the child and the birth parent, any interference with present custodial arrangements, and any impact on the adoption prospects for the child." Id., 590.

Despite our rejection of the "best interest of the child" standard and adoption of the "necessary or appropriate" standard in *In re Ava W.*, in the present case, the Appellate Court held—and Valerie argues—that our decision in *In re Ava W.* did *not* unequivocally reject the "best interest of the child" standard. Instead, the Appellate Court interpreted *In re Ava W.* to hold that, "when [a trial court rules on] a motion for posttermination visitation . . . the . . . court's consideration of the traditional best interest of the child is only part of the consideration of whether such visitation is 'necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the] child.' " *In re Annessa J.*, supra, 206 Conn. App. 601, quoting *In re Ava W.*, supra, 336 Conn. 589. To support its reasoning, the Appellate Court noted that, in *In re Ava W.*, before setting forth factors that trial courts can consider in ruling on a motion for posttermination visitation, we stated: "Whether to order posttermination visitation is . . . a question of fact for the trial court, which has the parties before it and is in the best position to analyze

all of the factors which go into the ultimate conclusion that [posttermination visitation is *in the best interest of the child*]." (Emphasis added; internal quotation marks omitted.) *In re Ava W.*, supra, 589; see *In re Annessa J.*, supra, 601. The Appellate Court maintained that our use of the phrase "best interest of the child" in that portion of the decision indicates that a trial court "should take a broader view of best interest [than the analysis made during the dispositional phase of the termination of parental rights hearing], including consideration of the factors set forth in *In re Ava W.*, to determine whether posttermination visitation is 'necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the] child.' " *In re Annessa J.*, supra, 602, quoting *In re Ava W.*, supra, 589.

We did not, however, intend this sentence, in isolation, to broaden the applicable standard to include a "best interest of the child" analysis. See, e.g., *Fisher* v. *Big Y Foods, Inc.*, 298 Conn. 414, 424–25, 3 A.3d 919 (2010) ("an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding").[11] Rather, read in its entirety, our decision in *In re Ava W.* held that trial courts must adhere to the "necessary or appropriate" standard set forth in § 46b-121 (b) (1), not the "best interest of the child" standard, when ruling on motions for posttermination visitation. See *In re Ava W.*, supra, 336 Conn. 589.[12]

[11] We acknowledge that, given our inclusion of the words "the best interest of the child" in *In re Ava W.*, the Appellate Court's interpretation was not without a logical basis. Any confusion that emanated from our unfortunate, but isolated, use of that phrase in *In re Ava W.* is hopefully cleared up by our legal analysis in this case.

[12] We pause briefly to provide one point of clarification. When a trial court analyzes the relevant factors to determine whether posttermination visitation is "necessary or appropriate" for the child's welfare, it makes its determination pursuant to its authority, codified at § 46b-121 (b) (1), to act in the child's best interest. See, e.g., *In re Ava W.*, supra, 336 Conn. 570–72 (citing historical cases demonstrating that, at common law, "courts had *broad authority* to act in the child's best interest in juvenile matters," and

Valerie nevertheless argues that the standard set forth in § 46b-121 (b) (1) necessarily incorporates the "best interest of the child" standard because it "codifies the . . . Superior Court's common-law powers to [issue] any order necessary or appropriate to secure the 'welfare' of a minor child committed to the court's jurisdiction." Valerie contends that, because the legislature enacted § 46b-121 (b) (1) "against the backdrop of . . . common-law history equating the child's welfare with the child's best interests," this court must presume that the legislature intended to incorporate the "best interest of the child" standard into § 46b-121 (b) (1) by its use of the word "welfare" in that statute. We disagree.

The legislature has frequently used the terms "best interest of the child," "best interests of the child," and "child's best interests" throughout chapter 815t of the General Statutes. See, e.g., General Statutes §§ 46b-129, 46b-129a, 46b-129c, 46b-132a and 46b-149. Typically, "[w]hen a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed. . . . That tenet of statutory construction is well grounded because [t]he General Assembly is always presumed to know all the existing statutes and the effect that its action or [nonaction] will have [on] any one of them." (Internal quotation marks omitted.) *State* v. *Heredia*, 310 Conn. 742, 761, 81 A.3d 1163 (2013); see, e.g., *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 850,

§ 46b-121 (b) (1) codified that authority (emphasis added)). Our recognition that trial courts retain this broad authority does not indicate that courts should utilize a broad *standard* when ruling on motions for posttermination visitation. Indeed, the trial court's *authority* to issue orders for posttermination visitation is distinct from the *standard* that it applies in exercising that authority. As we explain in greater detail in this opinion, the standard we chose to adopt in *In re Ava W.* is that which the legislature expressly adopted in § 46b-121 (b) (1).

937 A.2d 39 (2008) ("[t]he use of the different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings" (internal quotation marks omitted)). Thus, we presume that, had the legislature intended to incorporate the "best interest of the child" standard into the "necessary or appropriate" standard set forth in § 46b-121 (b) (1), it would have used the words "best interest of the child" instead of, or in addition to, "welfare." See, e.g., *State* v. *Kevalis*, 313 Conn. 590, 604, 99 A.3d 196 (2014) ("it is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly" (internal quotation marks omitted)); *McCoy* v. *Commissioner of Public Safety*, 300 Conn. 144, 155, 12 A.3d 948 (2011) ("[o]ur case law is clear . . . that when the legislature chooses to act, it is presumed to know how to draft legislation consistent with its intent and to know of all other existing statutes and the effect that its action or nonaction will have [on] any one of them" (internal quotation marks omitted)). We decline to import a standard into § 46b-121 (b) (1) that the legislature chose not to employ.

Anthony concedes that the Appellate Court "may have erred when it stated that this court [in *In re Ava W.*] did not explicitly reject the best interest standard" but nevertheless argues that the distinction that we drew in *In re Ava W.* between "necessary or appropriate" and "best interest of the child" was not substantive. To the extent that Anthony contends that whether a trial court utilizes the "best interest of the child standard" or the "necessary or appropriate" standard is purely a matter of semantics, we disagree. This contention is belied by our decision in *In re Ava W.*, in which, after considering both standards, we explicitly rejected the "best interest of the child" standard in favor of the "necessary or appropriate" standard. (Internal

quotation marks omitted.) *In re Ava W.*, supra, 336 Conn. 588–89. Moreover, our legislature has used the "best interest of the child" standard in other related statutes, and, thus, we presume that it intended to use a different standard when it employed the "necessary or appropriate" standard in § 46b-121 (b) (1). Cf. *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010) ("[T]he legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.)).

Moreover, we conclude that the "necessary or appropriate" standard is more stringent than the "best interest of the child" standard. Cf. *In re Alissa N.*, 56 Conn. App. 203, 208, 742 A.2d 415 (1999) ("Conducting a best interest analysis *is not a narrow concept* restricted to a compelling reason [for keeping a parent in a child's life] or to fully reuniting the parent with the child. Rather, it is *purposefully broad* to enable the trial court to exercise its discretion based [on] a host of considerations." (Emphasis added; internal quotation marks omitted.)), cert. denied, 252 Conn. 932, 746 A.2d 791 (2000). The term "necessary," when used in this context, has one fixed meaning: "Impossible to be otherwise . . . indispensable; requisite; [or] essential." Webster's New International Dictionary (1931) p. 1443. Although the definition of "appropriate" is elastic insofar as it is susceptible to a number of meanings; see, e.g., id., p. 111 (defining "appropriate" as "[b]elonging peculiarly," "suitable," "fit," or "proper"); given the fact that the preceding word in the standard is "necessary," we

choose to adopt a definition of "appropriate" that aligns with the more exacting term, "necessary." In the context of posttermination visitation, we read the word "appropriate" to mean "proper."

To define "appropriate" broadly would be to negate the word "necessary" within the standard set forth in § 46b-121 (b) (1). It is well settled that "[i]nterpreting a statute to render some of its language superfluous violates cardinal principles of statutory interpretation." *American Promotional Events, Inc.* v. *Blumenthal*, 285 Conn. 192, 203, 937 A.2d 1184 (2008). Furthermore, as Justice Keller notes in her concurrence, "there should be few cases in which court-ordered posttermination visitation could be deemed 'necessary or appropriate to secure the [child's] welfare,' " particularly in light of the grounds on which a trial court can terminate parental rights. See General Statutes § 17a-112 (j). A more exacting standard is required in this context, particularly in light of the rare circumstance in which a trial court could simultaneously terminate parental rights and, in the same proceeding, order posttermination visitation. Mindful of these considerations, we conclude that the "necessary or appropriate" standard is purposefully more stringent than the "best interest of the child" standard, as the trial court must find that posttermination visitation is necessary or appropriate—meaning "proper"—to secure the child's welfare.

Accordingly, we conclude that the Appellate Court improperly expanded the standard set forth in *In re Ava W.* As we held in *In re Ava W.*, the proper standard for deciding motions for posttermination visitation is the "necessary or appropriate" standard adopted by the legislature in § 46b-121 (b) (1). See *In re Ava W.*, supra, 336 Conn. 588–89.

Having concluded that the Appellate Court improperly expanded the standard for deciding motions for

posttermination visitation set forth in *In re Ava W.*, we next must determine whether the Appellate Court nevertheless correctly concluded that the trial court held the respondents to a more stringent standard than the "necessary or appropriate" standard that we articulated in *In re Ava W.*

In its memorandum of decision, the trial court found that "neither [Valerie] nor [Anthony] . . . met their burden [of] prov[ing] [that] posttermination visitation for such parent is *necessary or appropriate* to secure the welfare, protection, proper care and suitable support of [Annessa]." (Emphasis added.) In so ruling, the trial court recited the proper "necessary or appropriate" standard. (Internal quotation marks omitted.) *In re Ava W.*, supra, 336 Conn. 589. It also correctly recognized that the respondents' contention—that it would be in Annessa's best interest for posttermination visitation to continue—was "not the standard under . . . § 46b-121 (b) (1)." In addition, the trial court also explicitly considered at least one of the factors we enumerated in *In re Ava W.* that a trial court may consider when determining whether posttermination visitation is "necessary or appropriate" for the child's well-being. Specifically, in denying Anthony's motion for posttermination visitation, the trial court noted that "[Anthony] and Annessa do have a good visiting relationship." See *In re Ava W.*, supra, 590 (noting that one factor trial courts may consider when ruling on party's motion for posttermination visitation is "the frequency and quality of visitation between the child and birth parent prior to the termination of the parent's parental rights").

When the trial court's memorandum of decision is read as a whole, the court's specific references to the standard set forth in *In re Ava W.*, made throughout the relevant portion of the court's memorandum, and its explicit consideration of at least one factor from *In re Ava W.*, indicate that the trial court applied the cor-

rect legal standard in ruling on the respondents' motions for posttermination visitation. See, e.g., *In re Jason R.*, 306 Conn. 438, 453, 51 A.3d 334 (2012) ("[A]n opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding. . . . Furthermore, [w]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Citation omitted; internal quotation marks omitted.)). Indeed, in the absence of some clear indication to the contrary, we presume that the trial court applied the correct legal standard. See, e.g., *DiBella* v. *Widlitz*, 207 Conn. 194, 203–204, 541 A.2d 91 (1988) ("[in the absence of] a record that demonstrates that the trial court's reasoning was in error, we presume that the trial court correctly analyzed the law and the facts in rendering its judgment"); *State* v. *Baker*, 50 Conn. App. 268, 275 n.5, 718 A.2d 450 ("the trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden [of] demonstrating the contrary" (internal quotation marks omitted)), cert. denied, 247 Conn. 937, 722 A.2d 1216 (1998).

The respondents argue that the trial court's statement that posttermination visitation with the respondents was "not required" for Annessa's well-being demonstrates that the trial court was holding them to a more stringent standard than is required by *In re Ava W.* We disagree.

We conclude that the trial court's finding that posttermination visitation with the respondents was "not required" merely reiterated its earlier conclusion that such visitation was not "necessary," part and parcel of the standard set forth in *In re Ava W.*, which requires trial courts to consider whether posttermination visitation is "*necessary* or appropriate" for the child's well-being. (Emphasis added; internal quotation marks omitted.) *In re Ava W.*, supra, 336 Conn. 589. Indeed, the

terms "necessary" and "required" are synonymous. See, e.g., Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 828 (defining "necessary" as "absolutely needed" and identifying "*required*" as synonymous term (emphasis added)). As we have previously noted, "this court has never required the talismanic recital of specific words or phrases if a review of the entire record supports the conclusion that the trial court properly applied the law." *State* v. *Henderson*, 312 Conn. 585, 597, 94 A.3d 614 (2014); see, e.g., *State* v. *Reid*, 22 Conn. App. 321, 326–27, 577 A.2d 1073 (determining that trial court's charge to jury was not defective, despite fact that court substituted word "adverse" for "unfavorable" in statute, "because the terms are synonymous and such a substitution does not change the meaning of the sentence"), cert. denied, 216 Conn. 828, 582 A.2d 207 (1990).

Given that the trial court correctly articulated the "necessary *or* appropriate" standard; (emphasis added; internal quotation marks omitted) *In re Ava W.*, supra, 336 Conn. 589; see *State* v. *Dennis*, 150 Conn. 245, 248, 188 A.2d 65 (1963) ("[t]he use of the disjunctive 'or' between the two parts of the statute indicates a clear legislative intent of separability"); and stated that posttermination visitation was "not required" only *after* it determined that the respondents had not satisfied their burden of proving that such visitation was "necessary or appropriate" to secure Annessa's welfare, we are persuaded that the trial court understood that it was required to determine whether posttermination visitation was either necessary (i.e., required) *or* appropriate. Cf. *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 214–15, 192 A.3d 406 (2018) (rejecting city's argument that trial court failed to consider critical element when reaching its decision because trial court did not recite relevant "talismanic phrase," and concluding that trial court applied proper legal standard because it repeatedly cited to decision of this court, which unam-

biguously set forth legal standard, and implicitly acknowledged that element in its analysis). We therefore conclude that the Appellate Court incorrectly determined that the trial court held the respondents to a more exacting legal standard than the one set forth in *In re Ava W.*

The judgment of the Appellate Court is reversed insofar as that court reversed the trial court's rulings on the respondents' motions for posttermination visitation, the judgment of the Appellate Court is affirmed insofar as that court upheld the trial court's termination of the respondents' parental rights, and the case is remanded to the Appellate Court with direction to affirm the judgment terminating the respondents' parental rights and to affirm the trial court's denial of the respondents' motions.

In this opinion ROBINSON, C. J., and D'AURIA and MULLINS, Js., concurred.

ECKER, J., concurring. I join part I of the majority opinion, in which the majority rejects the unpreserved constitutional challenge of the respondent mother to the remote trial procedure used to adjudicate the petition to terminate her parental rights. I disagree, however, with part II of the majority opinion regarding the legal standard applicable to a motion for posttermination visitation. In my view, the scope of a trial court's authority under General Statutes § 46b-121 (b) (1) "to make and enforce . . . orders" that "the court deems necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child" simply does not provide a workable legal standard to guide a trial court's decision making on the subject of posttermination visitation, and the majority's revision of that language to effectively delete the words "or appropriate" is not a viable option. I agree with part II of

Justice Keller's concurring opinion that, in the absence of further legislative guidance, the proper legal standard under these circumstances should be the standard articulated in General Statutes § 46b-59, which was designed and intended to apply to "[*a*]*ny* person" who seeks visitation with a minor child. (Emphasis added.) General Statutes § 46b-59 (b). Because it is clear on the present record that the respondent parents cannot prevail under the standard articulated by the majority or § 46b-59, I agree with the majority that the judgment of the Appellate Court reversing the trial court's orders denying the respondents' motions for posttermination visitation should be reversed. I therefore concur with the result the majority reaches in part II of its opinion.

I agree with the majority that nothing in our opinion in *In re Ava W.*, 336 Conn. 545, 248 A.3d 675 (2020), should be understood to suggest that terminated parents can obtain visitation under a loose or liberal standard. See part II of the majority opinion. Our holding in that case, first and foremost, established the threshold point that the trial court was not powerless to order posttermination visitation if necessary or appropriate to secure the welfare of the child. See *In re Ava W.*, supra, 589. Of course, the fact that a court has the *authority* to decide an issue often does not tell the court *how* to exercise that authority in any particular case, and, as to that more particular issue, the majority is correct that *In re Ava W.* cannot be read to suggest that the usual "best interest of the child" standard by itself supplies the proper decisional matrix in the case of posttermination visitation.

But none of this means that the "necessary or appropriate" standard, without more, is sufficient to guide the exercise of the trial court's general authority to make and to enforce orders in this delicate context. There surely is no reason to believe that the legislature intended that broad and open-ended standard to supply

the substantive rule of decision with respect to posttermination visitation, or, for that matter, any other ruling that is within the jurisdictional purview of a "juvenile matter," as defined by § 46b-121 (a). I recognize that we concluded in *In re Ava W.* that it was "more prudent" to derive the posttermination visitation standard from the "necessary or appropriate" formulation than to adopt the "best interest of the child" standard; id.; but it is abundantly clear now, if it was not then, that this standard, without more, does not provide sufficient legal guidance to trial courts adjudicating motions for posttermination visitation. Indeed, we implicitly acknowledged in *In re Ava W.* itself the need for additional adjudicative guidance when we observed that a trial judge would be required to devise and consider more particularized "factors" to determine whether posttermination visitation is necessary or appropriate. Id., 589–90. At the time, we left to the trial courts the task of formulating the more specific factors to guide their decision making, in the belief that they are "best equipped to determine the factors worthy of consideration in making this finding." Id. We also offered suggestions of our own and references for additional consultation along these lines.[1]

It therefore should come as no surprise that the broad "necessary or appropriate" standard now requires fur-

[1] We stated: "As examples—which are neither exclusive nor all-inclusive—a trial court may want to consider the child's wishes, the birth parent's expressed interest, the frequency and quality of visitation between the child and birth parent prior to the termination of the parent's parental rights, the strength of the emotional bond between the child and the birth parent, any interference with present custodial arrangements, and any impact on the adoption prospects for the child. See *In re Adoption of Rico*, [453 Mass. 749, 754–55, 905 N.E.2d 552 (2009)] (court explained circumstances in which order for posttermination visitation may be appropriate and warranted); see also A. Williams, Note, 'Rethinking Social Severance: Post-Termination Contact Between Birth Parents and Children,' 41 Conn. L. Rev. 609, 636 (2008) (listing factors to consider for posttermination visitation). Trial courts should, of course, evaluate those considerations independently from the termination of parental rights considerations." *In re Ava W.*, supra, 336 Conn. 590.

ther refinement in light of the uncertainty on the subject that apparently has arisen in the wake of *In re Ava W.* The majority refines the "necessary or appropriate" standard by construing it to mean something closely approximating "necessary or necessary." See part II of the majority opinion. I would prefer to say that (1) the breadth and malleability of the statutory formulation require additional judicial gloss in the absence of direct legislative guidance addressing the specific context of posttermination visitation, (2) the supplementation to the "necessary or appropriate" formulation that we offered in our initial attempt to address the issue in *In re Ava W.* now appears to provide insufficient guidance, and (3) the most sensible and defensible legal framework to determine what is necessary or appropriate in this particular context is the standard set forth in § 46b-59. In the absence of further legislative guidance, I agree with part II of Justice Keller's concurring opinion that § 46b-59 provides the best legal framework for trial courts to adjudicate motions for posttermination visitation.[2] Applying the substantive standards set forth in

[2] Under § 46b-59, "a third party seeking visitation over a fit parent's objection must surmount a high hurdle . . . and . . . establish, by clear and convincing evidence, that (1) a parent-like relationship exists, and (2) denial of visitation would cause the child to suffer real and significant harm." (Citation omitted; internal quotation marks omitted.) *Boisvert* v. *Gavis*, 332 Conn. 115, 133, 210 A.3d 1 (2019); see part II of Justice Keller's concurring opinion, citing *Roth* v. *Weston*, 259 Conn. 202, 234–35, 789 A.2d 431 (2002).

I agree with Justice Keller that, because the statutory parent's objection to visitation is not of constitutional dimension, the burden of proof should be reduced to a preponderance of the evidence. See part II of Justice Keller's concurring opinion. I do not join Justice Keller's suggestion that an order of posttermination visitation should automatically terminate upon adoption, although I understand and acknowledge the concerns prompting that suggestion. Section 46b-59 (f) itself makes it clear that an order of visitation *may* be terminated upon adoption of the minor child: "The grant of such visitation rights shall not prevent any court of competent jurisdiction from thereafter acting upon the custody of such child, the parental rights with respect to such child or the adoption of such child and any such court may include in its decree an order terminating such visitation rights." In my view, whether to terminate visitation is a decision that should be made by the trial court under the particular factual circumstances of each case. I would hope that,

§ 46b-59 means that terminated parents seeking court-ordered visitation are subject to the same requirements as any other nonparents seeking such visitation. That standard is difficult but not impossible to meet, and it remains true, as we said in *In re Ava W.*, that trial courts are best able to decide whether the circumstances in any particular case warrant a carefully crafted order of visitation in accordance with the statutory terms. Because the respondent parents failed to establish that posttermination visitation was necessary or appropriate under the majority's construction of that term or § 46b-59, I concur in part II of the majority opinion.

KELLER, J., with whom KAHN, J., joins, concurring. I agree with and fully join in part I of the majority opinion, which determines that the Appellate Court correctly affirmed the trial court's judgment insofar as it terminated the parental rights of the respondents, Valerie H. and Anthony J., as to their minor child, Annessa J., by way of a virtual trial. I also agree with the result the majority reaches in part II of its opinion—that the Appellate Court improperly reversed the judgment of the trial court insofar as it denied the respondents' motions for posttermination visitation with Annessa on the ground that the trial court applied an incorrect legal standard rather than the standard required under *In re Ava W.*, 336 Conn. 545, 248 A.3d 675 (2020).

Although the petitioner, the Commissioner of Children and Families, has not requested reconsideration of *In re Ava W.*, I write separately to address that matter because I am convinced that the questions presented

if a trial court has determined that visitation with a terminated parent is warranted under the high standard prescribed by § 46b-59, a prospective adoptive parent would not allow the possibility of continued visitation to derail the adoption. I freely concede that my speculation on this point may be more aspirational in theory than justifiable in practice, but, at this juncture, it is unnecessary to decide the automatic termination question.

in part II of the majority opinion are the manifestation of the first of many issues that will arise if this court does not reconsider the holding in *In re Ava W.* that General Statutes § 46b-121 (b) (1) provides the Superior Court with authority in juvenile matters to order post-termination visitation prior to the rendering of a final judgment terminating parental rights.[1] See id., 585, 590 n.18. I use this concurrence to explain how the court in *In re Ava W.* misinterpreted the common law and the statutory scheme and, more importantly, how its holding threatens to undermine the public policy that the statutory scheme is intended to advance. The court in *In re Ava W.* not only decreed the validity of posttermination visitation orders previously uncontemplated in our courts,[2] the logistics of effectuating this change in our jurisprudence could lead to potentially disruptive change and the attendant psychological and economic costs to children, foster parents, preadoptive and adoptive parents, the Department of Children and Families,

[1] Recently, in *In re Riley B.*, 342 Conn. 333, 269 A.3d 776 (2022), this court addressed an issue left open in *In re Ava W.*, concluding that a former parent who files a motion for posttermination visitation *subsequent* to the rendering of a judgment terminating parental rights lacks a colorable claim of a direct and substantial interest in the posttermination phase of the juvenile matter to warrant the former parent's intervention as a matter of right. Id., 353.

[2] Connecticut courts have uniformly concluded that a request for visitation prior to the termination of parental rights trial is rendered moot once parental rights have been terminated. See, e.g., *In re Candace H.*, 259 Conn. 523, 526, 790 A.2d 1164 (2002); *In re Amy H.*, 56 Conn. App. 55, 61, 724 A.2d 372 (1999); *In re Victor D.*, Docket No. CP-10-007160-A, 2014 WL 7461459, *57 (Conn. Super. November 7, 2014); *In re Daniel C.*, Docket Nos. N05-JV-98-0009922-S and N05-JV-98-0009923-S, 1999 WL 558102, *1 n.2 (Conn. Super. July 22, 1999), aff'd, 63 Conn. App. 339, 776 A.2d 487 (2001); *In re Luke G.*, 40 Conn. Supp. 316, 326, 498 A.2d 1054 (1985). As one trial court aptly explained, a posttermination visitation order would be inconsistent with the judgment terminating parental rights, the purpose of which is to vest legal authority to make decisions about the children's future life and contact with others with the statutory parent. *In re Felicia B.*, Docket Nos. H13-JV-97-0005534-S and H13-JV-97-0005535-S, 1998 WL 928410, *4 (Conn. Super. December 29, 1998), aff'd, 56 Conn. App. 525, 743 A.2d 1160, cert. denied, 252 Conn. 951, 748 A.2d 298 (2000).

and the courts. As I am nonetheless mindful that *In re Ava W.* is currently controlling precedent, I also suggest two important clarifications that this court could make to minimize some of its potentially disruptive effects.

I

Section 46b-121 (b) (1) provides in relevant part: "In juvenile matters, the Superior Court shall have authority to make and enforce such orders directed to parents . . . guardians, custodians or other adult persons owing some legal duty to a child therein, as the court deems necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child subject to the court's jurisdiction or otherwise committed to or in the custody of the Commissioner of Children and Families. . . ."

A

I begin with the legal underpinnings of the decision in *In re Ava W.* The court in *In re Ava W.* began its analysis with the premise that the authority to order posttermination visitation existed at common law. See *In re Ava W.*, supra, 336 Conn. 569. After surveying early English and Connecticut case law, the court concluded: "These cases suggest that, under our common law, courts had broad authority to act in the child's best interest in juvenile matters. More specifically, we are able to glean from historical cases that, as part of their common-law authority, our courts contemplated termination and limitation of parental rights (described at the time as custody and modification of custody)." Id., 570–71.

The court then interpreted § 46b-121 (b) (1), and its predecessors dating back to 1921, as a codification of this broad common-law authority. Id., 549, 571–72. As proof of this fact, the court pointed to the statutory text authorizing the trial court to issue any order that

it deems "necessary *or* appropriate" and the fact that the scope of the statute is extended to any "adult persons owing some legal duty to a child" rather than being limited to parents. (Emphasis in original; internal quotation marks omitted.) Id., 572. The court then observed: "Although § 46b-121 (b) (1) does not expressly mention orders for posttermination visitation, neither does it expressly preclude that authority. In our view, a broad statutory grant of authority and a lack of limiting language . . . supports [a] conclusion that the Superior Court has the authority to issue such an order." (Internal quotation marks omitted.) Id., 572–73.

The court in *In re Ava W.* thus reasoned that the legislature's failure to "abrogate" the trial court's common-law authority to regulate visitation requires this court to interpret § 46b-121 (b) (1) to encompass posttermination visitation. Id., 574. The court pointed to *Michaud* v. *Wawruck*, 209 Conn. 407, 551 A.2d 738 (1988), in which a posttermination visitation agreement between the former parent[3] and adoptive parents was deemed enforceable, as further evidence that the legislature had not "expressly abrogated the authority to make or enforce orders regarding posttermination visitation." *In re Ava W.*, supra, 336 Conn. 576.

Finally, the court in *In re Ava W.* considered whether the statutory provisions governing cooperative postadoption visitation agreements between parents and prospective adoptive parents, enacted after *Michaud*; see General Statutes § 17a-112 (b) through (h); "abrogated a court's common-law authority to issue orders in juvenile matters and thus serves as a limitation on the court's authority to order posttermination visitation." *In re Ava W.*, supra, 336 Conn. 579. The court

[3] I use the term "former parent" rather than "biological parent," the term employed in most of the case law on this subject, because biological parent does not include adoptive parents.

pointed out that the operation of § 17a-112 (b), which applies to proceedings to terminate parental rights, is limited in scope and does not apply to contested postermination visitation orders. Id., 580. Because the court viewed the provisions governing the cooperative agreements to control a narrower subset of circumstances than those under § 46b-121 (b) (1), it determined that the rule of construction under which a more specific statute relating to a particular subject matter will control over a more general statute that might apply was not controlling. Id., 582. The court also pointed to statutory text providing that "[cooperative postadoption agreements] shall be in addition to those under common law" as evidence that the legislature did not intend to abrogate the common law. (Internal quotation marks omitted.) Id., 580, quoting General Statutes § 17a-112 (b).

B

The cases cited by the court in *In re Ava W.* support the proposition that courts historically exercised common-law authority to ensure care for neglected or abused children and to remove a child from unfit parents' custody. Id., 569–71. The court in *In re Ava W.* did not, however, cite a single case in which the court exercised common-law authority to order that parental visitation be provided with a child removed from the parent's custody.

An authoritative treatise that addresses the origins and limits of the court's equitable jurisdiction explains that this jurisdiction "extends to the care of the person of the [child], so far as is necessary for his protection and education; and to the care of the property of the [child] for its due management, and preservation, and proper application for his maintenance." 2 J. Story, Commentaries on Equity Jurisprudence, as Administered in England and America (2d Ed. 1839) § 1341, p.

573; see also id., § 1333 p. 561 (acknowledging that long-standing equitable jurisdiction over persons and property of children flows from crown's "general power and duty, as parens patriae, to protect those, who have no other lawful protector"). When the father is unfit to protect and provide education for his child,[4] the court will "deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them, and to superintend their education." Id., § 1341 p. 575. Although the treatise indicates that the court had jurisdiction to direct the guardian to take actions necessary to the child's maintenance, care, or education (typically for the benefit of children who come from families with means); see id., § 1337 p. 570; id., § 1338 pp. 570–71; id., § 1349 p. 579; id., § 1351 p. 580; id., § 1354 p. 582; the subject of visitation is never mentioned.

This omission is not surprising. Although the father's custody could be restored by way of a habeas petition upon proof of fitness; *Kelsey* v. *Green*, 69 Conn. 291, 298, 301, 37 A. 679 (1897); neither the state nor the court had any obligation to aid family reunification. It was not until 1923 that the United States Supreme Court held that parents have a constitutionally protected interest in the care and control of their children; see *Meyer* v. *Nebraska*, 262 U.S. 390, 399, 401, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); and not until 1972 that such rights were recognized in the context of custody and visitation decisions; see *Stanley* v. *Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); long after our

[4] At common law, the right to custody and control of minor children inhered exclusively in the father; the mother could become the child's natural guardian only upon the father's death. See *Goshkarian's Appeal*, 110 Conn. 463, 466, 148 A. 379 (1930). The earliest statutes similarly contemplated appointment of a guardian for a child only when the father was incapable of caring for the child. See General Statutes (1854 Rev.) tit. VII, c. 6, § 35. It was only by statute, first enacted in 1901, that the rights of both parents were made equal. See *Goshkarian's Appeal*, supra, 466.

legislature adopted a statutory scheme to address the care and custody of neglected, uncared for, and abused children.[5] See General Statutes (1854 Rev.) tit. VII, c. 6, § 35.

Another essential fact that must be considered is that the concept of termination of parental rights, as it is understood today, was unknown to the common law. See *Woodward's Appeal*, 81 Conn. 152, 166, 70 A. 453 (1908) ("A . . . parent has certain legal rights in respect to his children during minority. But these rights are not absolute rights, they may be forfeited by his own conduct, they may be modified or suspended against his will by action of the court, they may to a certain extent be transferred by agreement to another, but *they cannot be destroyed as between himself and his child, except by force of statute*." (Emphasis added.)). The child's care and custody could be vested in a guardian, but guardianship did not terminate the father's obligation to provide for the child's support; see *Stanton* v. *Willson*, 3 Day (Conn.) 37, 57–58 (1808); see also *Penfield* v. *Savage*, 2 Conn. 386, 387 (1818) ("a guardian is not bound to support his ward out of his own estate"); nor did it preclude restoration of the parents' custody. Similarly, adoption of children removed from their parents' custody was not recognized under the common law. See *Woodward's Appeal*, supra, 164–65 (construing Wisconsin statute similar to Connecticut's adoption

[5] See *Doe* v. *Doe*, 163 Conn. 340, 344, 307 A.2d 166 (1972) (noting that, when trial court rendered its decision, it did not have benefit of United States Supreme Court's decision in *Stanley* v. *Illinois*, supra, 405 U.S. 645, which held that both due process and equal protection clauses of fourteenth amendment to United States constitution required hearing on parent's fitness before his children could be taken from him); see also *In re Juvenile Appeal (Anonymous)*, 181 Conn. 638, 648, 436 A.2d 290 (1980) (*Parskey*, *J.*, dissenting) (citing *Stanley* for proposition that "[this court] must examine the 'no ongoing parent-child relationship' ground for termination in light of the [respondent's] constitutional right to preserve her parental rights in the absence of a powerful countervailing state interest").

statute and explaining that "courts in applying statutes of this kind have held that the power to so adopt minor children is a creation of the statute *unknown to the common law* . . . and that an adoption is invalid unless made in pursuance of the essential requirements of the statute" (emphasis added)); see also *Goshkarian's Appeal*, 110 Conn. 463, 473–77, 148 A. 379 (1930) (*Wheeler*, *C. J.*, dissenting) (discussing history of Connecticut adoption law from 1864 to 1930). Given the absence of any common-law procedure to terminate parents' rights vis-à-vis their children or to effectuate adoptions, statutes purportedly codifying the court's common-law authority could not have included (or contemplated) authority to grant posttermination visitation.

There can be no doubt that the statutory scheme governing neglected and abused children expanded on the court's common-law authority. In our earliest statutes, parents were designated as their children's "guardians" and could be removed as such by the Probate Court if the children had been abandoned or neglected, or the parent was otherwise unfit. See General Statutes (1866 Rev.) tit. XIII, c. 5, § 68; General Statutes (1854 Rev.) tit. VII, c. 6, § 35. The newly appointed guardian was granted "control of the person of such minor, and the charge and management of his estate; and a guardian so appointed shall have the same power over the person and property of such minor, as guardians of minors whose parents are deceased." General Statutes (1866 Rev.) tit. XIII, c. 5, § 68. The Probate Court was given authority to approve an adoption agreement between the child's newly designated guardian and a third party. See General Statutes (1875 Rev.) tit. XIV, c. 4, §§ 1 and 2. Approval of the adoption agreement rendered the adoptive parents the legal parent of the child with all of the rights and duties of a "legitimate" parent. General Statutes (1875 Rev.) tit. XIV, c. 4, § 2. It is thus fair to infer that adoption extinguished all

legal rights and obligations of the child's parents with respect to their child.[6] There is neither a textual basis nor case law from which an inference can be drawn, however, that the Probate Court had authority, in connection with its approval of the adoption agreement, to order the adoptive parents to provide visitation with the child's former parents.

In 1921, the legislature created the juvenile courts and provided such courts with the broad grant of authority to issue orders to parents and persons owing a legal duty to the child that are necessary or appropriate to secure the support or welfare of the child—the predecessor to § 46b-121 (b) (1).[7] See Public Acts 1921, c. 336, § 3. *A procedure to terminate parental rights prior to adoption still did not exist.* This statutory grant of authority could not, therefore, have been intended to include orders for posttermination visitation.

A procedure to terminate parental rights, prior to adoption, was not enacted until almost *four decades* later. See Public Acts 1959, No. 184. The legislative history reveals that the purpose of this procedure was to end the disruptive practice of parents filing petitions to revoke their child's commitment to the commissioner's predecessor after a required trial period for an adoptive placement began. See Conn. Joint Standing Committee Hearings, Public Welfare and Humane Insti-

[6] Courts held that, "[w]hen the custody of a child has been taken from [child's] parents because [he or she] is neglected and uncared for, their consent to its adoption is not required, since they have already been fully divested of its custody and control." *Goshkarian's Appeal*, supra, 110 Conn. 469.

[7] "[I]n 1978, the [legislature] enacted General Statutes § 51-164s, which merged the Juvenile Court with the Superior Court . . . [and] vested in the Superior Court the jurisdiction that had until then resided in the Juvenile Court. . . . [A]ll juvenile matters now come under the administrative umbrella of the family division of the Superior Court." (Citations omitted; internal quotation marks omitted.) *In re Ava W.*, supra, 336 Conn. 571 n.12.

tutions, 1959 Sess., pp. 34–36, remarks of Assistant Attorney General Ernest Halstead on behalf of the Commissioner of Welfare. Not long thereafter, the legislature defined "termination of parental rights" to make clear that it means "the *complete severance* by court order of the legal relationship, with all its rights and responsibilities, between the child and his parent . . . ." (Emphasis added.) Public Acts 1965, No. 488, § 1; see Public Acts 1974, No. 74-164, § 1 (expanding on that definition by adding "so that the child is free for adoption"); see also General Statues § 17a-93 (5) (current codification of definition). Relying on a similarly worded statute, the Maine Supreme Judicial Court reasoned: "The plain language of this section mandates that a termination order sever the relationship between parent and child. The court's attempt to terminate the mother's rights to her children and concomitantly to preserve her relationship with them by requiring the [relevant state agency] to provide for continuing visitation was beyond its authority." *In re Melanie S.*, 712 A.2d 1036, 1037–38 (Me. 1998).

Thus, it was made plain and unambiguous as of 1965 that the trial court had no authority under § 46b-121 (b) (1) to direct orders to former parents whose parental rights had been terminated. Severance of their responsibilities to the child meant that they were no longer "adult persons owing some legal duty to a child . . . ." General Statutes § 46b-121 (b) (1). The court's reliance in *In re Ava W.* on this language as support for a court's authority to issue posttermination orders for the benefit of the former parent is therefore misplaced.[8]

[8] To avoid the problem posed by the definition of termination of parental rights, the court in *In re Ava W.* characterizes posttermination visitation as an exercise of the court's equitable authority under § 46b-121 (b) (1) and not a *right* afforded to the parent. See *In re Ava W.*, supra, 336 Conn. 560–61. But the result is a distinction without a difference when *In re Ava W.* affords the parent the right to move for posttermination visitation and the decision to grant such visitation is assessed under a standard as elastic as "necessary or appropriate . . . ." General Statutes § 46b-121 (b) (1).

Subsequent changes to the statutory scheme with regard to termination of parental rights provide further evidence that the grant of authority in § 46b-121 (b) (1) was not intended to authorize the trial court to issue posttermination visitation orders. The legislature also provided authority to the Probate Court to adjudicate certain petitions for termination of parental rights. See General Statutes § 45a-715. It did not provide the Probate Court with authority similar to that under § 46b-121 (b) (1). Consequently, under the interpretation of the scheme by the court in *In re Ava W.*, the availability of posttermination visitation would depend on the forum in which the petition for termination of parental rights was adjudicated.[9] A construction of § 46b-121 (b) (1) under which it does not include authority to order posttermination visitation would render the termination scheme in harmony. See, e.g., *In re Jusstice W.*, 308 Conn. 652, 663, 65 A.3d 487 (2012) ("the legislature is always presumed to have created a harmonious and consistent body of law" (internal quotation marks omitted)).

Yet another significant change was the addition of authority for the trial court to appoint a "statutory parent" for the child following termination of parental rights, typically the commissioner. See General Statutes §§ 17a-93 (6), 17a-112 (m), 45a-717 (f) and (g), 45a-718 and 46b-129b (a). This appointment allowed the statutory parent to assume the role previously played by the legal parent and thereby served as a further backstop against the former parent's efforts to impede adoption. See General Statutes § 45a-718 (b) ("[t]he statutory parent shall be the guardian of the person of the

[9] The respondent parent could move to transfer the termination petition from the Probate Court to the Superior Court, but such a request must be made prior to a hearing on the merits; see General Statutes § 45a-715 (g); and hence prior to the time that the issue of posttermination visitation is likely to be contemplated in a contested case.

child, shall be responsible for the welfare of the child and the protection of the child's interests and shall retain custody of the child until the child attains the age of eighteen unless, before that time, the child is legally adopted or committed to the [c]ommissioner . . . or a licensed child-placing agency"); see also 16 S. Proc., Pt. 3, 1973 Sess., p. 1434, remarks of Senator George C. Guidera (describing steps in adoption process as termination of parental rights, appointment of a statutory parent, and then adoption proceedings, and explaining that "[t]he concept of a statutory parent is new in the law and is necessary in order to effectuate a greater degree of finality in adoptions"). The legislature thereby expressed its clear intention that the statutory parent would have control over the decision whether posttermination visitation, or any other form of contact with the former parent, was in the child's best interest. See *In re Nayya M.*, Docket No. H12-CP-10-012977-A, 2012 WL 2855816, *31 (Conn. Super. June 7, 2012) (ordering that "[a]ny future contact between the children and any of the respondent parents shall be left to the [commissioner's] or subsequent adoptive parents' informed discretion"); *In re Andrew C.*, Docket No. H12-CP-11-013647-A, 2011 WL 1886493, *15 (Conn. Super. April 19, 2011) (listing nine trial court decisions holding that judgment terminating parental rights allows legal authority over children to be vested in statutory parent or adoptive parents regarding decisions about children's future life and their contact with others); see also *Division of Youth & Family Services* v. *B.G.S.*, 291 N.J. Super. 582, 594–96, 677 A.2d 1170 (App. Div. 1996) (authority to allow posttermination visitation rests exclusively with state child protection agency).

The clearest indication that the court misinterpreted § 46b-121 (b) (1) in *In re Ava W.*, however, may be the plain and unambiguous evidence that the legislature

considered posttermination visitation for a parent whose rights have been terminated and provided the trial court with authority to grant it in only one circumstance: cooperative postadoption agreements.[10] See General Statutes § 17a-112 (b) through (h); see also General Statutes § 45a-715 (h) through (s) (granting similar authority to Probate Court). As important as the fact that the legislature provided such authority is the extent to which it prescribed substantive and procedural criteria to guide and limit the exercise of that authority.[11] The

[10] The legislature also considered and provided for posttermination visitation for siblings. Siblings of children committed to the department have the right to file a motion and to be heard on the issue of visitation. See General Statutes §§ 17a-15 (d) and 46b-129 (q); see also General Statutes § 45a-715 (o) (allowing court to consider and order postadoption communication or contact with sibling). No similar right is expressly provided for the former parent.

[11] General Statutes § 17a-112 provides in relevant part: "(b) Either or both birth parents and an intended adoptive parent may enter into a cooperative postadoption agreement regarding communication or contact between either or both birth parents and the adopted child. Such an agreement may be entered into if: (1) The child is in the custody of the Department of Children and Families; (2) an order terminating parental rights has not yet been entered; and (3) either or both birth parents agree to a voluntary termination of parental rights, including an agreement in a case which began as an involuntary termination of parental rights. The postadoption agreement shall be applicable only to a birth parent who is a party to the agreement. Such agreement shall be in addition to those under common law. Counsel for the child and any guardian ad litem for the child may be heard on the proposed cooperative postadoption agreement. There shall be no presumption of communication or contact between the birth parents and an intended adoptive parent in the absence of a cooperative postadoption agreement.

"(c) If the Superior Court determines that the child's best interests will be served by postadoption communication or contact with either or both birth parents, the court shall so order, stating the nature and frequency of the communication or contact. A court may grant postadoption communication or contact privileges if: (1) Each intended adoptive parent consents to the granting of communication or contact privileges; (2) the intended adoptive parent and either or both birth parents execute a cooperative agreement and file the agreement with the court; (3) consent to postadoption communication or contact is obtained from the child, if the child is at least twelve years of age; and (4) the cooperative postadoption agreement is approved by the court.

"(d) A cooperative postadoption agreement shall contain the following:

legislature prescribed the circumstances under which such agreements would be subject to approval (e.g., parent agrees to voluntary termination of parental rights) and the necessary terms of such agreements (e.g., parent's acknowledgment that adoption is irrevocable, even if adoptive parents violate agreement). See General Statutes § 17a-112 (b) through (e). It protected the adoptive parents' right to change their residence after executing the agreement. See General Statutes

(1) An acknowledgment by either or both birth parents that the termination of parental rights and the adoption is irrevocable, even if the adoptive parents do not abide by the cooperative postadoption agreement; and (2) an acknowledgment by the adoptive parents that the agreement grants either or both birth parents the right to seek to enforce the cooperative postadoption agreement.

"(e) The terms of a cooperative postadoption agreement may include the following: (1) Provision for communication between the child and either or both birth parents; (2) provision for future contact between either or both birth parents and the child or an adoptive parent; and (3) maintenance of medical history of either or both birth parents who are parties to the agreement.

"(f) The order approving a cooperative postadoption agreement shall be made part of the final order terminating parental rights. The finality of the termination of parental rights and of the adoption shall not be affected by implementation of the provisions of the postadoption agreement. Such an agreement shall not affect the ability of the adoptive parents and the child to change their residence within or outside this state.

"(g) A disagreement between the parties or litigation brought to enforce or modify the agreement shall not affect the validity of the termination of parental rights or the adoption and shall not serve as a basis for orders affecting the custody of the child. The court shall not act on a petition to change or enforce the agreement unless the petitioner had participated, or attempted to participate, in good faith in mediation or other appropriate dispute resolution proceedings to resolve the dispute and allocate any cost for such mediation or dispute resolution proceedings.

"(h) An adoptive parent, guardian ad litem for the child or the court, on its own motion, may, at any time, petition for review of any order entered pursuant to subsection (c) of this section, if the petitioner alleges that such action would be in the best interests of the child. The court may modify or terminate such orders as the court deems to be in the best interest of the adopted child. . . ."

The provisions in the Probate Court scheme for cooperative postadoption agreements mirror the provisions in § 17a-112. See General Statutes § 45a-715 (h) through (n).

§ 17a-112 (f). The legislature not only provided procedures for the approval of the agreement and its incorporation into the final order terminating parental rights, but also anticipated and provided guidance regarding disagreements between the parties and changed circumstances. See General Statutes § 17a-112 (c), (f), (g) and (h). Surely, if the legislature enacted provisions protecting intended adoptive parents who willingly enter into a postadoption agreement, it would have afforded adoptive parents equivalent protections when there is no such cooperation if it actually thought that the law already permitted or should be amended to permit the unilateral imposition of posttermination visitation orders. See *In re K.H.*, Docket No. 2019-258, 2019 WL 6048913, *3 (Vt. November 14, 2019) (concluding that trial court properly concluded that it had no authority to order ongoing contact posttermination in light of statute that provided for postadoption contact orders pursuant to agreement between biological parents and intended adoptive parents); see also *In re Hailey ZZ.*, 19 N.Y.3d 422, 437, 972 N.E.2d 87, 948 N.Y.S.2d 846 (2012) ("the open adoption concept would appear to be inconsistent with this [s]tate's view as expressed by the [l]egislature that adoption relieves the biological parent of all parental duties toward and of all responsibilities for the adoptive child over whom the parent shall have no rights" (internal quotation marks omitted)).

To the extent that the court in *In re Ava W.* relied on *Michaud* and a sentence in the statutes preserving common-law postadoption visitation agreements as support for its interpretation of § 46b-121 (b) (1), that reliance is misplaced. *Michaud* involved a common-law breach of contract action, predating the cooperative adoption agreement statutes, that challenged the adoptive parents' repudiation of a visitation agreement executed after parental rights were terminated. *Michaud* v. *Wawruck*, supra, 209 Conn. 408–409. It hardly provides

evidence that the legislature had not "expressly abrogated the [court's] authority to make or enforce orders regarding posttermination visitation." *In re Ava W.*, supra, 336 Conn. 576. As I previously explained, there was no such common-law authority to be abrogated. Moreover, *Michaud* did not involve the exercise of the court's authority in a juvenile matter but, rather, its authority to enforce a common-law contract. The legislature's subsequent adoption of language providing that "[cooperative postadoption] agreement[s] shall be *in addition to those under common law*"; (emphasis added) General Statutes § 17a-112 (b); accord General Statutes § 45a-715 (h); similarly refers to extrajudicial agreements, like the agreement in *Michaud*, between private parties. This language does not refer to posttermination visitation compelled over the objection of the statutory parent or the child's adoptive parents. See *In re Shane F.*, Docket Nos. 26623-1-111 and 26624-1-111, 2009 WL 44818, *5–6 (Wn. App. January 8, 2009) (decision without published opinion, 148 Wn. App. 1004) (statute providing that " '[n]othing in this chapter shall be construed to prohibit the parties to a proceeding under this chapter from entering into agreements regarding communication with or contact between child adoptees, adoptive parents, and a birth parent or parents' " did not support judicially mandated postadoption visitation).

In sum, there is not a single case or a shred of historical or textual evidence demonstrating that trial courts had authority to order posttermination visitation under the common law or were given such authority by statute. The historical record reflects that § 46b-121 (b) (1) had never previously been utilized by the courts to permit an order of posttermination visitation; it had been used to issue orders to address matters that arose during the course of child protection proceedings as they continued toward their ultimate and final goal: a

safe, permanent situation for the child—either reunification with a parent or the placement in a permanent home, preferably an adoptive home—and an end to the state's involvement. This provision allows the court to direct orders to the commissioner, parents whose rights are still intact and who are still striving to achieve restoration of the normal family unit, foster parents, and any other person who continues to owe some duty to the child.

C

The interpretation of § 46b-121 (b) (1) as allowing posttermination parental rights to visitation is also inconsistent with the policies that the legislative scheme is intended to implement. It is important to recognize at the outset that there should be few cases in which court-ordered, posttermination visitation could be deemed "necessary or appropriate to secure the [child's] welfare"; General Statutes § 46b-121 (b) (1); *regardless of what that standard means*. There are three principal reasons why this is so. The first is the nature of the clear and convincing proof that is required to terminate parental rights. This proof consists not merely of evidence that the parent has engaged in conduct that was harmful, or is likely to cause harm, to the child and has shown unwillingness or incapacity to change that conduct;[12] see General Statutes § 17a-112

[12] Let me remind the reader of the regrettable situations that warrant termination of parental rights: abandonment of the child; the parent's failure (after months of reunification efforts provided by the department) to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child; the child has been denied, by reasons of an act or acts of parental commission or omission, including, but limited to, sexual molestation or exploitation, severe physical abuse or a pattern of abuse, the care, guidance, or control necessary for the child's well-being; the lack of an ongoing parent-child relationship, which means the lack of a relationship that ordinarily develops as a result of a parent's having met on a day-to-day basis the needs of the child, and to allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child; the parent has killed, through deliberate, nonaccidental act, another child of the

(j); but also that termination of parental rights is in the child's best interest. See General Statutes § 17a-112 (j); see also General Statutes § 45a-717 (g). Most of these cases do not present circumstances in which an order of posttermination visitation would ever be appropriate. The second reason is that, in the absence of actual abuse, the court would be less likely to find that termination of parental rights is in the child's best interest if the child's chances of securing a permanent placement are remote (e.g., child is much older, has severe behavioral or medical issues, etc.), the child retains a strong attachment to the parent, and the parent has, to the best of his or her ability, maintained contact with the child. See General Statutes § 17a–112 (k) (4) through (7);[13] see also S. Williams, Child Trends, State-Level

parent, or has requested, commanded, importuned, attempted, conspired, or solicited such killing, or has committed an assault, through deliberate, nonaccidental act, that resulted in serious bodily injury of another child of the parent; or the parent committed an act that constitutes sexual assault, as defined in our law, or has compelled a spouse or cohabitor to engage in sexual intercourse by the use of force or by the threat of the use of force, if such act resulted in the conception of the child. See General Statutes §17a-112 (j).

[13] General Statutes § 17a-112 (k) provides in relevant part: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding . . . (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

Data for Understanding Child Welfare in the United States (February 28, 2022), available at https://www.childtrends.org/publications/state-level-data-for-understanding-child-welfare-in-the-united-states (last visited June 16, 2022) (providing federal fiscal year 2018, state by state statistics of children adopted and waiting to be adopted, demonstrating that, as age increases, average length of stay in foster care waiting to be adopted increases). One option if ongoing contact is appropriate is for the court to appoint a permanent legal guardian for the child in lieu of termination; see General Statutes § 46b-129 (j); a status that would allow the court to exercise its authority under § 46b-121 (b) (1) to order visitation.[14] See, e.g., *In re Mason S.*, Superior Court, judicial district of Hartford, Juvenile Matters, Docket No. H12-CP-17-16981-A, (May 30, 2017); *In re Nyara J.*, Superior Court, judicial district of Hartford, Juvenile Matters, Docket Nos. H12-CP-08-012242-A and H12-CP-08-012243-A (September 22, 2016). The third reason is that, if the court nonetheless orders termination under such circumstances, the commissioner, as statutory parent, is likely to voluntarily allow some form of posttermination contact or communication between the parent and the child, if it is in the child's best interest and the parent is willing and able to act in a cooperative manner. Thus, cases in which court-ordered, posttermination visitation could be viewed as necessary or appropriate to secure the child's welfare will likely be a distinct minority. Whether the legislature intended to provide authority for the trial court to order posttermination visitation must, therefore, be considered against this backdrop.

[14] Although the permanent legal guardianship may be terminated if the guardian becomes unsuitable, the parent may not move for termination. See General Statutes § 46b-129 (j) (7). The legislature's creation of the permanent legal guardianship suggests that it contemplated situations in which the parent lacks capacity to care for the child but should be permitted some ongoing contact.

This court also should consider whether court-ordered, posttermination visitation would be generally consistent with the purpose of termination of parental rights. Cf. *In re Eden F.*, 250 Conn. 674, 692, 741 A.2d 873 (1999) (considering whether court's interpretation of § 17a-112 was in accordance with public policy declared by legislature in General Statutes § 17a-101). Termination of parental rights is intended to foster permanency and stability for the child. See, e.g., *In re Nevaeh W.*, 317 Conn. 723, 731–33, 120 A.3d 1177 (2015); *In re Davonta V.*, 285 Conn. 483, 494–96, 940 A.2d 733 (2008). Adoption is the preferred outcome; see *In re Adelina A.*, 169 Conn. App. 111, 121 n.14, 148 A.3d 621 ("[t]he Adoption and Safe Families Act (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (1997), and parallel state law . . . [have] established a clear preference for termination followed by adoption when reunification with a parent is not a viable permanency plan"), cert. denied, 323 Conn. 949, 169 A.3d 792 (2016); and, in accordance with federal law, Connecticut's statutory scheme provides an expedited schedule to make a permanent placement for a child for whom reunification is not an appropriate option. See id., 122–23.

Just as failure to terminate parental rights may have an adverse effect on a child's need for permanency and stability, so, too, may permitting posttermination visitation, particularly with children who are too young or psychologically frail to understand that the parent they continue to have contact with will never resume his or her parental role. The schism created by any conflict between the parent and a foster or adoptive parent also can prove disruptive to the children and their caretakers or new family.[15] See, e.g., *In re Omar*

[15] Even when parents are cooperative during pretermination visitation, such conduct will not necessarily be an accurate predictor of their conduct posttermination, after the incentive to cooperate to obtain reunification has been removed. Moreover, given that almost all visitation ordered prior to termination is supervised, posttermination visitation likely would also need to be supervised. It is an open question as to how such supervision would

*I.*, 197 Conn. App. 499, 533, 231 A.3d 1196 (respondent father sent threatening e-mail to foster parents accusing them of emotional abuse and of alienating children from him), cert. denied, 335 Conn. 924, 233 A.3d 1091, cert. denied sub nom. *Ammar I.* v. *Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020); *In re Joseph W.*, 53 Conn. Supp. 1, 79, 79 A.3d 155 (2012) (respondent parents drove to foster home, pounded on doors, shouted child's name, and demanded to know where child was, terrifying foster parents' child who was home alone), aff'd, 146 Conn. App. 468, 78 A.3d 276, cert. denied, 310 Conn. 950, 80 A.3d 909 (2013) and cert. denied, 310 Conn. 950, 80 A.3d 909 (2013); *In re Guilherme F.*, Superior Court, judicial district of Middlesex, Child Protection Session at Middletown, Docket Nos. H12-CP-04-010032-A and H12-CP-05-010590-A (January 3, 2008) (foster placement was disrupted when respondent mother made referral to department hotline making unsubstantiated allegations that children were being abused by foster parents). Posttermination visitation thus poses the risk of impinging on foster families and deterring their willingness to foster children.

Similarly, posttermination visitation may derail adoption or reduce the children's opportunities to be placed in permanent homes and, if they are adopted, may threaten the integrity of the new family unit. See *People ex rel. M.M.*, 726 P.2d 1108, 1125 (Colo. 1986) (characterizing posttermination visitation order as "impediment to adoption"). Prospective adoptive parents may be reluctant or unwilling to facilitate contact between a child and a former parent who has exhibited problematic behaviors that justified the loss of his or her parental rights.[16] The prospect of having to initiate a court

be provided, who would provide supervision, where such visits would take place, and who would assume its cost.

[16] A recent Superior Court decision exemplifies the dilemma facing trial judges as a result of this court's decision in *In re Ava W.* and the resulting consequences of posttermination visitation orders. Judge Bernadette Conway, who, until her recent retirement, had been the chief administrative

action to revoke the visitation order or getting hauled into court to answer a motion for contempt for refusing to provide postadoption visitation may be a significant deterrent to adoption. The commissioner may thus feel compelled to limit the department's pool of potential adoptive parents to those who will agree to an open adoption.

Even under the best of circumstances, it is inevitable that disagreements and changes in circumstances will arise after posttermination visitation commences. It is not speculative to assume that compelled orders of visitation following a contested termination of parental rights will lead to repetitive motions for contempt and

judge for juvenile matters, concluded that she was obliged under the change in the law resulting from the court's holding in *In re Ava W.* and the particular circumstances of the case before her to issue an order of posttermination visitation. See *In re Roxanne F.*, Docket Nos. N05-CP-19-023890-A, N05-CP-19023891-A and N05-CP-19-023892-A, 2022 WL 375459 (Conn. Super. January 18, 2022). Judge Conway noted that, although the respondent mother and the children's paternal aunt, the identified preadoptive parent, would continue their "effective collaborative efforts" to allow for contact between the mother and the children such that no posttermination visitation order was necessary, there was the possibility that "a scenario could evolve wherein one or more of the children are adopted by someone other than [the] paternal aunt and by someone not supportive of postadoption visitation/contact between [the] respondent mother and the child[ren]." Id., *12. Because of that potential uncertainty, Judge Conway regrettably felt that she had no choice under *In re Ava. W.* but to enter a posttermination visitation order directed not only to the paternal aunt but also to any future adoptive parent. Id. Judge Conway expressed reservations about the propriety of subjecting nonparties to court orders and the court's continuing jurisdiction: "An adoptive parent's right to parent, free of unfettered outside interference, is indistinguishable from a birth parent's right to do the same. Under our state's statutory framework, prior to [*In re*] *Ava W.*, once adoption is effectuated, [department] involvement ends, and absent rare exceptions, the . . . court's jurisdiction over the child[ren] and the newly named adoptive parent(s) ceases. . . . [The] court's posttermination visitation orders necessarily [leave] intact the trial court's jurisdiction and de facto subjects the adoptive parent(s) to the court's continuing jurisdiction and court orders, until the child[ren] reach the age of majority, notwithstanding the adoptive parent's nonparty status and a lack of prior notice and opportunity to be heard prior to the issuance of the court's orders." Id., *12 n.23.

modification. This consequence will require the assignment of more judges to our already overburdened docket for juvenile matters. It also will impose a burden on foster parents and adoptive parents to initiate court action to modify or revoke the visitation order or require them to respond to court action initiated by the former parent.[17]

I am aware that there is some legal scholarship supporting the position that maintaining a relationship with the biological family can be beneficial to a child following termination of parental rights. See, e.g., National Council of Juvenile and Family Court Judges, Forever Families: Improving Outcomes by Achieving Permanency for Legal Orphans, (April, 2013) p. 18, available at https://www.ncjfcj.org/wp-content/uploads/2013/04/LOTAB_3_25_13_newcover_0.pdf; K. Foehrkolb, Comment, "When the Child's Best Interest Calls for It: Post-Adoption Contact by Court Order in Maryland," 71 Md. L. Rev. 490, 524–28 (2012); A. Williams, Note, "Rethinking Social Severance: Post-Termination Contact Between Birth Parents and Children," 41 Conn. L. Rev. 609, 617–19 (2008); see also *State ex rel. Amy M.* v. *Kaufman*, 196 W. Va. 251, 260, 470 S.E.2d 205 (1996) ("even where termination of parental rights is justified, a continued relationship between parent and child by means of post-termination visitation may be valuable to the child's emotional well-being"). In response, I offer two observations about ways in which such a relationship could be fostered that are likely to be far less intrusive and disruptive to the child's permanent placement than court-ordered visitation with the former parent. First,

[17] The right to appointed counsel in such proceedings is not certain. Although adoptive parents *may* be entitled to appointed counsel; see General Statutes § 46b-136 (a) (authorizing appointment of "attorney to represent . . . the child's or youth's parent or parents or guardian, or other person having control of the child or youth, if such judge determines that the interests of justice so require"); they will be assessed costs of such representation if they are not indigent. See General Statutes § 46b-136 (b).

a relationship with the child's biological family may be fostered through connections with relatives other than the child's former parent. There are statutory provisions that address sibling contact, for example. See footnote 10 of this opinion. Second, a less intrusive connection could be maintained with a former parent (or other relatives) by means other than face-to-face visitation. As the cooperative postadoption agreement statutes recognize, a relationship may be maintained through "*communication or* contact . . . ." (Emphasis added.) General Statutes § 17a-112 (b) and (c); General Statutes § 45a-715 (h) and (i). Presumably, visitation is contact. Communication would include oral or written communication, whether by phone, mail, or electronic means.

Ultimately, however, "it is a question of public policy how best to strike the appropriate balance between and among the competing values and interests at stake, *and*, '[*i*]*n areas where the legislature has spoken . . . the primary responsibility for formulating public policy must remain with the legislature*.' *State* v. *Whiteman*, 204 Conn. 98, 103, 526 A.2d 869 (1987)." (Emphasis added.) *In re Tresin J.*, 334 Conn. 314, 340, 222 A.3d 83 (2019) (*Ecker*, *J.*, concurring). The legislature has spoken with regard to the issue of posttermination visitation. "Th[e] definition [of termination of parental rights] does not confer upon the courts any license to go beyond the statutory language in this delicate and sensitive area." *In re Juvenile Appeal (83-BC)*, 189 Conn. 66, 89, 454 A.2d 1262 (1983) (*Healey*, *J.*, dissenting); see also *In re Hailey ZZ.*, supra, 19 N.Y.3d 438 (recognizing that legislature was "the entity best suited to balance the critical social policy choices and the delicate issues of family relations involved in such matters . . . [and it] has not sanctioned judicial imposition of posttermination contact where parental rights are terminated after a contested proceeding" (citation omitted; internal quotation marks omitted)).

II

The court's holding in *In re Ava W.*, however, is presently controlling precedent. There are nonetheless two steps that this court could take to clarify that decision to minimize some of the concerns that I have identified.

The first step would be to give a contextual meaning to the "necessary or appropriate" standard under § 46b-121 (b) (1) that fits the nature of the order at issue. These terms lack any fixed meaning, and what is necessary or appropriate in any given case may differ. "Appropriate" may be a perfectly serviceable standard when assessing whether to order the department to provide the child with a computer for school work; it is less so when assessing whether posttermination visitation should be ordered in light of the concerns discussed in part I C of this opinion.

I would interpret posttermination visitation over the objection of the presumptively fit statutory parent to be "appropriate" only when it is "necessary" (or simply that "necessary" is the governing standard in this context).[18] In turn, I would at least interpret "necessary" to be functionally equivalent to the standard that this court adopted for ordering third-party visitation over a presumptively fit parent's objection under General Statutes § 46b-59. See *Roth* v. *Weston*, 259 Conn. 202, 234–35, 789 A.2d 431 (2002). Under that standard, a

[18] Although § 46b-121 (b) (1) is phrased in the conjunctive ("necessary or appropriate"), it seems unlikely that the legislature's intention was to make either standard a sufficient basis to issue an order in any given situation (i.e., a choice of standards). Rather, it is likely that the legislature recognized that "necessary" might be the proper standard to guide the exercise of authority in some circumstances and "appropriate" might be the proper standard in others. "Appropriate" is such a broad term that it is difficult to envision any circumstance in which the court's exercise of authority could be deemed necessary but not appropriate. By authorizing the court also to issue orders when "necessary," the legislature acknowledged that necessary should be the sole governing standard in some circumstances.

parent can demonstrate that posttermination visitation is necessary by showing (1) that he or she presently has a parent-child relationship with the child,[19] and (2) that "denial of the visitation will cause real and significant harm to the child. . . . [T]hat degree of harm requires more than a determination that visitation would be in the child's best interest. It must be a degree of harm analogous to the kind of harm contemplated by [General Statutes] §§ 46b-120 and 46b-129, namely, that the child is 'neglected, uncared-for or dependent.' " Id. Mindful that the statutory parent's objection to visitation is not of constitutional dimension, as was the case in *Roth* v. *Weston*, supra, 230, I would reduce the burden of proof on these elements from *Roth*'s clear and convincing burden; see id., 230–31; to a preponderance of the evidence.[20]

The second step I would take is to make clear that any order of posttermination visitation will terminate *automatically* upon a court order approving an adoption agreement; notice of this potential occurrence would be incorporated into the final judgment terminating parental rights. Cf. *In re Noreen G.*, 181 Cal. App. 4th 1359, 1391–92, 105 Cal. Rptr. 3d 521 (2010) (court has no authority to order postadoption visitation), review denied, California Supreme Court, Docket No. S180958 (April 22, 2010). This rule would account for several important considerations. First, it would be consistent with the legislature's decision to sanction postadoption visitation only pursuant to a cooperative agreement, whether under the statute or common law. Second,

[19] The showing in connection with the first element would take into account some of the factors that the court must consider under § 17a-112 (k) to determine whether it is appropriate to terminate parental rights. See footnote 13 of this opinion.

[20] If this court is not inclined to adopt my second suggestion regarding postadoption visitation, the adoptive parent's objection to visitation would be of constitutional dimension; see General Statutes § 45a-731; and should be overcome only upon clear and convincing proof.

it would remove the impediments to adoption that I identified in part I C of this opinion. Third, it would ensure that the constitutional rights of the adoptive (now legal) parents; see General Statutes § 45a-731; to decide what is in their child's best interest would be protected, shifting the burden to the former parents to prove that they can meet the *Roth* standard by clear and convincing evidence. See *People ex rel. M.M.*, supra, 726 P.2d 1125. (Court concluded that the trial court properly struck the provision in its original termination order authorizing continued visitation because the provision "could well have had the effect of depriving any future adoptive parents of full control over any decision regarding whether any contact should be allowed between [the respondent mother] and [her son] . . . . In the event [the son] is adopted, his adoptive parents will have the right to determine whether it is in his best interests to maintain contact with [the respondent mother]."); *In re Hailey ZZ.*, supra, 19 N.Y.3d 439 n.9 ("[s]urely, adoptive parents are the best arbiters of whether continued contact with the birth parent is in a child's best interests").

For the foregoing reasons, I respectfully concur.

# IN RE AISJAHA N.*
## (SC 20612)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

*Syllabus*

The respondent mother appealed from the decision of the trial court vesting permanent legal guardianship of the minor child, A, in her maternal grandmother. On the basis of the respondent mother's substance abuse, poor parenting, and unrelated mental health issues, the Department of Children and Families placed A in the home of her maternal grandmother. Thereafter, the petitioner, the Commissioner of Children and Families, filed a neglect petition, and the trial court adjudicated A neglected and ordered her committed to the care and custody of the petitioner. Subsequently, the petitioner filed a motion for permanent legal guardianship, requesting that the trial court vest permanent legal guardianship of A in her maternal grandmother, to which the respondent mother objected. A hearing on the motion was held remotely via the Microsoft Teams platform amid the COVID-19 pandemic. Prior to the start of the mother's testimony, which occurred after the parties' closing arguments because the respondent mother indicated to her counsel at that point that she wanted "to be heard," the petitioner's counsel noted, for the record, that the mother was on the phone but not on video. The court asked whether anyone had an objection to proceeding with the mother testifying via audio only. There was no objection, and the mother then briefly testified. On appeal from the trial court's decision vesting permanent legal guardianship of A in her maternal grandmother, *held*:

1. The respondent mother's unpreserved claim that she was denied due process of law under the fourteenth amendment to the United States constitution by virtue of the trial court's failure to ensure that she was present by two-way video technology was unavailing: the record was inadequate to review this claim insofar as the record was largely silent regarding the nature of the mother's participation in the virtual hearing, and, although the respondent mother relied on a statement by the petitioner's counsel indicating that, after the close of evidence, the mother appeared by audio and not video during her testimony, the record was silent as to whether she appeared by video at any point prior to that during the proceedings; moreover, because the record was silent as to

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

what type of phone the mother used to participate in the hearing and whether the phone had video capability, this court could not determine whether the respondent mother simply chose to turn her video off or whether she was unable to participate via video as a result of inadequate technology; furthermore, the respondent mother waived any argument with respect to testifying via audio only when she, her counsel and her guardian ad litem failed to object, at the trial court's express invitation, to proceeding without video.

2. This court declined the respondent mother's invitation to invoke its supervisory authority over the administration of justice to adopt a rule requiring that a trial court, before conducting a virtual hearing or trial in a child protection case, ensure that the parties either appear by two-way videoconferencing technology or waive the right to do so, after a brief canvass: the respondent mother failed to demonstrate that the inability of parties to meaningfully participate in virtual child protection hearings or trials via two-way videoconferencing technology was a pervasive and significant problem that required this court's intervention; moreover, the record was not sufficiently robust to facilitate this court's exercise of its supervisory authority insofar as the record did not even indicate the manner in which the respondent mother appeared during the hearing, with the exception of during her testimony after closing arguments; furthermore, neither the respondent mother, her counsel, nor her guardian ad litem asked the trial court for technical accommodations, and the trial court was fully attentive to potential problems regarding the remote technology and took steps to ensure that the virtual format of the hearing did not negatively impact the respondent mother; nevertheless, although this court did not address whether a trial court may conduct virtual hearings or trials in circumstances other than during a pandemic, it did take the opportunity to emphasize the importance of ensuring equal access to justice and the proper functioning of technology when a trial court conducts a virtual hearing or trial and that equal access to justice was particularly significant in the context of virtual hearings and trials, given that certain groups, such as indigent litigants, communities of color, older people, and people with disabilities were more likely to lack access to reliable internet service and devices that are adequate to participate in remote court proceedings by videoconferencing technology.

Argued November 18, 2021—officially released June 20, 2022**

*Procedural History*

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child neglected,

** June 20, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

brought to the Superior Court in the judicial district of Waterbury, Juvenile Matters, and tried to the court, *Hon. John Turner*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment adjudicating the minor child neglected and ordering commitment to the custody of the petitioner, from which the respondent mother appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Moll* and *Harper*, *Js.*, which affirmed the trial court's judgment; thereafter, this court denied the respondent mother's petition for certification to appeal; subsequently, the court, *Hon. William T. Cremins*, judge trial referee, granted the petitioner's motion for permanent legal guardianship and vested permanent legal guardianship of the minor child in her maternal grandmother, and the respondent mother appealed. *Affirmed.*

*Albert J. Oneto IV*, assigned counsel, for the appellant (respondent mother).

*Evan O'Roark*, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Andrei V. Tarutin*, assistant attorney general, for the appellee (petitioner).

*Douglas H. Butler*, *Giovanna Shay*, *Shelley White*, *Nilda R. Havrilla*, *Agata Raszczyk-Lawska*, *Raphael Podolsky* and *Janice J. Chiaretto* filed a brief for the Greater Hartford Legal Aid et al. as amici curiae.

*Opinion*

McDONALD, J. This appeal is one of the companion cases to *In re Annessa J.*, 343 Conn. 642, A.3d (2022), which we also decide today. The respondent mother, Jacqueline H., appeals from the decision of the trial court, which vested permanent legal guardianship of Jacqueline's minor child, Aisjaha N., in a relative, pursuant to General Statutes § 46b-129 (j) (6). On appeal, Jacqueline claims that she was denied due process of

law when the trial court failed to ensure that she appeared by two-way video technology at a virtual trial, conducted via Microsoft Teams,[1] on the motion for permanent legal guardianship. Alternatively, Jacqueline asks this court to reverse the decision of the trial court pursuant to our supervisory authority over the administration of justice. Specifically, she asks this court to adopt a procedural rule requiring that a trial court, before conducting a virtual trial in a child protection case, ensure that the parties either appear by two-way videoconferencing technology or waive the right to do so, after a brief canvass. We affirm the decision of the trial court.

The record reveals the following relevant facts and procedural history. Jacqueline has a history of involvement with the Department of Children and Families as a result of her substance abuse, poor parenting, and untreated mental health issues, including schizophrenia and psychotic disorder. Relevant to this appeal, in 2018, the department became involved with Jacqueline due to her continued unstable mental health. Specifically, Jacqueline's adult daughter reported that Jacqueline was behaving erratically, telling Aisjaha that "someone entered [Jacqueline's] home while she was out, the water was unsafe to drink, it was not safe for her to be at home, and that someone was coming to get them." As a result of this behavior, Aisjaha asked her older sister if she could live with her. Concerned about Jacqueline's mental health, Aisjaha's older sister called the police. The police responded to Jacqueline's home, and Jacqueline was subsequently hospitalized under a seventy-two hour psychiatric hold. Aisjaha's older sister

[1] Microsoft Teams is "collaborative meeting [computer software] with video, audio, and screen sharing features." Connecticut Judicial Branch, Connecticut Guide to Remote Hearings for Attorneys and Self-Represented Parties (November 23, 2021) p. 5, available at https://jud.ct.gov/HomePDFs/ConnecticutGuideRemoteHearings.pdf (last visited June 15, 2022).

took Aisjaha to her home, where they met with a department social worker. While investigating the events surrounding Jacqueline's hospitalization, the department learned that Jacqueline had been forcing Aisjaha, who was then eight years old, to ingest expired human immunodeficiency virus (HIV) medication because Jacqueline believed that a man with HIV had sexually abused Aisjaha. Aisjaha, however, denied having ever been inappropriately touched, and a previous medical examination revealed no sexual trauma. Aisjaha also reported that Jacqueline "yells and is explosive, in that she throws things around in the home, and then vomits after being explosive."

After a department social worker met with Jacqueline following her release from the hospital, the department placed Aisjaha in the home of her maternal grandmother, and the petitioner, the Commissioner of Children and Families, sought an order of temporary custody of Aisjaha. Thereafter, the trial court, *Hon. Maurice B. Mosley*, judge trial referee, issued the order vesting temporary custody of Aisjaha in the petitioner. At that time, the petitioner also filed a petition alleging that Aisjaha had been neglected. At the initial hearing on the neglect petition, the trial court ordered Jacqueline to undergo a competency evaluation. She participated in that evaluation. The expert who evaluated her later testified that Jacqueline was not competent but could be restored to competency within sixty days if she engaged in mental health treatment, adhered to any prescribed medication, and abstained from smoking marijuana. Two months later, the trial court, *Hon. William T. Cremins*, judge trial referee, found that Jacqueline had not been cooperating with the entities providing her certain services and had not been restored to competency. The court appointed a guardian ad litem for Jacqueline and set the case down for trial on the neglect petition.

Jacqueline did not appear for the trial, and the trial court, *Hon. John Turner*, judge trial referee, proceeded with the trial in her absence, over the objections of Jacqueline's counsel and the guardian ad litem. Judge Turner thereafter adjudicated Aisjaha neglected and ordered her committed to the care and custody of the petitioner. The Appellate Court subsequently affirmed the judgment of the trial court. *In re Aisjaha N.*, 199 Conn. App. 485, 498, 237 A.3d 52, cert. denied, 335 Conn. 943, 237 A.3d 2 (2020).

Approximately one year after the trial court committed Aisjaha to the petitioner's care, the petitioner filed a motion for permanent legal guardianship, requesting that the trial court vest permanent legal guardianship of Aisjaha in her maternal grandmother pursuant to § 46b-129 (j).[2] Jacqueline objected to the petitioner's

[2] General Statutes § 46b-129 (j) provides in relevant part: "(2) Upon finding and adjudging that any child or youth is uncared for, neglected or abused the court may . . . (C) vest such child's or youth's permanent legal guardianship in any person or persons found to be suitable and worthy of such responsibility by the court, including, but not limited to, any relative of such child or youth by blood or marriage . . . .

* * *

"(6) Prior to issuing an order for permanent legal guardianship, the court shall provide notice to each parent that the parent may not file a motion to terminate the permanent legal guardianship, or the court shall indicate on the record why such notice could not be provided, and the court shall find by clear and convincing evidence that the permanent legal guardianship is in the best interests of the child or youth and that the following have been proven by clear and convincing evidence:

"(A) One of the statutory grounds for termination of parental rights exists, as set forth in subsection (j) of section 17a-112, or the parents have voluntarily consented to the establishment of the permanent legal guardianship;

"(B) Adoption of the child or youth is not possible or appropriate;

"(C) (i) If the child or youth is at least twelve years of age, such child or youth consents to the proposed permanent legal guardianship, or (ii) if the child is under twelve years of age, the proposed permanent legal guardian is: (I) A relative, (II) a caregiver, or (III) already serving as the permanent legal guardian of at least one of the child's siblings, if any;

"(D) The child or youth has resided with the proposed permanent legal guardian for at least a year; and

"(E) The proposed permanent legal guardian is (i) a suitable and worthy person, and (ii) committed to remaining the permanent legal guardian and assuming the right and responsibilities for the child or youth until the child or youth attains the age of majority. . . ."

motion for permanent legal guardianship. Jacqueline's counsel requested that the trial on the motion be conducted via Microsoft Teams due to the COVID-19 pandemic. On January 25, 2021, the trial court, *Hon. William T. Cremins*, judge trial referee, held a virtual trial on the petitioner's motion for permanent legal guardianship via Microsoft Teams. The petitioner's evidence showed that Jacqueline still had not engaged in any mental health treatment and that she remained "adamant that she didn't need mental health services." The petitioner proved, by clear and convincing evidence, one of the grounds for termination of parental rights, namely, the failure to rehabilitate. The petitioner's evidence also demonstrated that Aisjaha was "flourishing" while living with her maternal grandmother.

Relevant to this appeal, when the maternal grandmother logged into the trial via Microsoft Teams, the trial court and all counsel could hear her but could not see her on video. Jacqueline's counsel objected to the maternal grandmother's testifying via audio only, and the court stated that, "if there is an objection to the witness testifying by audio only, and she can't get onto the call as a video, then we'll have to continue the [case] until we can either set it up as live or get her access." After Aisjaha's counsel raised an objection, the court reiterated: "[I]f there's any objection to proceeding this way, then we will have to continue the case. . . . [I]f there's any objection at all, [because] this is an unusual way to proceed, I'm not going to go forward." The parties ultimately agreed to allow the maternal grandmother to state certain facts for the record.

After the petitioner's counsel called her last witness, Jacqueline's counsel asked the trial court for a recess, so that she could "call [Jacqueline] to confer with her about whether . . . she still wishes to be heard." The court agreed. Following the recess, Jacqueline's counsel stated that "[Jacqueline] does not wish to testify." There-

after, during her closing argument, Aisjaha's counsel argued in favor of vesting permanent legal guardianship of Aisjaha in her maternal grandmother, stating that, "since the beginning of the case, Aisjaha has been very clear that she wants to continue living with . . . her grandmother." After the closing arguments of the petitioner's counsel and Jacqueline's counsel, during which Jacqueline repeatedly interrupted the proceedings, the court asked whether Jacqueline's counsel needed a recess to again speak with Jacqueline. Counsel responded in the affirmative, and the court recessed. Jacqueline's counsel then notified the court: "I realize that we've rested and done closing; [Jacqueline], however, is insisting she really wants to be heard, and I've advised against it, but, at this point in time, I'm asking if she can be heard." The court allowed Jacqueline to testify, despite evidence having already been closed. Before Jacqueline testified, however, the court stated that it was having difficulty hearing her due to background noise. Jacqueline replied, "[o]h, I'm outside. I'm walking inside now." She then asked, "can you hear me now?" The court replied, "[y]eah, that's much better." Prior to the start of Jacqueline's testimony, the petitioner's counsel noted, for the record, that Jacqueline "is currently just on the phone; she's not on video." The court asked whether anyone had an objection to proceeding with Jacqueline testifying "on audio, rather than on audio and video." None of the parties objected; nor did Jacqueline's guardian ad litem. Jacqueline then briefly testified in narrative fashion. All parties declined to cross-examine her.

In its memorandum of decision, the trial court noted that Jacqueline had been represented by counsel and that she and her guardian ad litem "were present" for trial on the petitioner's motion for permanent legal guardianship. The court found that the petitioner had satisfied her burden of proving each element for the

establishment of a permanent legal guardianship. Accordingly, the trial court granted the petitioner's motion for permanent legal guardianship and vested permanent legal guardianship of Aisjaha in her maternal grandmother. This appeal followed.[3]

On appeal, Jacqueline raises two claims. First, she claims that she was denied due process of law when the trial court failed to ensure that she appeared by two-way video technology at a virtual trial, conducted via Microsoft Teams, on the motion for permanent legal guardianship. Alternatively, Jacqueline asks this court to reverse the decision of the trial court pursuant to its supervisory authority over the administration of justice. Specifically, she asks this court to adopt a procedural rule requiring that a trial court, before conducting a virtual trial in a child protection case, ensure that the parties either appear by two-way videoconferencing technology or waive the right to do so, after a brief canvass. We address each claim in turn.

I

We begin with Jacqueline's unpreserved claim that she was denied due process of law under the fourteenth amendment to the United States constitution when the trial court failed to ensure that she was present by two-way video technology at the virtual trial.[4] Specifically, she contends that, because "Practice Book § 35a-8 (a) required that [Jacqueline] 'shall be present for trial'

[3] Jacqueline appealed from the decision of the trial court to the Appellate Court, and the appeal was transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[4] We note that this claim is similar to those raised by the respondent parents in *In re Annessa J.*, supra, 343 Conn. 642, and *In re Vada V.*, 343 Conn. 730, A.3d (2022), which we also decide today. The respondent parents in these companion cases argued that their federal due process rights were violated given the virtual nature of the termination of parental rights trials. In each of the companion cases, however, the respondents appeared via audio and video for at least a portion of the trial. Jacqueline's constitutional claim is premised on the fact that she appeared via audio only.

. . . [in the absence of] a valid waiver of her presence, she had the right to appear, if not physically before the court, then at least by two-way video technology that closely approximated a live physical hearing, with all the constitutional safeguards traditionally associated with a courtroom trial, to include the right to observe and be viewed by the other participants, the right to confront physically the witnesses against her, and the right to plead her case personally to the fact finder. . . . The court's failure to ensure her virtual presence at trial . . . denied her a fundamentally fair proceeding, in violation of the due process of law." (Citations omitted.)

The petitioner contends that Jacqueline "was not absent or excluded from trial, as she suggests," and "[t]he fact that [she] appeared by audio only during her testimony in no way deprived her of due process." The petitioner notes that this court and the United States Supreme Court have previously held that "testifying by audio means only . . . does not offend the due process rights of a respondent parent." Finally, the petitioner contends that the record is not adequate to review this claim, "given how few details it contains about how [Jacqueline] participated in the trial and whether she could have appeared by video had she wanted to." We agree with the petitioner that the record is inadequate to review this unpreserved claim. With respect to Jacqueline's testimony, we also conclude that she waived any argument with respect to testifying via audio only when she, her counsel and her guardian ad litem failed to object, at the trial court's express invitation, to proceeding without video.

Jacqueline concedes that she did not raise this claim before the trial court and, therefore, seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Pursuant to *Golding*, "a

[respondent] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the [petitioner] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40; see also *In re Yasiel R.*, supra, 781 (modifying third prong of *Golding*). "The first two steps in the *Golding* analysis address the reviewability of the claim, [whereas] the last two steps involve the merits of the claim." (Internal quotation marks omitted.) *In re Azareon Y.*, 309 Conn. 626, 634–35, 72 A.3d 1074 (2013).

As we have explained, under *Golding*, an appellant "may raise . . . a constitutional claim on appeal, and the appellate tribunal will review it, but only if the trial court record is adequate for appellate review. The reason for this requirement demands no great elaboration: in the absence of a sufficient record, there is no way to know whether a violation of constitutional magnitude in fact has occurred. Thus, as we stated in *Golding*, we will not address an unpreserved constitutional claim [i]f the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred . . . . It is well established . . . that parties must affirmatively seek to prevail under . . . *Golding* . . . and bear the burden of establishing that they are entitled to appellate review of their unpreserved constitutional claims." (Citations omitted; internal quotation marks omitted.) *State* v. *Canales*, 281 Conn. 572, 581, 916 A.2d 767 (2007). In considering the adequacy of the record in this case, we are mindful that "[d]ue process is inherently [fact

bound] because due process is flexible and calls for such procedural protections as the particular situation demands. . . . The constitutional requirement of procedural due process thus invokes a balancing process that cannot take place in a factual vacuum." (Internal quotation marks omitted.) *State* v. *Long*, 268 Conn. 508, 523, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004).

Jacqueline contends that the record is adequate to review her claim because "[t]he trial transcripts reflect that [she] did not appear by two-way video . . . in this [case]." In support of this contention, however, she points to only one instance in the January 25, 2021 trial transcript indicating that the trial court could not see her. Specifically, prior to Jacqueline's testimony, after the close of evidence, the petitioner's counsel noted that Jacqueline "is *currently* just on the phone; she's not on video." (Emphasis added.) There is no other indication in the record regarding whether Jacqueline participated in the trial by audio or video. The statement by the petitioner's counsel indicates only that Jacqueline appeared by audio and not by video during her testimony but says nothing about whether she appeared by video at any point prior to that during the proceedings. The record is also silent about what type of phone Jacqueline used to participate in the proceeding and whether the phone had video capability. Appellate counsel also could not provide this court with additional information about the manner of Jacqueline's participation. As a result, the record is silent about whether Jacqueline simply chose to turn her video off or whether she was unable to participate via video as a result of inadequate technology.[5] Because the record is silent as

[5] It is possible that Jacqueline participated in the trial via a device with video capabilities given that, during trial, she informed the court that she was walking around outside. It is also possible that her device did not have video capabilities or was malfunctioning. Because the record is silent on these issues, we cannot evaluate the nature of her participation in the proceedings.

to the exact nature of the device she used, we also do not know whether Jacqueline had the ability to see the video of the proceedings. Because Jacqueline did not raise this issue at trial, the trial court was unable to assess any potential problems with Jacqueline's ability to participate via video and had no occasion to consider alternative means for her to participate via video or to continue the trial until it could be held in person. As this court repeatedly has observed, "[o]ur role is not to guess at possibilities . . . but to review claims based on a complete factual record developed by a trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court . . . any decision made by us respecting [the appellant's claims] would be entirely speculative." (Internal quotation marks omitted.) *State* v. *Brunetti*, 279 Conn. 39, 63, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007). Because the record is largely silent regarding the nature of Jacqueline's participation in the virtual trial, we conclude that the record is inadequate to review this unpreserved claim.

Moreover, with respect to Jacqueline's testimony, Jacqueline's counsel asked the trial court to allow Jacqueline to testify after the close of evidence. Moments later, the petitioner's counsel noted that Jacqueline was not on video. When the court asked whether anyone had an objection to proceeding with Jacqueline testifying "on audio, rather than on audio and video," none of the parties objected; nor did Jacqueline's guardian ad litem. As a result, although it is unclear whether Jacqueline's counsel asked the trial court to allow Jacqueline to testify when she was not on video, thereby inducing any error, it is clear that counsel did not object to Jacqueline's testifying via audio only, thereby waiving any claim that this was error. Cf. *Delahunty* v. *Targonski*, 158 Conn. App. 741, 751, 121 A.3d 727 (2015) (plaintiff waived right to jury trial, as "[t]he failure of the

plaintiff to raise an objection at the start of the court trial, after receiving notice that the [third-party] defendant had moved for a court trial and that there had been no jury selection, combined with her active and full participation in the ensuing trial, indicate[d] that she had acquiesced to a court trial and correspondingly relinquished her right to a jury trial"). This is particularly significant given that Jacqueline's counsel had previously objected to Aisjaha's maternal grandmother's testifying via audio only. See, e.g., *State* v. *Ramon A. G.*, 336 Conn. 386, 400, 246 A.3d 481 (2020) ("The rule is applicable that no one shall be permitted to deny that he [or she] intended the natural consequences of his [or her] acts and conduct. . . . In order to waive a claim of law . . . [*i*]*t is enough if he* [*or she*] *knows of the existence of the claim and of its reasonably possible efficacy*." (Emphasis added; internal quotation marks omitted.)). It is well settled that "[a] constitutional claim that has been waived does not satisfy the third prong of [*Golding*] because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 399; cf. *Independent Party of CT—State Central* v. *Merrill*, 330 Conn. 681, 723–24, 200 A.3d 1118 (2019) ("*Golding* review is not available when the claimed constitutional error has been induced by the party claiming it. . . . [A] party cannot take a path at trial and change tactics on appeal. . . . [W]hether we call it induced error, encouraged error, waiver, or abandonment, the result—that the . . . claim is unreviewable—is the same." (Citations omitted; internal quotation marks omitted.)). Accordingly, Jacqueline cannot prevail on her claim under prong three of *Golding*, even

if the record is adequate to review her claim with respect to her testimony.[6]

II

Jacqueline also asks this court to reverse the decision of the trial court pursuant to its supervisory authority over the administration of justice. Specifically, she asks us to adopt a procedural rule requiring that a trial court, before conducting a virtual trial in a child protection case, ensure that the parties either appear by two-way videoconferencing technology or waive the right to do so, after a brief canvass.

The petitioner contends that we should not adopt the rule proposed by Jacqueline because doing so would be tantamount to overruling *In re Juvenile Appeal (Docket No. 10155)*, 187 Conn. 431, 446 A.2d 808 (1982). In that case, this court held that telephonic testimony adequately protected the due process rights of the respondent father. See id., 435–41. The petitioner notes that, since *In re Juvenile Appeal (Docket No. 10155)*, the Superior Court has "relied [on] that decision and the procedure of allowing respondent parents to participate in child protection hearings via telephone." The petitioner cites to numerous cases in which the trial court

[6] We also note that Jacqueline does not address the impact of this court's holding in *In re Juvenile Appeal (Docket No. 10155)*, 187 Conn. 431, 435–41, 446 A.2d 808 (1982), on her claim. In that case, this court held that the trial court did not violate the respondent's constitutional rights by conducting the termination of parental rights trial while the respondent participated via telephone instead of in the physical presence of the trial court. See id. We explained that "[w]e cannot . . . say that the lack of a visual image seriously disadvantaged the trial court in making its determination. . . . [L]imiting the opportunity to assess the respondent's demeanor to its auditory component seems to us to entail only the most marginal risk that the [trial court] would be misled in evaluating the respondent's credibility." Id., 438. Applying the three-part test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), this court determined that telephonic testimony adequately protected the due process rights of the respondent. See *In re Juvenile Appeal (Docket No. 10155)*, supra, 435–41.

followed that procedure and contends that, for many parents, "telephone is . . . the only means by which they can participate in their case." As "long as the respondent parent's testimony is audible to the court and all parties," the petitioner contends, "there is nothing unconstitutional about telephonic testimony." We decline Jacqueline's invitation to exercise our supervisory authority in this case.

Supervisory authority is an extraordinary remedy that should be used "sparingly . . . ." (Citation omitted.) *State* v. *Rose*, 305 Conn. 594, 607, 46 A.3d 146 (2012). "Although [a]ppellate courts possess an inherent supervisory authority over the administration of justice . . . [that] authority . . . is not a form of free-floating justice, untethered to legal principle. . . . Our supervisory powers are not a last bastion of hope for every untenable appeal. They are an *extraordinary* remedy to be invoked only when circumstances are such that the issue at hand, [although] not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the [litigant] and the integrity of the judicial system. Our supervisory powers are invoked only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts." (Emphasis in original; internal quotation marks omitted.) *State* v. *Wade*, 297 Conn. 262, 296, 998 A.2d 1114 (2010). Overall, "the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers." (Internal quotation marks omitted.) *State* v. *Anderson*, 255 Conn. 425, 439, 773 A.2d 287 (2001). Thus, we are more likely to invoke our supervisory powers when there is a "pervasive and significant prob-

lem"; *State* v. *Hill*, 307 Conn. 689, 706, 59 A.3d 196 (2013); or when the conduct or violation at issue is "offensive to the sound administration of justice . . . ." (Internal quotation marks omitted.) *State* v. *Colon*, 272 Conn. 106, 239–40, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005).

"[T]hree criteria must be met before we will consider invoking our supervisory authority. . . . First, the record must be adequate for review. . . . Second, all parties must be afforded an opportunity to be heard on the issue. . . . Third, an unpreserved issue will not be considered [when] its review would prejudice a party." (Citations omitted.) *In re Yasiel R.*, supra, 317 Conn. 790.

In this case, Jacqueline has not demonstrated that the inability of parties to meaningfully participate in virtual child protection trials via two-way videoconferencing technology is a "pervasive and significant problem" requiring our intervention. *State* v. *Hill*, supra, 307 Conn. 706. Additionally, for the reasons explained in part I of this opinion, the record in this case is not sufficiently robust to facilitate our exercise of supervisory authority because the record does not even indicate the manner in which Jacqueline appeared during trial, with the exception of during her testimony after closing argument. See, e.g., *State* v. *Turner*, 334 Conn. 660, 687, 224 A.3d 129 (2020) ("[This] case does not present the exceptional and unique circumstances that would justify this court's exercising its supervisory authority. Without an adequate record to determine that an evidentiary error exists, let alone was harmful, we are not inclined to reverse the defendant's conviction."); *State* v. *Chambers*, 296 Conn. 397, 411, 414, 994 A.2d 1248 (2010) (record was inadequate for this court to determine, under either *Golding* or supervisory authority, whether meeting, in chambers, between trial court, prosecutor, and defense counsel was critical stage of

proceeding, at which criminal defendant had constitutional right to be present). We cannot conclude that Jacqueline was deprived of the opportunity to participate in the trial via two-way videoconferencing technology, as she may have simply chosen to turn her video off during her testimony.

We also note that, although trial courts have an obligation to ensure that parties have the ability to meaningfully participate, neither Jacqueline, her counsel, nor her guardian ad litem asked for technical assistance or accommodations from the trial court. Nonetheless, the trial court was fully attentive to potential problems regarding the remote technology and took steps to ensure that the virtual format of the trial did not negatively impact Jacqueline. For example, the court paused the proceedings several times to allow Jacqueline to confer with her counsel, asked if any party objected to Jacqueline's testifying via audio only, paused the proceedings when it could not hear Jacqueline, paused the proceedings to allow Jacqueline's counsel to confer with Jacqueline's guardian ad litem, and repeatedly noted that it would continue the case if the parties did not agree to the maternal grandmother's testifying via audio only. See, e.g., *People ex rel. R.J.B.*, 482 P.3d 519, 525 (Colo. App. 2021) (noting importance of trial court's taking steps to remedy technological issues during virtual termination of parental rights trial), cert. denied, Colorado Supreme Court, Docket No. 21SC115 (March 15, 2021); *In re M.M.*, Docket No. 21A-JT-840, 2021 WL 4839067, *3 (Ind. App. October 18, 2021) (decision without published opinion, 176 N.E.3d 589) (explaining that trial court rectified any technological issues during virtual termination of parental rights hearing and respondent mother was able to meaningfully participate). We therefore decline Jacqueline's invitation to invoke our supervisory authority to create a rule requiring that a trial court, before conducting a virtual trial in a child

protection case, ensure that the parties either appear by two-way videoconferencing technology or waive the right to do so, after a brief canvass.

Although we do not address whether a trial court may conduct virtual trials in circumstances other than during a pandemic, we take this opportunity to emphasize the importance of ensuring equal access to justice when a court undertakes a virtual trial. Equal access to justice is particularly significant in the context of virtual hearings and trials given the digital divide.[7] As the amici curiae note in their brief to this court, "[n]ationwide and in Connecticut, indigent litigants, communities of color, older people, and people with disabilities are more likely to lack access to reliable internet service and devices adequate to participate in remote court proceedings by videoconferencing technology." For example, one report found that nearly one quarter of all Connecticut households lack high-speed internet. See J. Horrigan, The Digital Divide in Connecticut: How Digital Exclusion Falls Hardest on Low-income Households in Cities, Older Adults, Communities of Color, and Students (September, 2020) p. 3, available at https://www.dalioeducation.org/Customer-Content/www/CMS/files/DigitalDivide_Report_2020_Final.pdf (last visited June 15, 2022). "Connectivity deficits fall hardest on low-income residents, older adults, and communities of color." Id. As a result, some commentators have suggested that "the most obvious area of concern in moving court hearings and trials online is the digital divide, which perpetuates unfairness in access to proceedings or timely case reso-

[7] "The idea of the 'digital divide' refers to the growing gap between the underprivileged members of society, especially the poor, rural, elderly, and [disabled] portion of the population who do not have access to computers or the internet; and the wealthy, middle-class, and young Americans living in urban and suburban areas who have access." Digital Divide, available at https://cs.stanford.edu/people/eroberts/cs181/projects/digital-divide/start.html (last visited June 15, 2022) (Stanford University project discussing current state of digital divide and its related causes).

lutions due to disparities in tech ownership or familiarity." A. Cahn & M. Giddings, Virtual Justice: Online Courts During COVID-19 (July 23, 2020) p. 9, available at https://www.law360.com/articles/1295067/attachments/0 (last visited June 15, 2022). Courts must be especially vigilant to ensure that parties are not disadvantaged by an inability to meaningfully participate in virtual proceedings.

Some jurisdictions have addressed the digital divide "in a novel and competent way by creating a number of remote public sites . . . that provide a safe and private location, a computer and connectivity." M. Spekter, Moving Courts Online: The Advantages Have Been Proven, and Online Court Proceedings Are Here To Stay, Law Practice Magazine, July 1, 2021, available at https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2021/ja21/spekter/ (last visited June 15, 2022). We note that the Connecticut Judicial Branch has created the Connecticut Guide to Remote Hearings for Attorneys and Self-Represented Parties to "assist anyone who is preparing to participate in a remote court hearing through Connecticut's 'Remote Justice Virtual Courtroom.' This includes counsel, self-represented parties, and other necessary hearing participants, such as witnesses." Connecticut Judicial Branch, Connecticut Guide to Remote Hearings for Attorneys and Self-Represented Parties (November 23, 2021) p. 4, available at https://jud.ct.gov/HomePDFs/ConnecticutGuideRemoteHearings.pdf (last visited June 15, 2022) (Connecticut Guide to Remote Hearings). The Connecticut Guide to Remote Hearings provides that, "[i]f you do not have a phone or device to videoconference or access to the [I]nternet, let the court know as soon as possible. The court may be able to help you find a way to participate, or your hearing may be postponed until everyone can participate." Id., p. 5. The Quick Reference Guide for Remote Court Proceedings that accompanies the Connecticut Guide to Remote Hearings provides that "[s]ome

courts have space in the courthouse with technology to allow you to participate in your remote court proceeding. These rooms, known as '[r]emote [r]ooms,' may be available to you. Contact the court to find out."[8] Connecticut Judicial Branch, Quick Reference Guide for Remote Court Proceedings (November 13, 2020) p. 1, available at https://jud.ct.gov/RemoteJustice/Docs/Quick_Ref_Guide_Remote_Hearings.pdf (last visited June 15, 2022). Importantly, the Connecticut Guide to Remote Hearings also notes that "[c]ourt [s]ervice [c]enters provide services for self-represented parties, members of the bar, and the community at large. They are located within [j]udicial [d]istrict [c]ourthouses and are staffed by Judicial Branch employees trained to assist all court patrons. Several [c]ourt [s]ervice [c]enters have bilingual staff. Court [s]ervice [c]enters can provide statewide calendar and docket information (civil and family cases), court forms, [j]udicial [p]ublications and self-help materials, public use computers and printers with internet access, and word processing, electronic filing, printers, copiers, fax machines, scanners, and work space." Connecticut Guide to Remote Hearings, supra, p. 26. In situations in which parties or witnesses express an inability to participate in virtual proceedings, it is imperative that our courts either provide alternative means of accessing the technology needed to participate—such as at these court service centers—or continue the proceeding until it can be conducted in person or until such time as the party or witness has secured the necessary technology to

[8] We note that, by November, 2021, after the trial in the present case, "the Judicial Branch ha[d] outfitted [eighty-six] [r]emote [r]ooms with Microsoft Teams access in courthouses across the state." Connecticut Judicial Branch, Access to Justice Commission, Draft Minutes of the Meeting (November 4, 2021) p. 4, available at https://www.jud.ct.gov/Committees/access/access_minutes_110421.pdf (last visited June 15, 2022). The purpose of these remote rooms is to "allow parties to utilize Judicial Branch technology to participate in remote court events." Id.

meaningfully participate in the proceeding. Courts must also be mindful of ensuring that parties have equal access to the same technological means to participate in the virtual trial, such as ensuring that both parties participate by either video and audio or audio only.

It is also important that trial courts, when undertaking virtual proceedings, ensure the proper functioning of technology. If the technology is not functioning properly, the court must take corrective measures then to remedy the technological problem, or continue the case until either it can be conducted in person or the technology problem can be resolved. See, e.g., *Diaz* v. *Commonwealth*, 487 Mass. 336, 342, 167 N.E.3d 822 (2021) ("We . . . urge judges to pay careful attention to the technology. If the technology does not function as described, it is crucial that the court suspend the hearing, rather than risk sacrificing certain of the defendant's constitutional rights.").

The decision of the trial court granting the petitioner's motion for permanent legal guardianship is affirmed.

In this opinion the other justices concurred.

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## IN RE VADA V. ET AL.*
## (SC 20603)
## (SC 20604)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

*Syllabus*

The respondents appealed from the judgments of the trial court terminating their parental rights with respect to their minor children. After the

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in these appeals are not disclosed. The records and papers of these cases shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

children were adjudicated neglected and committed to the care and custody of the petitioner, the Commissioner of Children and Families, the petitioner sought to terminate the respondents' parental rights with respect to the children on the ground that the respondents had failed to rehabilitate. During the COVID-19 pandemic, a virtual trial on the termination petitions was held via Microsoft Teams. The respondents were represented by separate counsel and participated in the proceedings through audio and video means. The respondents joined the trial via a shared cell phone, outside the proximity of their counsel, but they were able to communicate with counsel through e-mail, text messages, and a messaging application. After the conclusion of the trial, the trial court terminated the respondents' parental rights. On appeal from the trial court's judgments, *held*:

1. The respondents' unpreserved claims that the trial court had violated their rights under article first, § 10, and article fifth, § 1, of the Connecticut constitution by conducting the termination of parental rights trial virtually rather than in person, and that they had been denied their rights under the due process clause of the fourteenth amendment to physically confront the witnesses against them at the virtual trial were unavailing; this court, having addressed the same issues and underlying arguments in the companion case of *In re Annessa J.* (343 Conn. 642), adopted the reasoning and conclusions set forth in that decision, concluded, with respect to the respondents' claims under the state constitution, that the respondents failed to establish that there is a fundamental right to an in person termination of parental rights trial, and concluded, with respect to the respondents' due process claims, that, even if there is a right to in person confrontation under these circumstances, there was no factual record or factual findings on which this court could rely in order to determine whether that right was violated or whether the trial court correctly concluded that the state's interests were sufficiently great to warrant a virtual trial.

2. The record was inadequate to review the respondents' unpreserved claims, which they asserted either under the federal constitution or both the federal and state constitutions, that the state did not provide them with adequate devices and internet connection to participate both visually and by audio in the termination proceeding: the record was silent on, and, in some cases, undermined, the factual predicates necessary to evaluate the respondents' claims, as counsel for the respondent mother stated, during the trial, that the mother had more than one device, which contradicted the respondents' claim that they were forced to share the same device, the record indicated that the trial court took numerous steps to ensure that the respondents could meaningfully participate and communicate with their counsel throughout the trial, the record was largely silent as to the manner in which the respondents participated throughout the trial, including whether the respondents participated via audio or video or both at any given time, the record was devoid of any

indication that the respondents' cell phone did not allow them to view the trial, and there was no indication that the respondents asked for technical assistance or accommodations from the trial court; nevertheless, this court emphasized the importance of ensuring equal access to justice in the context of virtual hearings and trials and observed that those public policy considerations were identical to those that this court expressed in the companion case of *In re Aisjaha N.* (343 Conn. 709).

Argued November 18, 2021—officially released June 20, 2022**

*Procedural History*

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Marcus*, *J.*; judgments terminating the respondents' parental rights, from which the respondents filed separate appeals. *Affirmed*.

*Albert J. Oneto IV*, assigned counsel, for the appellant in Docket No. SC 20603 (respondent father).

*David E. Schneider*, *Jr.*, assigned counsel, for the appellant in Docket No. SC 20604 (respondent mother).

*Seon Bagot*, assistant attorney general, with whom were *Evan O'Roark*, assistant attorney general, and, on the brief, *William Tong*, attorney general, for the appellee in both appeals (petitioner).

*Opinion*

McDONALD, J. These appeals are companion cases to *In re Annessa J.*, 343 Conn. 642, A.3d (2022), and *In re Aisjaha N.*, 343 Conn. 709, A.3d (2022), which we also decide today. The respondents, Sebastian V. and Samantha C., appeal from the judgments of the trial court, which terminated their parental rights pursuant to General Statutes § 17a-112 (j). On appeal, the respondents raise three unpreserved constitutional

** June 20, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

claims relating to the virtual nature of the termination of parental rights trial. Specifically, the respondents contend that the trial court violated their rights under article first, § 10, and article fifth, § 1, of the Connecticut constitution by conducting the termination of parental rights trial virtually, via Microsoft Teams,[1] rather than in person. They also contend that they were denied the right to physically confront the witnesses against them at the virtual trial, in violation of the due process clause of the fourteenth amendment to the United States constitution. Finally, the respondents contend that their constitutional rights were violated when the state required them to participate in the virtual trial without providing them with an electronic device and internet connection that allowed them to appear before the trial court in the same manner as if they were in a courtroom. We affirm the judgments of the trial court.

The record reveals the following relevant facts and procedural history. The Department of Children and Families first became involved with the respondents at the time of the birth of their daughter, Vada V., in August, 2017. The department received numerous referrals alleging that Samantha was abusing Xanax, opiates, and marijuana during her pregnancy, and that Sebastian was selling his prescribed medications of Xanax and Adderall. Shortly after being discharged from the hospital following her birth, Vada was readmitted to the hospital for suspected methadone toxicity while in the care of the respondents. On September 6, 2017, the petitioner, the Commissioner of Children and Families, filed a motion for an order of temporary custody and a neglect petition with respect to Vada. On September

[1] Microsoft Teams is "collaborative meeting [computer software] with video, audio, and screen sharing features." Connecticut Judicial Branch, Connecticut Guide to Remote Hearings for Attorneys and Self-Represented Parties (November 23, 2021) p. 5, available at https://jud.ct.gov/HomePDFs/ConnecticutGuideRemoteHearings.pdf (last visited June 15, 2022).

22, 2017, the order of temporary custody was sustained by agreement of the respondents, and Vada was placed with her paternal aunt. On December 22, 2017, Vada was adjudicated neglected and committed to the care and custody of the petitioner. Due to the respondents' continued mental health issues and drug abuse, Vada was not reunified with them.

Thereafter, in December, 2018, the respondents' son, Sebastian V., Jr., was born. Both Samantha and Sebastian, Jr., tested positive for methadone and benzodiazepines. The petitioner filed a motion for an order of temporary custody and a neglect petition with respect to Sebastian, Jr., as the same issues that existed at the outset of the case regarding Vada continued to exist. On January 11, 2019, the order of temporary custody was sustained by agreement of the respondents, and Sebastian, Jr., was ultimately placed with Samantha's stepsister. Sebastian, Jr., was subsequently adjudicated neglected and committed to the care and custody of the petitioner on May 1, 2019. The trial court approved a permanency plan for both Vada and Sebastian, Jr., of termination of parental rights and adoption. On August 27, 2019, the petitioner filed petitions for termination of parental rights with respect to both Vada and Sebastian, Jr., on the ground that the respondents had failed to rehabilitate.[2]

In October and November, 2020, during the COVID-19 pandemic, a two day virtual trial was held, via Microsoft Teams, on the petitions for termination of the respondents' parental rights. The respondents were represented by separate counsel and participated in the proceedings through audio and video means.[3]

[2] The trial court's thorough and well reasoned memorandum of decision contains a detailed account of the extensive history of the department's involvement with the respondents.

[3] For the purposes of these appeals, the parties stipulate that the respondents were sharing a cell phone to participate in the virtual termination of parental rights trial, outside the proximity of their respective counsel.

On the first day of the virtual trial, the respondents, who had a history of arriving late to their court proceedings, were not present at the time trial was scheduled to begin. Before trial commenced, Samantha and Sebastian's respective counsel confirmed that they had provided their clients with the link to the trial, informed them of the time at which the proceedings would begin, and ensured that their clients had the technology needed to participate. The trial court subsequently asked that Samantha's counsel confirm, for the second time, that Samantha "acknowledged that [the respondents] had the technology to participate by [phone]." Samantha's counsel responded: "Yes. We were going over how we would be able to communicate during the trial, and [Samantha] said she had multiple devices, so she would be able to be on video and . . . perhaps text me on another device."[4] The trial court then commenced the trial in the respondents' absence.

During the cross-examination of the petitioner's first witness, the respondents joined the trial via a shared cell phone, outside the proximity of their counsel. The cross-examination was paused, and the trial court offered to recess, so that the respondents' counsel could have the opportunity to confer with their clients. Both attorneys declined the court's offer, and the cross-examination continued.

Following the first witness' testimony, the trial court asked the respondents' counsel how they planned to confer with their clients during trial. The court indicated that it was "willing to proceed in . . . any way [the respondents' counsel] would like" to ensure that they had adequate contact with their clients. Samantha's counsel stated that she had been communicating with Samantha through text messages and e-mail during trial.

[4] Samantha subsequently confirmed that she had internet connectivity and a cell phone.

Sebastian's counsel similarly indicated that Sebastian was communicating with him through a messaging application. The court then noted that, "if there's anything that the court needs to do in order to help you effectuate that communication, let me know . . . and we'll do our best to accommodate." The court then stood in recess to allow the respondents' counsel to confer with their clients.

The petitioner's counsel presented the testimony of four additional witnesses on the first day of trial. The respondents' counsel cross-examined each of the witnesses, and, at the close of the examination of three of those witnesses, before each witness was released, the trial court asked the respondents' counsel whether they needed an opportunity to confer with their clients to determine whether they should ask additional questions of the witness. The respondents' counsel declined the court's offer to do so each time, and, on at least one occasion, Samantha's counsel explained that she had already been communicating with Samantha during the witness' examination. Moreover, at the close of the examination of the final witness, the court asked whether the respondents' counsel, after consulting with their clients, had any further questions for the witness.

On the second day of the virtual trial, the respondents timely appeared via video, although the trial court commented that their video was frozen. Presumably, the respondents then turned their video off, as the court inquired, "[d]id you want to have your video on? Because, at the moment, it is not—your camera is not on." Samantha responded that she turned the video off because "it was lagging a lot," and she thought that turning the video off would "help the connection . . . ." Samantha indicated that she could attempt to turn the video back on if the court wanted, to which the court responded: "No. Whatever way works best for you. We just want to make sure that you have full

participation in the proceedings, that's all." Samantha responded that the audio only feature was the "clearest [the respondents could] hear [the court] at the moment" and that she "[could] try again." The court responded: "All right. That's fine." The court then proceeded with trial.

Both respondents testified at trial. At the start of her direct examination, Samantha participated by video, but, shortly after beginning to testify, her video froze. She then turned her video off, and the trial court indicated that it could hear her "much better." She proceeded to testify. At a later point during her testimony, however, the court paused the proceedings due to connectivity issues, and the respondents logged off of the virtual trial. Following a brief recess, the respondents "called in" and rejoined the proceedings. The court stated that the technical difficulties with the respondents' connection had been resolved, and the direct examination of Samantha continued. The record does not indicate whether Samantha testified via audio only for the duration of her testimony or, alternatively, whether she was able to utilize video technology for any portion of the remainder of her testimony.

Sebastian appeared via video at the beginning of his testimony, although, initially, his image appeared upside down, and his speech was muffled. His testimony was also interrupted, shortly into his counsel's questioning, by connectivity issues. The remainder of Sebastian's testimony proceeded without significant technological difficulty. As with Samantha, however, the record does not indicate whether Sebastian continued to utilize video technology throughout his testimony, or whether he, at some point, switched to audio only.

In its memorandum of decision, the trial court, *Marcus, J.*, terminated the parental rights of the respondents as to both Vada and Sebastian, Jr. The trial court

found that the department had made reasonable efforts to reunify the respondents with Vada and Sebastian, Jr., and that neither parent was able or willing to benefit from reunification efforts. The court found by clear and convincing evidence that Sebastian failed to rehabilitate because he failed to address his significant mental health and substance abuse disorders, and had not engaged in the services ordered and required for reunification. The trial court found by clear and convincing evidence that Samantha failed to rehabilitate, in part, because she had failed to commit to drug rehabilitation in a serious and sustained way. After making the seven findings required by § 17a-112 (k), the court found by clear and convincing evidence that termination of parental rights was in the children's best interests. These appeals followed.

On appeal to this court, the respondents raise three unpreserved constitutional claims, arguing that the trial court violated their constitutional rights by conducting their termination of parental rights trial via Microsoft Teams instead of holding it in person. First, the respondents contend that the trial court acted in derogation of its duty under article first, § 10, and article fifth, § 1, of the Connecticut constitution, which, they argue, combine to constitutionalize the right to an in person, civil, public trial of the kind that existed at common law. Second, the respondents argue that the trial court denied them the right to physically confront and cross-examine the witnesses against them at the virtual trial, thereby violating their right to due process guaranteed by the fourteenth amendment to the United States constitution. Finally, they assert various state and federal constitutional claims premised on the fact that the trial court did not provide the respondents, who were indigent persons, with their own exclusive devices and internet connection to participate both visually and by audio in the proceeding. Accordingly, the respondents

ask this court to reverse the trial court's judgments terminating their parental rights.

The petitioner contends that the respondents' unpreserved constitutional claims cannot satisfy the requirements set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Specifically, the petitioner contends that the respondents' first claim—that article first, § 10, and article fifth, § 1, of the state constitution combine to constitutionalize the right to an in person trial as it existed at common law—fails *Golding*'s second prong, as the state "constitution does not guarantee the right to a trial in the physical presence of the judicial authority." See *State* v. *Golding*, supra, 239. As to the respondents' remaining claims, the petitioner argues that the record is inadequate for review, and the claims therefore fail *Golding*'s first prong.[5] See id. We affirm the judgments of the trial court terminating the respondents' parental rights.

I

We begin with the respondents' first two unpreserved constitutional claims, namely, their contentions that the trial court violated their rights under article first, § 10, and article fifth, § 1, of the Connecticut constitution and their right to physically confront the witnesses against them, in violation of the due process clause of the fourteenth amendment to the United States constitution. Those issues and the merits of the underlying arguments presented in these appeals are identical to those that we considered in part I of *In re Annessa J.*, which we also decide today. See *In re Annessa J.*, supra, 343 Conn. 653–64. We conclude that our examination of the same issues in *In re Annessa J.* thoroughly resolves the claims in the present appeals and that there is nothing

[5] Counsel for the minor children, Vada and Sebastian, Jr., adopted the petitioner's briefs and all of her legal arguments.

in the present cases that would mandate a different result. In particular, with respect to the respondents' claim under the state constitution, we conclude that the respondents' claim fails under the second prong of *Golding* because they failed to establish that there exists a fundamental right under article first, § 10, and article fifth, § 1, of the Connecticut constitution to an in person termination of parental rights trial. See id., 656–61. With respect to the respondents' federal due process claim, we conclude that their claim fails under the first prong of *Golding* because, even if this court were to assume that there is a constitutional right to in person confrontation, there is no factual record or factual findings for this court to rely on to determine whether that right was violated or whether the trial court correctly concluded that the government's interests were sufficiently great to warrant conducting the trial virtually.[6] See id., 661–64. Namely, the record lacks many of the factual predicates to this claim. Accordingly, we adopt the reasoning and conclusions in part I of *In re Annessa J.* herein. See id., 653–64.

II

The respondents' final claim on appeal raises various unpreserved state and federal constitutional arguments premised on the fact that the state did not provide the respondents, who were indigent, with their own exclusive devices and internet connection to participate both visually and by audio in the proceeding. Specifically, Samantha claims that the trial court denied her due process of law, in violation of the fourteenth amendment to the United States constitution, when it failed to provide her with an adequate device and internet connection to participate in the trial. In addition to a

[6] Unlike the respondent parents in *In re Annessa J.*, the respondents in the present cases did not raise any objection to the virtual nature of the trial before the trial court.

federal due process challenge, Sebastian also asserts that this failure to provide adequate technology denied him equal protection of the law under the federal constitution and open access to the courts under the state constitution.

The respondents concede that they did not raise these claims before the trial court and, therefore, seek review under *State* v. *Golding*, supra, 213 Conn. 239–40. Pursuant to *Golding*, "a [respondent] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the [petitioner] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) Id.; see *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding*). "The first two steps in the *Golding* analysis address the reviewability of the claim, [whereas] the last two steps involve the merits of the claim." (Internal quotation marks omitted.) *In re Azareon Y.*, 309 Conn. 626, 634–35, 72 A.3d 1074 (2013).

As we have explained, under *Golding*, an appellant "may raise . . . a constitutional claim on appeal, and the appellate tribunal will review it, but only if the trial court record is adequate for appellate review. The reason for this requirement demands no great elaboration: in the absence of a sufficient record, there is no way to know whether a violation of constitutional magnitude in fact has occurred. Thus, as we stated in *Golding*, we will not address an unpreserved constitutional claim [i]f the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitu-

tional violation has occurred . . . . It is well established . . . that parties must affirmatively seek to prevail under . . . *Golding* . . . and bear the burden of establishing that they are entitled to appellate review of their unpreserved constitutional claims." (Citations omitted; internal quotation marks omitted.) *State* v. *Canales*, 281 Conn. 572, 581, 916 A.2d 767 (2007). To assess the adequacy of the record, we must first determine whether the alleged constitutional violation requires any factual predicates. See, e.g., *In re Azareon Y.*, supra, 309 Conn. 636.

As factual predicates to their constitutional claims, the respondents allege that their shared device was inadequate because they were unable to appear before the trial court, to confer spontaneously with counsel, or to view the proceedings. We conclude that the record is inadequate to review the respondents' constitutional claims because the record is silent on, and in some cases undermines, those factual predicates. First, the record does not indicate that the respondents shared a device because they had access to only one device. Indeed, after assuring the court that Samantha had the technology needed to participate in the proceedings, Samantha's counsel explained that Samantha had "said she had *multiple devices* . . . ." (Emphasis added.) Samantha subsequently confirmed that she had internet connectivity and a cell phone.

Second, contrary to the respondents' assertions, the trial court took numerous steps to ensure that the respondents could meaningfully communicate with their counsel throughout trial. The trial court specifically asked the respondents' counsel how they planned to confer with their clients during trial and explained that it was "willing to proceed in . . . any way that [the respondents' counsel] would like" to ensure that they had adequate contact with their clients. Samantha's counsel explained to the court that she had gone

"over how we would be able to communicate during the trial, and [Samantha] said she had multiple devices, so she would be able to be on video and . . . perhaps text me on another device." Samantha's counsel subsequently stated that she has "been texting [Samantha], and [Samantha has] been e-mailing, and, so, we are communicating . . . during the trial."[7] For his part, Sebastian's counsel similarly indicated that Sebastian was communicating with him through a messaging application.[8] The court then noted that, "if there's anything that the court needs to do in order to help you effectuate that communication, let me know . . . and we'll do our best to accommodate." Moreover, after the testimony of three of the petitioner's witnesses, before each witness was released, the court asked the respondents' counsel whether they needed an opportunity to confer with their clients to determine whether they should ask additional questions of the witness. The respondents' counsel declined the court's offer to do so each time. On at least one occasion, Samantha's counsel explained that she had already been communicating with Samantha during the witness' examination.

Third, other than a few instances in which the trial court noted that the respondents were appearing by video or audio only, the record is silent as to the manner in which the respondents participated throughout the trial. Indeed, as Sebastian conceded in his brief, the record is silent as to whether the respondents participated via audio or video on the morning of the first day

[7] The trial court even asked Samantha's counsel: "So, going forward, you'll be able to communicate by text, and it's really almost the same as [Samantha] sitting there and writing you a note because you're getting that note in real time. Is that correct?" Samantha's counsel responded, "[t]hat is correct, Your Honor."

[8] As with Samantha's counsel, the trial court specifically asked Sebastian's counsel whether he would be able to communicate with Sebastian during the testimony of a witness, to which Sebastian's counsel responded, "[Sebastian] can send me messengers. I get something from messenger from him."

of trial. The record indicates, however, that, following an afternoon recess, the court noted, "[the respondents] have joined us *by video*, which is great." (Emphasis added.) In addition, on the second day of trial, the court noted, at various points, that the respondents were visible via video. As a result, it is clear that the device the respondents were using to participate in the proceedings had video capabilities, and, contrary to the respondents' assertions, the record is devoid of any indication that the respondents' cell phone did not enable them to view the proceedings. Moreover, the record reflects that, when technical issues arose during trial, the court took corrective measures to ensure that it, the parties and counsel could meaningfully participate. See, e.g., *People ex rel. R.J.B.*, 482 P.3d 519, 525 (Colo. App. 2021) (noting importance of trial court's taking steps to remedy technological issues during virtual termination of parental rights trial), cert. denied, Colorado Supreme Court, Docket No. 21SC115 (March 15, 2021); *In re M.M.*, Docket No. 21A-JT-840, 2021 WL 4839067, *3 (Ind. App. October 18, 2021) (decision without published opinion, 176 N.E.3d 589) (explaining that trial court rectified any technological issues during virtual termination of parental rights hearing and respondent mother was able to meaningfully participate). At one point, when the respondents were experiencing technical difficulties, the court explained to the respondents, "[w]hatever way works best for you. We just want to make sure that you have full participation in the proceedings, that's all."

Finally, neither Samantha nor Sebastian asked for technical assistance or accommodations from the trial court. Because the respondents did not raise any issue with their technology at trial, the trial court was unable to assess any potential problems with their ability to participate via video and had no occasion to consider alternative means for them to participate via video,

to provide them technology or internet access, or to continue the trial until it could be held in person. As this court repeatedly has observed, "[o]ur role is not to guess at possibilities . . . but to review claims based on a complete factual record developed by a trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court . . . any decision made by us respecting [the appellant's claims] would be entirely speculative." (Internal quotation marks omitted.) *State* v. *Brunetti*, 279 Conn. 39, 63, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007). Because the record is silent on or, in some instances, undermines many of the factual predicates necessary to evaluate the respondents' claims, we conclude that the record is inadequate to review those unpreserved claims.

We take this opportunity, however, to emphasize the importance of ensuring equal access to justice, which is particularly significant in the context of virtual hearings and trials, given the digital divide. These public policy considerations are identical to those that we expressed in part II of *In re Aisjaha N.*, which we also decide today. See *In re Aisjaha N.*, supra, 343 Conn. 727–30. Accordingly, the public policy discussion in part II of *In re Aisjaha N.* applies with equal force to the present cases.

The judgments are affirmed.

In this opinion the other justices concurred.

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## STATE OF CONNECTICUT *v.* XAVIER RIVERA
## (SC 20539)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

*Syllabus*

Convicted of murder, conspiracy to commit assault in the first degree, unlawful restraint in the first degree, unlawful discharge of a firearm,

and carrying a pistol or revolver without a permit in connection with the shooting death of the victim, the defendant appealed. The defendant had gone with two other individuals, V and C, to an automobile parts store in Bridgeport to confront the victim about a break-in in which the defendant believed the victim was involved. The victim was ultimately shot and killed on a street adjacent to the store parking lot. V testified at the defendant's trial that he had witnessed the defendant strike the victim in the face with a gun and drag him across the parking lot. V also testified that he had heard gunshots and witnessed the defendant drive away from the scene in his car. In addition, approximately two weeks after the shooting, the police approached V about the victim's death, and V thereafter used a cell phone to surreptitiously record a conversation between him and the defendant in which the defendant allegedly confessed to his commission of the murder. V returned to the police station, played the audio recording of the conversation on his cell phone for the police, and e-mailed an electronic copy of the recording to the police. The police transferred a copy of the recording to a DVD, which was admitted into evidence. V testified that he had listened to the recording on the DVD proffered by the state and that the recording had not been manipulated since it was recorded. V also testified that he no longer possessed the cell phone that he had used to record the conversation, and, as a result, the original recording was no longer available. Another eyewitness to the events in question, R, testified that he saw a man dressed in all white pistol whip the victim multiple times. The state and the defense entered into a stipulation, which was provided to the jury, that R was unable to identify the defendant as the individual whom R identified as wearing all white when, prior to trial, R was presented with a photographic array that included a photograph of the defendant. The Appellate Court affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the Appellate Court incorrectly concluded that the trial court had not abused its discretion in admitting into evidence the DVD containing the audio recording of his alleged confession:

   a. There was no merit to the defendant's claim that the recording was inadequately authenticated and, therefore, was inadmissible under the Connecticut Code of Evidence (§ 9-1): the fact that the recording proffered by the state was stored electronically did not require a meaningful departure from well established methods of authentication; moreover, the state made a prima facie showing of the recording's authenticity, as V testified that he personally recorded the conversation, that he subsequently e-mailed an electronic copy of the recording to the police, that the recording proffered by the state had not been altered, and that he was familiar with the voices on that recording, and the detective who received the electronic copy of the recording testified that he had

received that copy from V via e-mail and then transferred it to the DVD that the state was seeking to introduce; furthermore, once the state made its prima facie showing, the evidence was admissible, and the ultimate determination of authentication and what weight to give that evidence was for the jury.

b. The defendant's claim that the unavailability of the original recording stored on V's cell phone rendered subsequent electronic copies of that recording inadmissible under the best evidence rule was unavailing; unchallenged testimony established that the original recording was no longer available, the defendant conceded that there was no indication that V lost or destroyed his cell phone with the intention of making the original recording unavailable for trial, and, in the absence of any claim that the state had destroyed or lost the original in bad faith in order to avoid producing it, the DVD containing an electronic copy of the original recording was admissible under the Connecticut Code of Evidence (§ 10-3) as a form of secondary evidence of the contents of the original recording.

2. The defendant could not prevail on his claim that the Appellate Court incorrectly concluded that the trial court had not abused its discretion when it directed the jury to disregard portions of defense counsel's closing argument concerning the prosecutor's failure to ask R for an in-court identification of the defendant, as any error on the part of the trial court was harmless: the state conceded R's inability to identify the defendant as the person whom he identified as the man in white through its stipulation to the fact that R was unable to pick the man wearing all white out of a photographic array that included a photograph of the defendant, defense counsel emphasized this point repeatedly during his closing argument without comment or contradiction by the prosecutor, and, therefore, this court could not conclude that the exclusion of a single, inferential argument relating to R's continued inability to identify the defendant at trial would have changed the result that the jury reached; moreover, it was undisputed that the state's case against the defendant did not include a definitive identification from any neutral witnesses, as all of the witnesses to the events in question could provide only a general description of the person in white, and R's testimony accounted for only a small portion of the evidence presented in the state's strong case against the defendant.

Argued January 12—officially released June 21, 2022

*Procedural History*

Two part substitute information charging the defendant, in the first part, with the crimes of murder, conspiracy to commit assault in the first degree, unlawful restraint in the first degree, unlawful discharge of a firearm and carrying a pistol or revolver without a per-

mit, and, in the second part, with criminal possession of a firearm, brought to the Superior Court in the judicial district of Fairfield, where the first part of the information was tried to the jury before *Kavanewsky, J.*; verdict of guilty; thereafter, the state entered a nolle prosequi as to the second part of the information, and the court, *Kavanewsky, J.*, rendered judgment in accordance with the verdict; subsequently, the defendant appealed to this court, which transferred the appeal to the Appellate Court, *Alvord*, *Elgo* and *Pellegrino*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

*Lisa J. Steele*, assigned counsel, for the appellant (defendant).

*Kathryn W. Bare*, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Marc R. Durso*, senior assistant state's attorney, for the appellee (state).

*Opinion*

KAHN, J. The defendant, Xavier Rivera, appeals from the judgment of the Appellate Court, which affirmed the judgment of the trial court, rendered after a jury trial, convicting him of the crimes of murder in violation of General Statutes § 53a-54a (a), conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-59 (a) (1) and 53a-48, unlawful restraint in the first degree in violation of General Statutes § 53a-95, unlawful discharge of a firearm in violation of General Statutes § 53-203, and carrying a pistol or revolver without a permit in violation of General Statutes § 29-35 (a). In the present appeal, the defendant claims that the Appellate Court incorrectly concluded that the trial court had not abused its discretion by (1) admitting an audio recording allegedly containing his confession into evidence, and (2) directing the jury to disregard portions of defense counsel's closing argument relating to the

absence of an in-court identification from one of the state's witnesses. For the reasons that follow, we reject both of those claims and, accordingly, affirm the judgment of the Appellate Court.

The following undisputed facts and procedural history are relevant to our consideration of the present appeal. The victim, Miguel Rivera,[1] was shot and killed on North Avenue in the city of Bridgeport at 12:22 a.m. on December 24, 2016. A specialized group of detectives in the Bridgeport Police Department gathered video surveillance footage from various security cameras in the area around that shooting. Video surveillance footage from one set of cameras located at an auto repair shop one block south from the scene of the shooting shows two vehicles turning onto North Avenue from River Street at approximately 12:18 a.m. The first of those two vehicles pulled into the parking lot of a strip club located near that intersection. Two individuals dressed in black exited from that vehicle, crossed to the other side of North Avenue, and then can be seen walking north toward the parking lot of a nearby AutoZone store. That footage also shows the second vehicle, which the police subsequently identified as a Cadillac DTS,[2] driving north for a few hundred feet and eventually parking in front of an office building located across the street from the southern entrance to the AutoZone parking lot.

A second set of video surveillance cameras, located at a fast food restaurant just north of that office building

[1] Although the defendant and the victim share the same surname, they are not related. *State* v. *Rivera*, 200 Conn. App. 487, 489 n.1, 240 A.3d 728 (2020).

[2] The police showed footage from these security cameras to a Cadillac dealer in Shelton, who identified this vehicle as a Cadillac DTS manufactured between 2006 and 2011. At trial, the defendant stipulated to owning a 2006 grey Cadillac DTS. Although that particular vehicle was seized by the police and processed for evidence, it was later stolen out of the police department's parking lot.

and directly across North Avenue from AutoZone, shows one individual dressed in all white, and then later two individuals dressed in black, walking into the AutoZone parking lot. Moments later, footage from those same video surveillance cameras shows the person in white dragging the victim back toward the parking lot's southern entrance.[3] At that same moment, one of the two people in black can be seen extending his arm as if he was pointing a handgun at the cars located behind them.

Additional footage from video surveillance cameras at the auto repair shop shows the victim being forced across North Avenue by the person in white and by one of the two people in black. The victim is then eventually pushed out of view alongside of the southern wall of the office building. A few seconds later, the victim can be seen running back out onto the street and fleeing north for a short distance, where he ultimately collapsed and died on the sidewalk in front of the fast food restaurant.[4] The Cadillac can then be seen moving in reverse, turning around, and driving away to the south without its headlights on. Two individuals dressed in black then walk to the car parked near the strip club and drive away at approximately 12:23 a.m.

The state presented physical and forensic evidence at trial. The medical examiner assigned to this case, Frank Evangelista, testified that the victim had suffered blunt force trauma to the face and a total of four gunshot wounds to his torso and lower extremities. One of those gunshot wounds entered the victim's back and exited from his chest. The victim sustained two other gunshot

[3] A thirty-seven second portion of the video surveillance footage from the feed labeled "CAMERA02," which would have captured the initial confrontation between these three individuals and the victim, was not included in the copy of the video surveillance footage introduced by the state at trial. The record contains no apparent explanation for this omission.

[4] A stipulation entered into evidence by the parties indicates that a blood trail found in the area had been left by the victim.

wounds to his thighs, and a fourth gunshot wound to his left knee. Three of these shots went completely through the victim's body; the fourth, however, left a bullet lodged in the victim's left thigh. Evangelista testified that the victim had bled to death and stated that the process would not have been instantaneous.

A firearms examiner, Marshall Robinson, testified that bullets and casings connected to this crime came from two distinct guns: a .22 caliber revolver and a nine millimeter Luger semiautomatic firearm. Robinson testified that the bullet recovered from the victim's left thigh and another found by the police on North Avenue came from the .22 caliber weapon, whereas four bullet casings discovered on the southern side of the office building came from the nine millimeter Luger firearm. Neither of these weapons was ever found by the police.

The state also presented testimony from various witnesses who were near the scene of the shooting. The first of those witnesses, McDonald Bogues, was in his car outside of the fast food restaurant with his wife, Rosemarie Dixon. Bogues testified that he heard what he had initially thought was a car backfiring across the street at AutoZone, and then started to see cars speeding out of the nearby parking lot. Bogues then saw four men on the other side of North Avenue: (1) the victim, who was wearing black, (2) a second man dressed in black who was pulling the victim, (3) a taller,[5] lighter-skinned man dressed in "full white" that was pushing the victim and holding a semiautomatic pistol, and (4) a third man dressed in black who was standing farther away and "wasn't in the mix of things." Bogues eventually lost sight of the altercation after the victim was forced across the street but then heard a single gunshot followed by three

[5] Bogues estimated that the man in white was between five feet, nine inches, and six feet tall. Evidence adduced by the state at trial shows that the defendant matches this description.

more in quick succession. After the victim had run back onto the street and collapsed on the sidewalk in front of the fast food restaurant, Bogues saw the man in white get into a "dark[er]" colored car parked on North Avenue, turn around in reverse, and then drive away without its headlights on.

Like Bogues, Dixon testified that a man dressed in white and one of the men dressed in black had dragged the victim across the street and that, shortly after they moved out of sight, she heard a series of gunshots. Dixon also described the individual in white as a taller man with a fair complexion and stated that she had called the police after seeing a black handgun in his right hand. After the victim had run out onto North Avenue and collapsed on the sidewalk in front of the fast food restaurant, Dixon saw the man in white getting into a dark colored car and turning around on North Avenue.

A third eyewitness, Jesus Rodriguez, was seated in his car in the AutoZone parking lot when the fight initially broke out. Specifically, Rodriguez testified that three men approached the car parked next to him and that a man dressed in all white had pulled the victim out of the passenger seat of that vehicle. Similar to the descriptions provided by both Bogues and Dixon, Rodriguez described the man in white as a tall, Hispanic male of average build. According to Rodriguez, the man in white then began asking where "his shit" was, pistol whipped the victim multiple times, and then pointed a gun at the victim's legs. Rodriguez heard a gunshot,[6] began to drive away, and called 911. As Rodriguez was leaving the parking lot, he saw a gold Cadillac driving away to the south on North Avenue.[7]

[6] Rodriguez testified that he did not see either of the two men in black carrying guns that night, and that he believed the shot came from the man in white.

[7] Although the defendant's motor vehicle registration indicates that his Cadillac is grey; see footnote 2 of this opinion; police officers who subsequently seized and photographed that vehicle indicated that it could appear brown or gold when light hits it. In closing, the prosecutor argued to the

The most comprehensive account of the events preceding the victim's death, however, came from Alexis Vilar, who told the jury that he had gone with the defendant and a third individual, Moises Contreras, to the AutoZone that night in order to confront the victim about a break-in that had recently occurred at the home of the defendant's girlfriend. Vilar indicated that the defendant had lost marijuana, money, and certain other personal items during that break-in, and that the defendant had strongly suspected that the victim, who had previously dated the defendant's girlfriend, was responsible. According to Vilar, the three men left a concert on the eastern side of Bridgeport and began heading toward the AutoZone around midnight, the defendant, driving alone in his grey 2006 Cadillac DTS, and Vilar and Contreras driving together inside of Vilar's Acura TL. Vilar stated that, on that particular evening, both he and Contreras were wearing dark colors, whereas the defendant was wearing white.

Vilar testified that he and Contreras parked at the strip club near the intersection of River Street and North Avenue, while the defendant continued up the street for a short distance and parked across the street from the AutoZone. By the time Vilar and Contreras eventually caught up to the defendant, he was already confronting the victim with a black nine millimeter handgun. Vilar testified that the defendant then began smacking the victim in the face with that gun and dragging the victim toward the southern end of the parking lot. Vilar indicated that, around that same time, Contreras fired a single shot from a small caliber revolver.

Vilar told the jury that that he was already heading back toward his Acura in the strip club's parking lot by the time Contreras and the defendant had dragged

jury that the lighting at the scene may have altered the appearance of the defendant's vehicle.

the victim across North Avenue. Vilar then heard another "small caliber shot," saw Contreras walking quickly toward him, and then heard a series of several louder shots in quick succession. Vilar testified that, after he and Contreras got back into the Acura, Contreras remarked, "I think [the defendant] finished him." Vilar stated that he then saw the defendant driving away in the Cadillac with the headlights off.

Finally, Vilar testified that, on January 11, 2017, police officers approached him to ask about the victim's death. Vilar subsequently retained an attorney, returned to meet with the police the following day, and proceeded to recount the events previously described. Vilar testified that, a few days after that meeting, he used a cell phone to surreptitiously record a conversation relating to the victim's death between him and the defendant. On January 19, 2017, Vilar returned to the police station, played the recording on his phone for the police, and then e-mailed a copy of it to one of the detectives. The police, in turn, saved a copy of that recording on to a DVD, which itself was introduced into evidence at trial as a full exhibit over defense counsel's objection. The person speaking with Vilar on that recording can be heard stating that "all [he] wanted to do was beat [the victim's] ass" that night but that he was forced to kill the victim in order to prevent him from going to the police after Contreras had shot the victim twice.[8]

The jury subsequently returned a verdict finding the defendant guilty of murder, conspiracy to commit assault

[8] Specifically, the man on that recording states: "As soon as Peto shot him . . . . [the victim] was like Sobe don't kill me, Sobe don't kill me . . . so now, he's looking at *me*, so, if I let him go . . . he can paint a picture and say he know who shot me. If the cops come pick me up, I'm not gonna say nothing, so I'm gonna get charged with it. I know what it is. So I . . . just blacked out, like, I'd rather have him dead that he can't pick me out than being alive and say he shot me." Uncontested evidence adduced by the state during the course of trial indicated that the defendant went by the nickname "Sobe" and that Contreras was also known as "Peto."

in the first degree, unlawful restraint in the first degree, unlawful discharge of a firearm, and carrying a pistol without a permit. The trial court rendered a judgment of conviction in accordance with that verdict and imposed a total effective sentence of fifty-five years of incarceration. The defendant then appealed from that conviction, claiming, inter alia, that (1) his alleged confession was improperly authenticated and inadmissible under the best evidence rule, and (2) the trial court improperly instructed the jury to disregard an argument made by defense counsel in closing relating to the absence of an in-court identification from Rodriguez. See *State* v. *Rivera*, 200 Conn. App. 487, 488–89, 491, 501, 240 A.3d 728 (2020). The Appellate Court rejected both claims and affirmed the defendant's conviction. Id., 505. This certified appeal followed.[9] Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim is that the Appellate Court incorrectly concluded that the trial court had not abused its discretion by admitting the electronic recording of his alleged confession into evidence. Although his briefing on the issues are somewhat entwined, the defendant appears to raise two analytically distinct legal grounds on this point: (1) the recording was improperly authenticated and, therefore, inadmissible under § 9-1 of the Connecticut Code of Evidence, and (2) the unavailability of the original electronic recording stored on Vilar's

[9] Specifically, this court granted the defendant's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the trial court did not abuse its discretion in admitting into evidence a [DVD] containing an audio recording of a conversation between . . . Vilar and the defendant?" And (2) "Did the Appellate Court correctly conclude that the trial court did not abuse its discretion when it directed the jury to disregard the portion of defense counsel's closing argument indicating that the state never had asked . . . [Rodriguez] to make an in-court identification of the defendant?" *State* v. *Rivera*, 335 Conn. 975, 241 A.3d 129 (2020).

cell phone and its associated metadata rendered subsequent electronic copies of that recording inadmissible under our state's best evidence rule. See Conn. Code Evid. §§ 10-1 through 10-3. The state responds by arguing, inter alia, that Vilar's testimony about the creation and contents of the recording provided a sufficient foundation for the purpose of admission under § 9-1. The state also argues that, in the absence of evidence that Vilar's cell phone was destroyed for the purpose of avoiding production of the original recording, the electronic copy proffered by the state at trial was admissible pursuant to § 10-3. For the reasons that follow, we agree with the state on both points.

The following additional facts and procedural history are relevant to our consideration of this issue. The exhibit presently at issue is a DVD containing a single multimedia file with a .3gp file extension. The recording on the DVD is approximately three minutes in length and contains a file date of January 19, 2017. The state's foundation for the admission of this exhibit came from two separate witnesses. Vilar testified that he secretly used his cell phone to record a conversation that he had with the defendant inside of a car outside a hookah lounge in Fairfield on January 15, 2017. Vilar then brought that recording to the police department on January 19, 2017, played it for the police on his cell phone, and sent a copy to them by e-mail. Vilar testified that he had listened to the recording on the DVD being proffered by the state and that the audio recording had not been manipulated since it was first recorded. Vilar specifically indicated that he recognized the two voices on the recording as the defendant's and his own.[10] Finally, Vilar testified that he no longer possessed the phone that he had used to record his conversation with the defendant and that, as a result, the original recording

[10] The defendant does not dispute the fact that Vilar would have been familiar with his voice.

was no longer available. A police detective, Jorge Cintron, likewise testified that he had heard the audio recording when Vilar played it at the police department on January 19, 2017, that Vilar had e-mailed a copy of that recording to him later that same day, and that he had then saved a copy of that recording to the DVD being proffered by the state. Cintron testified that he had listened to that recording and that it was the same as the one previously played for him by Vilar.

Defense counsel ultimately objected to the admission of the recording saved to the DVD, citing the absence of the original recording. Specifically, defense counsel argued that the gap in time between when Vilar allegedly recorded the conversation and when it was provided to the police was "enough to raise questions" about the recording's authenticity and its chain of custody. The prosecutor argued that the foundation previously laid was sufficient for admission.

The trial court overruled defense counsel's objection and admitted the recording into evidence, stating: "I think there's ample evidence of a sufficient chain of custody between how he says he recorded it; when he says he recorded it; how it was transmitted from his cell phone, apparently by e-mail, to the police. . . . Cintron . . . testified . . . as to how he made the DVD from the e-mail . . . [and] that what [Vilar] played for him at the police station was . . . the same . . . as what later went onto the DVD. . . . [Vilar] has testified to the same effect, [and] recognizes the . . . voices. . . . I think the rest of it goes to . . . the weight of the evidence but not the admissibility of the evidence. So, the objection is overruled."

The Appellate Court determined that there was no error with respect to this ruling. *State* v. *Rivera*, supra, 200 Conn. App. 489. Although not addressed directly, the Appellate Court decision appears to implicitly reject

the defendant's claim that the foundation laid by the state was insufficient to satisfy the standards for authentication required by our code of evidence.[11] See id., 502–503. It was likewise unpersuaded by the defendant's best evidence argument. Id., 501–502. The following passage from that court's comprehensive decision on this point is, we think, particularly instructive: "Section 10-3 of the Connecticut Code of Evidence . . . provides that the original of a recording is not required, and other evidence of the contents of the recording is admissible, if [a]ll originals are lost or have been destroyed, unless the proponent destroyed or otherwise failed to produce the originals for the purpose of avoiding production of an original . . . . [I]t is clear that the original recording is no longer available, as it was on Vilar's cell phone, which was no longer in his possession at the time of the trial. . . . The defendant has failed to point to any evidence in the record demonstrating that the original recording was made unavailable for the purpose of avoiding its production at trial. Vilar played the original recording for the police and then e-mailed a copy of the recording to the police, per . . . Cintron's instructions. At no time did the police request or order that Vilar turn over the cell phone containing the original recording. Furthermore, both Vilar and . . . Cintron verified that the copy of the recording e-mailed to the police was an exact copy of the original. On the basis of these facts, [the court] cannot conclude that the original recording was made unavailable for the purpose of avoiding its production. . . . Accordingly, the

[11] The Appellate Court also declined the defendant's invitation to invoke its supervisory powers to heighten the requirements for admission of electronically stored information. See *State* v. *Rivera*, supra, 200 Conn. App. 502–503. The defendant repeats that invitation in the present appeal, and we likewise decline to accept it. See, e.g., *State* v. *Edwards*, 314 Conn. 465, 498, 102 A.3d 52 (2014) (this court's supervisory powers represent "an extraordinary remedy that should be used sparingly" (internal quotation marks omitted)).

copy of the recording satisfies the requirement of § 10-3 of the Connecticut Code of Evidence . . . [and was therefore] admissible under [the code]." (Citation omitted; internal quotation marks omitted.) Id.

For the sake of simplicity, we address separately the defendant's claims with respect to authentication and the best evidence rule. The standard of review applicable to both of these claims is well established. "To the extent [that] a trial court's admission of evidence is based on an interpretation of the [c]ode of [e]vidence, our standard of review is plenary." *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007). "We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." Id. "Under the abuse of discretion standard [an appellate court] make[s] every reasonable presumption in favor of upholding the trial court's rulings, considering only whether the court reasonably could have concluded as it did." *State* v. *Annulli*, 309 Conn. 482, 491, 71 A.3d 530 (2013).

## A

## Authentication

We begin by rejecting the defendant's claim that the foundation laid by the state at trial was inadequate to authenticate the recording of the defendant's alleged confession. The relevant provision of our code of evidence provides: "The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be." Conn. Code Evid. § 9-1 (a). This bedrock requirement, as the parties accurately observe, "applies to all types of evidence, including writings, sound recordings, electronically stored information, real evidence . . . demonstrative evidence . . . and the like." Conn. Code Evid. § 9-1 (a), commentary. The burdens imposed by

this rule are, however, not intended to be onerous. See, e.g., M. Baldwin et al., A Practical Guide to Evidence in Connecticut (2d Ed. 2021) § 9.2.1. "Once this prima facie showing is made, the evidence may be admitted, and the ultimate determination of authenticity rests with the fact finder." Conn. Code Evid. § 9-1 (a), commentary; see also *State* v. *Carpenter*, 275 Conn. 785, 856, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006).

Although evidence may be authenticated in several different ways, two specific methods suggested by the commentary to our code of evidence are notable in this case: (1) "[a] witness with personal knowledge may testify that the offered evidence is what its proponent claims it to be"; and (2) "[a]ny person having sufficient familiarity with another person's voice, whether acquired from hearing the person's voice firsthand or through mechanical or electronic means, can identify that person's voice or authenticate a conversation in which the person participated." Conn. Code Evid. § 9-1 (a), commentary; see E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 9.8, p. 685 ("[T]he maker of an oral . . . communication may be identified by anyone familiar with the voice of the speaker. . . . If a minimal showing has been made, the statement should be admitted and the finder of fact will determine the weight to be given to the identification testimony." (Citations omitted.)); see also 2 R. Mosteller et al., McCormick on Evidence (8th Ed. 2020) § 228, pp. 115–16.

The fact that an audio recording proffered by the state was stored electronically does not, in our view, require a meaningful departure from these well established methods of authentication under the facts presented.[12] Cf. *State* v. *Manuel T.*, 337 Conn. 429, 460, 254

[12] As noted previously, the defendant's arguments with respect to the admissibility of the recording conflate the concept of authentication with the best evidence rule. Although defense counsel did not mention metadata with respect to either of these issues at trial, we pause to note that, to the

A.3d 278 (2020) ("[w]e see no justification for constructing unique rules of admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether . . . there has been an adequate foundational showing of their relevance and authenticity" (internal quotation marks omitted)). Vilar testified that he personally recorded the conversation, that he subsequently e-mailed a copy of the recording to the police, and that the recording proffered by the state had not been altered in any way. Vilar then identified the voices on that recording on the basis of his own familiarity with them. Cintron, likewise, testified that he had received a copy of that recording from Vilar via e-mail and then saved it to the DVD that the state was seeking to introduce. Once this prima facie showing was established, the evidence was admissible, and the ultimate determination of authentication and what weight to give that evidence was for the jury. See, e.g., *State* v. *Carpenter*, supra, 275 Conn. 856. On the record before us, we decline to conclude that the trial court abused its discretion by finding that the state had laid an adequate foundation for the admission of this recording into evidence.[13]

extent that the defendant now specifically claims on appeal that the absence of metadata associated with the recording on Vilar's cell phone categorically precluded authentication of the copy proffered by the state at trial, that claim lacks merit. An analysis of metadata associated with any digital evidence may be one of several methods by which authentication is either established or challenged, but it is not itself necessary to make a prima facie showing of authenticity for the purpose of admission.

[13] We note that the trial court's admission of the recording in no way precluded defense counsel from arguing to the jury that the recording could not be trusted. Indeed, defense counsel was permitted to argue at length that Vilar, who had a criminal history and experience creating audio files for rap music, had the means, motive, and opportunity to digitally alter—or even wholly fabricate—the recording. Although he did not do so, defense counsel also could have pointed out to the jury that the absence of the original recording meant that the metadata associated with that recording were also missing. We agree with the trial court's initial assessment that such arguments are properly addressed to the finder of fact. See *State* v.

B

The Best Evidence Rule

We likewise reject the defendant's argument that the admission of the DVD containing an electronic copy of his alleged confession violated the strictures of our state's best evidence rule. The defendant argues that, because the recording on the DVD was made from Vilar's e-mailed copy, it cannot be considered either an original in its own right or a copy admissible in lieu of the original. See Conn. Code Evid. §§ 10-1 and 10-2. Although not raised before the trial court, the defendant now argues on appeal that the copy of the recording proffered by the state should not have been admitted because, without the original recording, he lacked access to the metadata associated with the original recording. Even if we were to agree with the defendant's reading of §§ 10-1 and 10-2, however, the unchallenged testimony relating to the loss of the original recording would nonetheless compel us to uphold the trial court's admission of the DVD as a permissible form of secondary evidence. See Conn. Code Evid. § 10-3.

We begin with a brief review of the relevant rules of evidence. Section 10-1 of the Connecticut Code of Evidence provides: "To prove the content of a writing, recording or photograph, the original writing, recording or photograph must be admitted in evidence, except as otherwise provided by the Code, the General Statutes or any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code. An original of electronically stored information includes evidence in the form of a printout or other output, readable by sight or otherwise shown to reflect the data accurately." This rule generally applies to audio

*Manuel T.*, supra, 337 Conn. 461 ("[q]uestions about the integrity of electronic data generally go to the weight of electronically [stored] evidence, not its admissibility" (emphasis omitted; internal quotation marks omitted)).

recordings offered to prove the content of a previous conversation. See 2 R. Mosteller et al., supra, § 234, pp. 138–39 ("[A] conversation between two people is an event that may be proved either by testimony from the participants (or from anyone else who heard the conversation) as to what was said or a tape recording made of the conversation. If the proponent chooses to prove what was said during the conversation by use of [a] tape recording, then [that] tape is being offered to prove its own contents. The requirement of the original tape would apply." (Footnote omitted.)).[14]

When the original writing, recording or photograph is unavailable, courts should begin by examining the exceptions set forth in § 10-3 of the Connecticut Code of Evidence. That rule provides in relevant part: "The original of a writing, recording or photograph is not required, and other evidence of the contents of such writing, recording or photograph is admissible if: (1). . . [a]ll originals are lost or have been destroyed, unless the proponent destroyed or otherwise failed to produce the originals for the purpose of avoiding production of an original . . . ." Conn. Code Evid. § 10-3. These exceptions are rooted in the fact that the common-law best evidence rule expresses "a rule of preference rather than one of exclusion." Conn. Code Evid. § 10-3, commentary; see also 2 R. Mosteller et al., supra, § 237, p. 152 ("[t]he requirement of producing the original of a

[14] Section 10-2 of the Connecticut Code of Evidence provides: "A copy of a writing, recording or photograph, is admissible to the same extent as an original unless (A) a genuine question is raised as to the authenticity of the original or the accuracy of the copy, or (B) under the circumstances it would be unfair to admit the copy in lieu of the original." Because we conclude that the DVD proffered by the state is admissible as a form of secondary evidence under § 10-3, we need not address the defendant's various claims with respect to this provision. See, e.g., *United States* v. *Lanzon*, 639 F.3d 1293, 1301–1302 (11th Cir.) (conclusion that transcripts were admissible under rule 1004 of Federal Rules of Evidence rendered immaterial question of whether transcripts were duplicates within meaning of rule 1003), cert. denied, 565 U.S. 916, 132 S. Ct. 333, 181 L. Ed. 2d 208 (2011).

writing, recording or photograph is principally aimed, not at securing an original document at all hazards and in every instance, but at securing *the best obtainable evidence* of its contents" (emphasis added)).

As stated previously in this opinion, the testimony adduced by the state at trial demonstrated that the original recording on Vilar's cell phone was no longer available. Although the defendant characterizes the unavailability of Vilar's cell phone as "suspicious" in briefing the present appeal, a detailed review of the record shows that this argument was never raised, either explicitly or implicitly, during the course of trial. The defendant himself candidly concedes in his brief that there is "no evidence that Vilar lost or destroyed his [cell] phone with the intention of making the original recording unavailable for trial." We agree with the Appellate Court's assessment that, in the absence of any claim that the state had destroyed or lost the original in order to avoid its production before the trial court, the DVD copy made by Cintron was admissible under the exception set forth in § 10-3 as a form of secondary evidence of the contents of that original recording. See, e.g., *United States* v. *Lanzon*, 639 F.3d 1293, 1301–1302 (11th Cir.) (concluding that "transcripts were admissible under [rule 1004 of the Federal Rules of Evidence] because they contain evidence of the conversations and the originals were not destroyed in bad faith"), cert. denied, 565 U.S. 916, 132 S. Ct. 333, 181 L. Ed. 2d 208 (2011); *United States* v. *Knohl*, 379 F.2d 427, 439–41 (2d Cir.) (copy of audio recording made by federal law enforcement officers was admissible as secondary evidence after original recording was lost by government witness), cert. denied, 389 U.S. 973, 88 S. Ct. 472, 19 L. Ed. 2d 465 (1967); see also, e.g., *United States* v. *Gerhart*, 538 F.2d 807, 809–10 (8th Cir. 1976) (photocopy of photocopy was admissible when govenrment established that "the original photocopy was lost, that the

proffered photocopy was what it purported to be and it accurately reflected the contents of the original photocopy"); 2 R. Mosteller et al., supra, § 234, pp. 138–39 (secondary evidence, such as written transcripts, is admissible to prove contents of conversation when original audio recording is "shown to be unavailable"). Because there was no claim that the original recording was lost in bad faith, the defendant's challenge under the best evidence rule must fail.

II

The defendant's final claim is that the trial court abused its discretion by impermissibly restricting the scope of defense counsel's closing argument. Specifically, the defendant argues that the trial court improperly instructed the jury to disregard defense counsel's statements relating to the absence of an in-court identification from Rodriguez. The state responds by arguing that the trial court's instruction was proper and that, even if it was not, any error was harmless. For the reasons that follow, we agree with the state that any error by the trial court related to this claim was harmless.[15]

[15] Although the defendant also claims that the trial court's ruling violated his constitutional right to the effective assistance of counsel, that particular claim was neither raised in his petition for certification to appeal nor included in the list of questions subsequently certified by this court. See footnote 9 of this opinion. Even if we were inclined to overlook that particular omission and to reach the merits of that constitutional issue, that claim would still fail under the third prong of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). This court's precedent indicates that a violation of the constitutional right to the effective assistance of counsel arises when a defendant is "deprived of the opportunity to raise a significant issue that is reasonably inferable from the facts in evidence." *State* v. *Arline*, 223 Conn. 52, 64, 612 A.2d 755 (1992). The trial court's sua sponte restriction did not, as the defendant claims, "[deprive] the defense of the ability to raise reasonable doubt based on Rodriguez' inability to identify the man in white." As noted subsequently in this opinion, defense counsel was permitted to—and in fact did—argue in favor of that very inference to the jury by repeatedly highlighting the stipulated fact that Rodriguez had failed to pick the defendant out of a previously administered photographic array.

The following additional facts and procedural history are relevant to our consideration of the defendant's claim. The state presented testimony from Rodriguez on the third day of trial. During his direct examination, the prosecutor asked Rodriguez whether he was "asked [by the police] to make an identification of . . . the individual who [he] witnessed as the male in white on the night in question." Before Rodriguez answered that question, the trial court called for a discussion with counsel at side bar. After that off-the-record discussion, the prosecutor withdrew his question and concluded his direct examination. Later that same day, the trial court provided the jury with the following oral stipulation at the request of the parties: "As to . . . Rodriguez' testimony . . . counsel stipulate . . . that, on [January 21, 2017] . . . Rodriguez was at the Bridgeport Police Department for an interview. He was shown a photo[graphic] array of eight photographs, one of which was a photograph of the defendant. Then he was asked to see if he could identify anyone from those eight photo[graphs] as the person he saw all in white at the scene that evening. And he did not make any identification from that photograph[ic] array."

Defense counsel ultimately presented the following argument to the jury in closing: "Rodriguez, the state's own witness, came in . . . and he testified . . . about what happened or what he saw in the lot. And, at the end, when he finished, there was a stipulation that was entered on agreement between the prosecutor and me. And you ask to hear it. It's there. He was shown photographs, an array of photographs that included [the defendant's photograph] and . . . he did not pick [the defendant out] as the shooter, okay, as the guy in white, as anybody being involved in any of that situation over there. And he was in court. He was on the witness stand. Did the prosecutor . . . say to him, hey, do you see the guy in this courtroom who you saw? And he's

sitting in the car. You remember what he said, ladies and gentlemen? He's sitting in a car right here, right across the street from the [office] building in the AutoZone parking lot, and his car is facing North Avenue, and he sees all this stuff happening over here. He's looking at all the stuff going on here. Does . . . the [prosecutor] say to him, hey . . . Rodriguez, do you see the guy here in the courtroom? No, never says anything." Defense counsel's closing argument ended just prior to the luncheon recess.

After excusing the jury for lunch, the trial court raised three areas of concern that it noted in defense counsel's argument and advised counsel it would hear any arguments relating to them after the recess. With respect to the line of argument relating to the prosecutor's failure to ask Rodriguez for an in-court identification, the trial court expressed its own view that the argument was improper "because the law is that, if somebody cannot make an out-of-court identification . . . the state is precluded by law from asking the witness [whether he sees that] guy in court . . . [a]nd, so, you know, you can't have it both ways so to speak." The trial court explained its understanding of the developments of the law in this area. Prior to the recess, the prosecutor agreed with the trial court's view of the law and requested a curative instruction.

When the trial court reconvened, the prosecutor, citing this court's decision in *State* v. *Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017), agreed with the trial court's concern and offered to address it on rebuttal or, alternatively, requested a curative instruction. Defense counsel responded by asserting that an in-court identification would have been permissible under the law "when a witness cannot make a [photographic identification] or has not [been] given an . . . opportunity to make a [photographic identification]" and that, as a

result, his arguments about the absence of such an identification were proper.

The trial court then provided the jury with the following instruction: "You heard me say before that arguments of the attorney are just that, arguments, but not evidence, but I'm going to instruct you to disregard two lines of questions or two areas of questioning, I should say of part of [defense counsel's] closing argument, two parts of his closing argument; and that is when the defense said—and I'm paraphrasing now—when [Rodriguez] . . . who testified as a witness in court, I think it was suggested the, well, the state did not ask him whether or not he could identify the defendant here in court. Disregard that question and any thought of that question. All right. You don't need to know the reason why, but I'm telling you just to disregard that line of questioning." After briefly turning to address a second issue that is not relevant to the present appeal,[16] the trial court told the jury that "[t]he rest of [defense counsel's] argument can stand . . . ."

The parties do not contest the trial court's broad authority over the scope of the arguments before it. As the Appellate Court in the present case aptly observed, "it is within the discretion of the trial court to limit final arguments for the purpose of preventing comments on facts not properly in evidence, [and to] . . . [prevent] the jury from considering matters in the realm of speculation . . . ." (Internal quotation marks omitted.) *State* v. *Rivera*, supra, 200 Conn. App. 494, quoting *State* v. *Arline*, 223 Conn. 52, 59, 612 A.2d 755 (1992). "A trial

[16] The trial court also gave a curative instruction with respect to certain arguments made by defense counsel in closing relating to the state's failure to pursue a voice exemplar. See *State* v. *Rivera*, supra, 200 Conn. App. 497. Defense counsel noted that he had a "strenuous" objection to the trial court's instruction relating to the voice exemplars and the grounds for that objection. That particular instruction is not at issue in this certified appeal. See footnote 9 of this opinion.

court has wide discretion to determine the propriety of counsel's argument and may caution the jury to disregard improper remarks in order to contain prejudice." *State* v. *Herring*, 210 Conn. 78, 102, 554 A.2d 686, cert. denied, 492 U.S. 912, 109 S. Ct. 3230, 106 L. Ed. 2d 579 (1989); see also *Herring* v. *New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975) ("The presiding judge must be and is given latitude in controlling the duration and limiting the scope of closing summations. [The judge] may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. [The judge] may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects [the judge] must have broad discretion.").

The principles of law animating the trial court's invocation of this authority in the present case, as the prosecutor accurately observed at trial, arise from this court's decision in *State* v. *Dickson*, supra, 322 Conn. 410. In that case, we concluded that "first time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court." Id., 426. This court detailed that procedure at length: "In cases in which there has been no pretrial identification . . . and the state intends to present a first time in-court identification, the state must first request permission to do so from the trial court. . . . The trial court may grant such permission only if it determines that there is no factual dispute as to the identity of the perpetrator, or the ability of the particular eyewitness to identify the defendant is not at issue. . . .

"If the trial court determines that the state will not be allowed to conduct a first time identification in court, the state may request permission to conduct a nonsug-

gestive identification procedure, namely, at the state's option, an out-of-court lineup or photographic array, and the trial court ordinarily should grant the state's request. If the witness previously has been unable to identify the defendant in a nonsuggestive identification procedure, however, the court should not allow a second nonsuggestive identification procedure unless the state can provide a good reason why a second bite at the apple is warranted. If the eyewitness is able to identify the defendant in a nonsuggestive out-of-court procedure, the state may then ask the eyewitness to identify the defendant in court.

"If the trial court denies a request for a nonsuggestive procedure, the state declines to conduct one, or the eyewitness is unable to identify the defendant in such a procedure, a one-on-one in-court identification should not be allowed. The prosecutor may still examine the witness, however, about his or her observations of the perpetrator at the time of the crime, but the prosecutor should avoid asking the witness if the defendant resembles the perpetrator." (Citations omitted; footnotes omitted.) Id., 445–447. *Dickson* further provides that, when an in-court identification is prohibited by the trial court pursuant to these procedures, the prosecutor may request an instruction indicating that "an in-court identification was not permitted because inherently suggestive first time in-court identifications create a significant risk of misidentification and because either the state declined to pursue other, less suggestive means of obtaining the identification or the eyewitness was unable to provide one." Id., 449.

The dispute in this appeal centers on the indirect impact that *Dickson* may have had on the permissible scope of closing arguments. The defendant claims that remarks made by defense counsel relating to the state's failure to elicit an in-court identification from Rodriguez amounted to no more than a routine comment on the

absence of evidence. The state argues in response that, under *Dickson*, the results of the previously administered photographic array precluded it from eliciting a subsequent in-court identification from Rodriguez and that, as a result, defense counsel's remarks on the point were unfair. Put differently, the state claims that defense counsel's argument misled the jury to believe that the reason the Rodriguez was not asked to undertake an in-court identification was because he was incapable of identifying the defendant, rather than that the law prohibits such an identification due to its suggestive nature and unreliability. In the alternative, the state argues that the Appellate Court's affirmance of the trial court's judgment may be upheld on the ground that any error on the point was harmless. We agree with the state's latter contention for three reasons.[17]

First, Rodriguez' inability to identify the defendant as the man in white had already been conceded by the state through its stipulation to the fact that Rodriguez had been unable to pick the man in white out of a photographic array that had included a photograph of the defendant. Indeed, defense counsel emphasized this point repeatedly during the course of his closing argu-

[17] Because we conclude that any error by the trial court was harmless, we do not reach the question of whether the Appellate Court correctly concluded that defense counsel's arguments relating to the absence of an in-court identification from Rodriguez were improper. By extension, we also do not reach the question of the propriety of the trial court's curative instruction. We note, however, that curative instructions in this context should conform as closely as possible to the model language set forth in *Dickson*. See Connecticut Criminal Jury Instructions 2.6-4, commentary, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited June 13, 2022) (Noting that, in *Dickson*, "the Supreme Court approved the following instruction if requested by the state: 'An in-court identification was not permitted because inherently suggestive first time in-court identifications create a significant risk of misidentification and because either the state declined to pursue other, less suggestive means of obtaining the identification or the eyewitness was unable to provide one.' . . . If requested, do not deviate." (Citation omitted.)).

ment and expressly invited the jury to review the stipulation during its deliberations. In light of the fact that these repeated references went without comment or contradiction by the prosecution, we are unable to accept the defendant's assertion that the exclusion of a single, inferential argument relating to Rodriguez' continued inability to identify the defendant at the time of trial would have ultimately changed the result reached by the jury.[18]

Second, on a broader level, it was undisputed that the state's case against the defendant did not include a definitive identification from any *neutral* witnesses. There is no dispute that Bogues, Dixon, and Rodriguez were able to provide the jury only with a general description of the person in white as a taller Hispanic male with an average build.

Finally, Rodriguez' testimony accounted for only a small portion of the evidence arrayed against the defendant. The most critical witness in this case was Vilar, who testified that the defendant had gone to AutoZone that night in order to confront the victim about the break-in, subsequently forced him across North Avenue, and fatally shot him in a secluded area next to the office building. Although Vilar, who was present and a potential suspect in the victim's death, undoubtedly possessed a significant motivation to lie, the account he provided to the jury was corroborated in nearly all relevant respects by the video surveillance footage from

[18] This observation can be juxtaposed with the evident prejudice that arises in a case in which a witness, despite being unable to identify the defendant in a nonsuggestive, out-of-court procedure, is allowed to definitively identify the defendant as the perpetrator of a crime for the first time in court. See *State* v. *Dickson*, supra, 322 Conn. 439–40 ("the . . . reason that first time in-court identifications are so problematic is that, when the state places the witness under the glare of scrutiny in the courtroom and informs the witness of the identity of the person who has been charged with committing the crime, it is far less likely that the witness will be hesitant or uncertain when asked if that person is the perpetrator").

the area of the shooting, the various observations made by Bogues and Dixon, the .22 caliber bullet discovered in the victim's leg, the multiple nine millimeter casings discovered alongside of the office building, and—perhaps most important—the defendant's recorded confession. The overlaps between these various pieces of evidence, detailed at length previously in this opinion, made the state's case against the defendant an undeniably strong one.

For these reasons, we conclude that any error by the trial court in precluding arguments related to the absence of an in-court identification from Rodriguez was harmless.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.