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CONNECTICUT REPORTS

Vol. 343

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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.

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.

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.

ORDERS

CONNECTICUT REPORTS

VOL. 343

EDUARDO ORTIZ, JR. *v.* COMMISSIONER OF CORRECTION

The petition filed by the petitioner Eduardo Ortiz, Jr., for certification to appeal from the Appellate Court, 211 Conn. App. 378 (AC 44047), is denied.

Naomi T. Fetterman, assigned counsel, in support of the petition.

Sarah Hanna, senior assistant state's attorney, in opposition.

Decided May 17, 2022

LENDINGHOME MARKETPLACE, LLC *v.* TRADITIONS OIL GROUP, LLC

The defendant's petition for certification to appeal from the Appellate Court, 209 Conn. App. 862 (AC 44450), is denied.

John A. Sodipo, in support of the petition.

Patricia M. Lattanzio, in opposition.

Decided June 7, 2022

FAIRLAKE CAPITAL, LLC *v.* PETER LATHOURIS ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 210 Conn. App. 801 (AC 43872), is denied.

ALEXANDER, J., did not participate in the consideration of or decision on this petition.

Todd R. Michaelis and *Ann H. Rubin*, in support of the petition.

Yan Margolin, pro hac vice, and *Patrick McCabe*, in opposition.

Decided June 7, 2022

NABEEL KADDAH *v.* COMMISSIONER OF CORRECTION

The petitioner Nabeel Kaddah's petition for certification to appeal from the Appellate Court, 211 Conn. App. 823 (AC 42942), is denied.

ALEXANDER, J., did not participate in the consideration of or decision on this petition.

Robert L. O'Brien, assigned counsel, in support of the petition.

James A. Killen, senior assistant state's attorney, in opposition.

Decided June 7, 2022

MARK BOVA *v.* COMMISSIONER OF CORRECTION

The petitioner Mark Bova's petition for certification to appeal from the Appellate Court, 211 Conn. App. 248 (AC 43993), is denied.

J. Patten Brown III, assigned counsel, in support of the petition.

Nancy L. Chupak, senior assistant state's attorney, in opposition.

Decided June 7, 2022

IBRAHEEN OLORUNFUNMI *v.* COMMISSIONER OF CORRECTION

The petitioner Ibraheen Olorunfunmi's petition for certification to appeal from the Appellate Court, 211 Conn. App. 291 (AC 44187), is denied.

ALEXANDER, J., did not participate in the consideration of or decision on this petition.

J. Patten Brown III, assigned counsel, in support of the petition.

Christopher Alexy, senior assistant state's attorney, in opposition.

Decided June 7, 2022

STATE OF CONNECTICUT *v.* BENNIE GRAY, JR.

The defendant's petition for certification to appeal from the Appellate Court, 212 Conn. App. 193 (AC 43339), is denied.

KAHN, J., did not participate in the consideration of or decision on this petition.

Raymond L. Durelli, assigned counsel, in support of the petition.

Jonathan M. Sousa, deputy assistant state's attorney, in opposition.

Decided June 7, 2022

STATE OF CONNECTICUT *v.* KYLE A.

The defendant's petition for certification to appeal from the Appellate Court, 212 Conn. App. 239 (AC 43377), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the trial court's instruction on burglary in the first degree was not reversible error under the plain error doctrine?"

ROBINSON, C. J., did not participate in the consideration of or decision on this petition.

Julia K. Conlin, assigned counsel, and *Emily Graner Sexton*, assigned counsel, in support of the petition.

Rocco A. Chiarenza, senior assistant state's attorney, in opposition.

Decided June 7, 2022

DAVID O'SULLIVAN *v.* ALAN F. HAUGHT

The defendant's petition for certification to appeal from the Appellate Court (AC 45255) is granted, limited to the following issue:

"Did the Appellate Court properly dismiss, for lack of subject matter jurisdiction, the defendant's appeal from the trial court's denial of the defendant's motion for summary judgment based on collateral estoppel?"

ALEXANDER, J., did not participate in the consideration of or decision on this petition.

Kirk D. Tavtigian, Jr., in support of the petition.

Jesse A. Mangiardi, in opposition.

Decided June 7, 2022

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Vol. 213

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CITY OF MILFORD *v.* RECYCLING, INC., ET AL.
(AC 44819)

Moll, Cradle and Bear, Js.

Syllabus

The plaintiff city sought to foreclose a municipal tax lien on certain real property on which the defendant trustee, S, held a first mortgage. The trial court rendered a judgment of strict foreclosure and set law days. S filed a motion to open the judgment of strict foreclosure and to convert it to a judgment of foreclosure by sale, which the trial court granted. Thereafter, S filed a motion to open and to extend the sale date, claiming that there was an interested buyer in the property and that contract negotiations were ongoing. The plaintiff opposed the motion because

S failed to identify the alleged buyer or to provide any documentation evidencing the potential sale. The trial court denied the motion, and S appealed to this court. *Held* that the trial court did not abuse its discretion by denying S's motion to open the judgment and to extend the sale date because its determination that the balancing of the equities favored the plaintiff was made after considering all of the relevant circumstances and needs of justice specific to the case and was reasonable under the facts and circumstances in the record.

Argued March 3—officially released June 21, 2022

Procedural History

Action to foreclose a municipal tax lien on certain real property, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Hon. Arthur A. Hiller*, judge trial referee, rendered judgment of strict foreclosure; thereafter, the court, *Tyma*, *J.*, granted the motion to open the judgment of strict foreclosure and to convert it to a judgment of foreclosure by sale filed by the defendant Donna Stewart, Trustee; subsequently, the court, *Hon. Arthur A. Hiller*, judge trial referee, denied the motion to open the judgment and to extend the sale date filed by the defendant Donna Stewart, Trustee, and the defendant Donna Stewart, Trustee, appealed to this court. *Affirmed.*

Janine M. Becker, with whom, on the brief, was *Patricia Moore*, for the appellant (defendant Donna Stewart, Trustee).

Matthew B. Woods, for the appellee (plaintiff).

Opinion

PER CURIAM. In this municipal tax lien foreclosure action, the defendant Donna Stewart, Trustee,[1] appeals

[1] In the underlying foreclosure action, the following were also named as defendants: Recycling, Inc.; City Streets, Inc.; Outlaw Boxing Kats, Inc.; Cell Phone Club, Inc.; Millionair Club, Inc.; Frank P. Gillon, Jr., and John L. Silva, as trustees of the Connecticut Laborers' Health Fund; Frank P. Gillon, Jr., and Charles LeConche, as trustees of the Connecticut Laborers' Pension Fund; Marvin B. Morganbesser and Charles LeConche, as trustees of the Connecticut Laborers' Annuity Fund; Charles LeConche and Marvin B. Morganbesser, as trustees of the Connecticut Laborers' Legal Services Fund;

from the judgment of the trial court sustaining the objection of the plaintiff, the city of Milford, and denying her motion to open the existing judgment of foreclosure and to extend the sale date ordered therein. On appeal, the defendant claims that the court erred in concluding that, considering the equities advanced by both parties for the court's consideration, the balancing of those equities favored the plaintiff.[2] In response, the plaintiff argues that the judgment of the court should be affirmed because the court did not abuse its discretion in concluding that those equities favored the plaintiff. We agree with the plaintiff and, accordingly, affirm the judgment of the court.

The following facts and procedural history are relevant to our resolution of the defendant's appeal. The defendant is the holder of a first mortgage on commercial property located at 990 Naugatuck Avenue in Milford (property). On March 24, 2010, the plaintiff instituted the present municipal tax lien foreclosure action. On July 27, 2015, the court, *Honorable Arthur A. Hiller*, judge trial referee, rendered a judgment of strict foreclosure and set law days to commence on February 1, 2016. On July 27, 2020, after the disposition of numerous

Felix J. Conti and Robert B. Discuillo, Sr., as trustees of the New England Laborers' Training Trust Fund; Felix J. Conti and Robert B. Discuillo, Sr., as trustees of the New England Laborers' Laborer-Management Cooperation Trust; N 990 Naugatuck Avenue, LLC; Marr Consulting, LLC; Tricia Mulvaney; Rio, Inc.; Regensburger Enterprises, Inc.; Cummings Enterprises, Inc.; Nicholas Owen III; Allstar Sanitation, Inc.; Bridgeport Redevelopment, Inc.; Darlene Chapdelaine; JRB Holding Co., LLC; and Naugatuck Avenue, LLC. Those defendants are not involved in this appeal. We therefore refer in this opinion to Donna Stewart, Trustee, as the defendant.

[2] On appeal, the defendant also claims that the court erred in concluding that it lacked subject matter jurisdiction to open the foreclosure judgment and extend the sale date because of the four month restriction set forth in General Statutes § 52-212a. Because the court expressly stated that it was basing its denial of the motion to open on equitable grounds, we do not agree that the court concluded that it lacked subject matter jurisdiction, and, therefore, we decline to address this claim.

bankruptcy petitions and motions filed by one or more of the parties, the court, *Abrams*, *J.*, opened the foreclosure judgment and reset the law days to commence on September 9, 2020.

On August 27, 2020, the defendant filed a motion to open the judgment of strict foreclosure and to convert it to a judgment of foreclosure by sale with a proposed sale date of August 28, 2021. On August 28, 2020, the court, *Tyma*, *J.*, denied the defendant's motion without prejudice to refiling the motion to indicate the position of any appearing parties. On September 1, 2020, the defendant filed a caseflow request with an attached memorandum stating the position of the various appearing parties with respect to the motion and the proposed sale date. On September 2, 2020, the court granted the motion and converted the judgment to a judgment of foreclosure by sale, with a sale date set for June 26, 2021.

On May 14, 2021, the defendant filed a motion to reopen the judgment and extend the sale date, claiming that "there [was] a buyer interested in the property at a significant purchase price and that there [was] a written option and contract negotiations [were] ongoing." The plaintiff disputed the merits of this claim because of, inter alia, the defendant's failures to identify the alleged buyer and to provide any supporting documentation. On June 17, 2021, after a hearing, Judge Hiller denied the defendant's motion to open and set the sale date for July 24, 2021. This appeal followed.

"The standard of review of [a denial of a motion to open] a judgment of foreclosure by sale . . . is whether the trial court abused its discretion. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court

correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *McCord* v. *Fredette*, 92 Conn. App. 131, 132–33, 883 A.2d 1258 (2005).

In the present case, at the hearing on the defendant's motion to open the judgment of foreclosure by sale and extend the sale date, the court stated the following in support of its decision to deny the defendant's motion: "The court has reviewed all the papers and considered all the arguments. The court believes that the equities are clearly in favor of the plaintiff. There is no reason that the . . . taxpayers should fund this defendant's project or use of the premises. The equities require a sale so [that the plaintiff] can pay its obligations without adding to the tax bill sent to its taxpayers." In claiming on appeal that the court erred in concluding that the equities favored the plaintiff, the defendant argues that the court abused its discretion by denying the motion to open the judgment and extend the sale date because "complete justice required [that] the sale date be extended." We disagree.

"Foreclosure is peculiarly an equitable action, and the court may entertain such questions as are necessary to be determined in order that complete justice may be done. . . . [B]ecause a mortgage foreclosure action is an equitable proceeding, the trial court may consider all relevant circumstances to ensure that complete justice is done. . . . [E]quitable remedies are not bound by formula but are molded to the needs of justice." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Morgera* v. *Chiappardi*, 74 Conn. App. 442, 456–57, 813 A.2d 89 (2003). "The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court." (Internal quotation marks omitted.) *TD Bank, N.A.* v. *M.J. Holdings, LLC*, 143 Conn. App. 322, 326, 71 A.3d 541 (2013).

Upon review of the record, we conclude that the trial court's determination that the balancing of the equities favored the plaintiff (1) was made after considering all of the relevant circumstances and the needs of justice specific to this case and (2) was reasonable under the facts and circumstances to be found in the record. In light of this conclusion, we further conclude that the court did not abuse its discretion by denying the defendant's motion to open the judgment and extend the sale date.

The judgment is affirmed and the case is remanded for the purpose of setting a new sale date.

STATE OF CONNECTICUT *v.* DEYKEVIOUS RUSSAW (AC 43748)

Elgo, Suarez and Palmer, Js.

Syllabus

Convicted of the crime of conspiracy to commit murder as a result of a drive-by shooting during which an unintended person rather than the intended victim was fatally shot, the defendant appealed. He claimed, inter alia, that his conviction was legally insufficient because the state relied on the doctrine of transferred intent to prove the conspiracy charge and because it is legally impossible to conspire to kill an unintended victim. The state, which also charged the defendant with murder, alleged that the defendant had intended to kill a member of a rival gang but, instead, fatally shot the unintended victim, and the trial court, in its instructions to the jury, stated that the doctrine of transferred intent applied to both the murder charge and the charge of conspiracy to commit murder. *Held*:

1. The defendant could not prevail on his unpreserved claim that his conviction of conspiracy to commit murder is legally insufficient, which was based on his assertion that the doctrine of transferred intent does not apply to the crime of conspiracy, and, thus, he was deprived of his right to due process because it is legally impossible to conspire to kill an unintended victim: the state did not rely on the doctrine of transferred intent, as that theory bore no relevance to the conspiracy charge because it made no difference whether the rival gang member or the unintended third party was killed, and the state alleged and proved the elements of the conspiracy charge, which were the agreement to kill the rival

gang member and the overt act of firing the gunshot intended for the gang member in furtherance of that agreement; moreover, the trial court's jury instruction on transferred intent did not transform the state's theory of the conspiracy charge into one predicated on that doctrine, that instruction having been, at most, surplusage that had no bearing on the nature of the state's case or the jury's consideration of whether the state proved its case.

2. The defendant's claim that the trial court improperly denied his motion to suppress certain incriminating statements he had made to the police during their custodial interrogation of him was unavailing, as the record supported the court's findings that the police ceased questioning him after he invoked his right to counsel but that he thereafter initiated further communication with them of his own accord without counsel present:

a. Contrary to the defendant's assertion that the police induced him to speak to them after he invoked his right to counsel, the trial court correctly concluded that he knowingly and voluntarily initiated further communication, as it credited testimony by R, the lead detective during the questioning, that another officer had informed R that the defendant, notwithstanding the previous invocation of his right to counsel, wanted to speak with the police: the defendant was advised of his rights under *Miranda* v. *Arizona* (384 U.S. 436) before questioning resumed, he provided no authority to support his claim that the police were required to provide him with an attorney or means to contact one, he did not ask them for permission to contact anyone, and his father was at the police station during the custodial interview and had visited with him; moreover, the record did not bear out the defendant's contention of persistent statements by the police that they wanted to talk to him, and the brief outline of the incriminating evidence they gave him was in response to his question about why he was being held on a charge of murder.

b. This court concluded, in light of all of the relevant facts adduced at the suppression hearing, that the state had met its burden of demonstrating a knowing, intelligent and voluntary waiver by the defendant of his *Miranda* rights, as there was no showing that the police threatened the defendant or employed other coercive or improper tactics to obtain the waiver: although the defendant became eighteen years of age the day before the police questioned him, that did not require the court to reach a different conclusion, as the defendant had an eleventh grade education, could read and write, was not impaired in any way, and had signed two waiver forms after twice being informed of his *Miranda* rights, and his assertion of his right to counsel after being advised of those rights the first time was a clear indication that he understood those rights; moreover, the defendant's will was not overborne, as he contended, because the police did not contact a lawyer for him and, for a period of time, left him alone in the interview room separated from his father, and the surroundings and circumstances of his police interview, although hardly

comfortable, did not mean that he was necessarily unable to decide whether to resume speaking to the police without a lawyer.

c. The defendant could not prevail on his claim that he was harmed by the admission of R's testimony as to certain statements the defendant made during his police interview: because there was compelling independent evidence that the defendant was a passenger in the vehicle from which the gunshot was fired at the time it was fired, his statement to R acknowledging that he was in the vehicle was merely cumulative, and his statement to R identifying the intended victim of the shooting did not establish that the defendant was present when the shooting took place, as that statement contained no indication as to how the defendant became aware of the identity of the intended victim, it was hardly persuasive evidence of his participation in the shooting, and it could have been based on information he learned after the shooting; moreover, the state was not required to establish the shooter's identity for purposes of the charge of conspiracy to commit murder, the evidence having been clear that, even if the defendant did not fire the gunshot, it was fired from the vehicle in which he was a passenger, and the testimony of another passenger who claimed that the defendant was not in the vehicle at the time of the shooting was flatly contradicted by that passenger's sworn statement to the police; furthermore, all of the witnesses who testified were subjected to extensive cross-examination about whatever interest or motive they may have had to falsely implicate the defendant, and the jury was well aware of any such interest or motive.

Argued September 20, 2021—officially released June 21, 2022

Procedural History

Substitute information charging the defendant with the crimes of murder and conspiracy to commit murder, brought to the Superior Court in the judicial district of Hartford, where the court, *D'Addabbo*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *D'Addabbo*, *J.*; verdict and judgment of guilty of conspiracy to commit murder, from which the defendant appealed. *Affirmed.*

Pamela S. Nagy, supervisory assistant public defender, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *David L. Zagaja*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. The defendant, Deykevious Russaw, appeals from the judgment of conviction, rendered after a jury trial, of conspiracy to commit murder in violation of General Statutes §§ 53a-54a and 53a-48.[1] The defendant's conviction stems from an incident involving a drive-by shooting that resulted in the death of an unintended third person rather than the intended victim. On appeal, he claims, first, that his conviction of conspiracy to commit murder is legally insufficient because the doctrine of transferred intent, upon which he contends the state relied, does not apply to the crime of conspiracy, and second, that the trial court improperly denied his motion to suppress certain statements that he made to the police while he was in custody and after he had invoked his right to counsel. We reject both of the defendant's claims and, therefore, affirm the judgment of conviction.

The following facts and procedural history are relevant to this appeal. The defendant's conviction stems from a drive-by shooting that occurred on July 16, 2017, and resulted in the death of the victim, Jeffrey Worrell, who had sustained a single gunshot wound to the head. When he was shot, the victim was sitting at a picnic bench in a small park located in an area in Hartford known as the five corners, where Westland Street, Garden Street and Love Lane all intersect. Police officers who arrived at the scene shortly after the shooting spoke to witnesses, but none gave a description of the

[1] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person . . . ."

General Statutes § 53a-48 (a) provides: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

shooter. Shell casings, however, were recovered from the scene, and a video surveillance camera installed by the city of Hartford at the corner of Garden and Westland Streets captured the shooting. Upon review of the footage from that camera, the police identified three vehicles involved in the incident, a blue Honda Accord, a black Ford Escape, and a white Nissan Altima. The driver of the Honda Accord was identified as Dominick Pipkin, who, upon questioning by the police within hours of the shooting, provided information concerning the identities of the individuals in both the Nissan Altima and the Ford Escape. With respect to the occupants of the Ford Escape, Pipkin identified the driver as Teddy Simpson, and the rear passengers as Jonathan Vellon and his brother, Osvaldo Vellon, and a person whose nickname is "Bama," later identified as the defendant.[2] The police also received information identifying the front seat passenger of the Ford Escape as Dayquan Shaw.[3] In addition, the Vellon brothers, who admitted that they were present when the shooting occurred, gave the police information about others involved in the incident, including the defendant. Early in the investigation, it became apparent to the police that a member of a rival gang, and not the victim, was the likely target of the shooting.

Shortly after the incident, the police identified several addresses associated with the defendant, including a former residence in a multiunit apartment building in New Britain. When detectives from the Hartford Police Department went to that former residence in New Britain the day after the shooting, they discovered the Ford Escape.

[2] The police learned that the defendant is nicknamed "Bama" because he is originally from Alabama.

[3] The operator of the Nissan Altima was identified as Jose Verdes, who also provided the police with information about the shooting.

On the basis of the foregoing information, the lead investigator in the case, Sergeant Anthony Rykowski of the Hartford Police Department, prepared and obtained arrest warrants for Simpson and the defendant. The defendant was charged with murder and conspiracy to commit murder and arrested three days after the incident, on July 19, 2017. Following the defendant's arrest and transportation to police headquarters, Rykowski questioned the defendant, who made several incriminating statements.

A jury trial followed,[4] at which the state adduced testimony from several witnesses to the incident, including Jonathan Vellon. In his testimony, Jonathan Vellon acknowledged that he had provided the police with a written statement about the incident the next day, but he refused to identify anyone else who was in the car when the shooting occurred. He also testified that he did not know who was driving the Ford Escape at the time of the shooting, from where in the car the gunshots were fired, or who brought the gun into the car, even though his statement to the police indicated otherwise. When asked why he was refusing to provide the names of the individuals in the car, he stated that he "just [did not] feel like it." Although he did testify that he knew the defendant, he denied that the defendant was in the Ford Escape on the day of the shooting, and he also denied providing any contrary information to the police. Moreover, he claimed that he did not sign the statement even though he previously had acknowledged that the signature on the statement was his.

At the conclusion of Jonathan Vellon's testimony, the state introduced into evidence his written statement to the police pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct.

[4] The evidentiary portion of the trial commenced on July 17, 2019.

597, 93 L. Ed. 2d 598 (1986).[5] That statement provides in relevant part: "On Sunday afternoon [on the day of the shooting], my brother Osvaldo [Vellon] and I . . . were walking past . . . Flatbush Avenue . . . [when] I heard someone call my name from inside a car. When I looked at the car, I noticed [the defendant] in a black Ford Escape. [The defendant] was sitting in the passenger side rear seat . . . [and] told us to get in the car [and] so we did. . . . The person driving the Ford Escape is named Teddy [Simpson]. . . . The front seat passenger was someone I've never seen before . . . .

"Once inside the car, all five of us drove around and were smoking weed. . . . [Simpson] then pulled up to a blue Honda Accord and I saw a black male, around [nineteen to twenty years old] driving the Honda all alone. . . . I heard [Simpson] and [the defendant] say let's shoot the G's. The G's are gang members from the Barbour Street area. I've been with the Ave gang for around three months . . . . The Ave gang is from the Albany Avenue area.

"The next thing I [knew] [Simpson] was handed a gun by the driver of the blue Honda Accord and then [Simpson] passed it to [the defendant]. The gun was a small black handgun and it looked like the handle was grayish because it looked old. I heard the driver of the Honda tell [the defendant] that he wanted him to shoot the G's. [Simpson] then drove down the street and [the defendant] racked the gun back and I saw a bullet fall inside the car. [The defendant] then held the gun out the window and shot the gun around three times. I think the gun jammed once or twice as [the defendant] was shooting. [Simpson] then sped away and drove to meet

[5] In *State* v. *Whelan*, supra, 200 Conn. 753, our Supreme Court "adopted a hearsay exception allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination." *State* v. *Bermudez*, 341 Conn. 233, 240 n.8, 267 A.3d 44 (2021).

the guy in the blue Honda Accord. . . . [The defendant] then passed the gun over to [Simpson] who then handed the gun out the window to the driver of the blue Honda Accord. [Simpson] then told [the defendant] to drive so [Simpson] got into the passenger seat, [the defendant] got into the driver's seat and the tall guy who was sitting in the passenger seat before walked home. We sat there for around [twenty] minutes and then [the defendant] drove the Ford Escape to New Britain and parked it where the [p]olice found it . . . . [The defendant] used to live at the apartment where the car was found . . . . Once [the defendant] parked the car, [my brother] and I walked home to our house . . . ." (Internal quotation marks omitted.) In his written statement, Jonathan Vellon further stated that he had identified the defendant from a photographic array shown to him by the police, that he signed his name on the defendant's photograph, and that he was "100 [percent] sure" the photograph chosen from the array was the defendant, whom he "saw shoot from the Ford Escape at the G's," as he "was sitting shoulder to shoulder with [the defendant]" at the time of the shooting.[6] (Internal quotation marks omitted.)

The state next adduced testimony from Simpson, who testified pursuant to a plea agreement with the state related to his involvement in the shooting of the victim.[7] Simpson explained that he was associated with the Ave gang and was involved in the shooting as the driver of the Ford Escape. He further testified that the other occu-

[6] Jonathan Vellon's brother, Osvaldo Vellon, also was called by the state as a witness, but he refused to answer any questions.

[7] Pursuant to the agreement, Simpson pleaded guilty to conspiracy to commit murder and possession of a firearm in a motor vehicle for his role in the shooting, for which he was to be sentenced to a minimum of ten years and no more than twenty-five years of incarceration. In exchange for his guilty plea, he agreed to cooperate with the state by providing information and testimony concerning the shooting and another, separate criminal case involving the defendant. See footnote 10 of this opinion.

pantsof the car were Jonathan Vellon, Osvaldo Vellon, the defendant and Shaw. According to Simpson, at some point when they were driving around near the intersection of Garden and Capen Streets, they stopped to talk with Pipkin, who was operating a blue Honda. Simpson stated that he was familiar with a picnic spot in the area known as the five corners, and that, while driving in that area, they saw a group of kids from the G's neighborhood with whom they did not get along. Subsequently, they met up again with Pipkin, who began waving a handgun, and Simpson asked Pipkin for the gun at the defendant's request because the defendant had expressed a desire to open fire on the G's. At first, Pipkin told Simpson just to drive off but, shortly thereafter, Pipkin handed the gun to Shaw, who gave it to the defendant. Simpson testified that he did not see the defendant with the gun in the backseat and did not see the defendant fire the gun because he was focused on driving. He also testified that the defendant was not a member of the Ave gang.

Shaw also testified for the state. He stated that he was a front seat passenger in the Ford Escape at the time of the shooting, and he described the other passengers as two Hispanic males and the defendant. He testified further that, as they were driving around the five corners area, they saw a group of people in the grassy area, at which point the defendant stated that they were from the G's gang and that he did not like them. Shaw's testimony was consistent with that of Simpson with respect to how they had encountered Pipkin, the fact that the defendant possessed a gun in the Ford Escape, and how the shooting took place. Shaw also testified that, as they were driving away from the scene of the shooting, the defendant was "bragging about the incident" and saying, "I got somebody." Shaw further stated that the defendant had texted him on the night of the incident and "showed no remorse even though he killed an innocent bystander, he didn't feel bad about it. It

was like he was joyful of it, like he didn't care it was an old man."[8]

Finally, Rykowski testified about certain statements that he had obtained from Pipkin, Osvaldo Vellon and the defendant. With respect to Pipkin and Osvaldo Vellon, Rykowski explained that both of them had provided statements to the police shortly after the incident identifying the defendant as a passenger in the Ford Escape.

Rykowski further testified that he interviewed the defendant following his arrest on July 19, 2017. Although the defendant denied any involvement in the shooting, he did acknowledge that he had been in the Ford Escape on the day of the shooting. He also told Rykowski that he did not get along with the "G's."

Following the conclusion of the evidence,[9] the jury returned a verdict of not guilty on the murder charge and guilty on the charge of conspiracy to commit murder. The court sentenced the defendant to a term of twenty years of incarceration, which was to run consecutively to a sixteen year sentence he was already serving.[10] This appeal followed. Additional facts and procedural history will be set forth as necessary.

[8] We note that, contrary to Simpson's testimony, Shaw testified that the defendant was associated with the Ave gang, which conflicted with a written statement he had given to Rykowski shortly after the incident indicating that he was not aware of any such association. Shaw explained, however, that, at the time he gave that statement, he was unaware that the defendant had any gang affiliation and that the police subsequently told him that the defendant was in a gang. Shaw further testified, contrary to Simpson's testimony, that Pipkin himself handed the gun directly to Simpson and never gave the gun to Shaw.

[9] The defendant, who did not testify at trial, adduced testimony from one witness, Karina Salcedo, an officer with the Hartford Police Department, who had responded to the scene of the shooting.

[10] The defendant's previous sixteen year sentence followed his conviction of manslaughter in the second degree and evading responsibility based on conduct by the defendant that occurred the day before the shooting incident at issue in this appeal. His conviction of those charges was upheld on appeal to this court; see *State* v. *Russaw*, 203 Conn. App. 123, 247 A.3d 614 (2021); and our Supreme Court denied the defendant's petition for certification to appeal. See *State* v. *Russaw*, 336 Conn. 933, 248 A.3d 1 (2021).

I

The defendant claims, for the first time on appeal, that his conviction of conspiracy to commit murder is legally insufficient because the doctrine of transferred intent does not apply to the crime of conspiracy. Specifically, he maintains that, because the state's theory of the case was that the intended target of the murder was a member of the rival gang and not the victim, and because it is legally impossible to conspire to kill an unintended victim, his conspiracy conviction cannot stand. He seeks review of his unpreserved claim 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).[11] Although we agree with the defendant that he is entitled to review of his claim under *Golding*, we reject the claim because his conspiracy conviction was not predicated on the doctrine of transferred intent.

The following additional facts are relevant to this claim. The defendant was charged in a two count information with murder in violation of § 53a-54a and conspiracy to commit murder in violation of §§ 53a-54a and 53a-48. The murder charge, set forth in count one, alleged that, "on or about July 16, 2017, at approximately 2 p.m. in the area of Garden and Westland Streets in Hartford . . . the defendant, while acting with the intent to cause the death of another person, caused the death of a third person by discharging a firearm." Count two, which contained the charge of conspiracy to commit murder, alleged that, "on or about July 16, 2017, at approximately 2 p.m. in the area of Garden and West-

[11] Under *Golding*, a defendant may prevail on an unpreserved claim only if the record is adequate for review of the claim, the claim is of constitutional magnitude alleging the violation of a fundamental right, the alleged constitutional violation exists and deprived the defendant of a fair trial, and the state cannot demonstrate the harmlessness of the violation. See *State* v. *Golding*, supra, 213 Conn. 239–40.

land Streets in Hartford . . . the defendant, while acting with the intent that conduct constituting the crime of murder be performed . . . agreed with one or more persons to engage in and cause the performance of such conduct and any one of them committed an overt act in furtherance of said conspiracy."

At trial, the state's theory with respect to the murder charge was that the defendant fired the handgun from inside the vehicle with the intent to kill a member of the rival gang but, instead, missed and killed the victim. As noted previously in this opinion, the jury found the defendant not guilty of that charge. With respect to the conspiracy to commit murder charge, the jury found the defendant guilty of conspiring with at least one other person in the Ford Escape to shoot and kill a member of the rival gang. On appeal, the defendant does not challenge the legal or evidentiary sufficiency of the state's case with respect to his conviction of conspiracy to commit murder insofar as the state was required to prove both that he had entered into an agreement with at least one other person to murder a member of the rival gang and that one of the conspirators committed an overt act in furtherance of the conspiracy. He claims, rather, that the state's case was founded on the doctrine of transferred intent, which, although concededly applicable to the crime of murder, does not apply to conspiracy. Consistent with this assertion, the defendant maintains that he could not have conspired to kill an unintended victim and that, because the victim of the shooting was unintended, his conviction of conspiracy to commit murder is unlawful. This claim is unavailing because it rests on a false premise, namely, that the defendant's conspiracy conviction was predicated on a theory of transferred intent.[12]

[12] Although the defendant acknowledges that the question of whether the transferred intent doctrine applies to the crime of conspiracy to commit murder has not been decided by the courts of this state, he cites several cases which, he contends, support his claim that it does not. See, e.g., *State* v. *Beccia*, 199 Conn. 1, 5, 505 A.2d 683 (1986) ("Just as one cannot attempt

The defendant's claim that his conspiracy conviction was impermissibly founded on the doctrine of transferred intent is largely based on the trial court's jury charge. We therefore recite the relevant portions of those instructions, commencing with the court's charge on transferred intent. The court explained transferred intent as follows: "[I]n considering the evidence presented and what you find credible, it may establish that the defendant had the intent to cause the death of one person and by his actions caused the death of a different person. Our law is that, when considering intent, as long as the defendant has the intent to cause the death of a person and, by his actions, cause[s] the death of another, that is sufficient to establish the element of intent."[13]

Thereafter, the court instructed the jury on the murder charge in count one as follows: "[F]or you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt. One, that the defendant had the specific intent to cause the death of another person. And, two, that, acting with that intent, the defendant caused the death of a third person . . . by discharge of a firearm. . . .

"The first element, intent. The first element the [state] must prove beyond a reasonable doubt [is] that the defendant had the specific intent to cause the death of

to commit an unintentional crime . . . one cannot agree anticipatorily to accomplish an unintended result. There is just no such crime as would require proof that one intended a result that accidentally occurred." (Citation omitted; internal quotation marks omitted.)). We need not consider this issue, however, in light of our determination that the defendant's conspiracy conviction was not predicated on a theory of transferred intent.

[13] As reflected in the court's instruction on transferred intent, that doctrine "was created to apply to the situation of an accused who intended to kill a certain person and by mistake killed another. His intent is transposed from the person to whom it was directed to the person actually killed." (Internal quotation marks omitted.) *State* v. *Tutson*, 99 Conn. App. 655, 663, 915 A.2d 344 (2007).

another person. The state must prove beyond a reasonable doubt the defendant, in causing the death of the other person, did so with the specific intent to cause the death of a person; in other words, that the defendant's conscious objective was to cause the death of a person. . . .

"Intent, therefore, is intent to achieve a specific result; in other words, a person's conscious objective was to cause the specific result. As defined by law, a person acts intentionally with respect to the result when his conscious objective is to cause such result. *Now, the court has previously instructed you on intent and transferred intent. Those instructions apply in this section as well.*" (Emphasis added.)

At the conclusion of its jury instructions on murder, the court proceeded to instruct the jury on the second count, conspiracy to commit murder. After reading the allegations contained in count two, the court recited the elements of the conspiracy statute, § 53a-48 (a).[14] The court then instructed the jury as follows: "So, for you to find the defendant guilty of conspiracy in this count, conspiracy to commit murder, the state must prove the following elements beyond a reasonable doubt: one, that the defendant intended to commit the crime of murder; two, an agreement with one or more persons to engage in or cause the performance of the crime of murder; and, three, the commission of an overt act pursuant to the agreement by one or more of the persons who made the agreement. . . .

"The first element is that [the] defendant had the intent that conduct constituting the crime of murder be performed. The defendant must be proven to have been actuated by criminal intent. The defendant may not be found guilty unless the state has proven beyond a reasonable doubt he had a specific intent to violate

[14] See footnote 1 of this opinion.

the law and, in this case, intent to commit murder when he entered into an agreement to engage in conduct constituting a crime. *You will refer to the court's previous instructions on intent and transferred intent that are incorporated here with the same force and effect.* For the count of conspiracy, it is only necessary that he intended that certain conduct, which, if performed, would constitute the crime of murder, be performed or take place." (Emphasis added.)

In explaining the second element—the agreement—the court again made reference to intent. Specifically, the court stated in relevant part: "Remember that I instructed you that intent relates to the condition of the mind of the person who commits the act, his purpose in doing it. . . . *That instruction included an instruction on transferred intent, and that instruction is incorporated in this section with the same force and effect.*" (Emphasis added.)

Relying primarily on the court's instruction that its advisement to the jury concerning the meaning of transferred intent applied to the charge of conspiracy to commit murder as well as to the murder charge, the defendant asserts that, in light of that instruction, his conspiracy conviction was predicated on a theory of transferred intent. The defendant further maintains that the transferred intent doctrine is inapplicable to the crime of conspiracy and, consequently, his conspiracy conviction is fatally flawed as a matter of law.

We note, preliminarily, that, although the defendant's claim on appeal is based on the court's instructions regarding transferred intent, the defendant does *not* purport to raise a claim of instructional impropriety. Indeed, in the trial court, the defendant expressly stated that he had no objection either to the instruction on conspiracy or to the instruction on transferred intent. Moreover, any claim of instructional error that the

defendant might have raised on appeal would be deemed impliedly waived under *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011),[15] because the record clearly reflects that defense counsel had ample time to review the court's proposed charge and to object to the portions of the charge at issue and affirmatively accepted the proposed instructions. The defendant claims, rather, that his conviction must be reversed because the jury found him guilty of conspiracy based on a theory that he agreed to kill an unintended victim, which, the defendant further contends, is a legal impossibility. In other words, according to the defendant, the state's evidence, viewed most favorably to the state, established conduct by the defendant that simply does not constitute the crime of conspiracy. Of course, if the defendant is correct that he was convicted of a crime that is not cognizable under our law, then his conviction would be fundamentally incompatible with the fairness principles underlying the right to due process. See, e.g., *State* v. *Toczko*, 23 Conn. App. 502, 505, 582 A.2d 769 (1990) (defendant's fundamental constitutional rights were violated by virtue of his conviction of conspiracy to commit manslaughter, which is not cognizable crime).

We agree with the defendant that his claim, though unpreserved, is reviewable under *Golding* because the record is adequate for review of the claim and it is of constitutional magnitude. The defendant's claim fails, however, because he cannot establish that his conviction of conspiracy to commit murder was legally insufficient in violation of his right to due process.

[15] In *Kitchens*, our Supreme Court concluded that "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." *State* v. *Kitchens*, supra, 299 Conn. 482–83.

Before considering the merits of the defendant's claim, we first set forth certain general principles governing the crime of conspiracy. "To establish the crime of conspiracy under § 53a-48 . . . it must be shown that an agreement was made between two or more persons to engage in conduct constituting a crime and that the agreement was followed by an overt act in furtherance of the conspiracy by any one of the conspirators. The state must also show intent on the part of the accused that conduct constituting a crime be performed." (Internal quotation marks omitted.) *State* v. *Beccia*, 199 Conn. 1, 3, 505 A.2d 683 (1986). "While the state must prove an agreement [to commit murder], the existence of a formal agreement between the conspirators need not be proved because [i]t is only in rare instances that conspiracy may be established by proof of an express agreement to unite to accomplish an unlawful purpose. . . . [Although] [c]onspiracy can seldom be proved by direct evidence . . . [i]t may be inferred from the activities of the accused persons." (Internal quotation marks omitted.) *State* v. *Soyini*, 180 Conn. App. 205, 224–25, 183 A.3d 42, cert. denied, 328 Conn. 935, 183 A.3d 1174 (2018).

"Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to agree or conspire and (b) the intent to commit the offense which is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements of the offense." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Beccia*, supra, 199 Conn. 3–4. "The state, therefore, in order to prove the offense of conspiracy to commit murder, must prove two distinct elements of intent: that the conspirators intended to agree; and that they intended to cause the death of another person." (Internal quotation marks

omitted.) *State* v. *Mourning*, 104 Conn. App. 262, 286–87, 934 A.2d 263, cert. denied, 285 Conn. 903, 938 A.2d 594 (2007). With due regard for these principles, we now address the defendant's contention that his conviction of conspiracy to commit murder is unlawful because it was founded on the doctrine of transferred intent.

In the present case, the state did rely on a theory of transferred intent to prove the murder charge: the state sought to establish that the defendant, acting with the intent to kill a rival gang member, killed someone else. The defendant does not dispute the applicability of that theory to the crime of murder. Indeed, the murder statute, § 53a-54a, contemplates scenarios of the kind that occurred here because the statute expressly provides that a person commits the crime of murder when, with the intent to cause the death of one person, he causes the death of another person. See footnote 1 of this opinion.

The state, however, did *not* rely on the doctrine of transferred intent with respect to the conspiracy to commit murder charge. The conspiracy alleged and proven by the state was an agreement to kill a rival gang member, and the overt act proven by the state was the gunshot intended for that rival gang member. The conspiracy to commit murder charge was established by virtue of that proof and that proof alone. Although the gunshot that was fired was intended to kill the rival gang member, the fact that the gunshot, instead, killed the victim is simply irrelevant for purposes of the conspiracy to commit murder charge. In other words, with respect to *that* charge, the state did not need to prove, and indeed could not have proved, that the defendant and at least one other person agreed to kill the actual victim. Rather, as we have explained, the state merely sought to prove, and did prove, first, an agreement to kill a rival gang member, and second, the commission of an overt act in furtherance of that agreement, specifi-

cally, the gunshot that was intended for the rival gang member but which struck and killed the victim.

The defendant's claim is unavailing, then, because it fails to account for a fundamental difference between the crime of murder, which, among other things, requires proof that a person was killed, and the crime of conspiracy to commit murder, which requires proof only of an *agreement* to kill and an overt act in furtherance of that agreement. Put differently, the conspiracy charge does *not* require proof that the object of the conspiracy, namely, the death of a person, was accomplished, nor does it require proof regarding the result of the overt act committed. As our Supreme Court has explained: "The gravamen of the crime of conspiracy is the unlawful combination and an act done in pursuance thereof, *not the accomplishment of the objective of the conspiracy*. . . . Conspiracy is an inchoate offense the essence of which is an agreement to commit an unlawful act. . . . The prohibition of conspiracy is directed not at the unlawful object, but at the process of agreeing to pursue that object." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Beccia*, supra, 199 Conn. 3; see also *State* v. *Fox*, 192 Conn. App. 221, 228, 217 A.3d 41 (it is agreement that "constitutes the conspiracy which the statute punishes" (internal quotation marks omitted)), cert. denied, 333 Conn. 946, 219 A.3d 375 (2019). In the present case, because the crime of conspiracy to commit murder was completed when the defendant and one or more coconspirators agreed to kill a rival gang member and a gun was fired to that end, the defendant's conspiracy conviction is legally sound even though the murder charge itself was predicated on the death of an unintended victim. Thus, although the murder charge was based on a theory of transferred intent, the charge of conspiracy to commit murder was not.

Furthermore, it is apparent that the court's instruction to the jury that the doctrine of transferred intent

applied to the conspiracy to commit murder charge as well as to the murder charge did not serve to transform the state's theory of the conspiracy charge into one predicated on transferred intent. Notwithstanding the court's instruction on transferred intent, that doctrine simply bore no relevance to the conspiracy charge because the state's theory with respect to that charge, in contrast to its theory with respect to the murder charge, had nothing to do with transferred intent. For purposes of the conspiracy charge, it made no difference whether the rival gang member was killed—as had been planned—or whether, as actually occurred, the victim of the shooting was an unintended third party. As we have explained, all that was necessary for the state to establish the crime of conspiracy was proof that the defendant agreed with one or more other persons to cause the death of the rival gang member and that an overt act was committed in furtherance of that agreement, and the defendant does not challenge the adequacy or validity of the state's proof in that regard. In such circumstances, the court's instruction to the jury concerning the applicability of the doctrine of transferred intent to the conspiracy charge was, at most, mere surplusage that had no bearing on the nature of the state's case against the defendant or on the jury's consideration of whether the state had proven its case.

For these reasons, the defendant's conviction of conspiracy to commit murder was not predicated on the doctrine of transferred intent. Accordingly, the defendant cannot prevail on his claim of a due process violation stemming from his conviction of an offense that is not legally cognizable in this state, and his claim, thus, fails under the third prong of *Golding*.

II

The defendant next claims that the court improperly denied his motion to suppress certain statements he

made to the police during a custodial interrogation after he had invoked his constitutional right to counsel. He contends that the police impermissibly failed to honor his request for an attorney and that any statements he made thereafter were the result of improper questioning by the police in violation of his fifth amendment rights as safeguarded by *Miranda* v. *Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and its progeny. He also claims, alternatively, that his statements should have been suppressed because they were the product of police coercion and, therefore, not made following a knowing and voluntary waiver of his *Miranda* rights. We disagree.

The following facts and procedural history are necessary to our resolution of the defendant's claims.[16] Three days after the shooting, the defendant was located by the police and brought to the Hartford Police Department, where he was taken to an interview room, which was equipped with a video camera, for questioning. The video recording of the interview commenced at 2:27 p.m., at which time the defendant was alone in the room. Approximately thirty minutes later, Rykowski and another detective entered the room with the defendant's father, and Rykowski proceeded to review a parental consent form with the father,[17] followed by his review of a waiver of rights form with the defendant. Both the defendant and his father signed their respective forms. Subsequently, the police and the defendant's

[16] Our recitation of the relevant facts is predicated on the findings of the trial court as set forth in its memorandum of decision denying the defendant's motion to suppress and on our independent review of the video recording of the police interview. Although the recording of the interview was not introduced into evidence at the defendant's trial, the state did introduce the recording at the hearing on the defendant's motion to suppress, and the court relied on the recording in denying that motion.

[17] Although the defendant had turned eighteen years old the day before, on July 18, 2017, his father was present while the defendant was being advised of his rights because Rykowski believed that it would be best to advise the defendant as a juvenile.

father left the interview room, and at 3:20 p.m., Rykowski returned to the room with his partner, Detective Jeffrey Pethigal,[18] at which time they began questioning the defendant. At 3:35 p.m., Rykowski told the defendant that he was under arrest for murder and summarized the evidence that the police had against him. After that, Rykowski and Pethigal again departed the interview room until 4:26 p.m., when Pethigal returned with the defendant's father and questioned the defendant about his cell phone.

The following colloquy then transpired between the defendant and Pethigal:

"[The Defendant]: But is there like any way, cause this is a serious matter, and I feel like just so I'm ok with my like future and stuff, cause I don't know [what] the outcome of this [is] gonna be, *is there any way I could get like a lawyer in here*, so I know what's going on 'n stuff?

"[Pethigal]: What's that?

"[The Defendant]: 'Cause I don't really understand like what's going on and like and that's why I was saying I wanted my father in here.

"[Pethigal]: You can talk to your father, it's whatever you want to do.

"[The Defendant]: *Could we have a lawyer in here*, 'cause this is a serious matter.

"[Pethigal]: Yeah, you have your rights waiver, right?

"[The Defendant]: Huh?

"[Pethigal]: The rights waiver you signed.

"[The Defendant]: Um-hmm. It said I could have a lawyer.

[18] The defendant's father did not join Rykowski and Pethigal when they reentered the interview room at this time.

"[Pethigal]: Exactly, you understood it.

"[The Defendant]: Could you have—*could you have a lawyer come in here*?

"[Pethigal]: Ok . . . . If that's what you want?

"[The Defendant]: Yeah, because it don't wanna . . . I don't wanna, you get what I'm sayin? This is a serious matter.

"[Pethigal]: Alright, hold on . . . ." (Emphasis added.)

Thereafter, Pethigal ceased questioning and left the interview room, followed by the defendant's father. Several minutes later, Sergeant Rivera[19] opened the door to the room and told the defendant to "come on," to which the defendant replied, "where am I going?" Rivera explained to the defendant that he was taking him to the booking room to be processed because he was under arrest. When the defendant expressed confusion, Rivera told the defendant that he would have Pethigal and Rykowski explain the charges to him. Shortly thereafter, while Rivera and the defendant were still in the interview room, Pethigal returned and the following colloquy took place:

"[Pethigal]: Did you not understand us?

"[The Defendant]: You all said that . . . somebody said I did that. I didn't do anything.

"[Pethigal]: You are under arrest for murder.

"[The Defendant]: How [am I] under arrest for . . .

"[Pethigal]: Listen, you asked for a lawyer, I can't speak to you, ok?

"[The Defendant]: What . . . did I do?

[19] Sergeant Rivera's first name is not apparent from the record.

"[Pethigal]: Listen, I would love to discuss this more but you asked for a lawyer and I can't speak to you.

"[Rivera]: You have to stand up, come on.

"[The Defendant]: How am I getting arrested for murder . . . .

"[Rivera]: You requested an attorney, we cannot discuss this further with you. . . . You had your opportunity to speak to us. You requested a lawyer. We are done talking with you, sir.

"[The Defendant]: If I want to talk to you guys, can we talk about it?"

Neither Pethigal nor Rivera responded directly to the defendant's question, instead directing him to stand up and put his hands behind his back.

Thereafter, the defendant was escorted out of the interview room for booking. According to testimony by Rykowski at the hearing on the motion to suppress, when Rivera and the defendant were both in the booking room, the defendant told Rivera that he wanted to speak with Rykowski. Because there was no video camera in the booking room, the defendant's statement to Rivera was not recorded.

Upon completion of the booking process, the defendant was returned to the interview room. Rykowski returned to the room, as well, and asked the defendant to clarify whether he wanted to speak to him, to which the defendant responded, "I do, 'cause I didn't even do anything." Rykowski continued to question the defendant to make sure that he wanted to speak further to the police without an attorney present. After that exchange, the defendant's father entered the interview room, and Rykowski again explained the waiver of rights and parental consent forms to the defendant and his father, respectively. The defendant's father again

signed a parental consent form, and the defendant completed and signed another waiver of rights form. Rykowski thereafter read the defendant his *Miranda* rights for a second time, and the defendant initialed a form indicating that he had been advised of his rights and understood them. Thereafter, the interrogation of the defendant recommenced, and the defendant eventually admitted to being in the Ford Escape on the day of the shooting, and he gave the police a signed, written statement to that effect. He also told Rykowski that the intended target of the shooting was Deandre Johnson, a rival gang member.

The defendant filed a motion in advance of trial seeking to suppress the statements he made to the police following his invocation of his right to counsel but after he told the police that he wanted to continue to talk with them.[20] In support of his motion, the defendant argued that the police had improperly induced him to speak despite his expressed desire to have counsel present and that the efforts by the police to do so had rendered his *Miranda* waiver involuntary. Following a hearing, the court denied the defendant's motion. Expressly finding Rykowski to be a credible witness, the court concluded that the defendant had waived his rights knowingly, intelligently and voluntarily. The court further found that the defendant himself had "initiated the continued communication with the police" and that "[t]here [was] no evidence . . . that would indicate that the defendant's will was overborne and the decision to speak to the police was anything other than the result of his free, considered, and unconstrained choice."

Subsequently, at trial, the state adduced testimony from Rykowski that the defendant had acknowledged

[20] The defendant did not seek to suppress any statements that he made prior to invoking his right to counsel, and those statements are not the subject of this appeal.

that he was in the Ford Escape on the day of the shooting. Rykowski further testified that he believed that the defendant also told him the name of the intended target of the shooting. On appeal, the defendant contends that the trial court incorrectly refused to suppress the statements at issue, and he renews the arguments that he made in the trial court in support of his claim. The state maintains that the court properly denied the defendant's motion to suppress his statements and, further, that any possible impropriety was harmless beyond a reasonable doubt. For the reasons that follow, we agree with the state.

Preliminarily, however, we set forth our standard of review and certain legal principles that govern our consideration of the defendant's claims. The standard of review of the trial court's denial of the defendant's motion to suppress is well settled. "A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen [however] a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set [forth] in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 302 Conn. 287, 295–96, 25 A.3d 648 (2011).

With respect to the law applicable to the defendant's claims challenging the trial court's denial of his motion to suppress, "[t]he [f]ifth [a]mendment [to] the United

States [c]onstitution provides: '[n]o person . . . shall be compelled in any criminal case to be a witness against himself' . . . . To protect this constitutional right against self-incrimination, the Supreme Court's landmark decision in *Miranda* v. *Arizona* [supra, 384 U.S. 444] established certain 'procedural safeguards' that officers must comply with to subject a suspect to custodial interrogation." (Citation omitted.) *United States* v. *Abdallah*, 911 F.3d 201, 209–10 (4th Cir. 2018). Among them, an accused has the right to have an attorney present during custodial police interrogation; *Miranda* v. *Arizona*, supra, 444; and if the accused requests an attorney, "interrogation must cease until an attorney is present." Id., 474. "It is well established that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. [Id., 444.] Two threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody;[21] and (2) the defendant must have been subjected to police interrogation." (Footnote added; internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 302 Conn. 294.

"A defendant in custody is subject to interrogation not only in the face of express questioning by police but also when subjected to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. . . . [W]hether a defendant was subjected to interrogation . . . involves a . . . two step inquiry in which the court must determine first, the

[21] In the present case, there is no dispute that the defendant was in custody at all relevant times.

factual circumstances of the police conduct in question, and second, whether such conduct is normally attendant to arrest and custody or whether the police should know that it is reasonably likely to elicit an incriminating response." (Citations omitted; internal quotation marks omitted.) Id., 295; see also *Rhode Island* v. *Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) (exempting from definition of interrogation words and actions that are "normally attendant to arrest and custody").

In *Edwards* v. *Arizona*, 451 U.S. 477, 484, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the United States Supreme Court amplified the safeguards that must be afforded an accused who requests counsel during custodial interrogation. Specifically, the court in *Edwards* held that, "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [The court] further [held] that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (Footnote omitted.) Id., 484–85. With these principles in mind, we turn to the defendant's claims.

A

The defendant first claims that the police violated his fifth amendment right to counsel by failing to honor his invocation of his right to counsel by questioning him after he had done so. More specifically, the defendant contends that, insofar as he initiated communication with the police after his earlier request for counsel, he did so only because the police had impermissibly

induced him to speak to them. He therefore argues that he is entitled to suppression of the statements he made to the police after he resumed talking to them. We are not persuaded by the defendant's claim.

As we have explained, after the defendant was brought to the police station, he was informed of his *Miranda* rights, signed a waiver of rights form, and was questioned by the police. At approximately 4:28 p.m., the defendant asked: "[I]s there any way I could get like a lawyer in here?" That question was followed by two more requests for counsel, made in close succession, in which he asked, "[c]ould we have a lawyer in here?" and "could you have a lawyer come in here?" Under the fifth amendment, although "police officers conducting a custodial interrogation have no obligation to stop and clarify an ambiguous invocation by the defendant of his right to have counsel present . . . they must cease interrogation . . . upon an objectively unambiguous, unequivocal invocation of that right." *State* v. *Purcell*, 331 Conn. 318, 320–21, 203 A.3d 542 (2019). For purposes of this appeal, there is no dispute that the defendant's statements constituted a sufficiently clear and unequivocal request for an attorney that required a halt to all questioning. Although the defendant contends that Pethigal's immediate response to the defendant's invocation of his right to counsel—Pethigal reminded the defendant that he previously had waived that right—was designed to prompt the defendant to continue speaking to the police, no actual questioning took place and the defendant made no incriminating statements until several hours later, after he had reinitiated communication with the police. The crux of the defendant's claim, therefore, is that he resumed speaking to the police only because the police themselves induced him to do so in derogation of his right to counsel.

As noted previously, under *Edwards*, once a defendant has requested counsel, the police may not question

him further until counsel is present unless the accused himself initiates further communication with the police. *Edwards* v. *Arizona*, supra, 451 U.S. 484–85. In *Smith* v. *Illinois*, 469 U.S. 91, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984), the United States Supreme Court clarified the rule in *Edwards*, stating: "[The] rigid prophylactic rule [set forth in *Edwards*] . . . embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. . . . Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." (Citations omitted; internal quotation marks omitted.) Id., 95. The court in *Smith* further explained: "*Edwards* set forth a bright-line rule that *all* questioning must cease after an accused requests counsel. . . . In the absence of such a bright-line prohibition, the authorities through badger[ing] or overreaching—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 98. Thus, "[w]hen officers fail to scrupulously honor a suspect's invocation of the right to counsel, the suspect's subsequent waiver of that right—and any confession that follows—is presumptively invalid." (Internal quotation marks omitted.) *Rodriguez* v. *McDonald*, 872 F.3d 908, 926 (9th Cir. 2017). Our Supreme Court has explained that "[t]he initiation of conversation includes inquiries that can be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation." (Internal quotation marks omitted.) *State* v. *Canales*, 281 Conn. 572, 591, 916 A.2d 767 (2007). For example, in *Oregon* v. *Bradshaw*, 462 U.S. 1039, 103 S.

Ct. 2830, 77 L. Ed. 2d 405 (1983), the United States Supreme Court held that the defendant initiated further conversation with the police when he asked, " '[w]ell, what is going to happen to me now?' " Id., 1045; see also *State* v. *Hafford*, 252 Conn. 274, 294, 746 A.2d 150 (defendant's question concerning what would happen to him next constituted initiation under *Edwards*), cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000).

Because the inquiry required by the defendant's claim is necessarily fact specific, we set forth the facts and circumstances relevant to our resolution of the claim. The video recording of the defendant's interview with the police reveals that he invoked his right to have counsel present at 4:28 p.m. and that, following a brief exchange with Pethigal, all questioning ceased and Pethigal left the interview room at 4:29 p.m. Thereafter, commencing at 5:05 p.m., the defendant had a brief conversation with Rivera during which the defendant expressed his concern as to why he was being taken to the booking room, and Rivera and Pethigal explained that they could not speak with him because he had invoked his right to counsel. At 5:08 p.m., the defendant was placed in handcuffs and taken out of the room to be processed.

At the hearing on the motion to suppress, Rykowski testified that Rivera had informed him that, when the defendant "was being processed, he expressed his desire to continue to talk to me. So, once the processing of [the defendant] was complete . . . I asked that he be put back in that interview room . . . to confirm the information that . . . Rivera had given [to] me." As we have indicated, the defendant's overture to Rivera was not recorded.

At 5:25 p.m., Rykowski reentered the interview room and asked the defendant, who, by then, had been returned

to that room, to clarify whether he wanted to speak with the police again. The following colloquy took place:

"[Rykowski]: Deykevious, I just want to make sure I understand, do you want to talk to us again right now?

"[The Defendant]: I do 'cause I didn't even do anything. I don't understand why you guys are saying that I murdered someone. I didn't murder anyone.

"[Rykowski]: Ok, so, as I mentioned before, you asked about an attorney before.

"[The Defendant]: Only because I was scared. This is serious.

"[Rykowski]: Ok, I just wanna understand. Do you want to talk to us right now, without an attorney?

"[The Defendant]: If it helps clear stuff up.

"[Rykowski]: I mean, obviously, I want to get your side of this.

"[The Defendant]: But listen, if I could talk to you guys and you guys can see that I really have nothing to do with this, yes I will talk to you. My dad can clarify everything that I've been doing.

"[Rykowski]: No problem. I want to talk to you, ok?

"[The Defendant]: . . . I just turned eighteen yesterday, this is my life, I'm trying to do good and now everything messes up.

"[Rykowski]: Right . . . let me bring your father back in, we gotta go over those forms again, alright?

"[The Defendant]: Ok.

"[Rykowski]: If you want to, I'm not pushing you to talk to me.

"[The Defendant]: I want to cause I don't wanna go to jail for something I didn't do."

Following that brief discussion, Rykowski explained that he would be readvising the defendant of his *Miranda* rights. At 5:38 p.m., those rights were read to him again, and he reviewed and signed the waiver of rights form. After that, interrogation resumed.

On the basis of Rykowski's testimony, which the court expressly credited, and the court's review of the video recording of the defendant's police interview, the court found that, "[w]hen the defendant [was] presented for booking, he indicate[d] to . . . Rivera that he [wanted] to speak with the detectives. This information [was] brought to . . . Rykowski, who question[ed] the defendant about the request. The defendant indicate[d] that he [did want to talk] . . . if it would help. . . . Rykowski continue[d] to inquire about his desire to speak without a lawyer present. The defendant [was] again advised of his *Miranda* rights and waive[d] them." The court further stated: "The evidence indicates that [when] a lawyer was requested, questioning by the police ceased. The defendant requested further discussion, first with the officer [who] took him to booking and then to . . . Rykowski in the interview room and recorded on state's exhibit 1. Initiation can be said to represent a desire by a suspect to open up a more generalized discussion related to the investigation. . . . The court finds that the defendant initiated the continued communication with the police."

We conclude that the record fully supports the court's finding that the defendant initiated further communication with the police of his own accord. Although the defendant's discussion with Rivera during the booking process was not recorded, the court found credible Rykowski's testimony that the defendant told Rivera that he wanted to speak with the police notwithstanding his earlier invocation of his right to counsel, and we will not second-guess the court's credibility determination. See *State* v. *Shin*, 193 Conn. App. 348, 359, 219 A.3d

432 ("[b]ecause it is the sole province of the trier of fact to assess the credibility of witnesses, it is not our role to second-guess such credibility determinations" (internal quotation marks omitted)), cert. denied, 333 Conn. 943, 219 A.3d 374 (2019). Indeed, the defendant does not challenge the accuracy or truthfulness of Rykowski's testimony regarding the defendant's conversation with Rivera in the booking room, which plainly established that the defendant had decided to resume speaking to the police without counsel present. Nor does he contest that the statements he made to Rykowski in the interview room confirm those that he had made only moments before to Rivera. See *United States* v. *Carpentino*, 948 F.3d 10, 22 (1st Cir. 2020) ("a suspect opens the door to further questioning if his comments 'evince . . . a willingness and a desire for a generalized discussion about the investigation' "); see also *Oregon* v. *Bradshaw*, supra, 462 U.S. 1045–46 (no *Edwards* violation when accused initiated further conversation with police by inquiring as to what would be happening to him, which evinced "willingness and a desire for a generalized discussion about the investigation . . . [and] was not merely a necessary inquiry arising out of the incidents of the custodial relationship").

It is the defendant's position, nevertheless, that the conduct of the police just prior to the defendant's departure from the interview room to be booked and immediately after he was returned to the interview room supports his claim that "the officers should have known their actions and statements, which occurred after Pethigal left the room, were likely to get him to talk without an attorney." Specifically, he points to the facts that the police removed his father from the room and left the defendant alone there for thirty minutes without providing him with any means to contact an attorney; the officers made statements suggesting that the "defendant could have helped himself if he spoke to them,

but because he [had] asked for an attorney, they were booking him for murder";[22] and the officers' statements suggested that the defendant's situation could well improve if he spoke with the police at that time. The defendant further alleges that "[t]heir persistent statements that they needed to talk to him coupled with confronting him with the evidence against him undoubtedly wore [him] down until he agreed to talk without an attorney." According to the defendant, under these circumstances, the court incorrectly concluded that the defendant knowingly and voluntarily initiated further communication with the police. We are not persuaded by the defendant's argument.

First, the defendant has provided no authority for the proposition that the officers were required to provide him with an attorney or a means to contact one during the thirty minutes he was left alone in the interview room. Indeed, the defendant did not ask the police for permission to contact anyone, and his father was at the police station and had visited with the defendant. Moreover, the record does not bear out the defendant's contention of persistent statements by the officers that they wanted to talk to the defendant, and the brief outline of the incriminating evidence that the police gave the defendant was made in response to a question from the defendant himself as to why he was being held for murder.

The defendant's reliance on *State* v. *Gonzalez*, supra, 302 Conn. 287, and *Martinez* v. *Cate*, 903 F.3d 982 (9th Cir. 2018), to support his claim that the statements of the police constituted interrogation is misplaced because

[22] The defendant's claim concerns Pethigal's statements to the defendant that he could not speak with the defendant because the defendant had asked for an attorney and that Pethigal would "love to discuss this more" but could not in light of the defendant's request, as well as Rivera's statement: "You had your opportunity to speak to us. You requested a lawyer. We are done talking with you, sir."

those cases are distinguishable from the present case. In *Gonzalez*,[23] our Supreme Court held that the statement of a police sergeant to the defendant, who was in custody but had not been advised of his *Miranda* rights, "that it was the defendant's opportunity to tell his side of the story was the functional equivalent of interrogation because the police should have known that the phrase was reasonably likely to invite the defendant to respond by making possibly incriminating statements." *State* v. *Gonzalez*, supra, 299. The court in *Gonzalez* concluded that "at the onset of the interview the police improperly subjected the defendant to custodial interrogation without the benefit of *Miranda* warnings"; (emphasis omitted) id., 301; and that the defendant's "request to remain silent was not scrupulously honored because no steps were undertaken to conclude the interrogation or belatedly advise the defendant of his *Miranda* rights." Id., 302. In contrast, in the present case, the defendant was informed of his *Miranda* rights when the interview commenced and signed a waiver of rights form, and the police stopped questioning him

[23] The defendant in *Gonzalez* had been brought to the police station for questioning about a murder. *State* v. *Gonzalez*, supra, 302 Conn. 296. "Although the defendant initially persisted in resisting being interviewed by stating that he wanted an attorney and that he would not speak to the officers, the officers only told the defendant to sit there and wait to be booked, made no effort to honor the defendant's request for counsel or to explain his rights and remained seated at the table, staring at the defendant in silence. Approximately sixty seconds later, the defendant began making the contested statements." Id., 296–97. Moreover, "once the defendant commenced narrating his activity on the day of the murder . . . the officers did not ascertain whether the defendant was waiving his prior request for counsel. The officers also never presented the defendant with a waiver of rights form that had been in their possession throughout the interview." Id., 302–303. Those facts are notably different from the facts of the present case, in which the defendant was advised twice of his *Miranda* rights and twice signed a waiver of rights form before making any incriminating statements, the officers ascertained that the defendant wanted to speak to them despite his prior request for counsel, and the officers left the interview room and the interview ceased for a period of time after the defendant's invocation of his right to counsel.

after he invoked his right to counsel just prior to being removed from the interview room for booking.

Martinez is similarly inapposite to the present case. In *Martinez*, after the petitioner had requested that an attorney be present during his questioning by the police regarding a shooting incident, a detective stated: "All I wanted was your side of the story. That's it. O[k]. So, I'm pretty much done with you then. Um, I guess I don't know another option but to go ahead and book you. O[k]. Because . . . [you're] going to be booked for murder because I only got one side of the story. O[k]." (Footnote omitted; internal quotation marks omitted.) *Martinez* v. *Cate*, supra, 903 F.3d 988. The United States Court of Appeals for the Ninth Circuit held that the detective's statements constituted interrogation because the detective, by virtue of those statements, suggested that the petitioner might not be charged if he spoke to the police and gave them his side of the story. Id., 994–95. Accordingly, the detective's statements were " 'reasonably likely to elicit an incriminating response.' " Id., 995.

In the present case, the defendant was informed at 3:35 p.m., while he was being interviewed and long before he invoked his right to counsel, that he was under arrest for murder. Consequently, this case does not involve a situation in which the police suggested that the defendant was being arrested and booked only because he would not talk to them without an attorney.[24] See *Rodriguez* v. *McDonald*, supra, 872 F.3d 924 ("by suggesting to [the petitioner] that he would be imminently charged with murder but that cooperation would

[24] This determination is supported by the fact that, later in the interview, the defendant asked: "If we clear everything up will I still have to go to jail?" In response to that question and again thereafter, Rykowski explained to the defendant that there was an active warrant for his arrest, that Rykowski could not change that fact, and that the defendant would be placed under arrest and booked at that time regardless of what he told the police about the shooting incident.

result in more lenient treatment from the court, the probation office, and from the police themselves, the officers 'effectively told [the petitioner] he would be penalized if he exercised rights guaranteed to him under the [c]onstitution of the United States' "). On the contrary, in the present case, the court expressly found that "there [was] no evidence . . . that there are any police tactics designed to deflect the defendant from clearly invoking his right to counsel . . . ."

We conclude that the record supports the court's findings with respect to the officers' statements, which must be examined in the context in which they were made. When the defendant was informed that he was under arrest and about to be booked for murder, he became very upset, started crying, stated that he didn't do anything wrong and asked why he was being arrested. In response to *the defendant's* questions, he was informed that, because he had requested an attorney, the police could no longer speak with him. Within a very short period of time, at 5:08 p.m., he was placed in handcuffs and taken out of the interview room for booking. Only after this break in questioning did the defendant initiate further communication with the police, telling them that he again wanted to speak to them. See *Martinez* v. *Cate*, supra, 903 F.3d 997 ("[i]n every other case where the Supreme Court has held that a defendant initiated the communication with the police, there was some break in questioning"). The defendant's claim, which essentially ignores his own statements to the police, is unavailing.[25]

[25] We note that the defendant requested, for the first time at oral argument before this court and subsequently in a written motion filed shortly thereafter, that he be permitted to submit a supplemental brief raising an *Edwards* claim under article first, § 8, of the Connecticut constitution. See *State* v. *Purcell*, supra, 331 Conn. 362 (article first, § 8, of Connecticut constitution provides greater rights than federal constitution insofar as that state constitutional provision "requires that, if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel" (internal quotation marks omitted)).

B

We next must determine whether the defendant's second waiver of his right to counsel was valid because he relinquished that right knowingly, intelligently, and voluntarily. The defendant contends that, even if he initiated the conversation with the police, his subsequent statement acknowledging that he was in the Ford Escape on the day of the shooting should have been suppressed because it was the product of police coercion and, consequently, not made knowingly and voluntarily. We disagree.

"Pursuant to the fifth and fourteenth amendments to the United States constitution, a statement made by a defendant during custodial interrogation is admissible only upon proof that he . . . waived his rights [under *Miranda*] . . . . To be valid, a waiver must be voluntary, knowing and intelligent. . . . The state has the burden of proving by a preponderance of the evidence that the defendant voluntarily, knowingly and intelligently waived his *Miranda* rights. . . . Whether a purported waiver satisfies those requirements is a question of fact that depends on the circumstances of the particu-

More specifically, the defendant sought to raise and brief the claim that the statement he made after booking that he wanted to resume speaking to the police "if it helps clear stuff up" was equivocal, thereby triggering a state constitutional duty on the part of the police to inquire further solely for the purpose of clarifying the defendant's statement. Ordinarily, we will not entertain claims raised for the first time at oral argument. See, e.g., *State* v. *Cicarella*, 203 Conn. App. 811, 817 n.5, 251 A.3d 94, cert. denied, 337 Conn. 902, 252 A.3d 364 (2021). Upon consideration of the defendant's request in the present case, we concluded that there was no need to address the merits of the motion in light of our determination—explained more fully in part II C of this opinion and equally applicable to a claim under the state constitution—that, even if the defendant could establish that the police violated his right to counsel by questioning him following his invocation of that right and after he had been booked, the violation would be harmless beyond a reasonable doubt due to the overwhelming independent evidence of the defendant's guilt. We therefore denied the defendant's motion to raise an *Edwards* claim under article first, § 8, of the Connecticut constitution because he could not prevail on that claim.

lar case. . . . Although the issue is therefore ultimately factual, our usual deference to fact-finding by the trial court is qualified, on questions of this nature, by the necessity for a scrupulous examination of the record to ascertain whether such a factual finding is supported by substantial evidence. . . .

"Whether the defendant has knowingly and intelligently waived his rights under *Miranda* depends in part on the competency of the defendant, or, in other words, on his ability to understand and act upon his constitutional rights." (Citations omitted; internal quotation marks omitted.) *State* v. *Fernandez*, 52 Conn. App. 599, 610, 728 A.2d 1, cert. denied, 249 Conn. 913, 733 A.2d 229, cert. denied, 528 U.S. 939, 120 S. Ct. 348, 145 L. Ed. 2d 272 (1999). "In considering the validity of a waiver, we look to the totality of the circumstances of the claimed waiver. . . . Factors used to assess the totality of the circumstances include the age of the accused, the extent of his education, evidence concerning advisement of constitutional rights and the length and nature of the interrogation." (Citation omitted; internal quotation marks omitted.) *State* v. *Miller*, 137 Conn. App. 520, 531, 48 A.3d 748, cert. denied, 307 Conn. 914, 54 A.3d 179 (2012). With respect to voluntariness, the "test . . . is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear [the accused's] will to resist and bring about confessions not freely self-determined . . . ." (Internal quotation marks omitted.) *State* v. *Azukas*, 278 Conn. 267, 290, 897 A.2d 554 (2006). In other words, "[a] statement is voluntary if it is the product of an essentially free and unconstrained choice by its maker . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Fernandez*, supra, 612.

In finding that the defendant made a knowing, intelligent and voluntary waiver of his rights, the court exam-

ined the totality of the circumstances and found as follows: "[T]he defendant was eighteen years [old], he had been through the eleventh grade, [and he] was able to read and write. There was no indication that the defendant was under the influence of any type of substance, be it alcohol, narcotics, or that he was in any other way impaired. He was advised of his rights not once, but twice, and each time he initialed each of the rights acknowledging that right, and then finally signed off at the end indicating he was willing to speak with the officers.

"There was no evidence of threats or physical force to coerce him to waive his rights or to make a statement. In fact, the entire tenor of the interview [of] the defendant was completely conversational and generally lacked confrontation. The defendant had his father present the two times that he was advised of his rights and waived them. His father gave parental consent on both occasions. The evidence established that he understood those rights from his own comment. He asked if it was possible to get a lawyer the first time. It was the exercise of those rights which leads the court to infer that he understood them." The court further noted that the defendant had prior experience with law enforcement, such that he was not "a novice to the advisement process," and that, even though he was emotional, "there [was] no evidence that his emotion prevented him from understanding his rights."

The court also examined other factors, stating: "[T]here was no evidence presented that the defendant was lacking in intelligence or suffered from a mental deficiency, or that intellectual limitations influenced his judgment at the time he was with . . . Rykowski and Pethigal. . . . There was nothing in the evidence for the court to conclude that the defendant was sleep deprived or in need of food or bathroom relief. The record indicates [that] the defendant was given drink, offered food, and

[given the] opportunity to make bathroom visits. During the time that [the defendant] was being interviewed by . . . Rykowski, there was no indication [that] the defendant was subjected to any exhausting or incessant questioning or treatment." The court concluded that there was nothing in the record to substantiate the claim that the police had overborne the defendant's will or that his statements were not otherwise the product "of his free, considered, and unconstrained choice." Accordingly, the court rejected the defendant's claim that his waiver was involuntary because it was based on police pressure, intimidation or manipulation.

We agree with the state that, under the totality of the circumstances, there is substantial evidence to support the court's finding that the defendant's waiver of his *Miranda* rights was voluntary and intelligent, as required by *Edwards*. The record shows that the defendant twice signed a waiver of rights form after being advised of his *Miranda* rights. See *State* v. *Miller*, supra, 137 Conn. App. 530 ("[a] defendant's express written and oral waiver is strong proof that the waiver is valid" (internal quotation marks omitted)). Moreover, our careful examination of the record reveals that it supports the court's determination that there was no showing that the police threatened the defendant or employed other coercive or improper tactics to obtain the waiver. See *State* v. *Madera*, 210 Conn. 22, 49–50, 554 A.2d 263 (1989) ("court correctly factored into its determination of the *Miranda* issue that there was 'no evidence that the defendant was in any way threatened, intimidated, coerced or abused' ").

We disagree with the defendant's argument that the fact that he had just turned eighteen years old the day before the interrogation requires a different conclusion. As the court found, the defendant had an eleventh grade education, could read and write, was not impaired in any way, signed two waiver of rights forms after having

been informed, twice, of his *Miranda* rights, and, after previously having agreed to speak with police, asserted his right to counsel. His assertion of his right to counsel, after having been advised of his *Miranda* rights the first time, was a clear indication that he understood those rights. See *State* v. *Mercer*, 208 Conn. 52, 71, 544 A.2d 611 (1988) ("[W]e have held that the assertion of the right to remain silent after an initial willingness to speak with police is a strong indication that the defendant understood his rights. . . . The initial invocation of the right to counsel similarly serves to demonstrate that a defendant acted knowingly and intelligently in subsequently deciding to waive that right." (Citation omitted; internal quotation marks omitted.)); *Pickens* v. *Gibson*, 206 F.3d 988, 995 (10th Cir. 2000) ("[p]etitioner's initial refusal to make a statement and his request for an attorney indicate he 'understood . . . both the nature and consequences of his right to remain silent and his right to counsel' "); *United States* v. *Velasquez*, 885 F.2d 1076, 1087 (3d Cir. 1989) ("[the defendant] evidently understood the import of the *Miranda* warnings . . . because she invoked her right to counsel [one-half hour] before she made her incriminating statements"), cert. denied, 494 U.S. 1017, 110 S. Ct. 1321, 108 L. Ed. 2d 497 (1990); see also *State* v. *Fernandez*, supra, 52 Conn. App. 611 (waiver was not invalid when defendant "was eighteen years old at the time of the incident . . . had completed the tenth grade, [and] testified that he knew how to read and write English").

We also are not persuaded by the defendant's contention that the court was required to find that his will was overborne because the police failed to contact a lawyer for him and, for a period of time, left him alone in the interview room, separated from his father. Although the surroundings and circumstances of the defendant's interview by the police—including the fact that he knew that he was being arrested and booked for murder—

were hardly comfortable, that simply does not mean that the defendant necessarily was unable to decide for himself, in an informed and unconstrained manner, whether to resume speaking to the police without a lawyer.

We therefore conclude, in light of all of the relevant facts adduced at the suppression hearing, that the state has met its burden of demonstrating a knowing, intelligent and voluntary waiver by the defendant of his *Miranda* rights. See *United States* v. *Carpentino*, supra, 948 F.3d 26 (knowing and voluntary waiver of *Miranda* rights by defendant when he initiated second phase of custodial interview, was told by troopers that questioning would stop if he wanted to talk with his lawyer, troopers read defendant his *Miranda* rights twice, and defendant confirmed that he understood those rights, signed waiver of rights form and agreed to speak with troopers). Accordingly, the defendant has not established that he was entitled to have his statements excluded due to police coercion or intimidation.

C

Finally, the state argues that, even if a violation of the defendant's *Miranda* rights had occurred, any error in the court's admission of Rykowski's testimony regarding the defendant's acknowledgment that he was in the Ford Escape on the day of the shooting and his identification of the intended victim as a rival gang member was harmless beyond a reasonable doubt. Even though we find no *Miranda* violation, we, nevertheless, address the harmless error argument. In support of its contention, the state maintains that the other evidence of the defendant's guilt was overwhelming, such that that testimony had no material bearing on the jury verdict. The defendant asserts that the challenged evidence was harmful because there was no eyewitness testimony identifying him as the shooter, there was no physical evidence confirming his presence in the Ford Escape

at the time of the incident, the witnesses who implicated the defendant in the shooting had a motivation to do so, and the testimony of Shaw and Jonathan Vellon contained inconsistencies. We agree with the state.

The standard governing our review of this issue is well established. "[I]f statements taken in violation of *Miranda* are admitted into evidence during a trial, their admission must be reviewed in light of the harmless error doctrine." (Internal quotation marks omitted.) *State* v. *Tony M.*, 332 Conn. 810, 822, 213 A.3d 1128 (2019). "The harmless error doctrine is rooted in the fundamental purpose of the criminal justice system, namely, to convict the guilty and acquit the innocent. . . . Therefore, whether an error is harmful depends on its impact on the trier of fact and the result of the case. . . . [Our Supreme Court] has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt. . . . When an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt. . . . [W]e must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]." (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 302 Conn. 306–307. "Whether [an] error is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case [and] whether the testimony was cumulative . . . ." (Internal quotation marks omitted.) *State* v. *Tony M.*, supra, 822.

In the present case, there was compelling independent evidence that the defendant was a passenger in

the Ford Escape not only on the day of the shooting but at the time of the shooting, as well, such that the defendant's statement to Rykowski acknowledging that he was in the vehicle that day was merely cumulative. At trial, Simpson and Shaw, who were in the Ford Escape when the shooting took place, both testified that the defendant was with them in the vehicle at that time. Although Jonathan Vellon refused to identify anyone else in the vehicle in his trial testimony, including the defendant, his signed, sworn statement to the police identifying the defendant as a rear seat passenger in the vehicle at the time of the shooting was admitted into evidence as a full exhibit and read to the jury. Rykowski also testified that both Pipkin and Osvaldo Vellon had provided statements to the police identifying the defendant as a passenger in the Ford Escape when the gunshot that killed the victim was fired.

With respect to Rykowski's testimony that he believed that the defendant had told him that Johnson[26] was the intended victim of the shooting, it bears emphasis that, before invoking his right to counsel, the defendant—who maintained his innocence throughout his interview with the police—already had told Rykowski that he did not get along with people at Westland Street, whom he referred to as the "G's," and that he knew a person by the name of Deandre.[27] The fact that the defendant apparently told Rykowski later in the interview that Johnson was the intended victim does not establish that the defendant was present when the shooting took place because that statement itself contains no indication as to how the defendant became aware of the

[26] Although Rykowski testified that the name of the intended target was Andre Johnson, the intended target was identified in the record numerous times as Deandre Johnson.

[27] Because these statements were made before the defendant indicated he wanted a lawyer, they were not the subject of the defendant's motion to suppress.

identity of the intended victim.[28] Because the defendant's statement to Rykowski about Johnson could very well have been based on information that the defendant learned secondhand, after the shooting incident occurred, about Johnson's identity as the intended victim, the statement was hardly persuasive evidence of the defendant's actual participation in the shooting.

Moreover, the state was not required to establish the shooter's identity for purposes of the conspiracy to commit murder charge, and the evidence was clear that, even if the defendant did not fire the gunshot that killed the victim, the gunshot was fired from the Ford Escape. In addition, the inconsistencies in the testimony of Shaw and Jonathan Vellon related to collateral issues and were inconsequential, except insofar as Jonathan Vellon testified that the defendant was not in the Ford Escape at the time of the shooting. Jonathan Vellon's trial testimony in this regard, however, was flatly contradicted by the sworn statement that he gave to the police immediately after the shooting. Because Jonathan Vellon's written statement was made so soon after the incident and was corroborated by the statements of at least four other eyewitnesses, and because he was so evasive in his trial testimony, there is a high probability that the jury credited that statement over his testimony, which could well have appeared to the jury as motivated by a desire to protect the defendant. Finally, because Simpson, Shaw and Jonathan Vellon, like all of the other witnesses, were subject to extensive cross-examination about whatever interest or motive they may have had to falsely implicate the defendant

[28] Although, in his police interview and written statement, the defendant ultimately acknowledged that he was present in the Ford Escape at the time of the shooting and claimed that a passenger nicknamed "Hazy" was the shooter, the recording of the police interview and the defendant's written statement were never admitted into evidence at the defendant's criminal trial. Consequently, the jury never was apprised of that information, and, for that reason, it does not factor into our harmless error analysis.

in the shooting, the jury was well aware of any such interest or motive.

For all these reasons, we conclude that the admission of Rykowski's challenged testimony had no bearing on the outcome of the defendant's trial, and, consequently, its use by the state was harmless beyond a reasonable doubt. Accordingly, the defendant is not entitled to a new trial even if the admission of the testimony was improper.

The judgment is affirmed.

In this opinion the other judges concurred.

JOAQUIN SANTIAGO *v.* COMMISSIONER OF CORRECTION (AC 44533)

Elgo, Cradle and Alexander, Js.

Syllabus

The petitioner, who had been convicted of, inter alia, felony murder, and sentenced to fifty years' incarceration, sought a writ of habeas corpus, claiming ineffective assistance of his trial counsel for failure to preserve his direct appeal. Following the imposition of his sentence, the trial court clerk handed the petitioner notices of the right to appeal and the right to sentence review and informed the petitioner that by signing the documents, he acknowledged receipt of them. The petitioner's trial counsel, a special public defender, explained to the petitioner what the documents were and also what had to be done to initiate the appeal, in particular that in order for the appellate process to start in motion, an application for waiver of costs and fees and appointment of appellate counsel had to be filed. After receiving this information, the petitioner signed the notice forms. Trial counsel then asked the petitioner if he wanted him to initiate the appeal process or forward the matter to the Office of the Chief Public Defender so that the appellate unit might begin an appeal. Angered by the verdict and lengthy sentence imposed, the petitioner abruptly told his trial counsel that he wanted him to have no contact with his case any longer. Despite the advice of the trial clerk, his trial counsel, and the contents of the notice itself, the petitioner mistakenly believed that signing the notice of right to appeal form was all that was necessary to begin his appeal. The habeas court, after a

hearing at which the petitioner and his trial counsel testified, dismissed the petition for a writ of habeas corpus and denied the petition for certification to appeal. The petitioner did not immediately appeal from the judgment of the habeas court. Approximately twenty-five years later, the petitioner filed an application for waiver of fees and for appointment of counsel to appeal the judgment of the habeas court. Subsequently, the court granted the petitioner's application for waiver of fees and referred his petition for appointment of appellate counsel to the Office of the Chief Public Defender, which appointed counsel. On the petitioner's appeal to this court, *held*:

1. The petitioner failed to establish that the habeas court abused its discretion in denying his petition for certification to appeal, the petitioner having failed to establish that the issues raised were debatable among jurists of reason, that they reasonably could be resolved by a court differently, or that they raised questions deserving further appellate scrutiny.
2. The petitioner could not prevail on his claim that the habeas court's conclusion that he was not denied the effective assistance of trial counsel rested on clearly erroneous factual findings concerning his trial counsel's representations to him during his sentencing proceeding, a careful review of the record, including the transcript of the habeas trial, having revealed that the court's findings were supported by the evidence in the record; the court's factual findings set forth in its memorandum of decision were derived directly from the testimony of the petitioner's trial counsel at the habeas trial, the court had discretion to credit or discredit the witnesses who testified and was the sole arbiter of the weight to be given to witness testimony, and, in light of the testimony, there was ample evidence in the record to support the court's findings that the petitioner's trial counsel advised the petitioner regarding the initiation of the appeals process and offered to initiate the appeals process on the petitioner's behalf or forward the matter to the Office of the Chief Public Defender.
3. The petitioner could not prevail on his claim that the habeas court erred in concluding that his trial counsel's representation was not deficient and therefore that the petitioner failed to satisfy the performance prong of *Strickland* v. *Washington* (466 U.S. 668): it was undisputed that the petitioner expressly discharged his trial counsel following the imposition of his sentence, and it was reasonable for trial counsel to believe that initiating an appeal on the petitioner's behalf would contradict the petitioner's explicit instructions and violate his ethical duty to the petitioner, and it was clear that trial counsel was prepared to assist the petitioner in initiating the appeals process but ultimately deferred to the petitioner's instructions to not handle his file any longer.

Argued March 1—officially released June 21, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland

and tried to the court, *Sferrazza, J.*; judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Deborah G. Stevenson, assigned counsel, for the appellant (petitioner).

James M. Ralls, assistant state's attorney, with whom, on the brief, was *Sharmese L. Walcott*, state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Joaquin Santiago, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court abused its discretion in denying his petition for certification and improperly dismissed his petition for a writ of habeas corpus by concluding that he was not denied the effective assistance of his trial counsel, Special Public Defender John Stawicki, with respect to Stawicki's failure to preserve the petitioner's direct appeal. We disagree and, accordingly, dismiss the appeal.

The following facts and procedural history are relevant to our disposition of the petitioner's claim. Following a jury trial, at which the petitioner was represented by Stawicki, the petitioner was convicted of one count of felony murder in violation of General Statutes (Rev. to 1991) § 53a-54c, and four other related charges. On May 21, 1992, the trial court, *Miano, J.*, sentenced the petitioner to a total effective sentence of fifty years of incarceration.

"On May 26, 1993, the petitioner filed [a pro se petition for a writ of habeas corpus]" on the ground that he had been denied his constitutional right to the effective assistance of counsel. The petitioner was subsequently

appointed counsel and, in his amended petition, claimed that Stawicki rendered deficient performance by failing to preserve his right to appeal from the judgment of conviction after sentencing.

A habeas trial was held on August 24, 1995, whereby the petitioner presented the testimony of two witnesses, himself and Stawicki. On August 28, 1995, the habeas court, *Sferrazza*, *J.*, dismissed the petition for a writ of habeas corpus. In its memorandum of decision, the court found as follows: "Stawicki was appointed to represent the petitioner as a special public defender. Stawicki handled the petitioner's case for over a year, which case culminated in a jury trial at which the petitioner was found guilty of felony murder and related charges. . . . Following imposition of the sentence, the court clerk handed to the petitioner notices of the right to appeal and the right to sentence review. The clerk informed the petitioner that by signing these documents, the petitioner would be acknowledging receipt of them. Before the petitioner signed the documents, Stawicki explained to the petitioner what [the documents] were and also what had to be done to initiate the appeal. In particular, Stawicki explained that, in order for the appellate process to start in motion, an application for waiver of costs and fees and appointment of appellate counsel had to be filed. After receiving this information the petitioner signed the notice forms.

"Stawicki then asked the petitioner if he wanted Stawicki to initiate the appeal process or forward the matter to the [Office of the Chief Public Defender] so that the appellate unit at that office might begin the appeal. Angered by the verdict and lengthy sentence imposed, the petitioner abruptly told Stawicki that he wanted Stawicki to have no contact with his case any longer. Stawicki respected the petitioner's desire and had no further communication with the petitioner regarding the case. . . . Despite the advice of the clerk,

Stawicki, and the contents of the notice itself, the petitioner mistakenly believed that signing the notice of right to appeal form was all that was necessary to begin his appeal."

Applying the test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the court then determined that the petitioner had failed to demonstrate that he had been denied the effective assistance of counsel. Specifically, the court held that Stawicki properly had advised the petitioner regarding the initiation of the appeals process and willingly had offered to assist the petitioner in filing the application for waiver of costs and fees and the appointment of appellate counsel, or in having the appellate unit of the Office of the Chief Public Defender process the petitioner's appeal. The court also determined that the petitioner "out of anger and frustration curtly refused Stawicki's assistance and discharged him" and that it was "the petitioner's errors, not his counsel's, which resulted in the failure to file a timely appeal." The court concluded, accordingly, that Stawicki did not render deficient performance.[1] The petitioner subsequently filed a petition for certification to appeal from the decision of the habeas court, which the habeas court denied.

The petitioner did not immediately appeal from the judgment of the habeas court. Instead, on or about July 21, 2020, the petitioner filed an application for waiver of fees and for appointment of counsel to appeal the judgment of the habeas court. The habeas court subsequently returned the application to the petitioner and

[1] Having concluded that Stawicki did not render deficient performance, the court declined to address the prejudice prong of the *Strickland* test. See *Chance* v. *Commissioner of Correction*, 184 Conn. App. 524, 534, 195 A.3d 422 ("[t]he court . . . can find against a petitioner . . . on either the performance prong or the prejudice prong" (internal quotation marks omitted)), cert. denied, 330 Conn. 934, 194 A.3d 1196 (2018).

informed the petitioner that his file was destroyed on November 16, 2006, pursuant to Practice Book §§ 7-10[2] and 7-11.[3]

On August 24, 2020, the petitioner filed with this court a motion for review of the return of his application for waiver of fees and for appointment of counsel. In his motion, the petitioner requested that this court "remand the fee waiver back to the trial court for approval to appeal the [habeas] court's improper dismissal of [his] habeas petition." The respondent, the Commissioner of Correction, subsequently filed an opposition to the petitioner's motion in which he argued, inter alia, that this court should deny the petitioner's motion because his attempt to appeal the dismissal of his petition for a writ of habeas corpus was untimely. The respondent also contended that granting the petitioner's requested relief would prejudice the respondent given that approximately twenty-five years had passed "since the matter was heard and the fact that the habeas file was [subsequently] destroyed . . . ."[4]

On October 7, 2020, this court granted the petitioner's motion for review and vacated the habeas court's return

[2] Practice Book § 7-10 provides: "The files in all civil, family and juvenile actions, including summary process and small claims, which, before a final judgment has been rendered on the issues, have been terminated by the filing of a withdrawal or by a judgment of dismissal or nonsuit when the issues have not been resolved on the merits or upon motion by any party or the court, or in which judgment for money damages only has been rendered and a full satisfaction of such judgment has been filed, may be destroyed upon the expiration of one year after such termination or the rendition of such judgment."

[3] Practice Book § 7-11 provides in relevant part: "(a) With the exception of actions which affect the title to land and actions which have been disposed of pursuant to Section 7-10, the files in civil, family and juvenile actions in which judgment has been rendered may be stripped and destroyed pursuant to the schedule set forth in subsection (d), except that requests relating to discovery, responses and objections thereto may be stripped after the expiration of the appeal period. . . ."

[4] At oral argument before this court, the respondent stipulated that the petitioner's appeal was reviewable and properly before the court for consideration on the merits.

of the application for waiver of fees. This court also ordered, sua sponte, that the petitioner file with the habeas court an application for waiver of fees to file an appeal on or before November 18, 2020, and that the petitioner's application be referred to the presiding judge of the habeas court. The habeas court, *Oliver*, *J.*, subsequently granted the petitioner's application for waiver of fees, but denied the appointment of appellate counsel.

On December 2, 2020, the petitioner filed a motion for extension of time to file a motion to review the habeas court's denial of appellate counsel. On December 8, 2020, this court denied the petitioner's motion without prejudice to the petitioner filing with the trial court a request for a hearing on the denial of his application for appointment of appellate counsel on or before January 8, 2021. The petitioner subsequently filed a request for a hearing on the denial of his application for appointment of appellate counsel.

On January 20, 2021, the trial court, *Oliver J.*, held a hearing on the petitioner's motion for appointment of appellate counsel. In an oral ruling, the court ordered that the petitioner's application be referred to the Office of the Chief Public Defender for an expedited investigation. Appellate counsel subsequently was appointed and the petitioner filed the present appeal as to the dismissal of his 1995 habeas petition and the denial of certification to appeal.

On appeal, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal because it improperly concluded that he was not denied the effective assistance of counsel at his criminal trial. More specifically, the petitioner argues that (1) the habeas court's conclusion that Stawicki did not render deficient performance rested on clearly erroneous factual findings, and (2) the court improperly

determined that Stawicki did not render deficient performance by failing either to perfect the petitioner's direct appeal or to forward the petitioner's file to the Office of the Chief Public Defender, so that the office could preserve the petitioner's right to appeal and appoint new counsel to represent the petitioner. We disagree.

We first set forth the standard of review relevant to our resolution of this appeal. "Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed. . . .

"We examine the petitioner's underlying claim[s] of ineffective assistance of counsel in order to determine whether the habeas court abused its discretion in denying the petition for certification to appeal. Our standard

of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, [supra, 466 U.S. 687], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong [of the Strickland test] the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

. . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Citations omitted; internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 201 Conn. App. 1, 11–13, 242 A.3d 107, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020).

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. . . . Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the [s]ixth [a]mendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court,

examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (Citations omitted.) *Strickland* v. *Washington*, supra, 466 U.S. 688–89.

I

The petitioner first claims that the court's conclusion that he was not denied the effective assistance of counsel rested upon clearly erroneous factual findings concerning Stawicki's representations to the petitioner during his sentencing proceeding. Specifically, the petitioner alleges that the court erred in finding that Stawicki "properly advised the petitioner regarding the initiation of the appeals process" and offered "to initiate the appeal process [on the petitioner's behalf] or forward the matter to the [Office of the Chief Public Defender] . . . ." We are not persuaded.

It is well established that "[t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed [on appeal] unless they are clearly erroneous. . . . Thus, [t]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility

of witnesses and the weight to be given to their testimony. . . . Thus, the court's factual findings are entitled to great weight. . . . Furthermore, [a] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *David P.* v. *Commissioner of Correction*, 167 Conn. App. 455, 470, 143 A.3d 1158, cert. denied, 323 Conn. 921, 150 A.3d 1150 (2016).

Our careful review of the record, including the transcript of the habeas trial, reveals that the court's findings are supported by the evidence in the record. At the habeas trial, Stawicki testified: "I explained to [the petitioner] . . . as I usually do . . . that I can file these papers; that either myself or somebody from the Public Defender's Office—since I was an appointed special public defender in this case—would handle his appeal." When Stawicki was asked specifically whether he would handle the petitioner's appeal, he responded, "I believe the fairer characterization would be that somebody would handle his appeal. *If he would like me to handle it, I would handle it. And my recollection of the reaction was that he was so dissatisfied, he would take care of things himself*." (Emphasis added.) On cross-examination, Stawicki reiterated, "I explained to [the petitioner] that he had a right of sentence review. I went through what the notice entailed. I also told [the petitioner] that he had a right to appeal. It was an absolute right. I told [the petitioner] that before he could file the appeal and have representation from the [Office of the Chief Public Defender] that there would have to be a waiver of costs and fees granted. My recollection is that [the petitioner] was not listening extremely closely. [The petitioner] was quite upset about his sentence,

and he indicated to me that he didn't want me further handling his case; but I did go through the paperwork."

It is clear that the court's factual findings set forth in its memorandum of decision derive directly from Stawicki's testimony at the habeas trial. Indeed, it is well established that the habeas court has discretion to credit or discredit the witnesses who testify at the habeas trial and is the "sole arbiter of . . . the weight to be given to [witness] testimony." (Internal quotation marks omitted.) *David P.* v. *Commissioner of Correction*, supra, 167 Conn. App. 470; see also *Crespo* v. *Commissioner of Correction*, 292 Conn. 804, 810 n.5, 975 A.2d 42 (2009). In light of Stawicki's testimony, there was ample evidence in the record to support the habeas court's findings that Stawicki advised the petitioner "regarding the initiation of the appeals process" and offered "to initiate the appeal process [on the petitioner's behalf] or forward the matter to the [Office of the Chief Public Defender] . . . ." We conclude, therefore, that the court's factual findings were not clearly erroneous.

II

The petitioner's second claim is that the habeas court erred in concluding that Stawicki's representation of the petitioner was not deficient and, therefore, that the petitioner failed to satisfy the performance prong of *Strickland*. In particular, the petitioner contends that Stawicki's performance fell below an objective standard of reasonableness because Stawicki had an "affirmative duty" to preserve the petitioner's right to appeal or to forward the petitioner's file to the Office of the Chief Public Defender. We are not persuaded.

The United States Supreme Court has established that, although a lawyer who disregards a defendant's specific instructions to file a notice of appeal acts in a professionally unreasonable manner; see *Rodriquez* v. *United States*, 395 U.S. 327, 328–30, 332, 89 S. Ct. 1715,

23 L. Ed. 2d 340 (1969); a defendant who explicitly instructs his attorney not to file an appeal on his behalf cannot later complain that, by following those instructions, his counsel performed deficiently. See *Jones* v. *Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (accused has ultimate authority to make certain fundamental decisions regarding case, including whether to take appeal).

In the present case, it is undisputed that the petitioner expressly discharged Stawicki following the imposition of his sentence. Specifically, the petitioner told Stawicki that "he didn't want [Stawicki] to handle his file any longer" and that "he wanted [Stawicki] to have nothing more to do with his case. Period." In light of these statements, it was reasonable for Stawicki to believe, based on his experience representing criminal defendants,[5] that initiating an appeal on the petitioner's behalf would contradict the petitioner's explicit instructions and violate his ethical duty to the petitioner.[6]

[5] Stawicki testified that he had previously represented clients who instructed Stawicki not to file an appeal on their behalf. Specifically, Stawicki testified that he "had several clients who did not want appeals. I've had others who, although they've been unhappy with the result, have still had me file appeals. I've had some just have me file the waiver of costs and fees, and then I send . . . my file down to New Haven to the appellate office." Accordingly, Stawicki understood the petitioner's statements that he did not want Stawicki to "handle his file any longer" or "have [anything] more to do with his case" as explicit instructions not to file the petitioner's appeal.

[6] We note that the petitioner's instruction that Stawicki "play no further role" in handling his case distinguishes the present situation from our Supreme Court's decision in *Fredericks* v. *Reincke*, 152 Conn. 501, 208 A.2d 756 (1965), on which the petitioner relies. In that case, the special public defender appointed to represent the plaintiff disregarded the plaintiff's explicit request to pursue an appeal on his behalf. Id., 503–504. Rather, the plaintiff's counsel determined that the plaintiff's appeal was frivolous and withdrew from the representation. Id., 504. Our Supreme Court, relying on *Douglas* v. *California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963), held that "when the special public defender who conducted the plaintiff's defense at his trial came to the conclusion that he could not conscientiously proceed with the appeal which he had taken to preserve the plaintiff's rights, and for which he had obtained an extension of time within which to file the papers essential to the processing of the appeal, and had notified both

Nevertheless, the petitioner contends that Stawicki had a professional responsibility, even after being discharged from the representation, to either preserve the petitioner's appellate rights, contact the Office of the Chief Public Defender concerning the petitioner's appellate rights, or better explain the nature of the appeals process. In support of his claim, the petitioner cites several professional rules and guidelines[7] to

the plaintiff and the court of his decision, the plaintiff was entitled to have competent counsel appointed to represent him on the appeal." *Fredericks* v. *Reincke*, supra, 505. In the present case, Stawicki was prepared to either represent the petitioner on appeal, or to forward the petitioner's file to the Office of the Chief Public Defender, so that another attorney could represent the petitioner throughout the appeals process. The petitioner, however, discharged Stawicki from the representation and informed Stawicki that "he would take care of things himself." We cannot conclude that Stawicki performed unreasonably by following the petitioner's explicit instruction.

[7] In particular, the petitioner cites to the Connecticut Public Defender Services Commission Guidelines on Indigent Defense §§ 1.3 and 10.2 (guidelines); available at https://portal.ct.gov/-/media/OCPD/Important-Information/PDGuidelinespdf.pdf (last visited June 16, 2022); and rules 1.4 and 1.16 of the Rules of Professional Conduct. The Public Defender Services Commission, however, did not promulgate the guidelines until 1997, two years after the habeas court denied the petitioner's writ of habeas corpus. See Division of Public Defender Services, "30 Years in Review," available at https://portal.ct.gov/OCPD/Org-and-Admin/30-Years-in-Review (last visited June 16, 2022). Accordingly, the court could not have considered the guidelines in determining that Stawicki rendered adequate performance.

At the time of the petitioner's habeas trial, rule 1.4 of the Rules of Professional Conduct provided in relevant part: "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information . . . [and] shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rules of Professional Conduct (1978-97) 1.4.

At the time of petitioner's habeas trial, rule 1.16 of the Rules of Professional Conduct provided in relevant part: "(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . .

(3) The lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) The client has used the lawyer's services to perpetrate a crime or fraud;

(3) The client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

advance the argument that Stawicki's performance fell below an objective standard of reasonableness.[8] The habeas court found, however, that Stawicki adequately had explained the nature of the appeals forms to the petitioner, instructed the petitioner that the forms would have to be filed in order to perfect his appeal, and informed the petitioner that either he or another attorney from the public defender's office could represent the petitioner on appeal. The court also determined that the petitioner had discharged Stawicki under rule 1.16 (a) (3) of the Rules of Professional Conduct and

(4) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) Other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law." Rules of Professional Conduct (1978-97) 1.16.

[8] In his brief to this court, the petitioner also cites to the United States Supreme Court decisions in *Roe* v. *Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), and *Garza* v. *Idaho*, U.S. , 139 S. Ct. 738, 203 L. Ed. 2d 77 (2019), to argue that Stawicki's failure to take reasonable steps to preserve his right to appeal (1) falls below an objective standard of reasonableness as measured by prevailing professional norms and (2) entitles him to a "presumption of prejudice." These decisions, however, were released several years after the habeas court issued its memorandum of decision denying the petitioner's writ of habeas corpus in 1995. The petitioner has not raised the claim, pursuant to the framework set forth in *Teague* v. *Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), and adopted by our courts in *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 113, 111 A.3d 829 (2015) ("[w]e therefore adopt the framework established in *Teague*, with the caveat that, while federal decisions applying *Teague* may be instructive, this court will not be bound by those decisions in any particular case, but will conduct an independent analysis and application of *Teague*"), that the decisions in *Flores-Ortega* and *Garza* apply retroactively to his petition for a writ of habeas corpus. Accordingly, we decline to review such a claim. See *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 659 n.9, 224 A.3d 147 (2020).

explicitly directed Stawicki to "play no further role in his case." Accordingly, it is clear that Stawicki was prepared to assist the petitioner initiate the appeals process, but ultimately deferred to the petitioner's instructions to not "handle his file any longer."

Even if we assume that Stawicki violated one of the cited provisions, it is well established that professional rules and guidelines do not establish the constitutional requirements for adequate performance. Rather, "[p]revailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, *but they are only guides*. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." (Citation omitted; emphasis added.) *Strickland* v. *Washington*, supra, 466 U.S. 688–89.

Considering the circumstances of this case, particularly the court's finding that the petitioner discharged Stawicki and directed him to take no further action on the petitioner's behalf, we cannot conclude that Stawicki's performance was so egregious that he was not "functioning as counsel . . . ." *Ostolaza* v. *Warden*, 26 Conn. App. 758, 761, 603 A.2d 768, cert. denied, 222 Conn. 906, 608 A.2d 692 (1992). Indeed, Stawicki explained the appellate process to the petitioner and offered either to represent the petitioner on appeal, or to forward the petitioner's file to the Office of the Chief Public Defender. Despite these representations, the petitioner discharged Stawicki, instructed Stawicki to have nothing more to do with his case, and told Stawicki that he would personally handle his own appeal. To reiterate, a defendant has the ultimate authority to make certain fundamental decisions in his case, including the decision of whether to take an appeal. See *Jones* v.

Barnes, supra, 463 U.S. 751. Therefore, it was not unreasonable for Stawicki to believe that the petitioner would represent himself on appeal or find alternative representation. We conclude, accordingly, that the habeas court did not abuse its discretion in determining that Stawicki did not render deficient performance.[9]

For the foregoing reasons, we conclude that the petitioner has failed to establish that the issues raised are debatable among jurists of reason, that they reasonably could be resolved by a court differently, or that they raise questions deserving further appellate scrutiny. Accordingly, the petitioner has failed to establish that the court abused its discretion in denying his petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

JOHN J. PARROTT ET AL. *v.* AL L. COLON ET AL. (AC 44178)

Bright, C. J., and Alexander and Bishop, Js.

Syllabus

The plaintiff tenants, J and S, sought, inter alia, an order to compel the defendants to use the money collected from them for rent to make certain repairs to their leased premises. The plaintiffs, who had entered into a residential lease agreement with the defendants, filed a complaint for housing code enforcement, pursuant to the applicable statute (§ 47a-14h), with the town in which the premises was located, alleging that the defendants had violated the statute (§ 47a-7) when they failed to

[9] Because we conclude that the court properly found that the petitioner failed to demonstrate that Stawicki's performance fell below an objectively reasonable standard, we do not address the prejudice prong of the *Strickland* test. See *Anderson* v. *Commissioner of Correction*, supra, 201 Conn. App. 13 ("a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition" (internal quotation marks omitted)).

repair and maintain certain conditions at the premises, including, inter alia, the swimming pool, furnace, and chimneys. The trial court determined that only the plaintiffs' alleged violations concerning the furnace and chimneys arguably fell within the statutory criteria. During the bench trial, W, a town building official, testified that he notified D, a sanitarian for the local health district that enforces the health code, of the complaint because the alleged issues were property maintenance matters to be addressed by the local health district. D attested that after reviewing the complaint and speaking to J on the phone, she concluded that the alleged violations did not rise to the level of a health, fitness, or habitability concern and further determined that the defendants could not be cited for any code violations as the furnace reached a level of sixty-five degrees, which was legally sufficient, especially in July, and the housing code did not require chimneys or fireplaces to be provided or maintained. In its memorandum of decision, the court determined, inter alia, that based on the record and the evidence presented, the plaintiffs failed to prove by a fair preponderance of the evidence that the violations alleged in the complaint rose to the level of violations materially affecting the health, safety, and habitability of the premises and, therefore, rendered judgment in favor of the defendants. Thereafter, the plaintiffs appealed to this court, arguing that their claims regarding the swimming pool, furnace, and chimneys did not need to constitute violations of the housing code or rise to a level affecting the health, safety, and habitability of the premises to prevail on their complaint pursuant to § 47a-14h alleging violations of § 47a-7. *Held* that the trial court's finding that the plaintiffs failed to establish that their allegations constituted violations of the housing code or materially affected the health, safety, and habitability of the premises as required under § 47a-7 was not clearly erroneous: to trigger the sanctions available for a violation of § 47a-7, the plaintiffs were required to show more than dissatisfaction with the condition and operation of the pool, furnace, and chimneys and, instead, were required to adduce evidence that established a substantial violation or series of violations of housing and health codes that created a material risk or hazard to the plaintiffs as occupants; moreover, the evidence in the record demonstrated that the plaintiffs failed to establish that any of their allegations constituted a violation of § 47a-7, as the furnace reached a legally sufficient level of temperature, the lack of repairs to the pool was not a health, safety, or habitability issue, especially considering that the parties' signed agreement provided that the pool was strictly an amenity, of which use was not guaranteed, and J testified that the plaintiffs did not suffer any injury or illness as a result of the defendants' alleged failure to clean the chimneys.

Argued December 2, 2021—officially released June 21, 2022

Procedural History

Action for housing code enforcement, and for other relief, brought to the Superior Court in the judicial district of Middlesex, Housing Session at Middletown, and tried to the court, *Woods*, *J.*; judgment for the defendants, from which the plaintiffs appealed to this court. *Affirmed.*

Robert J. Hale, *Jr.*, for the appellants (plaintiffs).

David E. Rosenberg, for the appellees (defendants).

Opinion

ALEXANDER, J. In this housing code enforcement action, the plaintiffs, John J. Parrott and Solanyi A. Parrott-Rosario, appeal from the judgment of the trial court, rendered after a bench trial, in favor of the defendants, Al L. Colon, Karen J. Colon (landlord), and Robert C. White & Company, LLC (property manager). The plaintiffs claim that the court incorrectly construed General Statutes § 47a-7 when it required them to prove by a fair preponderance of the evidence that their allegations constituted violations of the housing code or materially affected the health, safety and habitability of the premises. We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. In July, 2018, the plaintiffs and the landlord, the owner of the premises, entered into a residential lease agreement for a single-family home located at 7 Redberry Lane in Portland (premises). The plaintiffs, as tenants, agreed to lease the premises from the landlord for the period of July 13, 2018, to June 30, 2019, for a rent of $2500 per month. Thereafter, the plaintiffs and the landlord agreed to extend the period of the lease agreement to June 30, 2020. In July, 2019, the plaintiffs filed a complaint form with the town of Portland's Building & Land Use Division, in which they

alleged certain issues with the premises that the landlord and the property manager had failed to rectify. In August, 2019, the plaintiffs initiated this action[1] by filing a complaint for housing code enforcement pursuant to General Statutes § 47a-14h in which they alleged that the landlord had violated § 47a-7. In their complaint, the plaintiffs claimed that the defendants failed to repair and/or maintain: (1) the plumbing and filtration system for the swimming pool; (2) the furnace providing heat to the second floor; (3) the trash compactor; (4) the patio lights; (5) the front doorbell; and (6) the chimneys. The plaintiffs sought: (1) an order requiring the defendants to make repairs and/or an order requiring a receiver to collect rents and correct the identified conditions with the money collected for rent; (2) money, which may include reimbursement of the money paid to the court pursuant to § 47a-14h (h);[2] and (3) attorney's fees and expenses pursuant to General Statutes § 42-150bb.[3] As a result of the plaintiffs' complaint and pursuant to § 47a-14h, the plaintiffs began paying their monthly rent to the clerk of the court instead of to the property manager. By the last day of trial, the plaintiffs had paid $10,000 in rent payments to the clerk of the court.

A trial on the plaintiffs' complaint was held on September 9, October 25 and December 13, 2019. At trial,

[1] The plaintiffs maintained this action in the trial court as self-represented parties and brought this appeal in that capacity. After the appeal was filed, the plaintiffs retained counsel.

[2] General Statutes § 47a-14h (h) provides in relevant part: "On each rent due date on or after the date when the complaint is filed with the clerk of the court, or within nine days thereafter, the tenant shall deposit with the clerk of the court an amount equal to the last agreed-upon rent. . . . Payment to the clerk shall, for all purposes, be the equivalent of having made payment to the landlord himself."

[3] General Statutes § 42-150bb provides in relevant part: "Whenever any contract or lease entered into . . . provides for the attorney's fee of the commercial party to be paid by the consumer, an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease. . . ."

the court heard testimony from John Parrott, Elizabeth Davidson, a sanitarian III for the Chatham Health District for the town of Portland, and Lincoln Bond White, a building official for the town of Portland.

The court summarized the relevant testimony as follows. "White testified that he received the complaint from [John Parrott] and sent a request for voluntary compliance to the [defendants]. After conferring with the [defendants], White determined that there were no violations of the state building code because the property was not under construction. He testified that, pursuant to the state building code, he was required to investigate complaints of newly constructed or newly installed items. White further testified that, as a building official with the town of Portland, he therefore had no authority to investigate the plaintiffs' complaint and said issues were property maintenance matters to be addressed, instead, by the Chatham Health District. White testified that, upon reaching these conclusions, he notified Davidson, of the housing code enforcement division, of the plaintiffs' complaint. White also testified that, based on his experience, nothing in the complaint rose to [the] level of [a] health, fitness or habitability [concern].

"Davidson testified that, as the official at the Chatham Health District that includes the town of Portland and enforces the Chatham Health Code, she reviewed the plaintiffs' complaint and spoke with [John Parrott] over the phone. She concluded that none of the six violations alleged by the plaintiffs rose to the level of a health, fitness or habitability concern. As a result, Davidson determined that the [defendants] could not be cited for any code violations based on the nature of the plaintiffs' complaint."

The court determined that only the plaintiffs' second and sixth alleged violations, concerning the furnace and

the chimneys, arguably fell within the statutory criteria. In analyzing the allegations regarding the second purported violation, that the defendants failed to repair and maintain the furnace on the second floor of the premises, the court noted that John Parrott "testified that the furnace did not heat the second floor of his house sufficiently. In response to this claim, Davidson testified that, on its face, failure to maintain a furnace in the middle of July was not indicative of a health, safety or habitability issue. Davidson also testified that, according to [John Parrott], with whom she had spoken . . . the furnace worked and there was heat being provided to the area in question on the second floor. Davidson testified that the furnace reached a level of sixty-five degrees, which was legally sufficient, particularly in July, when the complaint was made. . . . Davidson ultimately determined that there were no health concerns or health issues raised by the [plaintiffs] regarding the performance of the furnace."

In analyzing the allegations regarding the sixth purported violation, that the defendants failed to have the chimneys cleaned, the court noted that John Parrott "testified that soot and smoke came down the chimney and into the house during a temperature inversion. In response to this claim, Davidson testified that nothing in the housing code requires chimneys or fireplaces to be provided or maintained. She further testified that cleaning of chimneys does not come under the jurisdiction of the public health code, and, therefore, does not create a health, safety or habitability issue . . . . [John Parrott] further testified that neither he nor anyone else residing in the home suffered any injury, respiratory problems, or required the care of a physician as the result of any problems with the chimneys."

As to each of these claims, the court determined that "none of the plaintiffs' claims are so significant or so substantial that living under said conditions would be

detrimental to the safety and welfare of the [plaintiffs]" and found the testimony of the town officials to be "both compelling and persuasive." It concluded that "[b]ased upon the record and the evidence presented at trial . . . the [plaintiffs] failed to prove by a fair preponderance of the evidence that the violations alleged in [the] complaint rise to the level of violations materially affecting the health, safety and habitability of the premises . . . ." The court accordingly rendered judgment for the defendants and ordered that the $27,500 in rent payments that the plaintiffs paid to the clerk of the court be disbursed to the property manager.

On appeal, the plaintiffs contend that their claims regarding the swimming pool, furnace and chimneys[4] need not constitute violations of the housing code or rise to the level of materially affecting the health, safety and habitability of the premises to prevail on their complaint brought pursuant to § 47a-14h alleging violations of § 47a-7. Specifically, the plaintiffs claim that there is nothing "to indicate that the landlord's responsibilities under § 47a-7 are limited to those set forth in the applicable building and housing codes nor that they are limited to those materially affecting health and safety" and that "[a]n action by [an] individual tenant to enforce [a] landlord's responsibilities under . . . § 47a-14h is not the same thing as an action for breach of the lease contract but neither is it incompatible with an action

[4] The plaintiffs only challenge on appeal the court's conclusion as to their claims relating to the swimming pool, the furnace and the chimneys, and have abandoned the remaining claims set forth in the complaint. In their brief, the plaintiffs acknowledge that they "did not present any substantial evidence to support their allegations with regard to the defendants' failure to maintain the trash compactor, the patio lights, nor the front doorbell . . . ." They state, however, that they have "certainly proved, by a fair preponderance of the evidence, their factual allegations of the landlord's failure to maintain (1) the pool; (2) the furnace providing heat to the second floor; and (6) the chimneys." Therefore, we need not address the additional claims related to the trash compactor, patio lights and front doorbell.

against the landlord for violation of the lease." We disagree.

The issue in this case is whether, pursuant to § 47a-7, the plaintiffs were required to show that the alleged breaches of the lease constituted violations of the housing or building code, or a threat to the health, safety or habitability of the premises. "We are therefore faced with an issue of statutory construction requiring a conclusion of law. When construing a statute, we adhere to fundamental principles of statutory construction . . . over which our review is plenary." (Internal quotation marks omitted.) *777 Residential, LLC* v. *Metropolitan District Commission*, 336 Conn. 819, 827, 251 A.3d 56 (2021).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common-law principles governing the same general

subject matter . . . .” (Internal quotation marks omitted.) *Lagueux* v. *Leonardi*, 148 Conn. App. 234, 239–40, 85 A.3d 13 (2014).

We next set forth the relevant language of the statutes. Section 47a-14h[5] permits a tenant to institute an action when a landlord has failed to perform his or her legal duties as required by § 47a-7. Section 47a-7 (a) provides: “A landlord shall: (1) Comply with the requirements of chapter 368o and all applicable building and housing codes materially affecting health and safety of both the state or any political subdivision thereof; (2) make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition, except where the premises are intentionally rendered unfit or uninhabitable by the tenant, a member of his family or other person on the premises with his consent, in which case such duty shall be the responsibility of the tenant; (3) keep all common areas of the premises in a clean and safe condition; (4) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating and other facilities and appliances and elevators, supplied or required to be supplied by him; (5) provide and maintain appropriate receptacles for the removal of ashes, garbage,

[5] General Statutes § 47a-14h provides in relevant part: “(a) Any tenant who claims that the landlord has failed to perform his or her legal duties, as required by section 47a-7 . . . may institute an action in the superior court having jurisdiction over housing matters in the judicial district in which such tenant resides to obtain the relief authorized by this section and sections 47a-7a, 47a-20 and 47a-68 . . . .

“(b) . . . The complaint shall also allege that at least twenty-one days prior to the date on which the complaint is filed, the tenant made a complaint concerning the premises to the municipal agency, in the municipality where the premises are located, responsible for enforcement of the housing code or, if no housing code exists, of the public health code, or to the agency responsible for enforcement of the code or ordinance alleged to have been violated, or to another municipal agency which referred such complaint to the municipal agency responsible for enforcement of such code or ordinance. . . .”

rubbish and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and (6) supply running water and reasonable amounts of hot water at all times and reasonable heat except if the building which includes the dwelling unit is not required by law to be equipped for that purpose or if the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant or supplied by a direct public utility connection."

In construing the statute, this court previously has stated that § 47a-7 (a) requires that a landlord maintain his or her leased premises in "a fit and habitable condition." *Visco* v. *Cody*, 16 Conn. App. 444, 451, 547 A.2d 935 (1988). Although this court in *Visco* did not address the specific claim raised by the plaintiffs in the present appeal, we are "bound by our previous judicial interpretations of the language and the purpose of the statute." *Kasica* v. *Columbia*, 309 Conn. 85, 93–94, 70 A.3d 1 (2013). In *Visco*, the defendants, month-to-month tenants living in an apartment owned by the plaintiff, had requested that the plaintiff landlord make various repairs to their apartment. *Visco* v. *Cody*, supra, 445. The requests for repairs began in October, 1986, and were made at various times thereafter. Id. On April 14, 1987, the plaintiff caused a notice to quit to be served on the defendants and when the defendants failed to vacate, the plaintiff initiated a summary process action. Id. In their answer, the defendants raised a special defense in which they asserted that pursuant to General Statutes § 47a-20,[6] the summary process action was

[6] General Statutes § 47a-20 provides: "A landlord shall not maintain an action or proceeding against a tenant to recover possession of a dwelling unit, demand an increase in rent from the tenant, or decrease the services to which the tenant has been entitled within six months after: (1) The tenant has in good faith attempted to remedy by any lawful means, including contacting officials of the state or of any town, city or borough or public agency or filing a complaint with a fair rent commission, any condition constituting a violation of any provisions of chapter 368o, or of chapter 412, or of any other state statute or regulation, or of the housing and health ordinances of the municipality wherein the premises which are the subject

commenced within six months of the defendants' request for repairs and, therefore, the action was barred. Id., 446. At trial, the plaintiff testified that at the defendants' request, he "bled the bathroom radiator, tightened the bedroom windows and replaced the sash cords, weatherstripped the front door to eliminate drafts, fixed some loose tiles on the bathroom floor and provided paint to the defendants so that they could repaint the kitchen. On the basis of this evidence, the trial court determined that the protection afforded by . . . § 47a-20 had not been triggered, because the requested repairs did not relate to defects which materially affect health and safety." (Internal quotation marks omitted.) Id.

On appeal, the defendants argued that they need only prove a good faith request for repairs in order to invoke the protection of § 47a-20. Id., 446–47. This court affirmed the judgment of the trial court, explaining that "[i]f we were to adopt the defendants' argument, we would have to acknowledge a greater duty to make repairs as set forth in § 47a-20 than that which is specified in § 47a-7 (a). The latter obliges a landlord to maintain his leased premises in a fit and habitable condition; the former, under the defendants' construction, would also oblige the landlord to make any cosmetic or aesthetic repairs, solely at the tenant's good faith behest. This is not to say that a tenant does not have the right to request aesthetic repairs; rather, the tenant cannot avoid eviction, using § 47a-20 as a shield, on the grounds that he requested such repairs in good faith." Id., 451. This court further explained that the repair at issue was not required to be of a substantial code violation. Id., 453. "An adequate and fair balancing of the rights

of the complaint lie; (2) any municipal agency or official has filed a notice, complaint or order regarding such a violation; (3) the tenant has in good faith requested the landlord to make repairs; (4) the tenant has in good faith instituted an action under subsections (a) to (i), inclusive, of section 47a-14h; or (5) the tenant has organized or become a member of a tenants' union."

involved may be achieved by requiring the requested repair to be one necessary to put and keep the premises in a fit and habitable condition." (Internal quotation marks omitted.) Id. Additionally, this court stated that "the sanctions in these sections are not triggered until and unless evidence is adduced at trial establishing that there is a substantial violation or series of violations of housing and health codes creating a material risk or hazard to the occupant." (Internal quotation marks omitted.) Id., 450–51.

In the present case, the plaintiffs contend that their complaint specifically alleged violations of § 47a-7 (a) (4) and that this section does not require them to "prove a violation of the applicable building and housing codes or a condition materially affecting health and safety . . . ." The relevant subsection provides that a landlord shall "maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating and other facilities and appliances and elevators, supplied or required to be supplied by him . . . ." General Statutes § 47a-7 (a) (4). This subsection plainly states that the landlord's duty is to "maintain [the premises] in good and safe working order and condition . . . ." Such a standard clearly requires the plaintiffs to show more than their dissatisfaction with the condition and operation of the swimming pool, furnace and chimneys. Furthermore, as this court stated in *Visco* v. *Cody*, supra, 16 Conn. App. 450–51, the sanctions available for a violation of § 47a-7 "are not triggered until and unless evidence is adduced at trial establishing that there is a substantial violation or series of violations of housing and health codes *creating a material risk or hazard to the occupant* . . . ." (Emphasis added; internal quotation marks omitted.) Consequently, we conclude that to prevail in their action alleging violations of § 47a-7, the plaintiffs were required to demonstrate that the lack of repairs made to the swimming

pool, furnace and chimneys affected the health, safety or habitability of the premises.

To the extent that the plaintiffs challenge the court's factual findings, after our thorough review of the record, we conclude that the court properly determined that the plaintiffs failed to establish that any of the alleged violations affected the health, safety or habitability of the premises, as required under § 47a-7. "In a case tried before the court, the trial judge is the sole arbiter of the credibility of witnesses and the weight to be afforded to specific testimony. . . . [When] the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . In other words, to the extent that the trial court has made findings of fact, our review is limited to deciding whether those findings were clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *Village Mortgage Co.* v. *Veneziano*, 175 Conn. App. 59, 69, 167 A.3d 430, cert. denied, 327 Conn. 957, 172 A.3d 205 (2017).

The plaintiffs contend that they have "presented substantial, uncontroverted evidence" to support their claims relating to the pool,[7] the furnace and the chimneys. None of their evidence, however, related to the

[7] The court determined that the plaintiffs' claims alleging violations of § 47a-7 relating to the pool did not have merit. At trial, the parties stipulated that "the pool was not in working order, at least not to the plaintiffs' satisfaction . . . ." They further stipulated that the plaintiffs had signed a pool/spa

safety, health or habitability of the premises. To the contrary, the court credited Davidson's testimony that the furnace did in fact function, and "reached a level of sixty-five degrees, which was legally sufficient, particularly in July" and that the failure to maintain the furnace in July did not constitute a threat to the health, safety or habitability of the premises. As to the chimneys, the court credited John Parrott's testimony that the plaintiffs did not suffer any injury or illness as a result of any issues with the chimneys and Davidson's testimony that the failure to clean the chimneys did not create a health, safety or habitability issue.

The court determined that none of the plaintiffs' claims was "so significant or so substantial that living under said conditions would be detrimental to the safety and welfare of the [plaintiffs]" and found that the plaintiffs "failed to prove by a fair preponderance of the evidence that the violations alleged in [their] complaint [rose] to the level of violations materially affecting the health, safety and habitability of the premises . . . ." We conclude that there was sufficient evidence in the record to support the court's determination that the plaintiffs failed to establish that any of their allegations constituted a violation of § 47a-7.

The judgment is affirmed.

In this opinion the other judges concurred.

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addendum that provided that the pool was "strictly an amenity and that the use of the amenity is not guaranteed under the terms of the lease." On the basis of this evidence, we conclude that the court properly determined that the plaintiffs' allegations regarding the swimming pool did not constitute a violation of § 47a-7 because the lack of repairs made to the swimming pool did not affect the health, safety or habitability of the premises, especially in light of the parties' agreement that the swimming pool was "strictly an amenity . . . ."

ORAL CARE DENTAL GROUP II, LLC *v.* SHANTEEMA PALLET ET AL.
(AC 43877)

Bright, C. J., Elgo and Suarez, Js.

Syllabus

The defendant Commission on Human Rights and Opportunities appealed from the judgment of the trial court vacating the damages award granted by its human rights referee to the defendant employee, P, for garden-variety emotional distress in a sexual harassment complaint against the plaintiff employer. During a public hearing before the referee, P testified that the harassing and discriminatory conduct of M, who was her direct supervisor while she was employed by the plaintiff, made her feel uncomfortable, stressed, and nervous and caused her to become depressed. On direct examination, she was not asked about, and did not testify regarding, any medical treatment that she received relating to her depression. On cross-examination, however, the plaintiff's counsel questioned P regarding the professional treatment that she sought as a result of the emotional distress M had caused and asked why she had not produced any medical records relating to such treatment. The plaintiff's counsel continued this line of questioning even after the referee ruled that P was not required to produce any medical records because she was claiming only garden-variety emotional distress. With the exception of her testimony in response to the questions of the plaintiff's counsel, P did not offer any evidence regarding her medical treatment. The referee found in favor of P and awarded her back pay and damages for garden-variety emotional distress. The plaintiff appealed to the trial court, which vacated the referee's damages award, and the commission appealed to this court. *Held* that the trial court erred when it vacated the referee's damages award because it incorrectly concluded that the plaintiff was prejudiced by P's failure to disclose her medical records: the referee did not abuse her discretion when she awarded P damages for garden-variety emotional distress because our Supreme Court in *Connecticut Judicial Branch* v. *Gilbert* (343 Conn. 90) made clear that, where a claimant limits her claim to one for garden-variety emotional distress damages, her medical records have no relevance, and P's allegations in her complaint and her testimony on direct examination, redirect examination, and in response to the referee's questions during the hearing were consistent with a claim for garden-variety emotional distress and the referee's final decision clearly indicated that her award was limited to damages for garden-variety emotional distress; moreover, a new hearing in damages was not required because, unlike in *Gilbert*,

any prejudice that may have resulted from P's testimony regarding her psychiatric treatment and medication was caused solely by the plaintiff's counsel, who insisted on questioning P about her treatment even though the subject was not raised in her direct testimony and he was informed multiple times that such evidence was not relevant; furthermore, contrary to the plaintiff's claim, our Supreme Court in *Gilbert* did not state that a hearing on medical records was a prerequisite to allowing a complainant to present evidence of garden-variety emotional distress; accordingly, the plaintiff did not have a right to P's medical records and could not have been prejudiced by P's failure to produce them.

Argued January 6—officially released June 21, 2022

Procedural History

Appeal from the decision of the defendant Commission on Human Rights and Opportunities awarding the named defendant back pay and certain damages, brought to the Superior Court in the judicial district of New Britain, and tried to the court, *Cordani*, *J.*; judgment sustaining in part the appeal and vacating the damages award, from which the defendant Commission on Human Rights and Opportunities appealed to this court. *Reversed in part*; *judgment directed.*

Michael E. Roberts, human rights attorney, with whom, on the brief, was *Charles Krich*, principal attorney, for the appellant (defendant Commission on Human Rights and Opportunities).

David L. Gussak, with whom, on the brief, was *Gary Greene*, for the appellee (plaintiff).

Opinion

BRIGHT, C. J. The defendant Commission on Human Rights and Opportunities (commission) appeals from the judgment of the trial court vacating the human rights referee's damages award for garden-variety emotional

distress to the defendant Shanteema Pallet,[1] in her sexual harassment complaint against the plaintiff, Oral Care Dental Group II, LLC. On appeal, the commission claims that the court erred when it vacated the damages award after concluding that the plaintiff was prejudiced by Pallet's failure to produce certain medical records.[2] We agree with the commission and, accordingly, reverse in part the judgment of the trial court and remand the case to the trial court with direction to deny the plaintiff's administrative appeal.

The following facts, as found by the referee, and procedural history are relevant to our analysis of the commission's claim. Pallet worked as a marketer for the plaintiff from April 16 to December 15, 2012. During that time, Christopher Mertens was Pallet's direct supervisor. Shortly after Pallet began working for the plaintiff, Mertens started to sexually harass her, both at work and after hours. He regularly commented on Pallet's appearance, made sexually explicit comments to her, ordered her to dress a certain way, invited her to private lunches and dinners, and repeatedly called and texted her, often to ask her out on dates. At one point, after Mertens learned that Pallet was dating someone else, he punished her by cutting her hours and taking away her weekly gas cards. This led Pallet to tell Mertens, falsely, that she no longer had a boyfriend so that she could get her hours and gas cards back. After learning that Pallet was still dating her boyfriend, Mertens fired her in December, 2012.

Thereafter, "[o]n June 13, 2013, [Pallet] filed a complaint with the [commission] alleging employment based sexual harassment and discrimination in viola-

[1] Following her marriage, Pallet took the surname Graham but she did not amend her complaint to reflect that change. We thus refer to her as Pallet throughout this opinion.

[2] The plaintiff and Pallet both originally filed cross appeals in this action but those cross appeals were later withdrawn.

tion of General Statutes §§ 46a-60[3] and 46a-58 (a)[4] with a deprivation of rights secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (Title VII),[5] as its factual predicate." (Footnotes added.) In her complaint, Pallet specifically alleged that Mertens had sexually harassed her by commenting on her appearance and her body, regularly asking her out on dates, and calling and texting her during nonwork hours. Pallet further alleged that Mertens had discriminated against her after she rebuffed his repeated advances, first by reducing her hours and taking away her gas cards, then by firing her, and that "the [plaintiff's] actions have caused me to suffer monetary damages and emotional distress." The plaintiff summarily denied the allegations of sexual harassment and discrimination in Pallet's complaint.

[3] General Statutes § 46a-60 (b) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . (1) [f]or an employer . . . except in the case of a bona fide occupational qualification or need . . . to discharge from employment any individual or to discriminate against any individual in compensation or in terms, conditions or privileges of employment because of the individual's . . . sex . . . ."

Although the legislature has amended § 46a-60 since the events underlying this appeal; see Public Acts 2017, No. 17-118, § 1; Public Acts 2017, No. 17-127, § 4; Public Acts 2019, No. 19-16, § 4; Public Acts 2019, No. 19-93, § 8; Public Acts 2021, No. 21-69, § 1; those amendments have no bearing on the outcome of this appeal. All references herein to § 46a-60 are to the current revision of the statute.

[4] General Statutes § 46a-58 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of . . . sex . . . ."

Although the legislature has amended § 46a-58 since the events underlying this appeal; see Public Acts, Spec. Sess., June, 2015, No. 15-5, § 73; Public Acts 2017, No. 17-111, § 1; Public Acts 2017, No. 17-127, § 2; those amendments have no bearing on the outcome of this appeal. All references herein to § 46a-58 are to the current revision of the statute.

[5] Title 42 of the United States Code, § 2000e-2 (a), provides in relevant part: "It shall be an unlawful employment practice for an employer- (1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ."

The commission scheduled a public hearing, which was held before a referee on March 28, 29 and 30, 2017, and on June 30, 2017. At the hearing, Pallet first testified as to Mertens' harassing and discriminatory conduct.[6] As to the effects Mertens' conduct had on her, Pallet testified on direct examination that Mertens' conduct made her uncomfortable and stressed her out. Specifically, she testified: "The way he wanted me to dress is not usually how I would dress. The shorter outfits when it was cold [were] uncomfortable, extremely uncomfortable. When he just gawked at me when I wore them was demeaning, like I felt less than, like, I felt . . . like a piece of meat, like, I felt dirty." She also testified that her communications with Mertens made her nervous and made her feel like her job was not secure unless she did what he wanted her to do. Pallet further testified that when Mertens fired her after learning that she was still dating her boyfriend: "[I]t just made me question . . . my ability to work around men and be comfortable doing it. It made me feel disgusted with myself and depressed." When asked to describe how the firing affected her life, Pallet testified that she "got really depressed" and felt "worthless . . . ." She testified that her depression caused her to lose interest in things, including engaging in activities with her son, and affected her ability to raise him. She further testified that what happened to her while working for the plaintiff caused her to look for work in just "the medical field with elderly people that . . . maybe don't have any sexual wants or needs."

During her direct examination, Pallet was not asked about and did not testify about any medical treatment that she received to treat her depression. On cross-examination, however, the plaintiff's counsel asked Pallet whether she had ever sought professional help for

[6] Despite the issuance of two subpoenas, Mertens failed to appear at the hearing.

the emotional distress Mertens had caused, and Pallet admitted that she had seen a psychiatrist. The plaintiff's counsel then asked Pallet why she had not produced medical records related to that treatment despite the plaintiff requesting such documents.[7] Pallet's counsel objected, and the referee ruled that, because Pallet was claiming garden-variety emotional distress only, she was not required to produce any medical records. Despite this ruling, the plaintiff's counsel continued to cross-examine Pallet about her psychiatric treatment, and Pallet testified in response to a question by the plaintiff's counsel that the psychiatrist had prescribed her Zoloft. The plaintiff's counsel then commented, apparently directed at Pallet's counsel, "[s]omething else you didn't produce my friend," which led the referee to again state that Pallet was not required to disclose her medical records. On redirect examination, Pallet was not asked any further questions and did not provide any further testimony regarding any medical treatment she received for her depression. Furthermore, although the referee asked Pallet a few questions about payments she received from the plaintiff during her employment, she did not ask questions about the emotional distress the plaintiff claimed or any issues of treatment brought out by the plaintiff's counsel during cross-examination. Pallet did not offer any other evidence regarding any treatment she received for her depression.

In a memorandum of decision dated May 16, 2018, the referee found in favor of Pallet, concluding that she had demonstrated "by a preponderance of the evidence [that she] suffered illegal sexual harassment . . . ."

[7] During discovery, the plaintiff made a request for production of "copies of all medical reports or medical bills received by you for treatment, consultation, or diagnosis of injuries or conditions, which you claim are, or may be related to any claim for injuries you claim you were caused by the actions of the [plaintiff]." Pallet responded: "None."

The referee awarded Pallet $40,398 in back pay and $25,000 in damages for garden-variety emotional distress. The referee's award made no reference to any medical treatment Pallet received for her depression.

Thereafter, the plaintiff appealed to the trial court. On appeal, the plaintiff challenged the referee's damages award for garden-variety emotional distress, claiming that (1) Connecticut does not recognize a claim for garden-variety emotional distress and Pallet did not allege such distress, (2) emotional distress and the associated damages were not proven, and (3) the plaintiff was prejudiced by Pallet's failure to produce her medical records.[8] In their briefs to the trial court, Pallet and the commission argued that the referee's award of garden-variety emotional distress damages was proper because (1) a claim for garden-variety emotional distress damages has long been recognized and (2) proving such damages does not require medical records or expert testimony.

The court disagreed with the plaintiff's first and second claims but agreed that the plaintiff had been substantially prejudiced by Pallet's failure to produce her medical records. More specifically, the court held that the plaintiff was prejudiced because the lack of those records prevented it from fully understanding the treatment Pallet received and inhibited the plaintiff's ability to "effectively cross-examine [Pallet] and offer counter evidence." The court also held that "[l]imiting [Pallet's] claim to garden-variety emotional distress damages did not undo the prejudice" because, "[a]lthough emotional

[8] In its appeal to the trial court, the plaintiff also challenged several other aspects of the referee's final decision, claiming that the referee (1) erred in awarding back pay despite the lack of evidence supporting such an award, (2) improperly made an adverse inference based on Mertens' failure to appear at the hearing, and (3) made numerous erroneous evidentiary rulings. The court rejected these additional claims, and the plaintiff does not challenge on appeal the court's decisions as to those claims.

distress damages may be proven without the need for expert medical evidence, unjustifiably withholding discoverable evidence relevant to the claim and the related damages is a separate issue, and may still impact the ability to defend that claim." On the basis of that prejudice, the court vacated the referee's damages award for garden-variety emotional distress. The commission then appealed to this court.

We begin by setting forth the applicable standard of review and principles of law that guide our analysis. "It is well established that [j]udicial review of [an administrative agency's] action is governed by the Uniform Administrative Procedure Act [(UAPA) General Statutes § 4-166 et seq.] . . . and the scope of that review is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . [F]or conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Citation omitted; internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Cantillon*, 207 Conn. App. 668, 672, 263 A.3d 887, cert. granted, 340 Conn. 909, 264 A.3d 94 (2021).[9]

[9] The Supreme Court granted certification limited to the following issue: "Did the Appellate Court correctly conclude that the trial court had properly determined that the human rights referee adjudicating the underlying housing discrimination claim applied the proper legal principles in awarding the claimant 'garden-variety' damages for emotional distress in the amount of $15,000 against the named defendant, a neighbor who repeatedly subjected the claimant to racially motivated verbal and physical harassment?" *Commission on Human Rights & Opportunities* v. *Cantillon*, 340 Conn. 909, 909–10, 264 A.3d 94 (2021).

Claims for garden-variety emotional distress "are cognizable under Connecticut law." *Connecticut Judicial Branch* v. *Gilbert*, 343 Conn. 90, 127 n.25, 272 A.3d 603 (2022). Such claims "refer to claims for compensation for nothing more than the distress that any healthy, well-adjusted person would likely feel as a result of being so victimized . . . ." (Internal quotation marks omitted.) *Equal Employment Opportunity Commission* v. *Nichols Gas & Oil, Inc.*, 256 F.R.D. 114, 121 (W.D.N.Y. 2009); see also *Ruhlmann* v. *Ulster County Dept. of Social Services*, 194 F.R.D. 445, 449 n.6 (N.D.N.Y. 2000) ("[g]arden-variety emotional distress is that which [is] simple or usual"). A plaintiff's recovery for garden-variety emotional distress "is not preconditioned on whether [the plaintiff] underwent treatment, psychiatric or otherwise." (Internal quotation marks omitted.) *Olsen* v. *County of Nassau*, 615 F. Supp. 2d 35, 46 (E.D.N.Y. 2009). Instead, "the evidence of mental suffering is generally limited to the testimony of the plaintiff, who describes his or her injury in vague or conclusory terms, without relating either the severity or consequences of the injury. . . . Such claims typically [lack] extraordinary circumstances and are not supported by any medical corroboration." (Citations omitted; internal quotation marks omitted.) Id.; see also *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 706–707, 41 A.3d 1013 (2012) (plaintiff's testimony about mental suffering was sufficient on its own to support claim for garden-variety emotional distress).

On appeal, the commission claims that the court erred when it found that the plaintiff was substantially prejudiced by Pallet's failure to disclose her medical records because Pallet was not required to disclose those records, given that she was asserting a claim only for garden-variety emotional distress. We agree.

Our Supreme Court's recently released decision in *Connecticut Judicial Branch* v. *Gilbert*, supra, 343

Conn. 90, is instructive. In *Gilbert*, the complainant, a judicial marshal who was employed by the Connecticut Judicial Branch, "brought a claim with the commission alleging that another judicial marshal, Gordon Marco, subjected her to severe and pervasive sexual harassment and unwanted sexual contact, potentially rising to the level of sexual assault, at various times between 2006 and 2012, while she was stationed primarily at the Danielson courthouse. The complainant alleged that the branch discriminated against her on the basis of her gender by, among other things, subjecting her to a hostile work environment, failing to adequately investigate her allegations, and failing to take adequate remedial steps to protect her. The complainant also claimed that the branch had retaliated by altering the conditions of her employment in response to her complaint . . . [by relocating her to courthouses that were] significantly farther from her residence." Id., 97–98.

After the public hearing before the commission, the referee found that the complainant's allegations were substantiated. Id., 98. The referee awarded the complainant back pay with prejudgment and postjudgment interest, $47,637 in attorney's fees, and $50,000 in damages for emotional distress. Id. The referee also granted the complainant injunctive relief in the form of an order that " '[t]he [branch] shall give the complainant the option of returning to the Danielson courthouse.' " Id.

Thereafter, the branch appealed to the trial court claiming, inter alia, that "the referee's award of emotional distress damages . . . was improper because the complainant refused to provide the branch with her psychological and medical records, allegedly in violation of the referee's discovery orders . . . ." Id., 99. The court agreed with the branch's discovery claim and, accordingly, vacated the referee's damages award for emotional distress. Id.

On appeal, our Supreme Court reversed the trial court's judgment with respect to, inter alia, its decision to vacate the damages award.[10] Id., 97. The court first provided some additional facts and procedural history relevant to this issue, which we summarize at length. During the proceedings before the commission, the branch issued the following discovery request to the complainant and the commission: " 'Please produce all medical records, counseling records, office notes, or other documents, if any, identifying any and all medical professionals who[m] the complainant consulted with or was treated by for emotional damages and/or physical damages that the complainant contends are related to [her] claims of discrimination.' " Id., 128. No records were ever produced in response to this request. Id. The complainant's initial witness lists, however, included a therapist and a psychologist who had provided mental

[10] In the branch's appeal to the trial court, the branch made the following additional claims of error: "(1) . . . prior to 2019, the commission was not authorized to award attorney's fees and emotional distress damages to victims of employment discrimination under either § 46a-58 (a) or § 46a-60, (2) the award of prejudgment and postjudgment interest against the state under [General Statutes] § 46a-86 (b) is barred by the state's sovereign immunity . . . and (4) the referee exceeded her legal authority in ordering the branch to reinstate the complainant to her position at the Danielson courthouse." (Footnote omitted.) *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 99.

The trial court disagreed with the branch's first claim, concluding that, although "emotional damages and attorney's fees are unavailable for violations of § 46a-60 that occurred before 2019," such remedies are available to victims of employment discrimination when those victims also allege violations of federal employment discrimination laws, as was the case in *Gilbert*. Id., 99–100. With respect to the second claim, the court again disagreed with the branch, finding that "the state ha[d] waived its sovereign immunity as to prejudgment and postjudgment interest for civil rights violations." Id., 100. As to the branch's fourth claim, the court agreed with the branch and, accordingly, also vacated the referee's injunction. Id., 99.

Our Supreme Court then affirmed the trial court's holding on the first claim, reversed the trial court's holding on the second claim, and remanded for further proceedings on the fourth claim. Id., 97. Because none of these holdings is central to the issues implicated in the present case, we do not discuss them in detail in this opinion.

health treatment to the complainant and whom she intended to call in support of her claim for emotional distress damages. Id. The branch objected to this proposed testimony because the complainant had failed to provide any records related to either witness. Id.

The referee in *Gilbert* ruled on the branch's objection off the record and, according to the branch's characterization of that ruling, ordered that " '*if the complainant intended on pursuing anything other than garden-variety emotional distress* [*damages*], *she needed to provide copies of her psychological or mental health records*.' " (Emphasis in original.) Id., 129. Despite this order, the complainant still did not produce her complete medical records and, instead, ultimately produced a single record, which she alleged was her psychologist's original treatment notes. Id., 129–30. Accordingly, prior to the hearing, the referee ruled that the complainant could "put on evidence in support of her claim for garden-variety emotional distress but could not introduce medical records or other treatment related evidence of emotional distress damages [unless the complainant first produced her entire medical records]." Id., 131.

"At the hearing, the branch repeatedly objected to the admission of the complainant's evidence [as to garden-variety emotional distress] on two grounds. First . . . the branch argued that the complainant should be barred from introducing evidence even of garden-variety emotional distress. It contended that, without access to the complainant's medical records, it could not adequately cross-examine her regarding those claimed damages. The referee overruled those objections, stating that, in her view, the branch had an adequate opportunity for cross-examination without the records. Accordingly, the complainant was permitted to testify that she felt 'dirty,' victimized, embarrassed, ashamed, and fearful as a result of Marco's conduct

and the branch's inadequate response. She [also] testified that, following the incidents, she had ceased to be a happy person; she suffered anxiety and nervousness, and would wake in the night crying. . . .

"Second, the branch contended that some of the testimony by the complainant and her lay witnesses crossed the threshold from garden-variety to treatment related emotional distress damages because the testimony occasionally alluded to or directly referenced the complainant's use of mental health counseling and pharmaceuticals to treat her emotional distress. The referee's response to this second category of objections was not a model of clarity or consistency. When the branch objected to the complainant's testimony that her physician had prescribed daily Lexapro for depression and anxiety, the referee allowed her to testify as to the medication but not the amount. When the branch objected to testimony that the complainant saw [a therapist], the referee allowed the complainant . . . to testify that she went to [a therapist] but not about the 'particulars' as to what occurred at the therapist's office. When the branch objected to testimony that the complainant was taking Tylenol PM and prescription sleep aids, the referee responded: 'We really can't get into too much medical information, because we're not doing this based on her treatment. . . . [L]et's rephrase; just the over-the-counter [medications] that you know of . . . which does not have anything to do with records.' Finally, when the branch objected to testimony regarding the complainant's use of Xanax, the referee ruled: 'I think we're not getting into physician visits. I outlined in the beginning what garden-variety emotional distress is and how it's analyzed. I really don't think [that] taking a medic[ation] necessitates a review of medical records, but I don't want to get into more treatment or anything that happened with a doctor. . . . I really don't understand [the branch's] objection because . . . I'm not letting in any evidence that pertains to [the complainant's]

treatment. I know [that her husband] mentioned a prescription. We can strike that prescription . . . from the record . . . .'' Id., 131–33.

In her memorandum of decision, the referee in *Gilbert* largely avoided any mention of the complainant's use of medication or counseling services. Id., 133. Her factual findings, however, did include ''three references to the complainant's use of 'a prescription drug' or 'medication' to treat insomnia, anxiety, and chest pains arising from the alleged abuse.'' Id., 133–34. ''Ultimately, the referee found that the complainant had suffered emotional distress as a result of the branch's discriminatory treatment . . . [and] awarded the complainant $50,000 in emotional distress damages.'' Id., 134.

On appeal to the trial court, the court concluded that the referee's damages award was an abuse of discretion and, accordingly, vacated the award, stating: '' '[The complainant] withheld clearly discoverable, nonprivileged information without justification and despite the referee's order otherwise. . . . [T]he court cannot allow such unilateral, unjustified and fundamentally unfair action to go without consequence, particularly when it prejudices the other side. . . . The referee should have precluded all evidence concerning emotional and physical distress unless the proper discovery was provided. The referee's decision to allow garden-variety emotional distress evidence was made pursuant to improper procedure [and] was a clear error of law . . . .' '' Id.[11]

[11] We note that the same trial court, *Cordani, J.*, decided the administrative appeals in both *Gilbert* and the present case. We further note that the quoted language of the trial court's order in *Gilbert* is strikingly similar to the court's order in the present case: ''Complainant withheld clearly discoverable, nonprivileged information without justification. The court cannot allow such unilateral, unjustified and fundamentally unfair action to go without consequence, particularly when it prejudices the other side.'' These similarities make our Supreme Court's analysis and decision in *Gilbert* all the more relevant in the present case.

The Supreme Court in *Gilbert* disagreed, concluding that "the trial court's judgment rests on a flawed analysis." Id., 134. According to the court, the complainant's testimony on garden-variety emotional distress was proper despite her failure to disclose the majority of her medical records because when complainants are seeking damages only for garden-variety emotional distress, they are not required to disclose their medical records. Id., 136–38 (complainant was permissibly "given a choice by the referee that allowed her to refuse production of [her] medical records without violating the [referee's] order [which limited the complainant to garden-variety emotional distress damages]").[12] Thus, a complainant claiming only garden-variety emotional distress who fails to disclose his or her medical records properly is allowed to testify about "the sorts of everyday emotional and physical reactions to trauma that a jury reasonably could be expected to assess without the assistance of expert testimony . . . [as long as that testimony] does not involve a claim . . . that the emotional distress required professional medical/psychological diagnosis, treatment, or medication." Id., 127 n.25, 136–38. Testimony regarding a complainant's use of medications, counseling, or other medical treatment, however, "crosses the line into treatment related emotional distress and, thus, places [the complainant's] medical history at issue." Id., 138. In such cases, a complainant is required to disclose his or her medical records in order to obtain a damages award for that treatment related emotional distress. See id.

[12] We note that this holding in *Gilbert* is consistent with the holding of the United States Court of Appeals for the Second Circuit on the same issue. See *In re Sims*, 534 F.3d 117, 134, 141 (2d Cir. 2008) (when complainant makes claim only for garden-variety emotional distress, complainant is not required to disclose, and opposing party does not have legal right to, complainant's medical or psychiatric records); see also *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 415, 944 A.2d 925 (2008) (Connecticut's appellate courts "review federal precedent concerning employment discrimination for guidance in enforcing our own antidiscrimination statutes").

Accordingly, in *Gilbert*, the complainant's testimony that she felt " 'dirty,' victimized, embarrassed, ashamed, and fearful," suffered "anxiety and nervousness," and "ceased to be a happy person," all because of the harassment; id., 132; was properly admitted and could form the basis for the referee's garden-variety emotional distress damages award, even though the complainant produced almost none of her medical records, because such testimony was limited to garden-variety emotional distress. See id., 136–38; see also *Equal Employment Opportunity Commission* v. *Nichols Gas & Oil, Inc.*, supra, 256 F.R.D. 121 (garden-variety emotional distress is distress that " 'any healthy, well-adjusted person would likely feel as a result of being . . . victimized' "). The complainant's testimony about "her use of various over-the-counter and prescription medications to treat her insomnia and anxiety," however, crossed the line from garden-variety emotional distress into treatment related emotional distress. See *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 138–39. Consequently, the court held that, given the lack of medical records, allowing the complainant to testify about medications she had taken was an abuse of discretion because such testimony was not limited to garden-variety emotional distress. Id. The court further held that, although it was a close call, the erroneous admission of this testimony was not harmless because the referee had made several factual findings regarding the complainant's need for medication and the court was unable to conclude "that the improperly admitted evidence did not factor into her damages calculation." Id., 139–40. Therefore, the court remanded the matter for a new hearing in damages where the complainant would be allowed to present evidence only of garden-variety emotional distress and the referee would be limited to awarding damages for such emotional distress. Id., 140.

On April 27, 2022, following the release of our Supreme Court's opinion in *Gilbert*, we ordered the

parties in the present case to submit supplemental briefs addressing the impact, if any, of *Gilbert* on the commission's claim on appeal. The parties thereafter filed supplemental briefs in accordance with this court's order. In the supplemental brief filed by the commission, the commission argues that *Gilbert* supports its claim that the trial court erred in vacating Pallet's damages award because the result in *Gilbert* makes clear that, when a complainant seeks only garden-variety emotional distress damages—as Pallet did here—the complainant is not required to disclose his or her medical records. The commission also argues that a new damages hearing is not required in the present case because here, unlike in *Gilbert*, (1) it was only opposing counsel who solicited testimony about Pallet's medical history and (2) the referee did not reference that medical history in either her findings or her decision. Conversely, the supplemental brief filed by the plaintiff claims that the present case is distinguishable from *Gilbert* and that *Gilbert* "does not impact the decision rendered by the court below which is the subject of [the present] appeal." More specifically, the plaintiff contends that the court's decision to vacate Pallet's damages award was proper, even in light of *Gilbert*, because the court "found that discoverable documents were inappropriately withheld . . . [which] clearly prejudiced the [plaintiff]" and the referee in the underlying proceedings never held a hearing on Pallet's medical records. We agree with the commission.

On the basis of our Supreme Court's decision in *Gilbert*, we conclude that the court in the present case erred when it held that the plaintiff was prejudiced by Pallet's failure to produce her medical records because Pallet's allegations and her direct testimony at the public hearing were limited to garden-variety emotional distress, and the referee's decision and damages award were also so limited. We further hold that, unlike in

Gilbert, a new damages hearing is not required because the plaintiff is in no position to complain about Pallet's testimony regarding medical treatment when its counsel, after being instructed that such evidence was not relevant, insisted on asking questions that resulted in that testimony, and there is nothing in the record that establishes that the referee relied on such evidence when awarding Pallet damages for garden-variety emotional distress.

Specifically, in the present case, unlike in *Gilbert*, Pallet never gave any indication throughout the entire proceedings before the commission that she was seeking anything other than garden-variety emotional distress damages. In her complaint, Pallet stated that she suffered emotional distress as a result of Mertens' harassment. The complaint did not assert an independent cause of action for emotional distress or any claims for a specific mental disorder or condition. Further, Pallet did not allege that Mertens' conduct had a significant impact on her physical health. Accordingly, the allegations in her complaint were consistent with a claim for garden-variety emotional distress. See *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 132, 136–39 (testimony that sexual harassment caused anxiety and sadness was consistent with claim for garden-variety emotional distress); see also *Safeco Ins. Co. of America* v. *Vecsey*, 259 F.R.D. 23, 30 (D. Conn. 2009) (complainant's allegation of mental distress, "which [was] unaccompanied by any independent cause of action for mental distress . . . or claim for a specific mental disorder or condition," was claim for garden-variety emotional distress); *Olsen* v. *County of Nassau*, supra, 615 F. Supp. 2d 47 (treatment related emotional distress claims generally involve "outrageous or shocking discriminatory conduct or a significant impact on the [complainant's] physical health" (internal quotation marks omitted)).

Pallet's testimony during the hearing, specifically that Mertens' harassment caused her to feel nervous, dirty, "like a piece of meat," worthless and disgusted with herself, and caused her to be depressed and to lose interest in things, also was consistent with a claim for garden-variety emotional distress. See *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 132, 136–39; see also *Equal Employment Opportunity Commission* v. *Nichols Gas & Oil, Inc.*, supra, 256 F.R.D. 121 (garden-variety emotional distress refers to distress that " 'any healthy, well-adjusted person would likely feel as result of being . . . victimized' "). Unlike the complainant in *Gilbert*, who erroneously was allowed to testify, over the branch's objection, that she had taken medication to manage her anxiety and depression; *Connecticut Judicial Branch* v. *Gilbert*, supra, 138–39; Pallet did not testify on direct examination at all about any medical or psychiatric treatment. The topic was never raised by her, her counsel, or the referee. Instead, Pallet merely testified about how Mertens' harassment made her feel. Such testimony, in the absence of any mention of medical intervention, is not enough to cross the line into testimony about treatment related emotional distress. See id., 132, 136–39 (complainant's testimony that "she had ceased to be a happy person" constituted garden-variety emotional distress). Instead, such testimony is consistent with a claim for garden-variety emotional distress. See id.; see also *In re Sims*, 534 F.3d 117, 133–34 (2d Cir. 2008) (complainant who states that he or she suffers from depression makes claim only for garden-variety emotional distress). Pallet did not offer any other evidence regarding her medical treatment.

The plaintiff is correct that, at one point during the proceedings, Pallet testified that she had seen a psychiatrist and had been prescribed Zoloft. This testimony, however, occurred during cross-examination and was

in response to questions that the *plaintiff's counsel* asked, despite being repeatedly cautioned by the referee that the proceeding was limited to garden-variety emotional distress. The fact that Pallet's testimony about medical treatment occurred during cross-examination distinguishes it from the testimony that our Supreme Court found improper in *Gilbert*. In *Gilbert*, it was the complainant and her witnesses who introduced inadmissible evidence about her use of medication through their testimony on direct examination, over the branch's objections. *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 138–39. In the present case, however, any prejudice that might have resulted from Pallet's testimony about psychiatric treatment and medication was caused solely by the plaintiff because its counsel inquired into Pallet's medical treatment and elicited testimony about that treatment even though the subject was never raised in Pallet's direct testimony and the referee repeatedly told the plaintiff's counsel that such evidence and records were not relevant. We simply are unpersuaded by the plaintiff's claim of harm that was self-inflicted.

Furthermore, on redirect examination, Pallet was not asked any questions about the treatment the plaintiff's counsel brought out on cross-examination. Moreover, although the referee asked Pallet questions on another topic, she did not ask her questions about any medical treatment she received.

Finally, the referee in the present case took great pains to ensure that the hearing and her eventual decision and damages award were limited to garden-variety emotional distress. During the hearing, the referee repeatedly characterized Pallet's complaint as alleging only garden-variety emotional distress, a characterization that neither Pallet nor her counsel ever disputed. Moreover, and again unlike in *Gilbert*, the referee in

the present case did not make any factual findings about the complainant receiving psychiatric treatment or taking medication to manage her emotional distress. In fact, a review of the referee's final decision makes clear that the referee's damages award was limited to damages for garden-variety emotional distress and that the award was exclusively based on Pallet's testimony about the depression and other distress she had experienced because of Mertens' harassment.

Accordingly, because it is clear from the record that Pallet was making a claim only for garden-variety emotional distress, she was not required to disclose her medical records and the plaintiff, thus, was not entitled to receive those records. See id., 136–38 (complainant is limited to garden-variety emotional distress damages when he or she declines to provide his or her full medical records); see also *Olsen* v. *County of Nassau*, supra, 615 F. Supp. 2d 46 ("[i]n garden-variety emotional distress claims, the evidence of mental suffering is generally limited to the testimony of the plaintiff" (internal quotation marks omitted)). Therefore, because the plaintiff did not have a right to Pallet's medical records, the plaintiff could not have been prejudiced by Pallet's failure to produce those records.[13]

We are equally unpersuaded by the plaintiff's claim, made in its supplemental brief, that Pallet should not have been allowed to present evidence on garden-variety emotional distress at all because the referee never held a hearing to determine which medical records Pallet was or was not required to produce. According to the plaintiff, such a hearing was held in *Gilbert* and it was only because of that hearing that the complainant was allowed to present evidence on garden-variety emo-

[13] We also note that, at oral argument before this court, the plaintiff conceded that it would have no right to Pallet's medical records if all that Pallet was claiming was garden-variety emotional distress.

tional distress. Thus, the plaintiff contends that, because no such hearing was held in the present case, Pallet was barred from testifying about garden-variety emotional distress. We disagree. Nowhere in *Gilbert* did our Supreme Court state that a hearing on medical records is a prerequisite to a complainant being allowed to present evidence of garden-variety emotional distress. See *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 136–40. To the contrary, the court's holding in *Gilbert* is clear that when a claimant limits her claim to one for garden-variety emotional distress damages, her medical records have no relevance. See id. Hence, there is no need for such a hearing.

In sum, the referee did not abuse her discretion when she awarded Pallet damages for garden-variety emotional distress because, as explained in *Gilbert*, Pallet was permitted to testify about her depression without first disclosing her medical records, given that such testimony went to garden-variety, and not treatment related, emotional distress. See id., 136–38. In addition, the plaintiff was not prejudiced by Pallet's failure to disclose her medical records because Pallet confined her claim and evidence to garden-variety emotional distress and the referee confined the hearing, her decision, and her damages award to garden-variety emotional distress, which the referee had every right to do. See id. (referees can properly limit proceeding to claim for garden-variety emotional damages). Furthermore, any prejudice that the plaintiff may have experienced was caused solely by its counsel's actions and cannot properly be attributed to either Pallet or the referee. Last, a new hearing in damages is not required in the present case, even though one was required in *Gilbert*, because the record here makes clear that the referee did not rely on any testimony about treatment related emotional distress in reaching her decision. Thus, the court erred when it vacated the referee's damages award because

it incorrectly concluded that the plaintiff was prejudiced by Pallet's failure to disclose her medical records.[14]

The judgment is reversed with respect to the decision vacating the damages award, and the case is remanded to the trial court with direction to deny the plaintiff's administrative appeal.

In this opinion the other judges concurred.

EARL W. SWAIN *v.* TINA N. SWAIN
(AC 44591)

Elgo, Alexander and Harper Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court granting in part the defendant's motion to modify the existing child support, custody, visitation and parental access orders with regard to the parties' four minor children. Pursuant to those orders, the plaintiff had sole legal custody and primary physical residence of the children, with a specific visiting and access schedule for the defendant and payment of child support from the defendant to the plaintiff. The defendant's motion requested, inter alia, sole custody of the children and a suspension of the support order. After a hearing, the court granted the defendant's motion to modify as to access and visitation, issued a revised parenting schedule and reduced her weekly support obligation. On the plaintiff's appeal to this court, *held* that the plaintiff could not prevail on his claim that the trial court improperly modified the orders as to visitation, the parental access plan and child support because the defendant's motion sought to modify only custody: the plain language of the defendant's motion placed before the court the issues of custody, visitation and the parental access schedule, the defendant testified at the hearing that she had difficulties complying with the orders as to child support and the parental access schedule and proposed a new visitation and access schedule, and the plaintiff declined to present rebuttal witnesses to the defendant's testimony; moreover, none of the

[14] In light of our conclusion that the court erred in vacating the referee's damages award because the plaintiff was not prejudiced by Pallet's failure to disclose her medical records, we do not address the commission's alternative argument that the plaintiff did not adequately brief its claim of prejudice before the trial court.

requests by the plaintiff's counsel for clarifications of the court's oral ruling concerned the scope of the ruling compared to the motion to modify.

Argued February 1—officially released June 21, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Middlesex and tried to the court, *Shluger*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Diana*, *J.*, granted in part the defendant's motion to modify child support, custody and visitation, and the plaintiff appealed to this court. *Affirmed.*

Gregory A. Allen, with whom were *Lauren E. Higgs*, and, on the brief, *Alissa M. Korwek*, for the appellant (plaintiff).

Opinion

ELGO, J. The plaintiff, Earl W. Swain, appeals from the judgment of the trial court granting in part a post-judgment motion to modify filed by the self-represented defendant, Tina N. Swain.[1] On appeal, the plaintiff claims that the court improperly modified the existing orders as to visitation, the parental access plan, and child support because the defendant's motion to modify sought only to modify custody.[2] We disagree and, accordingly, affirm the judgment of the court.

[1] The defendant, now known as Tina Perez-Ocasio, has not participated in this appeal. Accordingly, we decide this appeal on the basis of the record, the plaintiff's appellate brief, and the plaintiff's oral argument.

[2] The plaintiff organizes his appeal into two different claims challenging the court's orders on (1) visitation and parental access, and (2) child support. To avoid substantive overlap, we consider the plaintiff's claims together. See *Rozbicki* v. *Gisselbrecht*, 152 Conn. App. 840, 845, 100 A.3d 909 (2014) (reorganizing claims on appeal), cert. denied, 315 Conn. 922, 108 A.3d 1123 (2015).

The following facts and procedural history are relevant to our resolution of this appeal.[3] On December 15, 2015, the court, after a contested trial, rendered judgment dissolving the parties' marriage by way of memorandum of decision. The court originally awarded the parties' joint legal custody of their four minor children, who were born in 2007, 2010, 2012, and 2013, with final decision-making authority and primary residence awarded to the plaintiff. The court ordered that the defendant, who was then residing in Maine, shall have visitation with the children on certain prescribed dates and shall pay the plaintiff $164 per week in child support. The court further ordered that the parties shall have telephone access with the children when not physically with them.

Following the dissolution of their marriage, the parties engaged in seven years of contentious postdissolution proceedings. On February 22, 2018, the court, after another contested hearing, awarded the plaintiff sole

[3] At the outset, we note that the appendix to the plaintiff's appellate brief is incomplete, as it selectively excerpts portions of the record referenced in his appellate brief, contains only photographs of certain filings, and does not include a full copy of the defendant's December 14, 2020 motion for modification that is the subject of this appeal. See Practice Book (2021) § 67-8 (b) (1) (directing that appellant's appendix shall contain "in chronological order, all relevant pleadings, including the operative complaint and any other complaint at issue, motions, requests, findings, and opinions or decisions of the trial court or other decision-making body"). At oral argument before this court, the plaintiff's counsel indicated that the selective incorporation of filings in his appendix was due to the manner in which he received the filings from the defendant. The plaintiff's incomplete appendix unnecessarily complicates our review, and we do not condone the plaintiff's noncompliance. This deficiency, however, does not preclude our review of the plaintiff's claim on appeal because we are able to examine the physical trial court file for the many filings not contained within his appendix. See Practice Book § 60-2 (2) (this court may "consider any matter in the record of the proceedings below necessary for the review of the issues presented by any appeal, regardless of whether the matter has been included in any party appendix"); see also *State* v. *Lawler*, 30 Conn. App. 827, 828 n.2, 622 A.2d 1040 (1993) (excusing appellant's failure to include pertinent material in his appendix).

legal custody and primary residence of the parties' four children. As for visitation and access, the court ordered that the defendant, who was still residing in Maine, shall have visitation with the children at specific times on certain holidays and periods during the summer. The court ordered that the defendant shall be responsible for all transportation related to her access, and that the exchanges shall occur at the plaintiff's residence in Connecticut. As for child support, the court ordered that the defendant shall pay the plaintiff $70 per week, suspended during the defendant's access periods.

On November 25, 2019, the court issued a postjudgment order, pursuant to the parties' agreement, modifying the visitation and access schedule. Particularly, the court ordered that the defendant, who had moved to Virginia, shall have visitation with the children in Connecticut for the weekends of Columbus Day, Martin Luther King, Jr., Day, Presidents Day, Easter, and Thanksgiving; Christmas between December 26 and January 1; and the weeklong April vacation. The new parental access plan also afforded the defendant visitation with the children in Virginia for summer vacation during the month of July.

On December 14, 2020, the defendant filed a motion to modify the existing child support, custody, visitation, and parental access orders.[4] In that motion, the defendant asserted that there was a substantial change in circumstances because the plaintiff and his mother "are incapacitated [with] COVID-19, put the children's lives in danger, [and] violated [Connecticut] rules." As for child support, the defendant sought that the court "suspend [the] current support order." As for custody, the defendant requested that the court award "sole custody

[4] The plaintiff on appeal construes the defendant's motion to modify as seeking only to obtain sole legal custody of the children, and his appendix contains a photograph of only the first page of this motion. That characterization is unsupported by the content of the defendant's motion to modify.

to [the] defendant mother." As for visitation and the parental access schedule, the defendant requested that the court order "no visitation for [the] plaintiff father at this time due to contagious COVID-19 infection until proof of negative test results" and that "after negative test results [the] plaintiff to have same visitation schedule that the defendant had."

On January 15, 2021, the court held a remote hearing as to five pending motions, including the defendant's motion to modify.[5] The plaintiff presented the testimony of Old Saybrook Police Officer Charles Kostek, the defendant, and Attorney Justine Rakich-Kelly, who was the appointed guardian ad litem for the children, and he also testified. The defendant then presented her case by way of narrative testimony, with certain questions from the court as to the issues raised by each of the five motions at issue. The defendant relevantly testified regarding her difficulty complying with the existing orders as to child support and the parental access schedule and her proposal for a new visitation and access schedule. After the defendant rested her case, the plaintiff declined the court's invitation to present any rebuttal witnesses.

At the conclusion of that hearing, the court issued an oral ruling granting in part the defendant's December 14, 2020 motion to modify the existing child support, custody, and visitation orders. The court granted the motion to modify as to access and visitation, holding that it "find[s] the testimony of the defendant credible.

[5] The other four motions heard by the court at the January 15, 2021 hearing were the plaintiff's August 12, 2020 motion for contempt, the plaintiff's August 14, 2020 motion for contempt, the plaintiff's October 2, 2020 motion for modification of visitation, and the plaintiff's October 16, 2020 motion for modification of visitation. Although the plaintiff's appellate brief states that the court denied all of his motions, a review of the transcript clearly establishes that the court granted his October 2, 2020 motion to modify visitation in order to ensure the parties' compliance with COVID-19 safety protocols.

The parties have four children. The court is going to grant the motion to modify with regard to [the defendant's] access. I believe it's in the best interest of these children, and I want to dial back the temperature on all this." The court issued a revised parental access schedule providing that the defendant shall have visitation with the children "for [the time between] the first five days after the children end school and the five days before they start school," Christmas vacation, Thanksgiving, and spring vacation. The court ordered that transportation for visitation was to be completed on the basis of an agreement of the parties, but, "[i]f there's no agreement on that, then one person drives down and one person drives back." The court also ordered telephone access to be "Monday evening between 6:30 and 8:30, one call [on] Skype a week." The court then denied the defendant's motion to modify as to custody, holding that there was no material change in circumstances to justify her request for sole legal custody. The court's oral decision did not specifically address the defendant's motion to modify as to child support. After the court issued its oral ruling, the plaintiff's counsel confirmed that the court did not "miss a motion," and asked for several clarifications, none of which contested the scope of the court's ruling compared to the relief sought by the defendant's motion to modify.

On the same day as the January 15, 2021 hearing, the court issued a written order further granting the defendant's motion to modify as to visitation and child support.[6] The court ordered that "the defendant do all the transportation for visitation and thereby reducing

[6] The plaintiff's appellate brief asserts that this written order was not issued until April 8, 2021. It is true that the court later issued a JDNO notice of this January 15, 2021 written order on April 8, 2021. Although the plaintiff may not have been aware of this January 15, 2021 written order until he received the April 8, 2021 JDNO notice, it is apparent from the JDNO notice itself as well as the trial court file that this written order was issued by the court on the same date as its oral ruling at the January 15, 2021 hearing.

her weekly child support obligation by $50 per week. [The] [d]efendant's child support payments to the plaintiff are suspended for any weeks that she has visitation with the children for 5 days or more."[7] The plaintiff filed a motion to reargue the court's decision, which the court denied. This appeal followed.

On appeal, the plaintiff claims that the court improperly modified the existing orders as to visitation, the parental access plan, and child support because the defendant's motion to modify sought only to modify custody.[8] In support, the plaintiff argues that, "by the court taking the action it did, the plaintiff was deprived of an opportunity to argue and present evidence as to the details of why the [then existing orders] should not be changed . . . ."[9] We disagree.

[7] There is some uncertainty within the plaintiff's appellate brief as to the amount of the defendant's child support obligation. At the January 15, 2021 hearing, the plaintiff's counsel questioned the defendant regarding her child support obligations imposed by Magistrate Gilman in the amount of $209 per week, to commence on November 19, 2020. Conversely, in his appellate brief, the plaintiff does not identify which order was operative, and instead represents that the court "reduced the defendant's child support obligation from $164 to $50 per week . . . ." This statement implies that the original child support order of $164 from the court's December 15, 2015 judgment of dissolution—not the subsequent November 19, 2020 order by Magistrate Gilman or the February 22, 2018 modification—was operative at the time of the January 15, 2021 hearing. Regardless, the plaintiff misreads the court's January 15, 2021 written order because that order *reduces* the defendant's child support obligation "by $50 per week," not orders the defendant to *pay* $50 per week.

[8] The plaintiff on appeal does not challenge the substantive merits of the court's decision on any other ground, including that the court's decision was not supported by evidence, the court failed to consider the pertinent statutory factors, the court's decision contained clearly erroneous factual findings, the court's decision was beyond the specific grounds for modification alleged in the parties' motions, or it otherwise was improper. Instead, the plaintiff's narrow appeal is limited to the scope of the court's January 15, 2021 orders as compared to the existing orders that the defendant' motion to modify sought to change.

[9] The plaintiff in passim makes a technical argument that the court improperly modified the existing orders as to visitation and the parental access plan because "both parties could not meet their burden in establishing that a modification was in the best interest of the children because, according to

We begin with the standard of review and relevant legal principles. Because the plaintiff's claim requires us to interpret both the court's orders as well as the defendant's motion to modify, our review is plenary. See *Meyers* v. *Livingston*, *Adler*, *Pulda*, *Meiklejohn & Kelly*, *P.C.*, 311 Conn. 282, 290, 87 A.3d 534 (2014) (plenary review applies to interpretation of pleadings); *Sosin* v. *Sosin*, 300 Conn. 205, 217, 14 A.3d 307 (2011) (plenary review applies to interpretation of trial court's judgment).

In general, a court's decision is restricted to those issues raised by the parties in their pleadings and in argument. "[P]leadings have their place in our system

the factual finding of the trial court, no substantial change in circumstances existed at the time of trial." This argument conflates the differing standards required to modify visitation, child support, and custody. See, e.g., *Balaska* v. *Balaska*, 130 Conn. App. 510, 515, 25 A.3d 680 (2011) ("[i]n ruling on a motion to modify visitation, the court is not required to find as a threshold matter that a change in circumstances has occurred"). Accordingly, the court's determination that there was no substantial change in circumstances sufficient to modify custody does not necessarily mean that the modification of visitation and access is not supported by the best interests of the children.

At oral argument before this court, the plaintiff's counsel repeatedly represented that the cases cited in his brief stand for the proposition that a court must make the determination that a substantial change in circumstances has occurred to modify an existing visitation order. A review of these cases does not support the representations made by the plaintiff's counsel. See *Dufresne* v. *Dufresne*, 191 Conn. App. 532, 538–39, 215 A.3d 1259 (2019) (outlining standard used by underlying trial court decision, which provided that modification of custody requires determination that substantial change in circumstances existed); *Petrov* v. *Gueorguieva*, 167 Conn. App. 505, 522 n.16, 146 A.3d 26 (2016) (holding that "there is an important distinction to be drawn between motions to modify custody, which generally require a material change in circumstances . . . and motions to modify visitation alone, which *do not require a material change*" (citation omitted; emphasis added)); *Kelly* v. *Kelly*, 54 Conn. App. 50, 55–57, 732 A.2d 808 (1999) (holding that "material change in circumstances" is required to modify custody and that modification of visitation is guided by best interest of child standard); *Emerick* v. *Emerick*, 28 Conn. App. 794, 802, 613 A.2d 1351 (holding that "substantial change in circumstances" is required to modify child support order, which " 'is wholly independent of the right of visitation' " (internal quotation marks omitted)), cert. denied, 224 Conn. 915, 617 A.2d 171 (1992).

of jurisprudence. While they are not held to the strict and artificial standard that once prevailed, we still cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them. . . . It is fundamental in our law that the right of a [party] to recover is limited to the allegations in his [pleading]. . . . Facts found but not averred cannot be made the basis for a recovery. . . . Thus, it is clear that [t]he court is not permitted to decide issues outside of those raised in the pleadings. . . . It is equally clear, however, that the court must decide those issues raised in the pleadings. . . . This rationale extends equally to motions." (Citation omitted; internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, 210 Conn. App. 725, 753, 271 A.3d 141 (2022); see also *Doe* v. *Cochran*, 332 Conn. 325, 333, 210 A.3d 469 (2019) (stating that pleadings should be read broadly and realistically, not narrowly and technically); *Morneau* v. *State*, 150 Conn. App. 237, 239 n.2, 90 A.3d 1003 (outlining established Connecticut policy of leniency toward self-represented parties), cert. denied, 312 Conn. 926, 95 A.3d 522 (2014).

These pleading requirements in postdissolution matters "historically have been much less circumscribed than in other types of actions." *Petrov* v. *Gueorguieva*, 167 Conn. App. 505, 514, 146 A.3d 26 (2016). "[A]lthough a court cannot determine a fact or issue beyond the reasonable cognizance of the parties . . . our rules of pleading are generally less restrictive as to what the court can decide in these matters" because most postdissolution proceedings "are ultimately governed by the child's best interests." (Citation omitted.) Id., 519. Therefore, "[i]n the context of a postjudgment appeal, if a review of the record demonstrates that an unpleaded [issue] actually was litigated at trial without objection such that the opposing party cannot claim surprise or prejudice, the judgment will not be disturbed on the basis of a pleading irregularity. . . . In making this

determination, our courts look not only to what occurred during the hearing itself . . . but also to whether actions occurring prior to the hearing placed the party on notice as to the unpleaded issues or facts." (Citations omitted; internal quotation marks omitted.) Id., 517.

In the present case, it is clear from the defendant's motion to modify that she cumulatively sought to modify the existing child support, custody, visitation, and parental access orders. Consequently, the plain language of the defendant's motion to modify, which she filed as a self-represented party, placed before the court the issues of custody, visitation, and the parental access schedule. Additionally, the transcript of the January 15, 2021 hearing undercuts the plaintiff's argument that he was surprised that these issues were decided by the court and that he was unable to present contrary evidence. The defendant testified regarding her difficulties complying with the existing orders as to child support and the parental access schedule and her proposal for a new visitation and access schedule.[10] After the defendant's testimony regarding custody, child support, and the visitation schedule, the plaintiff's counsel declined to present any rebuttal witnesses and confirmed that the court did not "miss a motion." The plaintiff's counsel then asked for several clarifications of the court's oral ruling, none of which concerned the scope of the court's ruling compared to the defendant's motion to modify. On the basis of both the language of the defendant's motion as well as the parties' representations at the

[10] At oral argument before this court, the plaintiff's counsel stated that he was deprived of an opportunity to present evidence as to all of these topics because neither party nor the court questioned Attorney Rakich-Kelly as to the parties' visitation and access rights. The transcript of the January 15, 2021 hearing, however, reveals that Attorney Rakich-Kelly specifically was questioned by both parties and the court as to the adequacy of the defendant's visitation and access.

January 15, 2021 hearing, we summarily reject the plaintiff's claim on appeal.[11]

The judgment is affirmed.

In this opinion the other judges concurred.

STEPHANIE SZYMONIK *v.* PETER SZYMONIK
(AC 42601)

Cradle, Alexander and Eveleigh, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgments of the trial court finding him in contempt on two separate occasions and sanctioning him for bad faith litigation. The court granted the plaintiff's motions for contempt, which alleged that the defendant had failed to make certain lump sum payments that the court had ordered him to pay toward a child support arrearage. The court also granted the plaintiff's motion for sanctions, concluding that the defendant had engaged in bad faith litigation because of his repetitive motions that did not raise any colorable claims. The court also awarded the plaintiff attorney's fees with respect to these motions. *Held* that, after a careful review of the record, briefs, oral argument and relevant law, this court concluded that the defendant failed to demonstrate any instance of reversible error by the

[11] On the basis of the manner in which the plaintiff's counsel presents this appeal to this court—particularly the misleading statements in his appellate brief and at oral argument before this court; see footnotes 4, 5, 6, 7, 8, and 10 of this opinion; selective excerption of filings within his appendix including the motion that is the subject of this appeal; see footnote 3 of this opinion; and the conflating legal arguments; see footnotes 8 and 9 of this opinion—we are compelled to reiterate the admonition that "[a]ttorneys have an obligation to act fairly and with candor in *all* of their dealings before the court, which includes factual statements made in open court or in pleadings and other written submissions." (Emphasis in original.) *Cummings Enterprise, Inc.* v. *Moutinho*, 211 Conn. App. 130, 134, 271 A.3d 1040 (2022); see also *Hartmann* v. *Prudential Ins. Co. of America*, 9 F.3d 1207, 1214 (7th Cir. 1993) ("we cannot have a rule that . . . an appellant can serve us up a muddle in the hope that we or our law clerks will find somewhere in it a reversible error"). Although it is unfortunate that the defendant, as a self-represented litigant, did not file a brief or appearance in this appeal, that does not obviate, but rather underscores, the duty of candor that the plaintiff's counsel owes to the court.

trial court, as that court's factual findings were not clearly erroneous and the proper legal standards and analyses were applied to the defendant's claims.

Argued January 26—officially released June 21, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Epstein*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Klatt*, *J.*, granted the plaintiff's motion for contempt and awarded the plaintiff attorney's fees, and the defendant appealed to this court; subsequently, the court, *Klatt*, *J.*, issued its finding regarding the amount of the attorney's fees, and the defendant amended his appeal; thereafter, the court, *Klatt*, *J.*, sanctioned the defendant for engaging in bad faith litigation, and the defendant amended his appeal; subsequently, the court, *Margaret Murphy*, *J.*, granted in part the plaintiff's motion for contempt and awarded the plaintiff attorney's fees, and the defendant amended his appeal. *Affirmed*.

Peter Szymonik, self-represented, the appellant (defendant).

Keith Yagaloff, for the appellee (plaintiff).

Opinion

PER CURIAM. In this extensively litigated postdissolution matter, the defendant, Peter Szymonik, challenges the judgments of the trial court finding him in contempt on two separate occasions and sanctioning him for engaging in bad faith litigation. On appeal, the defendant presents a myriad of overlapping and intertwined arguments seeking a reversal of the court's judgments. After a careful review of the file, the memoranda of decision, the appellate briefs, and the parties' oral

argument before this court, we affirm the judgments of the trial court.

The court, *Epstein*, *J.*, dissolved the marriage of the plaintiff, Stephanie Szymonik, and the defendant on April 30, 2008. *Szymonik* v. *Szymonik*, 167 Conn. App. 641, 644, 144 A.3d 457, cert. denied, 323 Conn. 931, 150 A.3d 232 (2016). The parties were granted joint legal custody of their children, with a shared parenting plan. Id., 645. On August 20, 2012, the court, *Carbonneau*, *J.*, issued an order stating that "neither party shall file any motions with the court without the prior express written approval of the presiding judge because of the interminable numbers of motions filed." On July 7, 2017, the court, *Simón*, *J.*, ordered the defendant to pay the plaintiff $242 per week in child support and an additional $48 per week toward an arrearage found to be $40,488. In addition, the court ordered the defendant to reduce the arrearage by making a lump sum payment of $2500 within thirty days and further payments of $1500 every six months until the arrearage was paid in full.

On October 11, 2017, the plaintiff filed a motion for contempt, claiming that the defendant had failed to make the lump sum payments required by the court's July 7, 2017 order. On February 8, 2019, the court, *Klatt*, *J.*, found that the defendant had the ability to make these payments, failed to do so and, therefore, was in wilful contempt. As a sanction, the court ordered the defendant to pay the attorney's fees of the plaintiff relating to this contempt motion. The defendant then commenced this appeal. On May 9, 2019, the court found the attorney's fees of the plaintiff related to the contempt motion to be $2338, and the defendant amended his appeal to include this finding.

On August 24, 2018, the plaintiff filed a motion for sanctions, alleging that the defendant had engaged in

litigation misconduct by filing meritless motions, motions for order raising issues that already had been decided, and numerous requests for leave to file additional motions. On August 30, 2019, the court issued a memorandum of decision granting the plaintiff's motion for sanctions. Specifically, the court stated: "In the present motion, the court finds that the defendant's repetitive motions do not raise any colorable claims. . . . [E]ach motion filed raises the same issues that have been determined by trial courts, appellate courts and the federal district court. Despite numerous rulings, the defendant continues to raise the same issues without any basis in law or facts." The court concluded that the defendant had engaged in bad faith litigation and awarded the plaintiff attorney's fees in the amount of $7150, payable by the defendant within ninety days. The defendant subsequently amended his appeal to challenge the court's August 30, 2019 judgment.

On September 10, 2019, the plaintiff filed a motion for contempt regarding the defendant's noncompliance with the orders relating to the child support arrearage. On October 31, 2019, the court, *M. Murphy, J.*, issued a memorandum of decision, finding that the defendant had not made any lump sum payments toward his arrearage. It found the defendant in contempt with respect to the nonpayment of the July 7, 2017 order relating to the arrearage. The court stated the following in order to enforce the prior orders: "The defendant shall make additional child support arrearage payments of $75 [per] week by immediate wage withholding through support enforcement services. The $75 [per] week is in place of the single lump sum payment of $2500 and the biannual (i.e., twice yearly) lump sum payments of $1500 . . . . The court finds the defendant has the ability to pay. The arrearage payments of $75 [per] week shall be in addition to any current child support payments and the current weekly arrearage

payment of $48 [per] week. The arrearage payments of $75 [per] week and $48 [per] week for a total of $123 [per] week shall be paid until such time as the arrearage is paid in full." The court also granted the plaintiff's request for attorney's fees, which subsequently was determined to be $600.80. The defendant again amended his appeal to include a challenge to these findings.

On appeal, the defendant challenges the court's February 8, 2019 memorandum of decision finding him in wilful contempt and the subsequent award of $2338 in attorney's fees; the court's August 30, 2019 memorandum of decision granting the plaintiff's motion for sanctions and the award of $7150 in attorney's fees; and the court's October 31, 2019 memorandum of decision finding him in wilful contempt, the award of an additional $75 per week in child support arrearage payments, and the subsequent award of $600.80 in attorney's fees. The defendant presents a multitude of arguments as to why the judgments of the trial court should be reversed, challenging their legal conclusions and factual findings.

After a careful review of the record, briefs, oral argument, and relevant law, we conclude that the judgments of the trial court should be affirmed. Despite the numerous arguments advanced by the defendant, he has failed to demonstrate any instance of reversible error by the trial court. We conclude that the court's factual findings are not clearly erroneous, and that the proper legal standards and analyses were applied to the defendant's claims. See, e.g., *In re Angelina M.*, 187 Conn App. 801, 803–804, 203 A.3d 698 (2019); *Singh* v. *CVS*, 174 Conn. App. 841, 842–43, 167 A.3d 461 (2017); *Bridgeport* v. *Niedzwiecki*, 9 Conn. App. 807, 808, 518 A.2d 406 (1986), cert. denied, 203 Conn. 802, 522 A.2d 292, cert. denied, 484 U.S. 852, 108 S. Ct. 154, 98 L. Ed. 2d 109 (1987). Accordingly, we affirm the judgments of the trial court.

The judgments are affirmed.

HIGHLAND STREET ASSOCIATES ET AL. *v.* COMMISSIONER OF TRANSPORTATION ET AL.

(AC 44330)

Bright, C. J., and Cradle and DiPentima, Js.

Syllabus

The plaintiffs, two entities that, respectively, owned a parcel of real property and a billboard located on that property, sought a declaratory ruling from the trial court pursuant to statute (§ 4-175) following the failure of the defendant Department of Transportation to act on their petition for a declaratory ruling that they could replace the billboard's existing support structure. The billboard, which was located in a residential zone within 660 feet of a federal highway and had been erected prior to 1968, was a nonconforming grandfathered sign pursuant to the federal Highway Beautification Act of 1965 (23 U.S.C. § 131 et seq.) and related state statute (§ 13a-123). In order to replace the billboard's support structure, the plaintiffs acknowledged that they would need to remove the existing billboard for a short period of time. The department denied the plaintiff's application for a permit to replace the support structure, as a new sign was not permitted pursuant to 23 U.S.C. §131 et seq. and § 13a-123. The trial court rendered judgment for the plaintiffs, holding that the proposed replacement of the billboard's existing support system constituted permissible maintenance and repair. The court further held that, pursuant to a zoning statute (§ 8-2), the sign's preexisting nonconforming use was a vested right with which the department and the defendant Commissioner of Transportation could not interfere. On the defendants' appeal to this court, *held* that the trial court erred in holding that replacing the billboard's existing support structure constituted maintenance and repair pursuant to federal and state law: although, as a grandfathered nonconforming sign, the billboard could continue to exist, even though it did not comply with state regulations, and it could be maintained and repaired without losing its grandfathered status, replacing the billboard's existing support system was not customary maintenance and repair because such construction would substantially change the billboard and constitute the erection of a new billboard, and all other jurisdictions confronted with similar facts have held that such structural replacement constitutes the erection of a new sign and, thus, the termination of the preexisting sign's nonconforming usage; moreover, this court's determination that reconstructing a billboard with a new support structure did not constitute customary repair and maintenance was consistent with the purpose of 23 U.S.C. § 131 et seq., as the policy behind the act was for billboards located in certain zones along federal highways to cease to exist after they had reached the natural

end of their lives; furthermore, the court's reliance on § 8-2, which restricts municipal zoning authorities from interfering with nonconforming uses, was misplaced, as that statute applies only in a zoning context and this case was governed by federal and state law and regulations, and, contrary to the plaintiffs' claim, there was no taking of a vested property right, as the defendants did not direct the plaintiffs to remove the billboard.

Argued January 11—officially released June 21, 2022

Procedural History

Action for a judgment declaring, inter alia, that the plaintiffs may replace the existing support structure for a certain nonconforming outdoor advertising sign, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Dale W. Radcliffe*, judge trial referee; judgment for the plaintiffs, from which the defendants appealed to this court. *Reversed*; *judgment directed*.

Anthony C. Famiglietti, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellants (defendants).

Joel Z. Green, with whom was *Linda Pesce Laske*, for the appellees (plaintiffs).

Opinion

BRIGHT, C. J. In this declaratory judgment action, the defendants, the Commissioner of Transportation (commissioner) and the Department of Transportation (department), appeal from the judgment of the trial court rendered in favor of the plaintiffs, Highland Street Associates (Highland Street) and Barrett Outdoor Communications, Inc. (Barret Outdoor). On appeal, the defendants claim that the court erred in concluding that the replacement of a billboard's existing trestle support structure with a monopole[1] constituted maintenance

[1] A monopole is a singular pole that is used to support a billboard or other advertising structure.

and repair under the Highway Beautification Act of 1965 (act), 23 U.S.C. § 131 et seq., and General Statutes § 13a-123. We agree and, accordingly, reverse the judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. Highland Street owns a parcel of real property located at 215 Webster Street in Bridgeport. Barrett Outdoor owns and operates a billboard that is located on the Webster Street property. The billboard consists of two sign faces that sit atop a trestle support structure that is affixed to the ground. Advertising messages are displayed on the sign faces and are changed frequently. The billboard is located in a residential zone and is also within 660 feet of Interstate 95, a federal highway. A permit for the billboard was issued by the department on May 9, 1966.[2] Although a new billboard would not be a permitted use at this location, because the billboard at issue was erected prior to 1968, it is undisputed that it is a nonconforming grandfathered sign under the act and § 13a-123.

Recently, Barrett Outdoor decided that it wanted to replace the billboard's existing trestle support structure with a new monopole. To that end, in November, 2017, Barrett Outdoor submitted an "Application for Outdoor Advertising Permit" to the department.[3] The application identified the billboard as a "[p]re-existing structure" and stated that "[t]he pole of the structure needs to be replaced." Dennis Buckley, a Bridgeport zoning official, signed off on the plaintiffs' application, attesting that "the structure described [in the application] is in accordance with all local zoning regulations and ordinances concerning off-premise advertising."

[2] This permit has been in effect since its issuance in 1966 and was still in effect at the time of this appeal.

[3] Highland Street also signed the application.

On January 5, 2018, the department denied the plaintiffs' request for a new permit, stating: "The existing sign . . . does have nonconforming status and will be allowed to be maintained and continued pursuant to [§] 13a-123-12 of the Regulations of Connecticut State Agencies and 23 C.F.R. § 750.707. However, to maintain nonconforming status, a billboard structure must remain 'substantially the same.' Anything beyond customary maintenance and repair, *such as the replacement of the sign with a new structure*, is not permissible under [f]ederal and [s]tate law." (Emphasis added.)

Thereafter, the plaintiffs sent a letter to the department asking it to reconsider the denial of their application because "the present use of the premises at 215 Webster Street . . . for an outdoor advertising structure while nonconforming to the Zoning Regulations of the City of Bridgeport, is a legally and permitted use of the premises at 215 Webster Street . . . [and] there is no contemplated change in the use of the property by virtue of the application including the replacement of the structure supporting the existing outdoor advertising sign which, once again, is specifically permitted under Connecticut law." The department denied that request, stating that the plaintiffs' application did not "request customary maintenance and repair" of the billboard because "[the plaintiffs are] seeking to remove the existing sign structure and replace it with an entirely new structure." In denying the plaintiffs' request for reconsideration, the department specifically relied on this court's decision in *Billboards Divinity, LLC* v. *Commissioner of Transportation*, 133 Conn. App. 405, 35 A.3d 395, cert. denied, 304 Conn. 916, 40 A.3d 783 (2012), wherein, according to the department's summary of the case, this court defined the phrase " 'maintenance and repair' to mean 'actions taken to perpetuate or to restore a *presently existing* sign.' " (Emphasis in original.)

Pursuant to General Statutes § 4-176,[4] the plaintiffs then petitioned the department for a declaratory ruling that they could replace the billboard's existing trestle support structure with a new monopole. After the department failed to act on the plaintiffs' petition, the plaintiffs brought a declaratory judgment action in the Superior Court, pursuant to General Statutes § 4-175,[5] seeking a declaratory ruling that they could replace the billboard's existing support structure.

A one day court trial was held on March 10, 2020.[6] At the trial, Bruce Barrett, the president of Barrett Outdoor, testified on direct examination that Barrett Outdoor submitted an application for a new permit because

[4] General Statutes § 4-176 provides in relevant part:

"(a) Any person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency. . . .

"(e) Within sixty days after receipt of a petition for a declaratory ruling, an agency in writing shall: (1) Issue a ruling declaring the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances, (2) order the matter set for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) decide not to issue a declaratory ruling and initiate regulation-making proceedings, under section 4-168, on the subject, or (5) decide not to issue a declaratory ruling, stating the reasons for its action. . . .

"(i) If an agency does not issue a declaratory ruling within one hundred eighty days after the filing of a petition therefor, or within such longer period as may be agreed by the parties, the agency shall be deemed to have decided not to issue such ruling. . . ."

[5] General Statutes § 4-175 (a) provides in relevant part: "If a provision of the general statutes, a regulation or a final decision, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff and if an agency . . . is deemed to have decided not to issue a declaratory ruling under subsection (i) of said section 4-176, the petitioner may seek in the Superior Court a declaratory judgment as to the validity of the regulation in question or the applicability of the provision of the general statutes, the regulation or the final decision in question to specified circumstances. . . ."

[6] Both parties filed motions for summary judgment, but the court, *Hon. Alfred J. Jennings*, judge trial referee, denied the motions.

"[w]e were being very protective, we wanted to make sure if we disassembled this sign and replaced it that midstream the [department] wouldn't tell us that we needed a permit." Barrett also testified on direct examination that, in order to replace the billboard's existing trestle support structure with a new monopole, the existing sign would need to come down for "a week or two weeks whatever time." On cross-examination, Barrett stated that, once the existing support structure had been replaced with the monopole, "[t]he [billboard's] support structure will look different."

Matthew Geanacopoulos, a department employee, testified that an application for a permit was required only when a sign owner was "erecting a new structure," and that, if a sign owner simply wanted to perform maintenance or repair on a billboard, the owner did not need to submit anything to the department. Geanacopoulos also testified that the department had denied the plaintiffs' application because the plaintiffs had "applied for a new permit, and their application said they were going to replace their existing sign," a request that the department "interpret[ed] . . . as a new structure, new sign" which was not allowed under state and federal law.

In a decision dated September 8, 2020, the court, *Hon. Dale W. Radcliffe*, judge trial referee, rendered judgment for the plaintiffs. The court held that (1) the construction of a monopole in place of the billboard's existing trestle support system constituted maintenance and repair because "the outdoor advertising sign is slated to remain in the same location, will contain the same dimensions, and will be adjacent to the same interstate highway," and (2) pursuant to General Statutes § 8-2, the billboard's preexisting nonconforming use was a vested right with which the department could not interfere. The court also held that this court's decision in *Billboards Divinity, LLC* v. *Commissioner of*

Transportation, supra, 133 Conn. App. 418–19, was distinguishable from the plaintiff's case because the property owners in *Billboards Divinity, LLC*, "desired to erect two new billboards, after two nonconforming billboards were removed from the site," whereas in the present case, "the issue involves an existing outdoor advertising sign, which has not been discontinued, or abandoned." The defendants then appealed.

We begin by setting forth the applicable standard of review and principles of law that guide our analysis. Resolving the defendants' appeal requires us to interpret and apply the provisions of the act and § 13a-123. "With respect to the construction and application of federal statutes, principles of comity and consistency require us to follow the plain meaning rule for the interpretation of federal statutes because that is the rule of construction utilized by the United States Court of Appeals for the Second Circuit. . . . If the meaning of the text is not plain, however, we must look to the statute as a whole and construct an interpretation that comports with its primary purpose and does not lead to anomalous or unreasonable results." (Citation omitted; internal quotation marks omitted.) *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 400–401, 941 A.2d 868 (2008); see also *O'Toole* v. *Eyelets for Industry, Inc.*, 148 Conn. App. 367, 373, 86 A.3d 475 (2014) (plain meaning rule, as set forth in General Statutes § 1-2z, does not apply when interpreting federal statutes).

Similarly, as to the construction and application of state statutes, "[o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . § 1-2z

directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . Furthermore, [t]he legislature is always presumed to have created a harmonious and consistent body of law . . . [so that] [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . Because issues of statutory construction raise questions of law, they are subject to plenary review on appeal." (Internal quotation marks omitted.) *Robinson* v. *Tindill*, 208 Conn. App. 255, 264, 264 A.2d 1063, cert. denied, 340 Conn. 917, 265 A.3d 926 (2021).

"The [act] . . . was enacted to exert federal control over the erection and maintenance of outdoor advertising signs, displays and devices located within 660 feet of the nearest edge of the right-of-way and visible from the traveled portion of interstate and federal-aid primary highways. . . . The act requires states to enter into agreements with the federal government to carry out the provisions and the goals of the act or else risk the loss of a portion of their federal highway funding. . . .

"Section (d) of the act provides [in relevant part]: In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use [as] is to be determined by agreement between the several [s]tates and the Secretary [of Transportation], may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and

primary systems which are zoned industrial or commercial under authority of [s]tate law, or in unzoned commercial or industrial areas as may be determined by agreement between the several [s]tates and the Secretary [of Transportation]. The [s]tates shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this [a]ct. Whenever a bona fide [s]tate, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. . . . Section (d), therefore, clearly limits the erection of signs falling within the provisions of the act solely to areas that are zoned by state or local authorities for commercial or industrial purposes . . . .

"The federal regulations promulgated in support of the act contain a provision addressing the issue of nonconforming signs, which it defines as a sign which was lawfully erected but does not comply with the provisions of [s]tate law or [s]tate regulations passed at a later date or later fails to comply with [s]tate law or [s]tate regulations due to changed conditions. . . . The regulation authorizes each state to include in its agreement with the federal government a so-called grandfather clause to allow for the continuation of nonconforming signs. . . . The clause only provides for the continuance of a sign at its particular location for the duration of its normal life subject to customary maintenance. . . .

"The federal regulations also set forth criteria necessary to maintain and continue a nonconforming sign. For example, the sign must remain substantially the same as it was on the effective date of the [s]tate law or regulations. . . . The regulation authorizes each

state to develop its own criteria to determine when customary maintenance ceases and a substantial change has occurred which would terminate nonconforming rights. . . . Further, a nonconforming sign can only continue as long as it is not destroyed, abandoned, or discontinued. . . .

"Connecticut entered into an agreement with the federal government pursuant to the act, which led to the enactment of . . . § 13a-123. Section 13a-123 (a) provides in relevant part: The erection of outdoor advertising structures, signs, displays or devices within six hundred sixty feet of the edge of the right-of-way, the advertising message of which is visible from the main traveled way of any portion of the National System of Interstate and Defense Highways, hereinafter referred to as interstate highways, the primary system of federal-aid highways or other limited access state highways, is prohibited except as otherwise provided in or pursuant to this section . . . . Section 13a-123 (c) authorizes the commissioner . . . to promulgate regulations for the control of outdoor advertising structures, signs, displays and devices along interstate highways, the primary system of federal-aid highways and other limited access state highways. Such regulations shall be as, but not more, restrictive than the controls required by Title I of the [act] and any amendments thereto with respect to the interstate and primary systems of federal-aid highways . . . . Section 13a-123 (e) provides in relevant part: Subject to regulations adopted by the commissioner and except as prohibited by state statute, local ordinance or zoning regulation signs, displays and devices may be erected and maintained within six hundred sixty feet of primary and other limited access state highways in areas which are zoned for industrial or commercial use under authority of law . . . .

"Among the regulations promulgated by the commissioner in accordance with § 13a-123 (d), is a grandfather

clause of the type authorized by 23 C.F.R. § 750.707 (c). . . . The regulation[s] [also define] erect to mean to construct, build, raise, assemble, place, affix, attach, create, paint, draw, or in any other way bring into being or establish, *but it shall not include* any of the foregoing activities when performed as an incident to the change of advertising message or *customary maintenance or repair* of a sign or sign structure." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Billboards Divinity, LLC* v. *Commissioner of Transportation*, supra, 133 Conn. App. 414–17.

On appeal, the defendants claim that the court erred when it concluded that replacing the billboard's existing support structure with a new monopole constituted customary repair and maintenance. We agree.

It is undisputed that the billboard in question is a grandfathered nonconforming sign, given that, although it is located in an area zoned for residential use, it existed prior to the enactment of the applicable state regulations. As a grandfathered nonconforming sign, the billboard is allowed to continue to exist even though it does not comply with state regulations. 23 C.F.R. § 750.707 (d); Regs., Conn. State Agencies § 13a-123-12. The billboard also can be maintained and repaired without losing its grandfathered status. 23 C.F.R. § 750.707 (d) (5); Regs., Conn. State Agencies § 13a-123-2 (b). Any alteration beyond maintenance and repair, however, terminates the continuation of the billboard's grandfathered status and transforms the billboard into a new sign that must comply with the state regulations. See *Billboards Divinity, LLC* v. *Commissioner of Transportation*, supra, 133 Conn. App. 416. Specifically, although § 13a-123-4 of the Regulations of Connecticut State Agencies prohibits the erection of new signs in protected areas, § 13a-123-12 permits signs erected

prior to March 19, 1968, to remain in place as nonconforming uses, and § 13a-123-2 excludes from the definition of " 'erect,' " "activities when performed as an incident to the change of advertising message or customary maintenance or repair of a sign or sign structure." Consequently, consistent with federal law, the plaintiffs' billboard maintains its grandfathered status so long as the plaintiffs' activities related to it are limited to customary maintenance and repair of the sign or the sign structure.

In *Billboards Divinity, LLC* v. *Commissioner of Transportation*, supra, 133 Conn. App. 418, this court specifically addressed the meaning of " 'customary maintenance and repair' " as used in the federal and state regulations. In *Billboards Divinity, LLC*, the plaintiff filed an application with the department for a permit to reconstruct two grandfathered nonconforming billboards as to which its tenant had cancelled the permits and removed from the property. Id., 408. The department denied the plaintiff's application because the property where the billboards were to be rebuilt was a residential zone and, thus, a prohibited area. Id., 408–409. The plaintiff appealed, claiming that it had a right to continue with a nonconforming use of its property and that the tenant's removal of the previous billboards had not extinguished that use. Id., 410.

This court determined that, "[p]ursuant to the statutory and regulatory scheme set forth [in the act and state law] . . . the plaintiff's argument has merit only if its erection of new billboards qualifies as 'customary maintenance or repair' of the prior nonconforming signs." Id., 418. Noting that " '[c]ustomary maintenance and repair' is not defined in the regulations [and] therefore, the term must be construed according to its commonly approved usage," the court held that "[t]he term 'maintenance and repair' as used in reference to nonconforming signs logically refers to actions taken to

perpetuate or to restore a *presently existing sign*." (Emphasis added.) Id. Given that interpretation, the court held that the plaintiff's proposed construction of new billboards to replace the previously existing billboards was not maintenance and repair because, "rather than seeking to make repairs to or to maintain an existing, nonconforming billboard, the plaintiff's application sought a permit to erect two wholly new signs." Id., 418–19.

The plaintiffs argue, as the trial court held, that *Billboards Divinity, LLC*, is distinguishable from the present case because, in *Billboards Divinity, LLC*, the billboards had been removed and the permits cancelled, whereas here, the billboard is still standing and the permit remains valid. We conclude that any factual differences between the present case and *Billboards Divinity, LLC*, are not material to our analysis. It is undisputed in the present case that the existing billboard and support structure must be taken down in order to *replace* the billboard's existing trestle support structure with the new monopole. When the billboard is put back up, *now supported by the new monopole*, the billboard is a new sign. See id. The erection of a new sign, even when that construction is done to replace a previously existing billboard and even though the owner has never stated an intention to abandon the permit to use a sign at that location, is not maintenance and repair because such construction is not an action taken to "perpetuate or to restore a presently existing sign," given that the "presently existing sign" no longer exists. Id. Thus, as was the case in *Billboards Divinity, LLC*, "rather than seeking to make repairs to or to maintain an existing, nonconforming billboard, the plaintiff's application sought a permit to erect [a] wholly new [billboard]." Id., 419. Such construction is not maintenance and repair according to that term's commonly understood usage, and the trial court therefore erred

in holding that replacing the billboard's existing support structure with a new monopole was maintenance and repair under the act and § 13a-123.

Moreover, replacing the billboard's existing support system with a new monopole is not customary maintenance and repair because such construction would substantially change the billboard. Under the federal regulations, a billboard can be maintained and repaired only to the extent that the sign remains substantially the same as it was when the sign was grandfathered in as a nonconforming sign. See 23 C.F.R. § 750.707 (d) ("[i]n order to maintain and continue a nonconforming sign . . . (5) [t]he sign must remain substantially the same as it was on the effective date of the State law or regulations"). Reconstructing the billboard in the present case with a monopole in place of its existing support structure would result in a billboard that is substantially different in how it is constructed from the grandfathered nonconforming billboard. Indeed, the president of Barrett Outdoor testified at trial that replacing the trestle support structure with a monopole involved disassembling the sign, with the end result being that the billboard's support structure would look different after the trestle structure was replaced with a monopole. Thus, because replacing the billboard's existing support system with a monopole would result in a substantially different sign, such construction is not customary maintenance and repair.

We also are not persuaded by the plaintiffs' argument that the billboard will be substantially the same after the trestle support structure is replaced with a monopole because the dimensions, location, and positioning of the sign portion of the billboard structure will be unchanged. The plaintiffs have not cited, nor have we found, any cases from Connecticut or any other jurisdictions in which a property owner was permitted to maintain their nonconforming use by replacing a billboard's

existing support structure with a new and different support structure.[7] To the contrary, our research has revealed that all of the other jurisdictions that have been confronted with facts similar to those here have held that replacing a billboard's existing support structure with a new support structure goes beyond maintenance and repair and instead constitutes the erection of a new sign, at which point the preexisting sign's nonconforming use is terminated and the relevant state regulations relating to the construction of the sign apply. See, e.g., *Tucson* v. *Whiteco Metrocom, Inc.*, 194 Ariz. 390, 397–98, 983 P.2d 759 (App. 1999) (replacement of billboard's existing twin I beam support structure with new unipole structure was not reasonable repair); *U.S. Outdoor Advertising Co.* v. *Indiana Dept. of Transportation*, 714 N.E.2d 1244, 1255 (Ind. App. 1999) (reconstructing billboard's existing support system by removing wooden supports and replacing them with steel supports was not maintenance and repair); *Meredith Outdoor Advertising, Inc.* v. *Iowa Dept. of Transportation*, 648 N.W.2d 109, 118 (Iowa 2002) (increase in billboard's size and *number of posts supporting sign* was "too extensive to constitute de minimis changes or a mere continuation of the existing sign"); *Zanghi* v. *State*, 204 App. Div. 2d 313, 314, 611 N.Y.S.2d 263 (1994) (reerecting billboard that tenant had removed constituted "change in existing use" and terminated sign's nonconforming use); *Park Outdoor Advertising Co.* v. *Commonwealth Dept. of Transportation*, 86 Pa. Commw. 506, 508, 510, 485 A.2d 864 (1984) (new billboard was erected when wooden frame and two support posts were changed to metal frame and one support

[7] We note, as this court did in *Billboards Divinity, LLC*, that we "need not decide at this time whether the complete replacement of a nonconforming sign that was destroyed by accident, natural disaster, or foul play would constitute customary maintenance and repair of the destroyed sign so as to permit the continuation of the nonconforming use." *Billboards Divinity, LLC* v. *Commissioner of Transportation*, supra, 133 Conn. App. 419 n.5.

post); cf. *State Dept. of Roads* v. *World Diversified, Inc.*, 254 Neb. 307, 315, 576 N.W.2d 198 (1998) (converting existing billboard into electronic billboard constituted maintenance and repair when "updates occurred upon the original frame of the sign [and] the sign remained in the same location *on the same support posts*" (emphasis added)). Significantly, we have located no cases that have held to the contrary since this court noted in *Billboards Divinity, LLC*, that "other jurisdictions have found that once nonconforming signs are removed completely, or *they have been repaired substantially or altered in some way*, any right to the continuation of the nonconformity terminates." (Emphasis added.) *Billboards Divinity, LLC* v. *Commissioner of Transportation*, supra, 133 Conn. App. 419. Consistent with the holdings in other jurisdictions and our decision in *Billboards Divinity, LLC*, we conclude that replacing the billboard's preexisting support structure and then installing the newly built structure constitutes both a substantial repair or alteration of the billboard and the erection of a new billboard, all of which is well beyond the customary maintenance and repair permitted by the act, § 13-123, and the corresponding regulations.[8]

Our conclusion that reconstructing a billboard with a new support structure does not constitute customary maintenance and repair is also consistent with the purpose of the act. The policy behind the act was for billboards located in certain zones along our nation's federal highways to cease to exist after those billboards

[8] At oral argument before this court, the plaintiffs' counsel argued that the department has the authority to regulate only the sign face itself and that the department cannot regulate a sign's support structure. Section 13a-123 (c) is directly to the contrary and makes clear that the department has the authority to regulate both the sign face and the sign's support structure as they are, essentially, one and the same. See General Statutes § 13a-123 (c) ("[t]he commissioner may promulgate regulations for the control of *outdoor advertising structures*, signs, displays and devices along interstate highways" (emphasis added)).

had reached the natural end of their lives. In fact, 23 C.F.R. § 750.707 (c), the provision of the Code of Federal Regulations that provides for the grandfathering of nonconforming signs, explicitly provides: "This clause only allows an individual sign at its particular location for the duration of its normal life subject to customary maintenance." See *Billboards Divinity, LLC* v. *Commissioner of Transportation*, supra, 133 Conn. App. 415–16; see also *Redpath* v. *Missouri Highway & Transportation Commission*, 14 S.W.3d 34, 39 (Mo. App. 1999) (act was "intended to reduce the number of signboards crowding the highways"); *National Advertising Co.* v. *Bradshaw*, 48 N.C. App. 10, 19–20, 268 S.E.2d 816 ("obvious purpose of the [act was] to gradually phase out signs . . . which existed at the time of enactment but which tended to harm the public interest and welfare by causing ugliness, distraction, and safety hazards"), appeal dismissed, 301 N.C. 400, 273 S.E.2d. 446 (1980). Accepting the plaintiffs' argument would mean that a sign owner could circumvent that purpose and extend forever the nonconforming use by essentially rebuilding a nonconforming sign more than fifty years after it was built and then replacing various parts of the sign as needed until the sign bears no resemblance to its original structure, save for its size and dimensions. We will not interpret the statutes and regulations to reach such an anomalous and unreasonable result, and thus decline to interpret the act and § 13a-123 as permitting the reconstruction of billboards with wholly new support structures. See *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 285 Conn. 400–401; see also *Raftopol* v. *Ramey*, 299 Conn. 681, 703, 12 A.3d 783 (2011) ("We often have stated that it is axiomatic that those who promulgate statutes . . . do not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results. . . . Accordingly, [w]e construe a statute in a manner that will not . . . lead to

absurd results." (Citations omitted; internal quotation marks omitted.)).

We further conclude that the court's reliance on § 8-2 to hold that the plaintiff could replace the billboard's existing support structure with a new monopole without the billboard losing its nonconforming status is misplaced. The court reasoned: "It is well settled in this jurisdiction that preexisting nonconforming uses of land involve vested rights. Section 8-2 of the General Statutes restricts municipal zoning authorities from interfering with nonconforming uses." After discussing several of our Supreme Court's cases applying § 8-2 and the restrictions on a municipality's ability to eliminate a nonconforming use, the court concluded: "It cannot be found, based on the evidence adduced at trial, and applicable Connecticut case law, that the proposed change in the support structure forfeits the right of the property owner to continue the lawful nonconforming use of 215 Webster Street." Relying on this same analysis, the plaintiffs argue that "[t]he policies of the [act] and [§ 13a-123], and the regulations promulgated pursuant to those statutes, provide protections to sign owners that are consistent with the constitutional protections that apply in the zoning context." We fail to see how § 8-2 or the cases cited by the court are relevant to the legal issues involved in this case.

Section 8-2 provides in relevant part that municipal zoning regulations shall not "[p]rohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations." There are no municipal zoning regulations at issue in the present case. This case is governed by state and federal law, specifically the act, § 13a-123, and the appropriate state and federal regulations, not by municipal zoning law. Accordingly, § 8-2, which only applies in the zoning context, does not apply here.

Given that § 8-2 has no application in the present case, the court's reliance on cases that have applied § 8-2 to municipal actions directed toward nonconforming uses is misplaced. Indeed, none of the cases relied on by the court involved billboards, the act, § 13a-123, or any of the applicable regulations.

Finally, we are not persuaded by the plaintiffs' claim that the defendants' denial of their request to *replace* the sign's existing support structure with a monopole constituted "a taking of a vested property right" without just compensation. Section 13a-123 (g) (2) provides in relevant part that the commissioner may "acquire by purchase, gift or condemnation, and shall pay just compensation upon *the removal* of [grandfathered] outdoor advertising structures, signs, displays." (Emphasis added.) In the present case, the defendants have not directed the plaintiffs to remove their sign. In fact, to the contrary, the defendants have recognized the sign's grandfathered status and have made it clear that the sign does not need to be taken down and that the plaintiffs can continue to operate and maintain it, albeit within the confines of § 13a-123-12 of the regulations. There can be no regulatory taking when a sign owner has not been told to take down a sign and, conversely, is explicitly allowed to continue operating the existing sign. See *Lamar Co., LLC* v. *Arkansas State Highway & Transportation Dept.*, 386 S.W.3d 670, 676 (Ark. App. 2011) (plaintiff's takings claim was premature when defendant had not ordered plaintiff to remove billboards); *U.S. Outdoor Advertising Co.* v. *Indiana Dept. of Transportation*, supra, 714 N.E.2d 1264 ("[t]he question of taking and compensation is not properly before this [c]ourt because the signs have not yet been removed"; additionally, no authority exists to support assertion that denial of permit amounts to order for removal of sign). Accordingly, we conclude that the plaintiffs' takings claim misses the point, given that the

defendants have not directed the plaintiffs to take down their sign and have instead said only that the plaintiffs may not remove the sign to reconstruct it with a new and different support structure.

The judgment is reversed and the case is remanded with direction to render judgment for the defendants.

In this opinion the other judges concurred.

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Zoning; claim that defective legal notice of public hearing deprived defendant zoning board of appeals of jurisdiction to consider application for approval of location for operation of automotive repair business; claim that board violated plaintiff's right to fundamental fairness because legal notice of public hearing did not sufficiently describe intended use of property; whether board applied incorrect legal standard in ruling on location approval application; whether board mistakenly believed it could not deny location approval application when proposed use was permitted in zone at issue; whether board committed error under "impotent to reverse" rule by failing to distinguish denial by different municipal entity seven years earlier of location approval application of different entity to operate used car dealership on property at issue.

Oral Care Dental Group II, LLC *v.* Pallet 389
Administrative appeal; employment based sexual harassment and discrimination; claim that trial court erred when it vacated damages award granted by Commission on Human Rights and Opportunities' human rights referee to sexual harassment complainant after concluding that her former employer was prejudiced by her failure to produce certain of her medical records; whether complainant was required to disclose medical records to prove damages for garden-variety emotional distress.

Parrott *v.* Colon 375
Housing code enforcement; whether action for housing code enforcement brought pursuant to statute (§ 47a-14h) alleging breaches of lease in violation of statute (§ 47a-7) required plaintiffs to prove by fair preponderance of evidence that their allegations constituted violations of applicable housing code or materially affected health, safety, and habitability of premises.

Russbach *v.* Yanez-Ventura 77
Uninsured motorist coverage; whether trial court improperly concluded that defendant insurance company's failure to comply with requirements of applicable statute (§ 38a-336 (a) (2)) was excused; claim that Frantz *v.* United States Fleet Leasing, Inc. *(245 Conn. 727)*, Kinsey *v.* Pacific Employers Ins. Co. *(277 Conn. 398), and* McDonald *v.* National Union Fire Ins. Co. of Pittsburgh, PA *(79 Conn. App. 800), created exception to statutory requirements of § 38a-336 (a) (2) for every case that involved commercial fleet or garage insurance policy; whether trial court improperly determined that automobile policy provided for standard, rather than conversion, uninsured motorist insurance coverage.*

Santiago *v.* Commissioner of Correction 358
Habeas corpus; whether habeas court abused its discretion in denying certification to appeal; claim that habeas court's conclusion that petitioner was not denied effective assistance of trial counsel rested on clearly erroneous factual findings concerning trial counsel's representations during sentencing proceeding; claim that habeas court erred in concluding that representation by petitioner's trial counsel was not deficient and therefore that petitioner failed to satisfy performance prong of Strickland *v.* Washington *(466 U.S. 668).*

Sessa *v.* Reale 151
Probate appeal; motion to dismiss; subject matter jurisdiction; claim that Superior Court had subject matter jurisdiction over plaintiff's probate appeal; whether Probate Court denied plaintiff's application to hear and decide rejected claim or decided merits of rejected claim underlying application; whether statute (§ 45a-364 (b)) required plaintiff to commence suit following Probate Court's denial of his application to hear and decide rejected claim rather than to file probate appeal; claim that Superior Court improperly granted motion to dismiss when

defendant raised alleged failure to satisfy time requirement for filing suit under § 45a-364 (b) in motion to dismiss instead of by special defense.

Sokolovsky *v.* Mulholland 128

Administrative appeal; discrimination; motion to dismiss; subject matter jurisdiction; claim that trial court erred in concluding that statutory (§ 46a-101) ninety day limitation period for commencing action in Superior Court pursuant to statute (§ 46a-100) was subject matter jurisdictional; claim that trial court improperly dismissed plaintiff's action; claim that trial court erred by not considering action commenced on date that plaintiff filed his application for waiver of fees; whether trial court erred in concluding that plaintiff was required to plead continuing course of conduct doctrine in his complaint.

State *v.* Norris 253

Risk of injury to child; assault in third degree; breach of peace in second degree; interfering with officer; motion for joinder; claim that trial court improperly failed to conduct adequate inquiry into defendant's competency to stand trial and to order competency hearing at start of trial; whether trial court abused its discretion in denying motion for competency evaluation; whether trial court abused its discretion in granting state's motion to join two informations for trial; whether defendant demonstrated that joinder resulted in substantial prejudice; whether trial court's explicit instructions to jury to consider each charge separately in reaching verdict cured risk of substantial prejudice to defendant.

State *v.* Russaw 311

Conspiracy to commit murder; unpreserved claim that defendant was deprived of right to due process because it is legally impossible to conspire to kill unintended victim; claim that state relied on doctrine of transferred intent for conspiracy charge; whether trial court improperly denied motion to suppress certain incriminating statements defendant made to police during custodial interrogation; whether trial court properly determined that defendant voluntarily and intelligently waived rights under Miranda *v.* Arizona *(384 U.S. 436).*

Swain *v.* Swain. 411

Dissolution of marriage; postjudgment motion to modify custody, child support, visitation and parental access schedule; claim that trial court erred in modifying orders as to visitation, parental access plan and child support because defendant's motion sought to modify only custody.

Szymonik *v.* Szymonik 421

Dissolution of marriage; motion for contempt; motion for sanctions; whether trial court erred in granting motions for contempt; whether trial court erred in granting plaintiff's motion for sanctions; whether trial court erred in awarding plaintiff attorney's fees; whether trial court's factual findings were clearly erroneous.

Wine *v.* Mulligan. 298

Alleged deprivation of plaintiff inmate's constitutional rights; motion to strike; motion for judgment; claim that trial court erred in granting defendants' motion to strike; claim that plaintiff's complaint adequately stated claim that defendants violated his constitutional right of access to courts.

NOTICES

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in April and May 2022. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Anderson, Taylor Elaine of Stamford, CT
Badiola, Carlos Manuel of West Hartford, CT
Bonica, Angela Rose of Massapequa, NY
Cerbo, Alexander J. of West Springfield, MA
Charbonneau, Mallarie Sue of Quincy, MA
Crawford, Andrew Chase of Saratoga Springs, NY
Fornis, Angela Isabel of Yorktown Heights, NY
Johnson, Matthew Zane of West Hartford, CT
Krinsky, Jason H. of Brooklyn, NY
Loehr, Daniel Briggs of Brooklyn, NY
Lopez Low, Gabriel Thomas of Brooklyn, NY
Maier, Irena Maria Alexandra of Walpole, MA
Pendergraft, Alexis Jean of Chapel Hill, NC
Prall, Jacob Thomas of New London, CT
Rose, Joseph Frank of East Setauket, NY
Scarcella, Anthony Reid of New York, NY
Wood, Darleen Frances of Auburn, MA
Zaccherio, Elizabeth Wood of Riverside, CT

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in May 2022. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Del Pozo, Eric of Long Island City, NY
Donall, Johann G. of Providence, RI
Dorso, Kyle Philip of Boston, MA
Fialky, Jeffrey Ira of Springfield, MA
Galvis, Lorraine Kay of East Lyme, CT
Gong, Jennifer Aimee of Tarrytown, NY
Greatorex, Justin Michael of Norwalk, CT
Lin, Terry of Westport, CT
Merker, Rachel Suzanne of W. Hempstead, NY
Muller III, Arthur J. of White Plains, NY
Noble, Daniel Scott of Darien, CT

NOTICE

Supreme Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately two weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2022 - 2023 court year is as follows: September 7, 2022; October 11, 2022; November 14, 2022; December 12, 2022; January 9, 2023; February 14, 2023; March 20, 2023; and April 24, 2023.

Carl D. Cicchetti
Chief Clerk

Appellate Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately three weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2022 - 2023 court year is as follows: September 1, 2022; October 3, 2022; November 7, 2022; January 3, 2023; January 30, 2023; February 27, 2023; April 3, 2023; and May 8, 2023.

Carl D. Cicchetti
Chief Clerk

Docket and Assignment Posting Dates for Supreme and Appellate 2022–2023 Court Years

Docket and case assignment information is available on the Judicial Branch website and at http://appellateinquiry.jud.ct.gov. The electronic posting on the Judicial Branch website is the official notice of the dockets and assignments except for incarcerated self-represented parties and individuals who have an exemption from e-filing who will continue to receive notice by mail. See Practice Book sections 69-1 and 69-3. Notice of the cases the Appellate Court determines should be considered on the court's motion calendar for dismissal or sanction will also be by mail. The information below provides docket and assignment posting dates for both courts for the 2022 – 2023 court year.

Supreme Court Docket	**Information available on or about**
First Term Docket	Posted to the website June 27, 2022
Second Term Docket	Posted to the website August 19, 2022
Third Term Docket	Posted to the website September 23, 2022
Fourth Term Docket	Posted to the website October 24, 2022
Fifth Term Docket	Posted to the website November 28, 2022
Sixth Term Docket	Posted to the website January 5, 2023
Seventh Term Docket	Posted to the website February 6, 2023
Eighth Term Docket	Posted to the website March 13, 2023
Supreme Court Assignment	**Information available on or about**
First Term Assignment	Posted to the website July 28, 2022
Second Term Assignment	Posted to the website September 15, 2022
Third Term Assignment	Posted to the website October 14, 2022
Fourth Term Assignment	Posted to the website November 18, 2022
Fifth Term Assignment	Posted to the website December 22, 2022
Sixth Term Assignment	Posted to the website January 26, 2023
Seventh Term Assignment	Posted to the website March 1, 2023
Eighth Term Assignment	Posted to the website April 6, 2023

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Appellate Court Docket	**Information available on or about**
First Term Docket	Posted to the website July 12, 2022
Second Term Docket	Posted to the website August 22, 2022
Third Term Docket	Posted to the website September 27, 2022
Fourth Term Docket	Posted to the website November 8, 2022
Fifth Term Docket	Posted to the website December 13, 2022
Sixth Term Docket	Posted to the website January 19, 2023
Seventh Term Docket	Posted to the website February 27, 2023
Eighth Term Docket	Posted to the website April 3, 2023
Appellate Court Assignment	**Information available on or about**
First Term Assignment	Posted to the website August 11, 2022
Second Term Assignment	Posted to the website September 20, 2022
Third Term Assignment	Posted to the website October 25, 2022
Fourth Term Assignment	Posted to the website December 6, 2022
Fifth Term Assignment	Posted to the website January 11, 2023
Sixth Term Assignment	Posted to the website February 16, 2023
Seventh Term Assignment	Posted to the website March 24, 2023
Eighth Term Assignment	Posted to the website April 27, 2023