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CONNECTICUT REPORTS

Vol. 335

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ELVIN G. RIVERA (SC 20277)

Robinson, C. J., and Palmer, D'Auria, Mullins, Kahn, Ecker and Vertefeuille, Js.*

Syllabus

Convicted of breach of the peace in the second degree, criminal mischief in the third degree, and threatening in the second degree in connection with a confrontation involving C, a tow truck driver, the defendant appealed to the Appellate Court, claiming, inter alia, that the trial court had violated his rights to confrontation and to present a defense when it precluded him from cross-examining C about the facts underlying certain of C's prior convictions. In response to C's attempt to tow the defendant's vehicle from a fire lane at a condominium complex, the defendant confronted C, demanding to know why his vehicle was being towed. After the defendant opened the driver's door of his vehicle, C raised the vehicle off the ground to prevent the defendant from driving it off of the back of the tow truck. The defendant then retrieved a pipe from a nearby garage and used it to strike the tow truck. Thereafter, C, fearing that the defendant was going to hit him with the pipe, retrieved a can of Mace and sprayed it in the defendant's face. The defendant then took a knife out of his pocket, and C, fearing for his life, drove away in the tow truck. At trial, the defendant raised the defenses of self-defense and defense of property, arguing that C was attempting to steal the defendant's vehicle for his own financial benefit. The defendant was permitted to and did ask C about previously having been convicted of larceny. In response to the trial court's decision to preclude the defendant from cross-examining C about the specific facts underlying C's prior misdemeanor convictions of larceny and breach of the peace, the defendant claimed that this evidence would have served to impeach C by showing his character for untruthfulness and by establishing his motive, intent and interest in attempting to steal the defendant's vehicle to finance his drug habit and in lying about having sprayed the defendant with Mace in self-defense. The Appellate Court concluded that the trial court did not abuse its discretion in limiting the defendant's cross-examination of C and rejected the defendant's constitutional claims. On the granting of certification, the defendant appealed to this court. *Held*:

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

1. The Appellate Court correctly determined that the trial court had not abused its discretion when it precluded the defendant from cross-examining C regarding the facts underlying his prior larceny convictions in order to show that C had stolen cell phones to support a drug habit: C's motivation for the prior theft of the cell phones was not probative of his veracity, as the trial court reasonably could have concluded that C's motive for stealing them to finance a drug habit two to three years prior to the incident in the present case was not relevant to his character for truthfulness any more than the fact that he generally had a history of theft, which was made known to the jury when the defendant asked C whether he previously had been convicted of larceny, preclusion of evidence of drug use to show character for untruthfulness was in line with the general rule that propensity evidence is inadmissible, as addiction alone could not reasonably be thought to amount to more than a compelling propensity to use drugs, and the trial court reasonably could have determined that any possible connection between C's prior drug habit and his character for untruthfulness was outweighed by the potential for prejudice, as there was no evidence that C was using drugs or had a drug addiction at the time of the incident in question; moreover, there was no merit to the defendant's claim that the facts underlying C's larceny convictions were admissible to establish C's motive, interest and intent to falsely inculpate the defendant and to cover up his own misconduct, the defendant having failed to establish that C had an ongoing drug habit at the time of the incident at issue or that C's conduct underlying his prior larceny convictions was sufficiently similar to the conduct at issue in the present case.
2. The Appellate Court correctly determined that the defendant had failed to establish that the trial court violated his rights to confrontation and to present a defense when it precluded him from cross-examining C about the fact that C, by pleading guilty to the crime of breach of the peace in connection with a prior incident involving an altercation with another individual, had admitted that he was lying about using pepper spray in self-defense during that incident: the trial court did not abuse its discretion in determining that C's prior statements to the police about acting in self-defense in connection with that prior incident were not inconsistent with his guilty plea to the charge of breach of the peace and, thus, were not evidence of C's having previously lied about acting in self-defense, as C had maintained throughout the plea proceedings on the breach of the peace charge that he had used pepper spray in self-defense; moreover, contrary to the defendant's claim that a guilty plea is an admission of guilt, a myriad of reasons may explain why an individual would plead guilty, and there is no open and visible connection between a guilty plea and an individual's state of mind at the time of the crime for which the plea is entered.

Argued February 26—officially released June 10, 2020**

** June 10, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Substitute information charging the defendant with the crimes of breach of the peace in the second degree, criminal mischief in the third degree and threatening in the second degree, brought to the Superior Court in the judicial district of Hartford, geographical area number twelve, where the court, *Lobo*, *J.*, granted in part the state's motion to preclude certain evidence and denied the defendant's motion to disclose certain evidence; thereafter, the case was tried to the jury; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Keller* and *Moll*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed*.

Alice Osedach, assistant public defender, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Courtney M. Chaplin*, former assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. In this certified appeal, the defendant, Elvin G. Rivera, appeals from the judgment of conviction, rendered after a jury trial, of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (1), criminal mischief in the third degree in violation of General Statutes § 53a-117 (a) (1), and threatening in the second degree in violation of General Statutes § 53a-62 (a) (1). On appeal, he claims that the Appellate Court incorrectly determined that the trial court had not abused its discretion by precluding him from cross-examining the state's key witness, Stephen Chase, about the facts underlying Chase's prior misdemeanor convictions of larceny in the sixth degree and breach of the peace, thereby violating his constitutional

rights to confrontation and to present a defense under the sixth amendment to the United States constitution. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The jury reasonably could have found the following facts. In March, 2015, Chase was employed as a tow truck driver.[1] Pursuant to a contract executed by Chase's employer and Coachlight Condominiums, a condominium complex at 40 Hillside Drive in East Hartford, Chase was authorized to tow vehicles on the Coachlight Condominiums property if they were parked in a restricted area, such as in front of a dumpster or in a fire lane.

On March 24, 2015, while patrolling the Coachlight Condominiums property in the course of his employment, Chase noticed a silver colored vehicle parked in front of a garage door in an area marked as a fire lane. As Chase was strapping the driver's side rear tire of the vehicle to the boom of his tow truck, the defendant exited the garage in front of which the vehicle was parked and demanded to know why his car was being towed. Chase informed the defendant that his car was parked in a fire lane and that it would cost $93.59 for the car to be released. The defendant was irate, and he opened the driver's side front door of his vehicle. Believing that the defendant intended to drive his car off the back of the tow truck, Chase entered the tow

[1] There was some confusion at trial about the identity of Chase's employer. Chase testified on direct examination that he was employed by A & M Towing & Recovery, Inc. (A & M Towing), and an entity he identified as Central Groups. He clarified on cross-examination that he had been hired by A & M Towing but that, at the time of the incident at issue, A & M Towing had been purchased by Central Groups. Subsequently, the defendant offered the testimony of John L. Freitas, the vice president and director of A & M Towing, who testified that, at the time of the incident at issue, Central Automotive Transport had not purchased A & M Towing but had entered into a management agreement with A & M Towing. Freitas indicated that, although A & M Towing had no record of employing Chase, Central Automotive Transport might have employed him, but Freitas did not have access to those records.

truck and raised the defendant's vehicle off the ground. The defendant moved away from his vehicle, reentered the garage, grabbed a white pipe composed of unknown material, and walked toward Chase, who was then standing by the driver's side front door of the tow truck. The defendant proceeded to hit the tow truck with the pipe. In response, Chase reached into the tow truck to retrieve a can of Mace he kept in the center console. Fearing that the defendant was going to hit him with the pipe, Chase sprayed the Mace in the defendant's face. The defendant then reached into his pocket and pulled out a knife. Fearing for his life, Chase turned, dove into the tow truck and drove around the corner of the building. Once Chase believed he was safely away from the defendant, he parked and called 911 to report the incident. The police subsequently arrived, spoke with Chase, and then arrested the defendant.

The defendant was charged with breach of the peace in the second degree, criminal mischief in the third degree and threatening in the second degree. At trial, the state called Chase as its key witness. In response, the defendant attempted to discredit Chase and raised the defenses of defense of property and self-defense, arguing that the defendant's vehicle was not parked in an official fire lane and that Chase had attempted to steal the car for his own financial benefit. The jury found the defendant guilty on all three counts. The trial court sentenced the defendant to a total effective term of two years of incarceration, execution suspended after fifteen months, followed by two years of probation with special conditions.

The defendant appealed to the Appellate Court, claiming, among other things, that the trial court violated his constitutional rights to confrontation and to present a defense by precluding him from cross-examining Chase regarding the specific facts underlying Chase's prior misdemeanor convictions of larceny in the sixth degree and

breach of the peace in the second degree. *State* v. *Rivera*, 187 Conn. App. 813, 819, 204 A.3d 4 (2019). The Appellate Court determined that the trial court had not abused its discretion by precluding this testimony and rejected the defendant's constitutional claims. Id., 828.

We subsequently granted the defendant certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the trial court properly precluded the defendant from cross-examining the state's key witness about the specific facts underlying that witness' prior misdemeanor convictions?" *State* v. *Rivera*, 331 Conn. 911, 203 A.3d 1246 (2019). Additional facts will be discussed as required.

Before this court, the defendant renews his claims that the trial court violated his rights to confrontation and to present a defense under the sixth amendment[2] by prohibiting him from cross-examining Chase regarding the facts underlying Chase's prior convictions of larceny and breach of the peace. The defendant argues that this evidence would have impeached Chase by showing his character for untruthfulness and would have established Chase's motive, intent, and interest in the present case—namely, that Chase had attempted to steal the defendant's car to finance his drug habit and lied about macing the defendant in self-defense. The defendant contends that because motive, intent, interest, and credibility are not collateral issues, the trial court's preclusion of this evidence denied him his rights to confrontation and to present a defense.

In reviewing the defendant's claim, we are guided by well established legal principles. The sixth amendment

[2] Although the defendant asserts in his brief to this court that the trial court's ruling also violated his rights under article first, § 8, of the Connecticut constitution, "[b]ecause the defendant has not provided an independent analysis of his state constitutional claim under *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), we consider that claim abandoned and unreviewable." *State* v. *Arias*, 322 Conn. 170, 185 n.4, 140 A.3d 200 (2016).

guarantees a defendant the rights to confrontation and a meaningful opportunity to present a defense. See, e.g., *State* v. *Hedge*, 297 Conn. 621, 634, 1 A.3d 1051 (2010) (right to present defense); *State* v. *Colton*, 227 Conn. 231, 248–49, 630 A.2d 577 (1993) (right to confrontation). Under the sixth amendment, "[c]ross-examination to elicit facts tending to show motive, interest, bias and prejudice is a matter of right and may not be unduly restricted." (Internal quotation marks omitted.) *State* v. *Colton*, supra, 249. Although "the extent of the proof of details lies in the court's discretion"; (internal quotation marks omitted) id.; "the preclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements [of the confrontation clause] of the sixth amendment . . . [and] may deprive the defendant of his constitutional right to present a defense." (Citation omitted; internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 9, 1 A.3d 76 (2010).

"The confrontation clause does not, however, suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination." (Internal quotation marks omitted.) *State* v. *Barnes*, 232 Conn. 740, 746, 657 A.2d 611 (1995). As a result, we analyze whether limitations on cross-examination violated a defendant's rights to confrontation and to present a defense only if the trial court improperly precluded the testimony. See, e.g., *State* v. *Davis*, supra, 298 Conn. 10–11. Thus, we must "first review the trial court's evidentiary rulings. Our standard of review for evidentiary claims is well settled. To the extent [that] a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Citation omitted; internal quotation marks omitted.) Id.

I

The defendant first claims that the Appellate Court incorrectly determined that he did not establish that the trial court violated his rights to confrontation and to present a defense by precluding him from cross-examining Chase about the specific facts underlying Chase's three prior larceny convictions—specifically, the fact that Chase stole cell phones to finance a drug habit. The defendant argues that, because a larceny conviction is probative of veracity, these underlying facts would have impeached Chase's credibility and, thus, were admissible under §§ 4-4 and 6-6 of the Connecticut Code of Evidence. He also argues that these underlying facts would have established Chase's motive, intent, and interest—namely, that Chase had similarly attempted to steal the defendant's car to finance his drug habit and had testified against the defendant to cover up his own illegal actions—and, thus, were admissible under §§ 4-5 (c) and 6-5 of the Connecticut Code of Evidence. We conclude that the trial court did not abuse its discretion by limiting cross-examination of Chase in this manner and that the defendant has failed to establish a constitutional violation.

The following additional facts and procedural history are relevant to this claim. Prior to the start of evidence, the state moved to preclude defense counsel from inquiring into Chase's past criminal convictions and any other prior misconduct. The defendant objected, arguing that the facts underlying Chase's prior misdemeanor convictions of larceny were admissible under § 6-6 for impeachment purposes to show a lack of veracity and under § 4-5 (c) for the limited purposes of showing motive, intent, and interest. Specifically, the defendant sought to inquire into the underlying facts of three larceny convictions that were based on four incidents in 2013. According to the defendant, on four prior occasions between 2012 and 2013, Chase had stolen cell

phones from different stores. Police reports regarding the thefts, which the defendant attached to his memorandum of law in opposition to the state's motion, noted that Chase had admitted that he stole the cell phones to finance a drug habit. The defendant raised the same arguments regarding veracity, motive, intent, and interest that he now raises before this court. Additionally, he argued that Chase's drug use was admissible for credibility and impeachment purposes to test his perception and ability to recall events. Defense counsel clarified at argument before the start of trial that he did not seek to ask Chase about the convictions themselves, only the underlying facts supporting those convictions.

The trial court ruled that because larceny was relevant to veracity, defense counsel could impeach Chase's credibility by inquiring about his prior larceny convictions,[3] but the court found that the underlying facts of those convictions were irrelevant as to Chase's veracity or motive. Therefore, the court precluded counsel from inquiring into the specific facts underlying those convictions. The trial court found that Chase's prior drug habit from 2013 was too remote in time to be relevant to a motive to steal the defendant's car, given that there was no evidence that Chase had a continuing substance abuse problem or was under the influence of drugs at the time of the incident at issue. The trial court determined that whether Chase stole cell phones to finance a drug habit in 2013, without evidence even of drug *usage* in 2015—let alone drug dependency—was "a collateral issue . . . not probative as to what's before the court today and would only serve to confuse the jury."

[3] The trial court also admitted Chase's prior misdemeanor convictions of larceny under § 6-7 of the Connecticut Code of Evidence. The defendant suggests that this basis was improper. We have no occasion to review this issue because it was to the benefit of the defendant, who relied on these convictions to impeach Chase during cross-examination and to attack his credibility during closing argument.

On cross-examination, defense counsel asked Chase if he previously had been convicted of larceny, to which Chase responded in the affirmative. Additionally, defense counsel asked Chase whether, on the day of the incident at issue or during the seven days before the incident, he had been under the influence of any illegal drugs, to which Chase responded in the negative.

During closing argument to the jury, defense counsel argued that the defendant had acted in self-defense and in defense of his property because Chase, "a vigilante road predatory tow truck operator," was illegally towing the defendant's car to steal it and was motivated by personal financial gain. Defense counsel argued that, when the defendant caught Chase stealing the car, Chase sprayed Mace at the defendant and damaged his own truck to cover up his actions. Defense counsel urged the jury to disregard Chase's testimony, impeaching his credibility by arguing that Chase had a motive to lie—to cover up his actions so he would not be charged with larceny and assault. Further attacking Chase's credibility, defense counsel argued that Chase had a tendency to lie, given his three prior larceny convictions.

The trial court subsequently instructed the jury on the defenses of self-defense and defense of property but limited the applicability of these defenses to the charges of breach of the peace in the second degree and threatening in the second degree. It did not instruct the jury on these defenses regarding the charge of criminal mischief in the third degree. The trial court also instructed the jury that it could consider Chase's larceny convictions in evaluating his credibility.

A

The defendant argues that the Appellate Court incorrectly determined that the trial court had not abused its discretion by precluding cross-examination about the facts underlying Chase's prior larceny convictions

because this testimony was admissible under §§ 4-4 and 6-6 of the Connecticut Code of Evidence as evidence of Chase's character for untruthfulness. We disagree.

Sections 4-4 and 6-6 of the Connecticut Code of Evidence govern whether witnesses may be asked about specific conduct to impeach their character for truthfulness. These rules "[prevent] the use of a general trait of character or propensity to prove that a person acted that way on a specific occasion"; C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 4.12.2, p. 166; but make an exception for evidence of a witness' character for untruthfulness. "Subdivision (3) [of § 4-4 (a)] authorizes the court to admit evidence of a witness' character for untruthfulness or truthfulness to attack or support that witness' credibility. . . . Section 6-6 addresses the admissibility of such evidence and the appropriate methods of proof." (Citation omitted.) Conn. Code Evid. § 4-4, commentary. Specifically, § 6-6 (b) (1) permits the questioning of a witness about instances of the witness' conduct if the conduct is probative of the witness' veracity. Conn. Code Evid. § 6-6 (b) (1) ("[a] witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness").

"[T]he right to cross-examine a witness pertaining to specific acts of misconduct is limited in three distinct ways. . . . First, cross-examination may only extend to specific acts of misconduct other than a felony conviction if those acts bear a special significance upon the issue of veracity. . . . Second, [w]hether to permit cross-examination as to particular acts of misconduct . . . lies largely within the discretion of the trial court. . . . Third, extrinsic evidence of such acts is inadmissible." (Citation omitted; internal quotation marks omitted.) *State* v. *Valentine*, 255 Conn. 61, 71, 762 A.2d 1278 (2000).

As to the first and second limitations, "[w]hether particular acts of misconduct are relevant to lack of verac-

ity depends on whether they have a logical tendency to indicate a lack of veracity. . . . [U]nless particular acts of misconduct are indicative of a lack of veracity, it is error to permit cross-examination concerning them, however much they may be indicative of bad moral character. . . . It does not follow, however, that if the acts inquired about are indicative of a lack of veracity, the court must permit the cross-examination." (Citations omitted; footnote omitted) *Vogel* v. *Sylvester*, 148 Conn. 666, 675–76, 174 A.2d 122 (1961). "In considering whether the court abused its discretion in this regard, the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable." (Internal quotation marks omitted.) *State* v. *Annulli*, 309 Conn. 482, 495, 71 A.3d 530 (2013).

"We have consistently recognized that crimes involving larcenous intent imply a general disposition toward dishonesty or a tendency to make false statements." (Internal quotation marks omitted.) *State* v. *Askew*, 245 Conn. 351, 363–64, 716 A.2d 36 (1998); see *State* v. *Martin*, 201 Conn. 74, 87, 513 A.2d 116 (1986); *State* v. *Lindsay*, 143 Conn. App. 160, 173, 66 A.3d 944, cert. denied, 310 Conn. 910, 76 A.3d 626 (2013). This does not mean, however, that the trial court was required to permit the defendant to ask Chase about the underlying facts of his larceny convictions without limitation. It is the larceny itself that is indicative of veracity. The defendant was permitted to, and did, question Chase about having been convicted of larceny. As a result, the defendant was able to present evidence to the jury that Chase previously had been involved in stealing. Cf. *State* v. *Martin*, supra, 87–89 (trial court abused its discretion by not allowing defense counsel to inquire whether victim ever had been involved in stealing).

The trial court prevented the defendant from inquiring into the facts underlying those prior larceny convic-

tions, including Chase's motivation for the prior thefts, because Chase's motivation on those prior occasions was not probative of his veracity. The trial court could have reasonably concluded that Chase's alleged motive for stealing cell phones to finance a drug addiction two to three years prior to the incident in the present case was not relevant to his character for truthfulness any more than the fact that he generally had a history of theft.

In response, and relying principally on an Illinois appellate court decision, the defendant argues that Chase's history of drug abuse is probative of veracity because " 'habitual users of narcotics become habitual liars.' " *People* v. *Accardo*, 195 Ill. App. 3d 180, 194, 551 N.E.2d 1349, appeal denied, 133 Ill. 2d 560, 561 N.E.2d 695 (1990). Although drug addiction or drug use may be probative of a witness' credibility for other reasons, such as a witness' ability to accurately perceive and to remember events, this court has rejected the proposition that drug addiction is probative of veracity. See *State* v. *Dobson*, 221 Conn. 128, 138, 602 A.2d 977 (1992) ("narcotics convictions are crimes which do not reflect directly on the credibility of one who has been convicted of them" (internal quotation marks omitted)); see also *State* v. *Lambert*, 58 Conn. App. 349, 357, 754 A.2d 182 (evidence of drug dealing is not relevant to veracity), cert. denied, 254 Conn. 915, 759 A.2d 507 (2000); *State* v. *Jaynes*, 35 Conn. App. 541, 553–55, 645 A.2d 1060 (evidence that witness had drug addiction did not require trial court to give instruction that drug addiction could be considered in determining witness' credibility), cert. denied, 231 Conn. 928, 648 A.2d 880 (1994); *State* v. *Irving*, 27 Conn. App. 279, 288 n.5, 606 A.2d 17 ("narcotics offenses are not relevant to prove truthfulness or veracity"), cert. denied, 222 Conn. 907, 608 A.2d 694 (1992).

Preclusion of evidence of drug use to show character for untruthfulness is in line with our general rule that

propensity evidence is inadmissible; see, e.g., *State* v. *Stenner*, 281 Conn. 742, 752, 917 A.2d 28, cert. denied, 552 U.S. 883, 128 S. Ct. 290, 169 L. Ed. 2d 139 (2007); because "addiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics . . . ." *Robinson* v. *California*, 370 U.S. 660, 678–79, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962) (Harlan, J., concurring). Accordingly, a defendant's constitutional rights to confrontation and to present a defense are not violated when the trial court precludes a defendant from impeaching a witness' character for truthfulness through evidence of drug use. See *State* v. *Dobson*, supra, 221 Conn. 137–38.

Moreover, exercising its discretion, the trial court reasonably could have determined that any possible connection between Chase's prior drug habit and his character for untruthfulness was outweighed by the potential prejudice in a case in which the defendant presented no evidence that Chase was using narcotics or had a drug addiction during the relevant time period. See *State* v. *James*, 211 Conn. 555, 571–72, 560 A.2d 426 (1989) ("[e]ven if the evidence did involve untruthfulness, the court was well within its discretion in excluding it because of its remoteness in time, its minimal bearing on credibility, and its tendency to inject a collateral issue into the trial"); see also part I B of this opinion.

Accordingly, we reject the defendant's argument that the Appellate Court incorrectly determined that the trial court had not abused its discretion by precluding him from inquiring into the underlying facts of Chase's prior larceny convictions to impeach Chase's character for untruthfulness.

B

The defendant next argues that the facts underlying Chase's larceny convictions were relevant to Chase's

intent to steal the defendant's vehicle to finance his drug habit because Chase previously had stolen to finance his drug habit and, thus, was motivated to falsely inculpate the defendant to cover up his own misconduct. On this basis, the defendant argues that this testimony was admissible under §§ 4-5 (c) and 6-5 of the Connecticut Code of Evidence to establish motive, interest, and intent. We disagree.

Evidence of prior misconduct is not admissible "merely to show an evil disposition of an [individual], and especially the predisposition to commit the crime [at issue]." (Internal quotation marks omitted.) *State* v. *Stenner*, supra, 281 Conn. 752. Under §§ 4-5 (c) and 6-5 of the Connecticut Code of Evidence although, this evidence may be admissible if it is relevant to an individual's motive, intent, or interest in testifying. See Conn. Code Evid. § 4-5 (c) ("[e]vidence of other crimes, wrongs or acts of a person is admissible . . . to prove intent . . . [or] motive"); Conn. Code Evid. § 6-5 ("[t]he credibility of a witness may be impeached by evidence showing bias for, prejudice against, or interest in any person or matter that might cause the witness to testify falsely"). "We have developed a two part test to determine the admissibility of such evidence. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh [its] prejudicial effect." (Internal quotation marks omitted.) *State* v. *Stenner*, supra, 752.

For prior misconduct to be relevant to a witness' intent, it must permit the reasonable inference that, "under similar circumstances, the [witness] engaged in intentional conduct similar to a form of the intentional conduct [at issue]." *State* v. *Nunes*, 260 Conn. 649, 688, 800 A.2d 1160 (2002). Nevertheless, relevant prior misconduct evidence may be precluded if its admission would cause undue delay in the trial or would unduly

distract or confuse the jury. See *State* v. *Hill*, 307 Conn. 689, 698, 59 A.3d 196 (2013).[4]

Case law establishes that evidence of an individual's prior drug use may be relevant to intent, motive, and interest. See *State* v. *Feliciano*, 256 Conn. 429, 452–53, 778 A.2d 812 (2001) (evidence of defendant's having drug habit and stealing to finance drug habit one month before robbery and murder at issue was relevant to show defendant had motive and intent to commit rob-

[4] The defendant relies on *Hedge* to argue that, because the prior misconduct evidence tends to negate his guilt by supporting his defenses of self-defense and defense of property, this evidence is not only admissible under § 4-5 (c), but also that the Code of Evidence has "extremely limited applicability" to the extent that it limits admissibility of this type of evidence. *State* v. *Hedge*, supra, 297 Conn. 653. *Hedge* is distinguishable, however, because, in that case, we held that prior misconduct may be admissible under what is now § 4-5 (c) to establish third-party culpability. Given the strict requirements for establishing third-party culpability, we determined that the policies underlying §§ 4-4 (a) and 4-5 (a) of the Connecticut Code of Evidence have "extremely limited applicability" under those circumstances, as unduly restricting the defendant's ability to establish his claim would be unfair. Id., 650–53 (holding that prejudice does not weigh in balancing test because third party against whom evidence is offered to exculpate defendant is not party to case and, thus, prior misconduct of third party is admissible unless outweighed by " 'undue waste of time and confusion of the issues' "). The defendant in the present case, however, was not offering this evidence to establish third-party culpability for his own breach of the peace—that he was innocent and Chase the actual perpetrator—but to support his defenses of self-defense and defense of property by establishing Chase's intent, motive, and interest—that Chase intended to steal the defendant's car to finance a drug habit, motivating him to lie about acting in self-defense, giving him an interest in the outcome of this case. We therefore do not find the language in *Hedge* applicable in the present case.

Moreover, although *Hedge* recognized that prior misconduct may be admissible under what is now § 4-5 (c) if it is relevant to the defendant's theory of defense, for the facts underlying Chase's larceny conviction to be relevant to the defense theory in the present case, those facts would have to be relevant to Chase's intent and motive—namely, that he intended to steal the defendant's vehicle and, thus, was motivated to falsely assert self-defense and to falsely inculpate the defendant. Because we conclude that the trial court did not abuse its discretion in determining that this evidence was not relevant to intent and motive, it likewise was not relevant to the defendant's theory of defense.

bery that led to victim's murder); *State* v. *Colton*, supra, 227 Conn. 250–51 (trial court abused its discretion by precluding evidence of witness' drug habit at time she first came forward to provide police information—fourteen months after victim's murder and once reward money was offered—to contradict witness' testimony that she was not using drugs at time of trial and to establish both that she lied and was motivated to falsely accuse defendant to finance her drug habit); *State* v. *Schonagel*, 189 Conn. 752, 768, 459 A.2d 106 (1983) (on retrial, evidence of defendant's drug habit at time of arson could be admissible to establish that he was motivated to commit arson to finance his drug habit, although state must establish first that he could not afford drug habit), vacated on other grounds, 465 U.S. 1002, 104 S. Ct. 990, 79 L. Ed. 2d 224 (1984). The present case is distinguishable from those cases, however, because the defendant failed to establish a proper foundation—namely, some evidence from which the jury reasonably could have concluded that Chase had an ongoing drug habit at the time of the incident at issue and that Chase's prior misconduct was sufficiently similar to the conduct at issue. "The proffering party bears the burden of establishing the relevance of the offered testimony. Unless such a proper foundation is established, the evidence . . . is irrelevant." (Internal quotation marks omitted.) *State* v. *Barnes*, supra, 232 Conn. 747.[5] Without an offer of proof that a witness had a drug habit at the time of the incident at issue, inquiry into whether the witness had a drug habit and whether this habit motivated the witness' actions or testimony constitutes an improper fishing expedition. Id., 749–50.

[5] "This may be accomplished in one of three ways. First, the defendant can make an offer of proof. . . . Second, the record independently can be adequate to establish the relevance of the proffered testimony. . . . Finally, the defendant can establish a proper foundation for the testimony by stating a 'good faith belief' that there is an adequate factual basis for his inquiry. . . . A cross-examiner may inquire into the motivation of a witness if he or she has a good faith belief that a factual predicate for the question exists." (Citations omitted.) *State* v. *Barnes*, supra, 232 Conn. 747.

The state conceded in its brief to this court that, if there had been any evidence that Chase had an ongoing drug habit at the time of the incident at issue, evidence of that habit may have been relevant to motive, intent, and interest. The defendant offered no such evidence. Rather, he merely argued that, because Chase had a drug habit approximately two years prior to the incident, he likely still had a drug habit and that this drug habit likely motivated him to attempt to steal the defendant's car because it motivated him to steal cell phones two years prior. To list these speculative leaps is to explain why the trial court reasonably could have prevented this line of inquiry.

Clearly, Chase's drug addiction at the time he committed the 2012 and 2013 larcenies would be relevant to his motive and intent to steal the cell phones during that period of time. This evidence, however, without more, is not relevant to his motive and intent to commit a larceny approximately two years later, under significantly different circumstances. Although the passage of two years may not be long enough to deem the larceny convictions themselves too remote, for general credibility purposes, this passage of time, without evidence that Chase continued to have a drug habit in 2015 that motivated him to steal, substantially diminished the relevancy of the underlying facts relating to those convictions.[6] Additionally, although both sets of facts involve theft, there are no other similarities between the

[6] In determining that the trial court did not abuse its discretion by precluding this testimony, the Appellate Court's analysis relied on the trial court's finding that there was no evidence that Chase was *under the influence* of drugs at the time of the incident at issue. *State* v. *Rivera*, supra, 187 Conn. App. 825. The issue, however, is not whether the facts underlying Chase's prior larceny convictions were relevant to his drug use *on a particular day*, including the day of the incident but, rather, whether this evidence was relevant to whether Chase had an ongoing drug habit during the time period at issue that might have motivated him to steal. An individual could have an ongoing drug habit but not be under the influence of drugs on a particular day, especially if that individual was in need of money to support his drug habit.

conduct in the present case and the conduct underlying Chase's previous larceny convictions. See *State* v. *Nunes*, supra, 260 Conn. 688 (requiring "similar circumstances" for prior misconduct to be relevant to intent). This lack of similarity, as well as the lack of evidence that Chase had an ongoing drug habit at the time of the incident at issue, supports the trial court's conclusion that this evidence had minimal, if any, probative value on the issues of motive, intent, and interest, all of which were contingent on Chase's having had a drug habit at the time of the incident at issue.

In response, the defendant argues that the facts of the present case are nearly identical to the facts in *Colton*, in which the state's main witness came forward fourteen months after the unsolved murder of the victim to identify the defendant as having been with the victim at the scene of the crime and to implicate him in the murder only after the state had offered reward money in the case. *State* v. *Colton*, supra, 227 Conn. 234, 239. The defendant's theory of defense in *Colton* was that the reward

In the present case, the trial court found that there was no evidence of Chase either being under the influence of narcotics or having a substance abuse habit at the time of the incident at issue. It is the latter, not the former, that supports the trial court's determination that the facts underlying Chase's larceny convictions two years before the incident were too remote in time to be relevant to his motive, intent, or interest. Contrary to the Appellate Court's reasoning that this prior misconduct evidence was too remote because it occurred approximately two years prior to the incident at issue and because there was no evidence that Chase was under the influence of drugs at the time of the incident at issue, if there had been evidence that Chase had a continuing drug habit at the time of the incident at issue, regardless of whether he was under the influence of drugs during the incident at issue, the facts underlying his prior larceny convictions would have had increased relevancy to his intent, motive, and interest. It is the lack of this evidence that renders the prior misconduct too remote, thereby diminishing its relevancy. Without some evidence that Chase had a continuing drug habit, the trial court reasonably determined that evidence of drug addiction two years prior to the incident at issue was too remote in time to be relevant to whether Chase was motivated to steal the defendant's vehicle to finance a drug habit that may no longer have existed.

money motivated the witness, who was a prostitute and a drug addict, to falsely identify the defendant and to testify against him because she had an ongoing drug habit she needed money to finance. Id., 240. The witness testified at trial that, at the time of the murder, she in fact had a drug habit and was a prostitute but that, at the time she decided to give her statement to the police, she no longer used drugs or worked as a prostitute, and, thus, her prior drug habit did not motivate her to falsely testify. Id., 241. To prove both that the witness lied and that she was motivated by her desire for money to buy drugs, the defendant proffered the testimony of two acquaintances of the witness, who had seen her use drugs and work as a prostitute both at about the time she came forward with the information inculpating the defendant and at about the time of her trial testimony. Id., 243–44. The trial court precluded the defendant from offering this evidence. Id. We determined that the trial court in *Colton* abused its discretion because the testimony regarding the witness' drug use and prostitution in the years after the murder, coupled with the testimony about her drug use and prostitution before and at the time of the murder, strongly indicated that the witness not only had an ongoing drug problem at the relevant time but also had a motive to falsely accuse the defendant to finance her habit. Id., 250–52.

The facts of the present case are distinguishable from the facts in *Colton*. Although the defendant in the present case proffered evidence that Chase had a prior drug habit, and although Chase denied at trial that he had a drug habit at the time of the incident at issue, the similarities between the two cases end there. The defendant offered no evidence that Chase had an ongoing drug habit at the time of the incident at issue. The defendant appears to argue that, because he offered the police reports regarding the larcenies in support of his proffer that Chase had a drug addiction two years prior to

the incident at issue, it was the state's burden to establish how and when Chase overcame that addiction, and that, in the absence of such evidence, the defendant had satisfied his burden of laying a sufficient foundation. Additionally, to the extent any additional evidence was required to satisfy this burden, the defendant argues that, because the trial court precluded him from accessing Chase's medical and substance abuse records, a decision that the Appellate Court upheld on appeal, he was prevented from offering any such evidence. As *Colton* makes clear, however, medical records are not the only means of establishing that an individual has a drug habit, and it is the proffering party that bears the burden of establishing a sufficient foundation.[7]

In the absence of this evidence, evidence of Chase's prior drug use had little or no relevance as to whether Chase had a drug habit at the time of the incident at issue and, thus, had minimal relevance to Chase's motive, intent, and interest. Accordingly, we conclude that the trial court did not abuse its discretion by precluding inquiry into the underlying facts of Chase's prior larceny convictions, and, thus, the defendant failed to establish a constitutional violation.

II

The defendant next claims that the Appellate Court incorrectly determined that he did not establish that the trial court had violated his rights to confrontation and to present a defense by precluding him from cross-examining Chase about the specific facts underlying Chase's prior breach of the peace conviction—specifically, the fact that, by pleading guilty to the breach of the peace charge, he admitted that he had lied about

[7] Additionally, the defendant offered no evidence that Chase needed to steal to finance a drug habit. For example, although there was testimony at trial that there was some confusion over which company Chase worked for at the time of the incident; see footnote 1 of this opinion; the defendant offered no evidence that Chase was unemployed at this time.

using pepper spray in self-defense—because they were relevant to veracity, intent, motive, and a common scheme or pattern. We disagree.

The following additional facts are necessary to our review of this claim. Prior to the start of evidence, defense counsel proffered a police report that showed that, in 2012, Chase, while in his motor vehicle, had gotten into an altercation with another driver. Chase told the police that the other driver had tried to run him off the road, then exited his vehicle, approached Chase's vehicle, and attempted to open Chase's car door. Chase told the police that he responded by spraying pepper spray at the other driver in self-defense. The other driver provided the police with a different version of events, stating that Chase had been swerving and "[b]rake [c]hecking" him and that, when both cars stopped, he exited his vehicle and approached Chase to ask what was wrong when Chase sprayed pepper spray at him. Unable to determine fault due to the inconsistencies in the two versions of events, the police officer issued Chase and the other driver misdemeanor summons tickets for breach of the peace. Subsequently, Chase, who represented himself, pleaded guilty to the breach of the peace charge and received a relatively minor fine but maintained that he had been acting in self-defense when he sprayed the pepper spray.

Defense counsel in the present case argued that he intended to use these underlying facts to impeach Chase because Chase's guilty plea was the equivalent of an admission that he had no valid defense of self-defense and, thus, had lied about using pepper spray in self-defense.[8] Evidence of this lie, defense counsel argued,

[8] From the trial transcript of argument on this issue, it appears the defendant proffered a transcript from the plea proceedings regarding Chase's breach of the peace conviction. Both the state and the trial court reviewed the transcript, and the trial court relied on it in making its determination. The defendant did not have the transcript marked for identification or admitted as a court exhibit, however, and, thus, the transcript is not part of the record before us. Accordingly, our review of what occurred at Chase's

was admissible under § 4-5 (c) of the Connecticut Code of Evidence because it was relevant to establish that Chase had a common scheme or pattern of falsely accusing other people of being the initial aggressor and falsely raising the defense of self-defense to cover his tracks when he engaged in misconduct. Further, defense counsel argued, also pursuant to § 4-5 (c), that this conduct was admissible to show Chase's motive and intent because it showed that Chase had a habit of claiming self-defense to escape prosecution for his misconduct and, thus, he was not acting in self-defense in the present case.

The trial court declined to permit inquiry into Chase's breach of the peace conviction and the underlying facts of that conviction. The trial court determined that the nature of a conviction of breach of the peace was not indicative of veracity and did not impeach Chase's credibility by showing that he lied about having acted in self-defense. Specifically, the court was unwilling to find that Chase's guilty plea was the equivalent of an admission that he lied about having acted in self-defense, especially in light of Chase's having maintained at the plea proceedings that he had in fact acted in self-defense. Because the trial court found that his guilty plea was not inconsistent with his statements regarding self-defense, it also found that this evidence was not relevant to intent, motive, absence of malice, knowledge, or a common scheme or plan. Additionally, the trial court determined that this evidence would inject

plea proceeding is limited to the findings of fact made by the trial court, which are limited to the fact that Chase pleaded guilty to the breach of the peace charge but also maintained that he was acting in self-defense. Specifically, the court found: "Prior to entering his plea, he was still reiterating, in that case back in—or that incident back in 2012, that the other individual ran him off the road, approached his car, and, as he approached the car, he tried to spray it. So, as far as making the jump from, because he entered his plea to a breach of [the] peace, he wasn't still claiming that he was doing this in self-defense. [The] [c]ourt's not willing to make that jump."

collateral issues into the trial and lacked probative value due to its remoteness in time.

Despite the court's ruling, when the state asked Chase on direct examination if he previously had been convicted of any crimes, he admitted that he had been convicted of both larceny and breach of the peace. On cross-examination, defense counsel similarly inquired into Chase's prior convictions, and again Chase admitted to the breach of the peace conviction. During closing argument, defense counsel urged the jury to reject Chase's testimony as dishonest and motivated by his own desire to cover up his attempted theft of the defendant's car and his assault of the defendant, relying in part on Chase's prior breach of the peace conviction to show that he previously had "engaged in fighting behavior."

For the facts underlying Chase's prior breach of the peace conviction to be relevant to veracity, intent, motive, or common scheme, the defendant would have to be correct that Chase's guilty plea to the breach of the peace charge was inconsistent with his statements to the police that he sprayed another person with pepper spray in self-defense, showing that he lied about acting in self-defense. Whether two statements are actually inconsistent is a determination that "lies within the discretionary authority of the trial court." *State* v. *Avis*, 209 Conn. 290, 302, 551 A.2d 26 (1988), cert. denied, 489 U.S. 1097, 109 S. Ct. 1570, 103 L. Ed. 2d 937 (1989).

We conclude that the trial court did not abuse its discretion in determining that Chase's prior statements to the police about acting in self-defense were not inconsistent with his guilty plea to the charge of breach of the peace and, thus, were not evidence of Chase's having previously lied about acting in self-defense. The trial court found, and the defendant does not challenge, that Chase maintained that he had been acting in self-defense throughout the plea proceedings. Rather, the

defendant argues that a plea of guilty is an admission of guilt and, thus, is a concession by Chase that he had no viable self-defense claim and had lied about acting in self-defense, regardless of his having maintained that he acted in self-defense. This court has recognized, however, that a myriad of reasons may explain why an individual would plead guilty, and, thus, there is "simply no open and visible connection" between a guilty plea and the individual's state of mind at the time of the crime. *State* v. *Tony M.*, 332 Conn. 810, 834, 213 A.3d 1128 (2019). On the basis of the limited record before this court regarding the plea proceedings for Chase's breach of the peace conviction, we cannot say that the trial court abused its discretion in finding that Chase's guilty plea was not an admission that he did not have a valid defense of self-defense and, thus, did not establish that he previously had lied about acting in self-defense. Because this evidence was not relevant to whether Chase previously lied about acting in self-defense, the facts underlying Chase's breach of the peace conviction were not relevant to veracity, motive, intent, or a common scheme or pattern. Thus, the trial court did not abuse its discretion by precluding this evidence, and, therefore, the defendant has failed to establish a constitutional violation.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

VOL. 335

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* HUBERT POTOTSCHNIG ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 200 Conn. App. 554 (AC 41229), is denied.

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

Patrick Zailckas and *Randolph E. White*, pro hac vice, in support of the petition.

Brian D. Rich and *Logan A. Carducci*, in opposition.

Decided November 24, 2020

AMY A. DAVIS *v.* ALEXANDER F. DAVIS, SR.

The defendant's petition for certification to appeal from the Appellate Court, 200 Conn. App. 180 (AC 41360), is denied.

David V. DeRosa, in support of the petition.

Decided November 24, 2020

STATE OF CONNECTICUT *v.* JOHN PJURA

The defendant's petition for certification to appeal from the Appellate Court, 200 Conn. App. 802 (AC 41869), is denied.

James B. Streeto, senior assistant public defender, in support of the petition.

Brett R. Aiello, special deputy assistant state's attorney, in opposition.

Decided November 24, 2020

B. SHAWN MCLOUGHLIN ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF BETHEL

The plaintiffs' petition for certification to appeal from the Appellate Court, 200 Conn. App. 307 (AC 42561), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that, under *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 170 A.3d 73 (2017), a zoning commission can deny a special use permit application based on noncompliance with the general standards enumerated in the zoning regulations despite full compliance with the technical requirements?

"2. If the answer to the first question is in the affirmative, did the Appellate Court correctly determine that substantial evidence supported the decision of the defendant planning and zoning commission to deny the plaintiffs' special use permit application?"

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

Daniel E. Casagrande, in support of the petition.

Charles R. Andres, in opposition.

Decided November 24, 2020

DOROTHY A. SMULLEY *v.* SAFECO INSURANCE COMPANY OF ILLINOIS ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court (AC 44015) is denied.

Dorothy A. Smulley, self-represented, in support of the petition.

Philip T. Newbury, Jr., in opposition.

Decided November 24, 2020

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CONNECTICUT APPELLATE REPORTS

Vol. 201

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE JA'LA L. ET AL*
(AC 44072)

Prescott, Elgo and Pavia, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her minor children, who had previously been adjudicated uncared for. The respondent claimed that there was insufficient evidence to establish, by clear and convincing evidence, that termination of her parental rights was in the children's best interest and that, in light of her continuing efforts to rehabilitate and the relationship she has with them, she would be capable of rehabilitating and resuming a responsible position in her children's lives as required by the applicable statute (§ 17a-112) if given additional time and appropriate services. *Held* that there was sufficient evidence to support the trial court's conclusion that it was in the best interests of the children to terminate the respondent's parental rights; the respondent did not challenge as clearly erroneous any of the subordinate facts on which the court relied for its conclusion, the respondent's argument that she should have been permitted more time to rehabilitate was unavailing, as it was inconsistent with the repeated recognition by our Supreme Court of the importance of permanency in children's lives, and the respondent's claim ignored the particular needs of the children, who had experienced confusion and anxiety due to the respondent's sporadic visits and their uncertainty about future placements and who would benefit from the ability to build relationships and connect with permanent homes.

Argued October 13—officially released December 1, 2020**

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, *Conway*, *J.*; judgments terminating the respondents' parental rights,

* 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.

** December 1, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

from which the respondent mother filed an appeal to this court. *Affirmed.*

David Rozwaski, assigned counsel, for the appellant (respondent mother).

Kristin Losi, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon* and *Evan O'Roark*, assistant attorneys general, for the appellee (petitioner).

Opinion

PRESCOTT, J. The respondent, Shanea L., appeals from the judgments of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights with respect to her daughters, Ja'La L. and Ja'Myiaha L., on the ground that the respondent has failed to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B) (i).[1] On appeal, the respondent concedes that the evidence was sufficient to prove an adjudicatory ground, but claims that the court improperly concluded that termination was in the best interests of the children. We affirm the judgments of the trial court.

The record reveals the following relevant facts and procedural history, as set forth by the trial court in its memorandum of decision or as otherwise undisputed in the record. The respondent is the mother of four children, only two of whom are the subject of this proceeding, namely, Ja'La and Ja'Myiaha. The respondent has a history with the Department of Children and Families

[1] The court also terminated the parental rights of Ja'La's father, Raymond B., and Ja'Myiaha's putative fathers, Kenneth V. and John Doe, in the same proceeding on the ground of abandonment. None of these individuals appealed from the judgments, and, therefore, we refer to Shanea L. as the respondent in this opinion.

(department) that dates back to 2010.[2] Only the respondent's youngest child, Jordyn L., remained in her care at the time of these proceedings.[3]

In January, 2015, the Probate Court vested guardianship of Ja'La and Ja'Myiaha with their maternal great grandmother, due to the respondent's homelessness, substance abuse, and mental health issues. In April, 2017, the girls' great grandmother became unable to care for them because of her own medical conditions. On May 2, 2017, the petitioner obtained an order of temporary custody of Ja'La and Ja'Myiaha. Two days later, the petitioner filed neglect petitions, and, on June 8, 2017, the children were adjudicated uncared for[4] and committed to the care and custody of the petitioner.

Shortly thereafter, Ja'La and Ja'Myiaha were placed with Ja'La's paternal aunt. In October, 2017, while in her aunt's care, Ja'La was severely burned by hot water. She spent two months in a hospital receiving treatment for second and third degree burns, during which time the department offered to transport and supervise weekly hospital visits between the respondent and Ja'La. The respondent visited Ja'La at the hospital only once. Ja'Myiaha was removed from the aunt's care and placed in her present nonrelative foster home, and Ja'La joined her sister on her discharge from the hospital. Ja'La has

[2] In 2010, the respondent was arrested after hitting her oldest child, Jaden L., in the head and causing him to fall down the stairs. The allegations of abuse were substantiated and guardianship was later transferred to Jaden's maternal uncle and his girlfriend.

[3] The department has expressed concern with the respondent's ability to parent Jordyn. According to the respondent, Jordyn was briefly removed from her care. Subsequently, Jordyn was adjudicated neglected and remained in the respondent's care under a court-ordered period of protective supervision.

[4] We note, as did the trial court in its memorandum of decision, that although many of the exhibits from the trial on the termination of the respondent's parental rights reflect that the girls were adjudicated neglected, the original allegation of neglect was amended to allege that the girls were uncared for.

since been removed from that foster home because she threatened to kill Ja'Myiaha and attempted to physically assault her on a number of occasions.[5]

On March 8, 2018, a permanency plan of reunification was approved by the court, and the respondent was issued court-ordered specific steps. Specifically, the respondent was ordered, inter alia, to stop using illegal drugs, seek recommended substance abuse treatment, take part in individual therapy, and visit with her children as often as the department permits. With regard to visitation, the respondent was inconsistent in her efforts to see her children. She became more consistent beginning in August, 2018, when she had two hour supervised visits every other week with both girls. In April, 2019, however, the respondent ceased attending visits entirely. Approximately six months passed before the respondent saw Ja'La and Ja'Myiaha again in connection with a court-ordered psychological evaluation.[6] During those intervening six months, the respondent also did not phone her children despite being permitted to do so.

As to the respondent's substance abuse and recommended treatment, in April, 2018, the department referred her to Family Based Recovery, but she denied drug usage and chose not to submit to urine/hair testing. In December, 2018, the respondent completed a substance abuse evaluation at Midwestern Connecticut Council of Alcoholism (MCCA), at which time she acknowledged smoking marijuana two times a day, and her urine screen tested positive for marijuana. Consequently, the respondent was recommended to attend the MCCA Intensive Outpatient Program. She claimed, however, that she

[5] On December 10, 2019, Ja'La was removed and placed in a new foster home, in which she is the only child.

[6] As part of the evaluation, Ines Schroeder, a psychologist, supervised an interaction between the respondent, Ja'La, Ja'Myiaha, and the respondent's youngest child, Jordyn, on November 7, 2019. A written report regarding the evaluation is dated December 7, 2019.

could not attend the program due to child care issues. The respondent was then referred to Multicultural Ambulatory Addict Services (MAAS), which is a drug treatment program with a child care component. She started the MAAS program in January, 2019, but stopped attending after a March, 2019 incident in which Jordyn assaulted another child and was banned from the program's daycare.

With regard to individual therapy, the department referred the respondent to an in-home program called K-Assist in June, 2017. She worked with K-Assist for about one year, did not attend the psychiatric evaluation that her clinician recommended, and ultimately chose not to participate in the program. For a period of time, the respondent was not willing to engage in any other services offered by the department. In February, 2019, the respondent attended an intake appointment at Integrated Wellness, but her participation in the program was short lived.

On March 8, 2019, the petitioner filed termination of parental rights petitions with respect to the two children on the ground that the court had found them uncared for in a prior proceeding and the respondent has failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and the needs of the children, she could assume a responsible position in the lives of the children. See General Statutes § 17a-112 (j) (3) (B) (i).

The trial on the termination of parental rights petitions took place on December 16, 2019.[7] The petitioner

[7] On March 5, 2019, the respondent filed a motion to revoke commitment of Ja'La and Ja'Mayiaha, pursuant to Practice Book § 35a-14a, alleging that the reason for commitment no longer exists and it is in the children's best interests to return to her care. A hearing on that motion was consolidated with the termination of parental rights trial. Ultimately, the court denied the respondent's motion to revoke commitment, finding that she failed to sustain her burden of proof because grounds for commitment continued to exist.

presented one witness, social worker Elizabeth Reynoso. Reynoso testified, inter alia, that (1) the respondent did not successfully utilize the department's services to address her own needs, (2) Ja'La and Ja'Myiaha have specialized needs that the respondent is not capable of meeting, (3) in a conversation the week prior to trial, the respondent acknowledged that she was not currently able to meet the needs of her children and that she had not done what she needed to do to comply with specific steps,[8] and (4) the department has concerns about the respondent's ability to manage three children at once, particularly because she already was experiencing challenges with the only child currently in her care. The respondent testified on her own behalf, stating, inter alia, that she had started seeing a therapist whom she likes three weeks prior to trial.

On December 20, 2019, the court issued a memorandum of decision granting the petitions to terminate the parental rights of the respondent.[9] Specifically, the court noted that the respondent "suffers from major depressive disorder, post-traumatic stress disorder [(PTSD)] and a personality disorder. At times her anxiety precludes her from leaving her home and she habitually consumes marijuana [despite not having a medical prescription]. [The department] has made reasonable efforts to address [the respondent's] debilitating mental health issues and to foster [the respondent's] relationship and interaction with the girls. The [department's] efforts have had little to no positive impact because [the respondent] has been noncompliant and/or unengaged in referrals and services, the most glaring being her failure to engage

[8] The respondent agreed that this conversation took place and confirmed that she told Reynoso that (1) she has not done what was asked of her, and (2) she was tired of fighting for the children and hoped that they would get the help that they needed.

[9] Both the attorney for the minor children and their guardian ad litem supported the termination of the respondent's parental rights. Additionally, on appeal, the guardian ad litem for the minor children adopted the petitioner's brief and supports the affirmance of the trial court's decision.

in mental health and substance use treatment and her April, 2019 cessation of contact with Ja'La and Ja'Myiaha. Similarly, the testimony and exhibits reveal the respondent . . . is unable or unwilling to benefit from reunification efforts." (Footnote omitted.)

The court also quoted portions of Ines Schroeder's December, 2019 psychological evaluation of the respondent.[10] Specifically, Schroeder indicated in her evaluation that "[the respondent] strives to meet her own needs first with little consideration for the effect on others. This was noted when she voiced that she stopped visits [in April, 2019] because she . . . struggled . . . greatly in having them because they left her too emotional and upset. While it is important that she took care of herself, her choice left her daughters feeling abandoned by [the respondent]. She did not share with them what she was doing, why she was doing it, or work with a therapist to help her process and manage these emotions so she can be available to her daughters. Her choices left her daughters to suffer emotionally. . . .

"While she feels more competent now than in the past, she recognizes her limits and admitted her need to stay away from visits because she is too emotionally overwrought by them. She is pessimistic about achieving her goals. She desires to be present for her children but feels emotionally unprepared. She recognizes her inability to care for the girls now but fears what her decision will mean regarding her future relationship with her children. She wishes to have more time to prepare and be available to the girls."

Schroeder concluded that "[i]t is highly recommended that visits with [the respondent] stop unless it is determined that they are going to [be reunified] in the near future and the visits can be consistent and nurturing for them. Random inconsistent visits are very

[10] Court-ordered psychological evaluations of the respondent, Ja'La, and Ja'Myiaha were conducted by Schroeder in July, 2018 and December, 2019.

confusing to the girls and the discussion of potentially returning to her care without a clear understanding of when that might happen are emotionally damaging. When they witness their younger sister [Jordyn] engaging with [the respondent] and remaining in her care when they cannot can also be emotionally damaging. For them, it can affirm a belief that they are not wanted or valued as their sister is."

With regard to the individual needs of the children, the court found that Ja'La has "profound emotional and behavioral issues," including PTSD and disruptive mood dysregulation. She was hospitalized multiple times in 2018, and again in December, 2019, due to her unsafe and out of control behaviors. Ja'Myiaha is diagnosed with PTSD, attention deficit hyperactivity disorder, and enuresis, and her treatment goals in 2018 through 2019 included "gaining control over her fits of anger, physical and verbal aggression towards animals and people, refusing to listen to adults, nightmares, lying, screaming and difficulty expressing herself." (Internal quotation marks omitted.) The court further stated that "Ja'Myiaha has made considerable progress over the past year or so but she continues to need a level of care that is far beyond [the respondent's] capabilities. Any contact between [the respondent] and the girls is detrimental to the girls' well-being . . . ."

Accordingly, the court found that the ground for termination asserted in the petitions, namely a failure to rehabilitate, had been proven. The court next considered the appropriate disposition of the children and made detailed written findings regarding their best interests pursuant to the criteria set forth in § 17a-112 (k).[11] On the basis of these findings, the court determined by clear and convincing evidence that termination of the respondent's rights was in the best interests of the children. Accordingly, the court terminated her parental

[11] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether

rights and appointed the petitioner as the children's statutory parent.

On appeal, the respondent concedes that there were sufficient grounds for the termination of her parental rights. She contends, however, that the trial court improperly determined that it was in the best interests of the children to terminate her parental rights. Specifically, the respondent argues that, in light of her continuing efforts to rehabilitate and the relationship she has with her daughters, the court should have concluded that she is capable of rehabilitating and becoming a responsible parent if given additional time and appropriate services.

We begin with general principles of law and our applicable standard of review. "Proceedings to terminate

to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (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."

parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence." (Internal quotation marks omitted.) *In re Egypt E.*, 327 Conn. 506, 526, 175 A.3d 21, cert. denied sub nom. *Morsy E.* v. *Commissioner of Children & Families*, U.S. , 139 S. Ct. 88, 202 L. Ed. 2d 27 (2018). "If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 487–88, 940 A.2d 733 (2008).

At oral argument before this court, counsel for the respondent acknowledged that the respondent's claim on appeal is, in essence, that there was insufficient evidence to establish, by clear and convincing evidence, that termination was in the best interests of the children. The petitioner also invites us to employ the evidentiary sufficiency standard of review in this case. Accordingly, we will apply that standard.[12] When "the appropriate

[12] We leave open the question as to whether this is the appropriate standard of review that must be applied when reviewing a court's determination that termination is in the best interest of a child. See *In re Avia M.*, 188 Conn. App. 736, 739, 205 A.3d 764 (2019) ("the standard of review for the court's determination of the best interest of the child is clearly erroneous"). Additionally, we note that we have previously declined to extend the evidentiary sufficiency standard of review to the court's consideration of the best interest of a child where the evidence supported our decision under either standard. See *In re Jacob W.*, 178 Conn. App. 195, 205 n.10, 172 A.3d 1274 (2017) (citing *In re Elijah G.-R.*, 167 Conn. App. 1, 29–30 n.11, 142 A.3d 482 (2016)), aff'd, 330 Conn. 744, 200 A.3d 1091 (2019); *In re Nioshka A.N.*, 161 Conn. App. 627, 637 n.9, 128 A.3d 619, cert. denied, 320 Conn. 912, 128 A.3d 955

standard of review is one of evidentiary sufficiency . . . [the question is] whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . [W]e review the trial court's subordinate factual findings for clear error, but we review the court's ultimate conclusion . . . on the basis of whether the cumulative effect of the evidence was sufficient to justify the ultimate conclusion." (Citation omitted; internal quotation marks omitted.) *In re James O.*, 160 Conn. App. 506, 522, 127 A.3d 375 (2015), aff'd, 322 Conn. 636, 142 A.3d 1147 (2016).

Here, there is abundant evidence in the record to support the court's conclusion that it was in the best interests of the children to terminate the respondent's parental rights. The respondent does not challenge as clearly erroneous any of the subordinate facts on which the court relied in concluding that termination was in the best interests of the children. Moreover, the respondent's argument that she should have been permitted more time to rehabilitate before her parental rights were terminated is inconsistent with our Supreme Court's repeated recognition of "the importance of permanency in children's lives." *In re Davonta V.*, supra, 285 Conn. 494–95 ("Virtually all experts, from many different professional disciplines, agree that children need and benefit from continuous stable home environments. . . . [S]table and continuous care givers are important to normal child development. Children need secure and uninterrupted emotional relationships with the adults who are responsible for their care." (Citation omitted; internal quotation marks omitted.)).

(2015). This case constitutes another instance in which the evidence supports our decision under either standard.

Likewise, the respondent's claim ignores the particular needs of Ja'La and Ja'Myiaha as expressed in Schroeder's recommendation following the December, 2019 psychological evaluation. Specifically, Schroeder stated that "[i]t is recommended that no further time be afforded to [the respondent] to reunify with Ja'La and Ja'Myiaha as the girls would benefit from some stability about their future and permanency. . . . [The visits the children have had with the respondent] are sporadic and also become a source of unrest and unease. . . . They are confused about their permanent placement because of these random visits. . . . The children continue to wonder whether they are going back with [the respondent] or not. This is a source of unrest and anxiety for them. . . . Discussions in the visits about the future and returning to [the respondent's] care leave them feeling confused and stressed. This disrupts their ability to connect and bond with the people who are caring for them full time. It can also disturb their sense of loyalty and worry their biological mother may be upset they are making these bonds. The severance of the relationship [with the respondent] will permit them to process the loss but build the relationships that will be connected to their permanent homes." Because there was sufficient evidence in the record to support the court's conclusion that it was in the best interests of the children to terminate the respondent's parental rights, the respondent's claim fails.

The judgments are affirmed.

In this opinion the other judges concurred.

IN RE MIRACLE C.*
(AC 44006)

Alvord, Cradle and Sullivan, Js.

Syllabus

The respondent mother appealed from the judgment of the trial court terminating her parental rights with respect to her minor child. She claimed that the court erroneously concluded that the Department of Children and Families had made reasonable efforts at reunification pursuant to statute (§ 17a-112 (j) (1)) because, although the department's plan was to engage her in dialectical behavioral therapy, it failed to inform her that she should have engaged in that therapy. The court also found, pursuant to § 17a-112 (j) (1), that the mother was unable or unwilling to benefit from reunification efforts. *Held* that because the respondent mother, who did not challenge on appeal the trial court's finding that she was unable or unwilling to benefit from reunification efforts, challenged only one of the two separate and independent bases for upholding the court's determination that the requirements of § 17a-112 (j) (1) had been satisfied, there existed a separate and independent basis for upholding the court's determination, and, therefore, there was no practical relief that could be afforded to her; accordingly, the appeal was dismissed as moot.

Argued October 6—officially released December 1, 2020**

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 New Haven, Juvenile Matters, where the matter was tried to the court, *Marcus, J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Appeal dismissed.*

* 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.

** December 1, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

David J. Reich, for the appellant (respondent mother).

Renée Bevacqua Bollier, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, *Stephen G. Vitelli*, and *Evan O'Roark*, assistant attorneys general.

Opinion

PER CURIAM. The respondent mother, Priscilla W., appeals from the judgment of the trial court terminating her parental rights with respect to her minor child, M.[1] On appeal, she claims that the court erroneously concluded that the Department of Children and Families (department) had made reasonable efforts at reunification, pursuant to General Statutes § 17a-112 (j) (1). The respondent does not claim that the court erred in its additional conclusion that she was unable or unwilling to benefit from reunification efforts. Because the respondent challenges only one of the two bases for the court's determination that § 17a-112 (j) (1) had been satisfied, we conclude that the respondent's appeal is moot.[2]

The following facts, which were found by the trial court, and procedural history are relevant to this appeal. The child was born at Yale New Haven Hospital (hospital) in 2018. Shortly after the child was born, the hospital made a referral to the department. The referral was made on the basis of, inter alia, the respondent's significant mental health history, including past diagnoses of adjustment disorder with disturbance of conduct, bipolardisorder, depression, oppositional defiance disorder, post-traumatic stress disorder, and anxiety. At the time of the child's birth, the respondent had not been engaged in any mental health treatment since 2013.

[1] The child's father, Nigel C., consented to the termination of his parental rights and has not appealed from that judgment. We refer in this opinion to the respondent mother as the respondent.

[2] The attorney for the child has adopted the brief of the petitioner, the Commissioner of Children and Families.

The respondent also was involved in two domestic violence incidents with the child's father. See footnote 1 of this opinion. The first occurred in April, 2017, and the second occurred on January 4, 2018, while the respondent was pregnant with the child. Despite protective orders protecting the respondent from the child's father, the respondent planned, upon her discharge from the hospital following the birth of the child, to resume living with the child's father.

On February 5, 2018, the petitioner, the Commissioner of Children and Families (commissioner), pursuant to General Statutes § 17a-101g, placed a ninety-six hour hold on the child. On February 9, 2018, the commissioner filed a motion for an order of temporary custody, which was granted ex parte that same day. Also on February 9, 2018, the commissioner filed a neglect petition. The order of temporary custody was consolidated with the neglect petition. After a hearing on February 23, 2018, the court sustained the order of temporary custody and adjudicated the child neglected. On April 19, 2018, the court committed the child to the custody of the commissioner. The commissioner filed a petition for the termination of the parental rights of the respondent on May 7, 2019.

Beginning on October 28, 2019, the court, *Marcus*, *J.*, held a trial on the petition for termination of parental rights. The court rendered judgment terminating the respondent's parental rights on January 6, 2020.[3] The court found in relevant part that (1) the department had made reasonable efforts at reunification and (2) the respondent was unable or unwilling to benefit from those efforts at reunification.

The court set forth detailed findings regarding the services offered to the respondent and her level of engagement with and failure to benefit from such services. Specifically, the court found that despite attending weekly,

[3] The court also denied the respondent's motion to transfer guardianship.

trauma focused therapy through Integrated Wellness with Rachel Forbes, a therapist, from April, 2018 to March, 2019, the respondent made "little to no progress." The respondent also refused to increase her therapy sessions to twice weekly, as recommended by a psychological evaluation in November, 2018.[4]

The court further found that the respondent exhibited "extremely dysregulated behavior," including during one incident on July 2, 2018. That day, the department's social worker had transported the respondent and the child to a doctor's appointment for the child. After the appointment, the respondent and the social worker disagreed about the order of drop-offs. The respondent wanted to be dropped off first, began screaming that she wanted to go home, removed the social worker's keys from the car's ignition, and exited the car with the child. The social worker called the police, while the respondent engaged in a tantrum on the side of the road before eventually handing the child to the social worker. In another incident in March, 2019, the respondent expressed threats during a therapy session with Forbes and was admitted to the inpatient psychiatric unit at Middlesex Hospital. She was discharged with a recommendation for intensive outpatient treatment and prescribed Seroquel for her diagnosis of bipolar disorder.

From March through June, 2019, the court found that the respondent refused to attend either of two different trauma based therapy programs, Yale Intensive Outpatient Treatment Program (Yale program) and State Street Counseling, offered by the department. Although the respondent did complete the Yale program in July, 2019, employees of the Yale program reported to the department that the respondent had failed to accept responsibility for her actions and had no understanding

[4] The respondent also refused to be assessed for medication as recommended by a psychological evaluation performed in May, 2018.

why the child remained in the care of the department. Employees of the Yale program prescribed medication to the respondent, but she did not refill the prescription. The department also referred the respondent to a dialectical behavioral therapist recommended by the Yale program in September, 2019. Although the mother attended an intake session and her first appointment, she failed to attend her second appointment and told the department that she was not interested in dialectical behavioral therapy. The department also referred the respondent for medication assessment and management to the Cornell Scott Hill Health Center, but she failed to attend the intake appointment on August 19, 2019.

The court found that the respondent and the child's father "had an extensive history of domestic violence leading to the issuance of multiple protective orders with the [respondent] listed as the protected person." In light of that history, the department referred the respondent to Family Centered Services for domestic violence services. The social worker from Family Centered Services reported that the respondent had participated in four sessions of a domestic violence program, but she was "not . . . able to report what was discussed or what she had learned" and was "inconsistent in her focus during sessions, as she was often on the telephone." The court found that three additional domestic violence incidents with the child's father occurred in February, 2019.

The department also referred the respondent for supervised visits and parenting classes. The respondent completed the Therapeutic Family Time program with R Kids in July or August, 2018. The clinician from R Kids noted that the respondent did well with the child in visits but that she needed further mental health treatment. The clinician reported that the respondent was unable to appreciate what she did wrong in the July,

2018 roadside tantrum incident with the department's social worker. In October, 2018, Jewish Family Services performed a reunification assessment, which included supervised visits, conferences with the respondent's other providers, and a recommendation regarding reunification. Although the supervised visits ordinarily would include parent coaching, the respondent refused to engage in parent coaching, stating that she did not need any parenting advice or support. The clinician did not recommend reunification. The clinician reported, inter alia, that the respondent "did not understand why domestic violence was an issue nor did she understand safety concerns for [the child] as a result of the significant continuing domestic violence . . . ." The respondent's treatment and service providers, including Forbes and clinicians from Family Centered Services and R Kids, "expressed hesitation regarding reunification because of the [respondent's] emotional volatility, which had not been addressed in therapy or by medication."[5]

The court concluded: "Based [on] the foregoing, this court finds that [the department] has made reasonable efforts to reunite the [respondent] with [the child]. In addition, the court finds that the [respondent] is unable or unwilling to benefit from those efforts. . . . [The department] provided the [respondent] with timely, necessary, and appropriate referrals and services. The

[5] The court also found that the department offered the respondent substance abuse treatment and housing assistance. Specifically, the court found that the respondent had tested positive for marijuana both when she was admitted to Middlesex Hospital in March, 2019, and throughout her engagement with the Yale program. The respondent refused the department's request that she attend substance abuse treatment and stated that she planned to obtain a medical marijuana card, but she never obtained it.

The court also found that the department had provided financial assistance to the respondent to help pay her rent on two occasions. The respondent, however, owed $2100 in back rent and, following her noncompliance with a court-ordered repayment plan, was evicted. In February, 2019, the department made a referral to supportive housing, but she was found ineligible on the basis of the pending eviction, noncompliance with mental health treatment, and continued incidences of domestic violence.

[respondent] either did not engage in the services that were offered to her or when she did engage in treatment she did not benefit from those services as set forth in detail [herein]."

The respondent appeals from the judgment terminating her parental rights on the sole ground that the court erred in finding that the department had made reasonable efforts at reunification. Specifically, she argues that, although "[t]he department's plan was to engage [her] in [dialectical behavioral] therapy in order for [her] to heal from the trauma she experienced as a child and the trauma of the domestic violence she endured from [the child's] father," the department "failed to inform her that she should have been engaged in [dialectical behavioral] therapy." She maintains that "[i]t is an injustice for the department to fail to inform [her] that she should have engaged in [dialectical behavioral therapy] and then prevail on [its] termination of parental rights case."

The commissioner argues that the respondent's appeal should be dismissed as moot because she failed to challenge the court's finding that she was unable or unwilling to benefit from the department's reunification efforts. Thus, the commissioner maintains that there is no relief this court can afford the respondent. We agree with the commissioner that the respondent's appeal is moot because there is no practical relief this court can afford to her on appeal.

"Mootness raises the issue of a court's subject matter jurisdiction and is therefore appropriately considered even when not raised by one of the parties. . . . Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . We begin with the four part test for justiciability . . . . Because courts are established to resolve actual controversies,

before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . [I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *In re Jorden R.*, 293 Conn. 539, 555–56, 979 A.2d 469 (2009).

"Section 17a-112 (j) (1) requires a trial court to find by clear and convincing evidence that the department made reasonable efforts to reunify a parent and child *unless it finds instead* that the parent is unable or unwilling to benefit from such efforts. In other words, either finding, standing alone, provides an independent basis for satisfying § 17a-112 (j) (1)." (Emphasis in original; internal quotation marks omitted.) *In re Natalia M.*, 190 Conn. App. 583, 588, 210 A.3d 682, cert. denied, 332 Conn. 912, 211 A.3d 71 (2019); see also *In re Jorden R.*, supra, 293 Conn. 556.

In the present case, the court found that the department had made reasonable efforts to reunify the respondent with the child *and* that the respondent was unable or unwilling to benefit from reunification efforts. In other words, it found that both alternatives set forth in § 17a-112 (j) (1) had been satisfied. Because the respondent challenges on appeal only one of the two separate and independent bases for the court's determination that the requirements of § 17a-112 (j) (1) had been satisfied, this court can afford the respondent no relief. See

In re Natalia M., supra, 190 Conn. App. 588 (appeal dismissed as moot where trial court found both alternatives set forth in § 17a-112 (j) (1) had been satisfied and respondent challenged on appeal only one of two bases).

The appeal is dismissed.

ENRICO VACCARO, ADMINISTRATOR (ESTATE OF MARIE J. VACCARO), ET AL. *v.* CHRISTOPHER P. LOSCALZO ET AL.

(AC 42951)

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

Syllabus

The plaintiffs, V and E, sought to recover damages for, inter alia, the allegedly wrongful death of the decedent, M, as a result of the defendants' negligence. The plaintiffs commenced the action in May, 2016. Despite various pleadings and motions filed by the defendants, the plaintiffs did not serve any discovery, take any depositions, close the pleadings, disclose any experts, or respond to outstanding discovery requests. Additionally, E died in May, 2016, and his estate was never substituted as the proper party in the case. Eventually, in February, 2018, the plaintiffs' counsel relayed to the trial court personal reasons why deadlines and discovery compliance were not met and represented that he needed to withdraw. Following more continuances, V was not able to obtain new counsel, and objected to the plaintiffs' counsel withdrawing from the case. In March, 2019, the court denied the motion to withdraw filed by the plaintiffs' counsel and, in April, 2019, granted the defendants' motion to dismiss for failure to prosecute with due diligence. On appeal to this court, the plaintiffs claimed that the court abused its discretion in rendering a judgment of dismissal. *Held* that the trial court did not abuse its discretion in dismissing the plaintiffs' complaint for failure to prosecute with due diligence; under the factors articulated in *Ridgaway* v. *Mount Vernon Fire Ins. Co.* (328 Conn. 60), the court's sanction of dismissal was proportional to the plaintiffs' misconduct in that the court carefully set forth a pattern of misconduct by the plaintiffs over the course of three years, the plaintiffs were clearly on notice of the possibility of a sanction as the defendants began requesting a judgment of dismissal as a sanction in November, 2017, and the court repeatedly notified the plaintiffs that a dismissal would be forthcoming if they continued their pattern of delays, the court demonstrated the use of

alternatives to dismissal by issuing new orders and warnings of dismissal but these alternatives failed and further alternatives were not required, and, although the court squarely put the blame for the repeated violations of its orders on the plaintiffs' counsel, the record demonstrated that the plaintiffs were aware of the misconduct.

Argued September 16—officially released December 8, 2020

Procedural History

Action to recover damages for, inter alia, the allegedly wrongful death of the named plaintiff's decedent as a result of the defendants' negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Wilson, J.*, granted the defendants' motion to dismiss and rendered a judgment of dismissal, from which the plaintiffs appealed to this court. *Affirmed.*

Paul T. Edwards, with whom was *Bruce Jacobs*, for the appellants (plaintiffs).

Patrick M. Noonan, with whom, on the brief, was *Kristianna L. Sciarra*, for the appellees (defendants).

Opinion

BRIGHT, C. J. The plaintiffs, Enrico Vaccaro (Attorney Vaccaro), acting as the administrator of the estate of Marie J. Vaccaro (decedent), and Enrico F. Vaccaro, the now deceased husband of Marie J. Vaccaro,[1] appeal from the judgment of the trial court dismissing for failure to prosecute with due diligence[2] their substitute complaint against the defendants, Christopher P. Loscalzo,

[1] Apparently, the plaintiff Enrico F. Vaccaro died in May, 2016, but his estate has never been substituted as the proper party in this case. Appellate counsel for the plaintiffs has listed Enrico F. Vaccaro as a party to this appeal. Because the propriety of this failure to substitute is not relevant to the issues on appeal, we consider the appeal as filed.

[2] Practice Book § 14-3 (a) provides: "If a party shall fail to prosecute an action with reasonable diligence, the judicial authority may, after hearing, on motion by any party to the action pursuant to Section 11-1, or on its own motion, render a judgment dismissing the action with costs. At least two weeks' notice shall be required except in cases appearing on an assignment list for final adjudication. Judgment files shall not be drawn except where an appeal is taken or where any party so requests."

Cardiology Associates of New Haven, P.C., Yale Medical Group, Yale University School of Medicine, and Yale New Haven Hospital, Inc. The plaintiffs claim that the court abused its discretion in dismissing the substitute complaint. We affirm the judgment of the trial court.

The trial court, in a very thorough memorandum of decision, set forth the following procedural history of this case. "On May 26, 2016, the plaintiff[s] . . . commenced this wrongful death [and loss of consortium] action by service of writ, summons and complaint against the defendants . . . . The return date is June 21, 2016, and the original complaint was returned to court on June 3, 2016. The original complaint contains six counts . . . .

"The plaintiffs divide the six count complaint into two parallel sets of postmortem and antemortem claims. Counts one through three of the plaintiffs' complaint assert claims for wrongful death, loss of consortium, and a claim for reimbursement for any liability incurred per [General Statutes] § 46b-37 for antemortem or postmortem expenses, relating to the decedent's treatment, stroke, and death. Counts four through six of the plaintiffs' complaint assert antemortem claims for medical malpractice, loss of consortium, and a claim for reimbursement for any liability incurred per § 46b-37 for antemortem expenses, relating to the decedent's treatment and stroke. . . .

"On January 17, 2017, counsel filed a joint scheduling order [that] was approved by the court on January 19, 2017. The scheduling order included the following filing deadlines:

"File certificate of closed pleadings: March 1, 2017

"Exchange written discovery requests: April 1, 2017

"Exchange discovery responses: June 1, 2017

"Complete fact witness depositions: August 1, 2017

"Disclose the plaintiff[s'] experts: October 15, 2017

"Depose the plaintiff[s'] experts: December 15, 2017

"Disclose defense experts: March 2, 2018

"Depose defense experts: May 1, 2018

"Trial management conference: May 21, 2018

"Trial: June 5, 2018.

"Despite these clear deadlines, the plaintiff[s] did not serve any discovery, take any depositions, close the pleadings, disclose any experts, or respond to outstanding discovery requests. [The defendants'] counsel attempted to work with the plaintiff[s'] counsel since the beginning of the case. According to [the defendants'] counsel, the parties discussed certain revisions to the complaint, and after said discussions, [the defendants'] counsel was under the impression that an amended complaint would be forthcoming. However, after waiting several months for an amended complaint, [the defendants'] counsel was forced to file a partial motion to strike.

"On February 17, 2017, the defendants filed a motion to strike counts three through six of the plaintiffs' complaint on the ground that they fail to state claims upon which relief can be granted. The defendants concurrently filed a memorandum of law in support of their motion to strike. The plaintiffs [did not file] an objection. . . .

"On August 24, 2017, the court granted the motion to strike counts three, four, five, and six of the plaintiff[s'] complaint. On October 6, 2017, the defendants answered the remaining counts of the complaint. On November 29, 2017, the defendants filed a motion to dismiss . . . for the plaintiff[s'] failure to diligently prosecute the case. This motion appeared on the court's January 16, 2018 arguable short calendar. Attorney Joseph Gasser appeared for the defendants, however the plaintiff[s']

counsel, [Paul T. Edwards], failed to appear. At oral argument, the court stated that it would give the plaintiff[s'] counsel until February 5, 2018, to respond to the motion to dismiss and would reschedule the matter for argument. . . . As of January 16, 2019, the date of oral argument on the motion, [the plaintiffs] still [have] not complied with the scheduling order or the defendants' request for discovery.

"[O]n February 7, 2018, the court denied the defendant[s'] motion to dismiss and issued the following order: [February 28, 2018 10 a.m.] This case is scheduled for a status conference with the Honorable Robin L. Wilson on the date and time shown above. All counsel of record must attend. The court further gives notice that it will hear argument on the record regarding the defendant[s'] pending motion to dismiss. Counsel for the plaintiff[s] must appear at the scheduled status conference and hearing and show cause why this action should not be dismissed and costs awarded for failure to diligently prosecute. Failure to appear may result in entry of dismissal or default. Please report to Judge Wilson's courtroom at 4C (New Haven Superior Court, 235 Church St., New Haven). . . .

"On November 29, 2017, the same date the defendants filed their motion to dismiss, they filed a motion for order of compliance. In that motion, the defendants move[d] for an order requiring [the plaintiffs] to comply with the defendants' interrogatories and requests for production dated July 21, 2017, or, in the alternative, for an order of nonsuit. Responses were due by September 21, 2017; [the plaintiffs] [have] neither responded nor sought an extension of time to respond. Counsel for the defendants attempted to resolve [the plaintiffs'] noncompliance without consuming judicial resources. . . . Having received no response from [the plaintiffs'] counsel, the defendants respectfully request[ed] that this court either order [the plaintiffs] to respond or enter

an order of nonsuit against [the plaintiffs] for failure to comply with [their] discovery obligations. . . . On February 7, 2018, the court ordered the plaintiff[s] to comply with discovery by March 2, 2018.

"In accordance with the court's order issued on February 7, 2018, a status conference was held on February 28, 2018. At the status conference, [the plaintiffs'] counsel acknowledged that compliance with the deadlines set forth in the scheduling order had not been met, nor had discovery been produced in response to the defendants' discovery requests which were due on September 21, 2017. [The plaintiffs'] counsel relayed to the court and to [the defendants'] counsel personal reasons why deadlines were not met and discovery compliance had not been met. After discussions with both counsel, the court issued the following order in accordance with the discussions at the status conference: Pursuant to a status conference held on February 28, 2018, the parties have agreed to file a joint modified scheduling order on or before March 14, 2018. Failure to comply with the court's order by filing said modified scheduling order on the date herein ordered could result in the entry of a dismissal or default against the noncomplying party. . . . On March 16, 2018, [the plaintiffs'] counsel filed a modified scheduling order signed by both counsel, and the court approved same on March 20, 2018. The modified scheduling order . . . included the following deadline dates:

"File certificate of closed pleadings: March 31, 2018

"Exchange written discovery requests by: June 1, 2018

"Exchange responses to discovery requests by: September 1, 2018

"Any dispositive motions to be filed by: October 15, 2018

"Responses to dispositive motions [to be filed] by: November 15, 2018

"Dispositive motions shall be marked ready no later than: December 3, 2018

"Disclose [the plaintiffs'] experts by: August 15, 2018

"Disclose the defendants' experts by: January 15, 2019

"Complete depositions:

"[The plaintiffs'] fact witnesses by: April 30, 2018

"[The defendants'] fact witnesses by: June 30, 2018

"[The plaintiffs'] experts by: November 1, 2018

"[The defendants'] experts by: April 1, 2019.

"Counsel further agreed that the plaintiff[s] would respond to the defendants' outstanding written discovery on/or before March 28, 2018. Based upon the filing of the modified scheduling order by the parties, and the court's approval of same, a trial date was continued to March 19, 2019, from its original date of June 5, 2018, and a trial management date was set for March 5, 2019.

"On March 15, 2018, seven months after the court's August 24, 2017 ruling on the defendants' motion to strike, the plaintiff[s] filed a substituted complaint. The . . . substituted complaint, which was filed a year ago, still contains a noncognizable statutory claim under . . . § 46b-37, which was stricken by this court. In addition, the plaintiff Enrico F. Vaccaro died in May, 2016, nearly three years ago and his estate has not been substituted as the proper party in this case.

"Due to the plaintiff[s'] counsel's continued failure to prosecute this case, by failing to comply with scheduling orders, and by failing to respond to the defendants' request for discovery, the defendants, again, on October

15, 2018, moved to dismiss the case for lack of diligence. The defendant[s] also filed a motion for summary judgment on grounds that the plaintiff[s] failed to disclose an expert in support of [their] medical negligence claim and derivative loss of consortium claim and therefore could not meet [their] burden of proof, thus, entitling the defendants to judgment as a matter of law. Both motions were scheduled for oral argument on December 10, 2018. During oral argument on the motions, counsel for the plaintiff[s] represented that he needed to get out of the case due to health issues and personal issues and requested thirty days to allow the plaintiff[s] to obtain new counsel. Counsel for the plaintiff[s] acknowledged on the record that the case had not moved forward, and that the lack of prosecution of the case was no fault of the plaintiff[s'] but rather [was] counsel's fault. Counsel further stated that if the court was going to issue a sanction for failure to prosecute with diligence, it should sanction counsel. Attorney Edwards asked the court for thirty days so that he could assist the plaintiff in obtaining new counsel. The court granted [Attorney Edwards'] request and gave him until January 9, 2019, to file a withdrawal of appearance in accordance with [Practice Book] § 3-10. The court further ordered that an appearance by new counsel be filed by no later than January 9, 2019. The court rescheduled oral argument on the motion to dismiss . . . and the motion for summary judgment . . . for January 14, 2019. The court heard oral argument on January 14, 2019. The [plaintiffs'] counsel failed to comply with the court's order of January 9, 2019. At oral argument on January 14, 2019, [Attorney Edwards] stated that the reason he did not file the withdrawal was because he was not comfortable filing the motion to withdraw and leav[ing] [Attorney Vaccaro] hanging. Counsel stated that he had been making attempts to assist [A]ttorney Vaccaro in obtain-

ing new counsel, and that he did not want to abandon him without assisting him in obtaining new counsel. . . .

"On January 14, 2019, after the court heard argument, it issued the following order: Based upon argument before the court on January 14, 2019, the court hereby issues the following order. By no later than February 13, 2019, counsel for the plaintiff[s] shall file a withdrawal of appearance in accordance with Practice Book § 3-10. It is further ordered that by no later than February 13, 2019, the plaintiff[s] shall file appearance[s] as self-represented [parties][3] or new counsel shall file an appearance by said date. All expert disclosures shall be filed by no later than February 13, 2019. Oral argument on the motion to dismiss . . . and motion for summary judgment . . . is rescheduled for Monday, February 18, 2019, at 9:30 a.m. . . . Any supporting or opposing memoranda must be on file no later than the previous Thursday. . . . [A]ttorney Vaccaro is hereby ordered to appear at oral argument. No continuances will be granted absent compelling reasons and for good cause shown. In light of the court's ruling above, jury selection in this case is continued to July 12, 2019. A [trial management conference] is scheduled for June 28, 2019, at [11 a.m.] The clerk is directed to schedule oral argument and the new trial and [trial management conference] dates in accordance with the court's order. . . . At the request of the plaintiff[s'] counsel, and with the consent of the defendant[s'] counsel, oral argument was continued from February 18, 2019, to March 11, 2019.

"On March 11, 2019, the plaintiff[s'] counsel and the defendants' counsel appeared. Although the court ordered

[3] We note that the court misstated that Attorney Vaccaro could file an appearance as a "self-represented party." Rather, he could have filed an appearance as the attorney acting on behalf of himself *as the administrator of the estate.*

the plaintiff [A]ttorney Vaccaro to appear, due to a medical condition, the court allowed him to appear by phone. As of March 11, 2019, the plaintiff[s'] counsel failed to comply with the court's January 14, 2019 order. A new appearance of counsel was not filed on or before February 13, 2019, and had not been filed as of the date of oral argument. Expert disclosures were filed the day after the court-ordered deadline without any explanation from counsel of any compelling reason or good cause for missing the court-ordered deadline.

"Again, after the court having given the plaintiff[s'] counsel ample opportunity to get this case on track and obtain new counsel . . . he failed to do so. Moreover, [A]ttorney Vaccaro vehemently objected to counsel's motion to withdraw appearance and disputed the representations made to the court by the plaintiff[s'] counsel regarding counsel's assistance in obtaining new counsel . . . . [Attorney] Vaccaro further represented that he looked at the Judicial Branch website and noticed that not much was going on with the case. He contacted Attorney Edwards, [who] represented to him, at that time, that he was going to get the case on track. [Attorney] Vaccaro represented that he hired Attorney Edwards in 2016, and that he just learned, in February, 2019, of [A]ttorney Edwards' need to withdraw from the case, and the basis of [A]ttorney Edwards' motion to withdraw. [Attorney] Vaccaro further represented that to allow [A]ttorney Edwards to withdraw under the circumstances would significantly prejudice his interests. He further argued that [A]ttorney Edwards had not established good cause, under rule 1.16 of the [R]ules of [Professional] [C]onduct to withdraw from the case. After hearing argument of all counsel, the court ruled from the bench on [Attorney Edwards'] motion to withdraw and denied the motion. The court advised the parties that it would take the motion to dismiss under consideration and issue a written decision on the motion."

(Citations omitted; footnote added; internal quotation marks omitted.)

On April 8, 2019, the court, pursuant to Practice Book § 14-3 (a), granted the defendants' motion to dismiss for failure to prosecute with due diligence. In its decision, the court reasoned as follows: "The plaintiff[s] commenced the present action in May, 2016, nearly three years ago. In the nearly three years since the commencement of this case, the case has barely been advanced. . . . [I]n January, 2017, the parties jointly submitted a scheduling order, which the court approved. Pursuant to this scheduling order, trial was scheduled for June 5, 2018. Despite the clear deadlines set forth in the scheduling order, the plaintiff[s] failed to serve any discovery, take any depositions, close the pleadings, timely disclose any experts, or respond to outstanding discovery requests.

"In addition, [the] defendants filed a motion to strike, to which the plaintiff[s] failed to object, or, appear at oral argument. The court granted the motion to strike, and, although the plaintiff[s] filed a substituted complaint, the complaint still contains a noncognizable statutory claim under . . . § 46b-37, which was stricken by the court on August 24, 2017. In addition, the plaintiff Enrico F. Vaccaro, who has a loss of consortium claim, died in May, 2016, nearly three years ago, and his estate has not been substituted as the proper party.

"Due to the plaintiff[s'] inaction on this case, the defendants filed a motion to dismiss on November 29, 2017. This court denied the motion on February 7, 2018, and scheduled the matter for a status conference on February 28, 2018. The parties appeared for the status conference at which time [the] plaintiff[s'] counsel requested additional time to comply with discovery, and represented to the court that he would get the case back on track. Based upon counsel's representations at the status conference, the court ordered counsel to

jointly file a modified scheduling order by no later than March 14, 2018. [The] [plaintiffs'] counsel filed the modified scheduling order on March 16, 2018, and the court approved same on March 20, 2018. Pursuant to the modified scheduling order, the trial in this case was continued from its original date of June 5, 2018, to March 19, 2019.

"Between March, 2018 and October, 2018, counsel for the plaintiff[s] did absolutely nothing on the case, despite his representations to the court at the status conference held in February, 2018, and despite the clear deadlines set forth in the modified scheduling order. On October 15, 2018, the defendants again filed a motion to dismiss for lack of diligence. The court scheduled a show cause [hearing] . . . for Monday, December 10, 2018, at 9:30 a.m. . . . [ordering] [t]he plaintiff[s] . . . to produce the requested discovery by said date or appear and show cause why a dismissal should not be entered for failing to prosecute this case. . . . Counsel appeared on December 10, 2018. At the hearing, [the] plaintiff[s'] counsel represented to the court that he was having personal issues and that he needed to get out of the case and that he wanted thirty days to file a motion to withdraw and to assist [the plaintiff] [A]ttorney Vaccaro in getting new counsel. Attorney Edwards acknowledged that the case had not been prosecuted diligently and that the status of the case was no fault of counsel's client but [was] due to his own actions. Pursuant to this hearing, the court issued an order directing Attorney Edwards to file a motion to withdraw by January 9, 2019, and that new counsel file an appearance by January 9, 2019. The court rescheduled argument on the motion to dismiss and motion for summary judgment for January 14, 2019. [Attorney Edwards] appeared on January 14, 2019, and once again . . . failed to comply with the court's order. Pursuant to the January 14, 2019 hearing, the court ordered counsel for the plaintiff[s] to file a motion to withdraw by no later

than February 13, 2019. The court further ordered [the plaintiff] [Attorney Vaccaro] to file an appearance as a self-represented party or [to have] new counsel file an appearance by no later than February 13, 2019. [See footnote 3 of this opinion.] The court rescheduled oral argument on the motions to dismiss and for summary judgment for February 18, 2019. In light of the court's January 14, 2019 order, the court continued the trial in this matter to July 12, 2019. The court further ordered [the plaintiff] [A]ttorney Vaccaro to appear at the February 18, 2019 hearing. . . . [A]t the request of [Attorney Edwards], and with the consent of [the] defendants' counsel, the February 18, 2019 hearing was continued to March 11, 2019. . . . As of the date of the March 11, 2019 hearing, there had been zero discovery. The plaintiff[s] had not responded to basic discovery requests, which were served back in July, 2017. This court had twice ordered the plaintiff[s] to respond to discovery without avail. No depositions have occurred despite the defendant[s'] multiple notices for [the] plaintiff[s'] depositions. The pleadings have not been closed.

"[The] [p]laintiff[s'] [counsel] has failed to correct defects in his complaint in accordance with the court's ruling on the defendant[s'] motion to strike, and an estate has not been substituted as the proper party for the plaintiff decedent Enrico F. Vaccaro, who died in May, 2016. This court on numerous occasions has provided the plaintiff[s'] counsel with every opportunity to get this case on track, whether it be by way of the granting of a continuance so that counsel could conduct discovery and disclose experts, or whether it was for the purpose of withdrawing from the case and assisting [A]ttorney Vaccaro in obtaining new counsel. Counsel simply failed to comply with the court's orders. . . .

"Accordingly, for the foregoing reasons, the court concludes that the plaintiff[s] [have] failed to prosecute this case with diligence, and the defendants have been severely prejudiced as a result of same. The defendants' motion to dismiss is therefore granted."

After the court rendered its judgment, the plaintiffs' filed a motion for reargument, which the court denied on April 30, 2019. On May 17, 2019, the plaintiffs filed the present appeal. The plaintiffs also filed a motion to open with the trial court, which the court denied on June 10, 2019. The plaintiffs did not amend their appeal to include the court's denial of its motion to open.[4]

On appeal, the plaintiffs claim that the court abused its discretion in dismissing the substitute complaint for failure to prosecute with due diligence under Practice Book § 14-3. See footnote 2 of this opinion. They argue that the sanction of dismissal was disproportionate "under the totality of the circumstances, particularly where lesser sanctions were available and appropriate, and the plaintiffs, themselves, were not, in any way, responsible for the status of the case and the failure to comply with discovery." In response, the defendants argue that "[t]he record reveals a flagrant and persistent pattern of violating not one, but half a dozen, court orders over the course of one year. . . . In three years, no discovery had been completed . . . . The trial court was patient and clear with each order, granting many extensions and continually warning that the case was subject to dismissal if [the] plaintiffs did not comply.

[4] We note that "[d]isciplinary dismissals pursuant to Practice Book § 14-3 . . . may be set aside and the action reinstated to the docket upon the granting of a motion to open filed in accordance with Practice Book § 17-43 and [General Statutes] § 52-212. *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 429, 190 A.3d 105, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018); cf. *Pump Services Corp.* v. *Roberts*, 19 Conn. App. 213, 216, 561 A.2d 464 (1989) (concluding that proper way to open judgment of dismissal rendered pursuant to predecessor to Practice Book § 14-3 is to file motion to open pursuant to predecessor to Practice Book § 17-4, which parallels General Statutes § 52-212a)." (Internal quotation marks omitted.) *Harris* v. *Neale*, 197 Conn. App. 147, 156, 231 A.3d 357 (2020). In *Harris*, we recognized that "there is a conflict in our case law as to whether a motion to open a judgment of dismissal rendered pursuant to Practice Book § 14-3 is governed by § 52-212 and Practice Book § 17-43 or § 52-212a and Practice Book § 17-4." Id., 156 n.9. Because this conflict does not affect the outcome of this appeal, we need not address it at this time.

. . . This persistent pattern of complete neglect was more than a sufficient basis for the trial court to exercise its discretion and dismiss this case for failure to prosecute with reasonable diligence." (Citation omitted; internal quotation marks omitted.) We agree with the defendants.

"Practice Book § 14-3 (a) permits a trial court to dismiss an action with costs if a party fails to prosecute the action with reasonable diligence. The ultimate determination regarding a motion to dismiss for lack of diligence is within the sound discretion of the court. . . . Under [§ 14-3], the trial court is confronted with endless gradations of diligence, and in its sound discretion, the court must determine whether the party's diligence falls within the reasonable section of the diligence spectrum . . . .

"We review the trial court's decision for abuse of discretion. . . . In determining whether a trial court abused its discretion, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . .

"A trial court properly exercises its discretion to dismiss for failure to prosecute [with reasonable diligence] if the case has been on the docket for an unduly protracted period or the court is satisfied from the record or otherwise that there is no real intent to prosecute . . . ." (Footnote omitted; internal quotation marks omitted.) *Fleischer* v. *Fleischer*, 192 Conn. App. 540, 546, 217 A.3d 1028 (2019).

"The court's discretion, however, is not unfettered; it is a legal discretion subject to review. . . . [D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised

in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In addition, the court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Internal quotation marks omitted.) *Harris* v. *Neale*, 197 Conn. App. 147, 157, 231 A.3d 357 (2020). "[E]ven though a trial court has wide discretion in determining whether to dismiss an action for failure to prosecute it with due diligence, there are limits to this discretion. Importantly, sanctions imposed by the court must be *proportional* to the violation or misconduct. . . .

"Our Supreme Court has identified the following factors as relevant to determining the proportionality of a sanction: the nature and frequency of the misconduct, notice of the possibility of a sanction, the availability of lesser sanctions, and the client's participation in or knowledge of the misconduct. . . . Our Supreme Court also noted that these principles reflect that, in assessing proportionality, a trial court must consider the totality of the circumstances, including, most importantly, the nature of the conduct itself. . . . [Although] . . . the[se] . . . factors were established [by our Supreme Court in *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 776 A.2d 1115 (2001)] in the context of noncompliance with discovery orders, [they apply to all sanction orders, including] . . . a failure to prosecute with due diligence pursuant to Practice Book § 14-3." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Fleischer* v. *Fleischer*, supra, 192 Conn. App. 548–49, citing *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 328 Conn. 60, 71–73, 176 A.3d 1167 (2018) (holding that proportionality test set forth in *Millbrook Owners Assn., Inc.*, applies to all sanctions of nonsuit). We examine the *Ridgaway* factors in relation to the present case.

"With respect to the first factor, the nature and frequency of the misconduct, it is logical that particularly egregious or frequent misconduct, such as repeated refusals to comply with a court order, warrants more severe sanctions." *Fleischer* v. *Fleischer*, supra, 192 Conn. App. 549. In the present case, the court carefully set forth in its memorandum of decision a pattern of misconduct by the plaintiffs over the course of three years, which included the repeated failure to comply with discovery requests, the repeated failure to comply with court-ordered deadlines, the failure to replead properly after the defendants' motion to strike had been granted in 2017, and the failure to substitute a proper party for a deceased party.

"With respect to the next factor—notice of the possibility of a sanction—our Supreme Court noted [in *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 74] that in instances in which our appellate courts have upheld the sanction of a nonsuit, a significant factor has been that the trial court *put the plaintiff on notice* that noncompliance would result in a nonsuit." (Emphasis in original.) *Fleischer* v. *Fleischer*, supra, 192 Conn. App. 550. In the present case, the defendants, in November, 2017, began requesting a judgment of dismissal as a sanction for the plaintiffs' failure to prosecute this case with due diligence. The court repeatedly notified the plaintiffs that a dismissal would be forthcoming if they continued their pattern of delays. Clearly, they were on notice.

"Next, in evaluating the third factor, i.e., the availability of lesser sanctions, [our Supreme Court has] noted that [it] has refused to uphold a sanction of nonsuit when there were available alternatives to dismissal that would have allowed a case to be heard on the merits while ensuring future compliance with court orders." (Internal quotation marks omitted.) Id., 550–51; see id., 551 (noting that trial court in that case had not stated

on record that it had considered lesser sanction before rendering judgment of dismissal). In the present case, the court repeatedly issued new orders with which, the plaintiffs, again and again, failed to comply. The case had been stalled on the court's docket for approximately three years, and the plaintiffs had failed to comply with several of the court's orders, including discovery orders. The court made a gallant effort to move things along, but the plaintiffs appeared unwilling to do so. Although the court did not state on the record that alternatives to dismissal had been considered, the court repeatedly employed alternatives by issuing new orders and warnings of dismissal to the plaintiffs. We conclude, therefore, that the court demonstrated the use of alternatives to dismissal, but that these alternatives failed. Further alternatives were not required.

Moreover, the only alternative suggested by the plaintiffs, sanctioning counsel, would not have served the interest of the court or mitigated the impact on the defendants from the plaintiffs' failure to prosecute the case with due diligence. The trial court has an interest in ensuring that its orders are respected and followed. The court also has an interest in the timely resolution of the cases on its docket. Similarly, the defendants had an interest in the prompt resolution of the plaintiffs' allegations that the defendants had engaged in medical malpractice. Sanctioning counsel for his failure to follow court orders and advance the case would not have brought the case any closer to resolution. In fact, it is undisputed that, at the time the court rendered its judgment of dismissal, the case, due to the plaintiffs' inaction, in no way was close to being ready for trial, and sanctioning counsel would not have made it so. In this regard, the present case is markedly different than *Fleischer*, on which the plaintiffs principally rely. In *Fleischer*, we concluded that the trial court abused its discretion in ordering a disciplinary dismissal, in part because the

parties were prepared to proceed with a hearing on the merits on the very day that the court dismissed the case due to counsel's prior delay in prosecuting the matter. *Fleischer* v. *Fleischer*, supra, 192 Conn. App. 550. As we noted: "There was nothing further the defendant needed to do to comply with [Practice Book] § 14-3, as he was already willing and able to prosecute the motions that day." Id.[5] That certainly was not the circumstance facing the trial court in the present case when it rendered its judgment of dismissal.

"As to the last factor, i.e., the client's participation in or knowledge of the misconduct, [our Supreme Court has] stated that [w]hether the misconduct was solely attributable to counsel and not to the party also has been a factor in assessing whether a less severe sanction than a nonsuit or dismissal should have been ordered." (Internal quotation marks omitted.) Id., 551. In the present case, on December 10, 2018, the court heard argument on the defendants' motions to dismiss and for summary judgment. During argument, Attorney Edwards told the court that the defendants had been "exceedingly gracious throughout this matter" and that he, regretfully, needed to withdraw from the case due to health and personal issues. He requested thirty days to allow the plaintiffs to obtain new counsel. Attorney Edwards acknowledged on the record that the failure to prosecute the case was his fault and not the fault of the plaintiffs. He also stated that he needed thirty days to assist the plaintiffs in obtaining new counsel. The court admonished Attorney Edwards because there had been no movement in this case. The court, however, gave

[5] We further noted in *Fleischer* that, unlike in the present case, the court provided little or no prior notice of the possibility that it would render a disciplinary dismissal. *Fleischer* v. *Fleischer*, supra, 192 Conn. App. 550. Furthermore, unlike in the present case, the trial court in *Fleischer* had alternatives to dismissal available to it that would have addressed the prejudice claimed by the plaintiff. See id., 552–53.

Attorney Edwards until January 9, 2019, and it rescheduled oral argument on the plaintiffs' motions to January 14, 2019.

At the January 14, 2019 hearing, Attorney Edwards stated that he had been making attempts to assist Attorney Vaccaro in obtaining new counsel. He stated that he had spoken to two different attorneys. The court, again, admonished Attorney Edwards for failing to follow the court's orders. It then issued an order requiring Attorney Edwards to file a motion to withdraw his appearance on or before February 13, 2019. It further ordered Attorney Vaccaro to file an appearance by that date or to have new counsel do so. The court again rescheduled the hearing on the defendants' motions to dismiss and for summary judgment for February 18, 2019. The court also ordered Attorney Vaccaro to appear for that hearing. That hearing, however, at the plaintiffs' request, again was rescheduled, this time to March 11, 2019.

At the March 11, 2019 hearing, Attorney Edwards informed the court that Attorney Vaccaro was unable to appear at the courthouse, and he suggested that the court call him by telephone. The court, obviously, was troubled by another direct violation of its orders, but it did allow Attorney Edwards to contact Attorney Vaccaro via his cell phone. As of the date of the hearing, March 11, 2019, Attorney Vaccaro had neither hired new counsel nor filed an appearance, despite having been ordered by the court to do so on or before February 13, 2019. No apparent effort had been made by the plaintiffs to comply with the court's January 14, 2019 order. During the hearing, Attorney Vaccaro objected to Attorney Edwards' withdrawal. Although he admitted knowing that Attorney Edwards needed to withdraw from the case for "about a month or so," he contended that he had been unable to find replacement counsel. Although Attorney Vaccaro stated that, in 2018, he was unaware of the delays in this case, he admitted that he

"found out about [it] this year . . . ." He also told the court that he had checked the Judicial Branch website and that anyone "who looks at the judicial website sees that little or nothing has been done in this case." That online judicial docket contains all of the orders of the court, as well as its repeated warnings that the case would be dismissed if the plaintiffs' failed to comply with the court's orders. Although the court in this case squarely put the blame for the repeated violations of its orders on Attorney Edwards, we conclude that the record demonstrates that the plaintiffs were aware of the misconduct.

Our Supreme Court has observed that "[i]n the disciplinary dismissal context . . . [a] trial court, for example, might find an attorney's misconduct to be egregious if the attorney represented that his nonappearance was caused by difficulties with his car without disclosing that he had ready access to alternative transportation. A trial court might make a similar finding if, in one case, the attorney repeatedly, and without credible excuse, delayed scheduled court proceedings. Nonappearances that interfere with proper judicial management of cases, and cause serious inconvenience to the court and to opposing parties, are categorically different from a mere failure to respond to a notice of dormancy pursuant to Practice Book § 251 [now § 14-3]; see *Lacasse* v. *Burns*, [214 Conn. 464, 474, 572 A.2d 357 (1990)]; or a single failure to appear, in a timely fashion, after a luncheon recess. See *Gionfrido* v. *Wharf Realty, Inc.*, [193 Conn. 28, 34 n.6, 474 A.2d 787 (1984)]. *Ruddock* v. *Burrowes*, [243 Conn. 569, 576 n.12, 706 A.2d 967 (1998)]." (Internal quotation marks omitted.) *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 50–51 n.17, 12 A.3d 885 (2011). In light of the record in this case, including the court's repeated efforts to accommodate the plaintiffs, and, on the basis of the foregoing analysis of the *Ridgaway* factors, we conclude that the

court's sanction of dismissal was proportional to the plaintiffs' misconduct. Accordingly, the court did not abuse its discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

CHRYSOSTOME KONDJOUA *v.* COMMISSIONER OF CORRECTION
(AC 43322)

Moll, Alexander and DiPentima, Js.

Syllabus

The petitioner, who had previously been convicted, on a guilty plea, of the crime of sexual assault in the third degree, sought a second writ of habeas corpus, claiming that his guilty plea was not made knowingly, intelligently and voluntarily because, at the time of his plea, he was under the influence of medication, he did not receive the benefit of an interpreter and his trial counsel had coerced him. The habeas court sua sponte dismissed the petition pursuant to the applicable rule of practice (§ 23-29 (3)) as an improper successive petition. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to demonstrate that his claim involved an issue that was debatable among jurists of reason, that a court could resolve the issue in a different manner, or that the question raised was adequate to deserve encouragement to proceed further.
2. The petitioner could not prevail on his claim that the habeas court improperly dismissed his second habeas petition as an improper successive petition, as the second petition presented the same legal ground and sought the same relief as the first petition, and the petitioner failed to state new facts not reasonably available at the time of the first petition.

Argued October 7—officially released December 8, 2020

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Peter G. Billings, for the appellant (petitioner).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley* and *Matthew C. Gedansky*, state's attorneys, and *Angela Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, J. The petitioner, Chrysostome Kondjoua, 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 as an improper successive petition pursuant to Practice Book § 23-29 (3). On appeal, the petitioner claims that the court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly dismissed his habeas petition as successive. We dismiss the appeal.

In the petitioner's appeal from the denial of his first habeas petition, we set forth the following facts and procedural history. "The petitioner is a Cameroonian citizen who has resided in the United States since 2010 as a long-term, permanent resident with a green card. He was arrested on November 29, 2013, and charged with the sexual assault in the first degree of an eighty-three year old woman, for whom he had been working. The petitioner entered a plea of not guilty and elected a jury trial.

"On December 16, 2014, after the jury had been picked and evidence was set to begin, the petitioner accepted a plea agreement to the reduced charge of sexual assault in the third degree. Before accepting the petitioner's guilty plea, the trial court canvassed him. The trial court found that the plea was made knowingly, intelligently, and voluntarily, and ordered a presentence investigation. On March 4, 2015, the court sentenced

the petitioner to the agreed disposition of five years of imprisonment, execution suspended after twenty months, with ten years of probation. The petitioner also was required to register as a sex offender for ten years. The petitioner did not file a direct appeal.

"While the petitioner was serving his sentence, the United States Department of Homeland Security (department) initiated deportation proceedings against him. The department cited the petitioner's March, 2015 conviction for sexual assault in the third degree as the ground for removal and stated that the petitioner was subject to removal because he had been convicted of an aggravated felony and a crime of moral turpitude, in violation of § 237 (a) (2) (A) (iii) and § 237 (a) (2) (A) (i) of the Immigration and Nationality Act, respectively. A warrant for the petitioner's arrest was served on July 14, 2015, and the petitioner was taken into the department's custody.

"On June 19, 2015, the petitioner, then self-represented, filed a petition for a writ of habeas corpus. Appointed counsel thereafter filed an amended petition. On October 17, 2017, counsel filed a second amended petition . . . . It alleged two claims: Ineffective assistance of trial counsel for the improper advice concerning the immigration consequences of a guilty plea and a due process challenge to his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made. On December 19, 2017, the respondent, the Commissioner of Correction, filed a return alleging that the petitioner's due process claim was in procedural default. The petitioner filed a reply denying the allegations in the respondent's return on December 28, 2017.

"On May 16, 2018, the habeas court issued a memorandum of decision in which it denied the petition. The habeas court found that the petitioner failed to establish that trial counsel had rendered ineffective assistance. . . . Regarding the petitioner's second claim,

the court found that the petitioner had not established cause and prejudice sufficient to overcome the procedural default." (Footnotes omitted.) *Kondjoua* v. *Commissioner of Correction*, 194 Conn. App. 793, 795–99, 222 A.3d 974 (2019), cert. denied, 334 Conn. 915, 221 A.3d 809 (2020). On appeal, this court rejected the petitioner's claims that the first habeas court erred in rejecting his ineffective assistance of counsel claim and in concluding that his second claim, that his plea was not made knowingly, intelligently, and voluntarily, was procedurally defaulted. Id., 799–807.

The self-represented petitioner filed a second habeas action on August 17, 2018. The petitioner alleged that his plea was not made knowingly, intelligently, and voluntarily because he had been under the influence of medication that caused him to become passive and to accept a guilty plea "unconsciously," he did not receive the benefit of an interpreter, and his counsel coerced him to plead guilty.[1] On July 11, 2019, the court, without holding a hearing on the petition, dismissed the petition sua sponte and found the following: "Upon review of the complaint in the above titled matter, the court hereby gives notice pursuant to Practice Book § 23-29 that the matter has been dismissed for the following reasons: (1) The petition is successive, in that it presents the same grounds as the prior petition . . . previously denied . . . and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition. More specifically, the prior petition made claims of ineffective assistance of counsel and a claim that the petitioner's guilty plea was not knowingly, voluntarily, and intelligently made, and a fair reading of the present complaint presents the same legal grounds, but without any new facts or evidence not

[1] The petitioner also alleged that his trial counsel had rendered ineffective assistance. On appeal, the petitioner does not challenge the court's dismissal of his ineffective assistance claim as successive.

known at the time of the prior petition, and seeks the same relief." The habeas court denied the petition for certification to appeal from the dismissal of the second habeas action. This appeal followed.

I

The petitioner claims that the court erred in denying his petition for certification to appeal from the court's dismissal of his second petition for being successive.

"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 the 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." (Internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 169 Conn. App. 444, 448, 150 A.3d 1166 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

On the basis of our review of the petitioner's substantive claim, we conclude that he has not shown that the

court abused its discretion in denying his petition for certification to appeal.

II

The petitioner claims that the court improperly dismissed his second habeas petition as successive. Specifically, he argues that he raised new factual allegations and a new legal ground in his second petition. He contends that his first habeas petition centered on ineffective assistance rendered by trial counsel in failing to advise him of the immigration consequences of his guilty plea and that his second petition focused on the involuntariness of his plea as a result of the psychological effect of his medication, the lack of an interpreter, and the coercive conduct by trial counsel. We are not persuaded.

Our standard of review is well established. "The conclusions reached by the [habeas] court in its decision to dismiss the habeas petition are matters of law, subject to plenary review. . . . Thus, [w]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts in the record." (Internal quotation marks omitted.) *Zollo* v. *Commissioner of Correction*, 133 Conn. App. 266, 276, 35 A.3d 337, cert. granted, 304 Conn. 910, 39 A.3d 1120 (2012) (appeal dismissed May 1, 2013).

Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition . . . ." See *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 64–65, 6 A.3d 213 (2010) (Practice Book § 23-29 (3) memorialized ability to dismiss petition that presents same ground as previously denied petition and that fails to state new facts

or to proffer new evidence not reasonably available at time of prior petition), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011).

"In *Negron* v. *Warden*, [180 Conn. 153, 158, 429 A.2d 841 (1980)], [our Supreme Court] observed that pursuant to Practice Book § 531 [now § 23-29], [i]f a previous application brought on the same grounds was denied, the pending application may be dismissed without [a] hearing, unless it states new facts or proffers new evidence not reasonably available at the previous hearing. [The court] emphasized the narrowness of [its] construction of Practice Book [§ 23-29] by holding that dismissal of a second habeas petition without an evidentiary hearing is improper if the petitioner either raises new claims or offers new facts or evidence. . . . *Negron* therefore strengthens the presumption that, absent an explicit exception, an evidentiary hearing is always required before a habeas petition may be dismissed."[2] (Emphasis omitted; internal quotation marks omitted.) *Mejia* v. *Commissioner of Correction*, 98 Conn. App. 180, 188–89, 192, 908 A.2d 581 (2006).

Pursuant to Practice Book § 23-29 (3), the habeas court sua sponte dismissed the second habeas petition as successive. In his first habeas petition, the petitioner claimed that his trial counsel had provided ineffective assistance by failing to advise him properly of the immigration consequences of pleading guilty and made a due process challenge to his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made. See *Kondjoua* v. *Commissioner of Correction*, supra, 194 Conn. App. 798–99. Specifically, with respect to the second claim, the petitioner had alleged that his guilty plea was not made knowingly, intelligently, and voluntarily due to the failure of trial counsel to advise him adequately of the immigration consequences of his guilty plea. See id., 805.

[2] The petitioner does not raise as a ground for reversal the lack of an evidentiary hearing.

In his second habeas petition, the petitioner again claimed that his guilty plea was not made knowingly, intelligently, and voluntarily. Instead of claiming, as he had in his first petition, that the involuntary nature of his guilty plea was due to inadequate advice by trial counsel, the petitioner alleged in his second petition that the involuntary nature of the plea was caused by the effects of medication, the lack of an interpreter, and coercion by trial counsel.

The petitioner argues that his second petition is not successive because his first petition alleged ineffective assistance of counsel and the second petition alleges the involuntariness of his guilty plea. We disagree. Both petitions challenge the voluntariness of the guilty plea. Although the factual allegations in the two operative petitions are not the same, it does not necessarily follow that the claims are not identical. "Identical grounds may be proven by different factual allegations, supported by different legal arguments or articulated in different language. . . . They raise, however, the same generic legal basis for the same relief. Put differently, two grounds are not identical if they seek different relief." (Internal quotation marks omitted.) *Carter* v. *Commissioner of Correction*, 133 Conn. App. 387, 393, 35 A.3d 1088, cert. denied, 307 Conn. 901, 53 A.3d 217 (2012).

The legal ground and the relief sought by the petitioner here is the same in both the first and second petitions. Moreover, the petitioner cannot prevail on his argument that the second petition alleges new facts not reasonably available at the time of the first petition. See, e.g., *McClendon* v. *Commissioner of Correction*, 93 Conn. App. 228, 231, 888 A.2d 183 (successive petition premised on same legal grounds and seeking same relief will not survive dismissal unless petition is supported by allegations not reasonably available to petitioner at time of original petition), cert. denied, 277 Conn. 917, 895 A.2d 789 (2006); see also Practice Book § 23-29

(3). In the first habeas action, the petitioner's original nonoperative petition "alleged a due process violation claiming that his guilty plea was not made knowingly, intelligently, or voluntarily because he was under the influence of medication, trial counsel pressured him to plead guilty, and he had trouble understanding and communicating with trial counsel because English is not his first language and he did not always have the benefit of an interpreter during their conversations." *Kondjoua* v. *Commissioner of Correction*, supra, 194 Conn. App. 798 n.3. Although that petition was later amended to eliminate these precise grounds; see id., 798–99; the petitioner clearly knew of their existence at the time of the first petition, defeating any argument now made on appeal that these grounds were not reasonably available at the time of the first petition.

The habeas court was not required to determine the merits of the second habeas petition because, pursuant to Practice Book § 23-29 (3), the second petition presented the same ground as the first petition and the petitioner failed to state new facts not reasonably available at the time of the prior petition. See *McClendon* v. *Commissioner of Correction*, supra, 93 Conn. App. 231; see also Practice Book § 23-29 (3). The petitioner, therefore, has not shown that the resolution of this claim involves an issue that is debatable among jurists of reason, that a court could resolve the issue in a different manner, or that the question is adequate to deserve encouragement to proceed further. Accordingly, we conclude that the habeas court did not abuse its discretion in denying his petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 201

JAYSAN YOUNG *v.* COMMISSIONER OF CORRECTION
(AC 42892)

Prescott, Cradle and DiPentima, Js.

Argued November 17—officially released December 8, 2020

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Bhatt*, *J.*

Per Curiam. The judgment is affirmed.

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90 GROVE STREET LOAN, LLC *v.* N.J. VOOG REALTY, LLC, ET AL.
(AC 43442)

Moll, Alexander and Suarez, Js.

Argued November 30—officially released December 8, 2020

Named defendant's appeal from the Superior Court in the judicial district of Danbury, *Kowalski*, *J.*

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

JEREMY D. *v.* COMMISSIONER OF CORRECTION
(AC 42532)

Moll, Alexander and Suarez, Js.

Argued November 30—officially released December 8, 2020

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Bhatt*, *J.*

Per Curiam. The judgment is affirmed.

ANDRES R. SOSA *v.* COMMISSIONER
OF CORRECTION ET AL.
(AC 42148)

Lavine, Prescott and Elgo, Js.

Argued November 30—officially released December 8, 2020

Plaintiff's appeal from the Superior Court in the judicial district of New Britain, *Wiese*, *J.*

Per Curiam. The judgment is affirmed.

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NOTICE OF CONNECTICUT STATE AGENCIES

State of Connecticut
Connecticut State Dental Commission

Notice of Declaratory Ruling Proceeding

The Connecticut State Dental Commission hereby gives notice of its intention to issue a declaratory ruling, without further proceedings, at its January 14, 2021 meeting regarding the following issue.

May licensed dental hygienists in the State of Connecticut take digital impressions of the teeth for the purpose of fabricating crowns, bridges and implants or for orthodontic treatments under General Statutes § 20-126*l*?

May licensed dentists in the State of Connecticut delegate to dental assistants and expanded function dental assistants the taking of digital impressions of the teeth for the purpose of fabricating crowns, bridges or implants or for orthodontic treatments under General Statutes § 20-112a?

The meeting will be held commencing at 1:00 p.m., by video conference utilizing Microsoft Teams. The link to the meeting can be obtained by emailing the Department of Public Health, Public Health Hearing Office at phho.dph@ct.gov 3-5 days prior to the meeting.

The Connecticut State Dental Commission has prepared this notice in accordance with the Uniform Administrative Procedure Act (''UAPA''), Conn. Gen. Stat. § 4-166 *et seq.*, and specifically Conn. Gen. Stat. § 4-176.

November 25, 2020

Peter S. Katz, DMD
Chairperson
Connecticut State Dental Commission
410 Capitol Avenue, MS# 13PHO
Hartford, CT 06106

NOTICE OF MATERIALS INNOVATION AND RECYCLING AUTHORITY (Successor to Connecticut Resources Recovery Authority)

REVISED CONNECTICUT SOLID WASTE SYSTEM PERMITTING, DISPOSAL AND BILLING PROCEDURES

Pursuant to Conn. Gen. Stat sections 1-121 and 22a-268a, the Materials Innovation and Recycling Authority (''MIRA''), successor to the Connecticut Resources Recovery Authority, hereby gives notice by publication in the Connecticut Law Journal that it intends to adopt revisions to the Connecticut Solid Waste System Permitting, Disposal and Billing Procedures at its **January 20, 2021 Board Meeting commencing at 9:30 a.m.**

MIRA offices will likely be closed to the public on January 20, 2021 due to the Corona Virus pandemic. Members of the public may attend the meeting telephonically by calling a phone number and entering a ZOOM meeting ID number and then a password. The phone number, meeting ID number and password will be provided on the Agenda for the Board Meeting, which Agenda will be posted on MIRA's website prior to the meeting.

Interested persons may present their views at that time and/or submit written comments to the Board prior to the meeting.

The proposed revisions to the Connecticut Solid Waste System Permitting, Disposal and Billing Procedures would:

1. Add a provision specifying that MIRA may reduce a Permittee's Guaranty of Payment (GOP) to no less than one month's waste disposal charges provided the Permittee has maintained excellent payment history. The purpose of this revision is to provide increased flexibility of GOP options to waste haulers who have demonstrated an excellent payment history.

2. Add a provision specifying that MIRA's waste hauling customers are allowed to deliver, on one vehicle, a consignment of recyclables originating in more than one municipality. The purpose of this revision is to provide operational flexibility to MIRA's waste hauling customers regarding their pick-up routes for recyclables.

3. Add a provision that prohibits trucks that carry both MSW and recyclables from delivering at MIRA facilities. The purpose of this provision is to reduce contamination of recyclables from MSW that occurs in split load vehicles because the liquids associated with the MSW side of the vehicle migrate to the recycling side, mixing with the recyclables and diminishing their quality. This provision will also clarify that drivers are not to tip recycling loads at transfer stations until an inspector directs them to, in order to reduce the quantity of contaminated recyclables received at the transfer stations.

4. Eliminate the requirement that cap and lids be removed from PET and HDPE plastic containers. The purpose of this revision is to reflect what is now acceptable at MIRA's recycling facility.

5. Add a provision requiring that loads of recyclables that are rejected must be picked up and removed the same day, and that failure to do so will result in a monetary fine. The purpose of this revision is to ensure orderly operations at the facility.

DIVISION OF CRIMINAL JUSTICE
(Affirmative Action/Equal Opportunity Employer)

STATE'S ATTORNEY
JUDICIAL DISTRICT OF NEW LONDON

Applications are being accepted for the full-time position of State's Attorney for the Judicial District of New London (PCN 4861). The successful applicant shall hold office from the date of appointment through June 30, 2025, and thereafter be subject to appointment to an eight (8) year term. The annual salary is $163,292.17. For a description of this position, please go to : **https://portal.ct.gov/DCJ/Employment/Job-Descriptions/States-Attorney.**

At the time of appointment, the successful candidate must be an attorney-at-law and shall have been admitted to the practice of law for at least three years; residency in the State of Connecticut is a prerequisite to appointment. All applicants must complete division of Criminal Justice application forms. These forms may be downloaded from the Division website at **www.ct.gov/csao.** A job description for this position may also be viewed on this website.

Two (2) complete sets of application forms along with resumes must be sent via U.S. Mail to**:** The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: SA-New London JD (PCN 4861) and must be postmarked no later than **January 7, 2021**. In addition, an electronic copy (pdf) of application materials should be sent to **DCJ.HR@ct.gov**. Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.

Reappointment of Judges

Notice Of Evaluation of Incumbent Judges Who Seek Reappointment

The terms of the following Judges of the State of Connecticut will expire during the year 2022 and the nominations by the Governor will come before the Judicial Selection Commission for review commencing in February 2021.

There are 20 judges with terms expiring in 2022:

Appellate Court

Hon. Eliot D. Prescott

Superior Court

Hon. Carl J. Schuman
Hon. Maureen M. Keegan
Hon. Leslie L. Olear
Hon. Harry E. Calmar
Hon. Michael G. Maronich
Hon. Kevin A. Randolph
Hon. Robyn Stewart Johnson
Hon. Leo V. Diana
Hon. Robert Nastri, Jr.
Hon. John D. Moore
Hon. Kevin S. Russo
Hon. Tammy D. Geathers
Hon. Jane K. Grossman
Hon. Rupal Shah
Hon. Cesar A. Noble
Hon. Erika M. Tindill
Hon. Kevin J. Murphy

Senior Judges

Hon. Julia L. Aurigemma
Hon. Denis D. Markle
Hon. Sheridan L. Moore

Comments regarding the reappointment of any of the Judges on the Reappointment List for 2022 may be submitted to the Judicial Selection Commission, 165 Capitol Ave, Suite 1080,Hartford, CT 06106 on or before January 31, 2021. Reappointment interviews of the listed Judges will commence in February 2021 and continue through June 2021. Accordingly, comments received after January 31, 2021 will be considered if received prior to a Judge's reappointment interview. Anonymous submissions will be considered but afforded less weight than signed submissions.

Charles E. Tiernan, III
Chairperson

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of October 20, 2020:	
Christopher R. Smith	DMT Solutions Global Corp.
Certified as of October 22, 2020:	
Stacey M. Barnes	Eversource Energy
Certified as of October 23, 2020:	
Karen B. Simons	General Electric Company
Certified as of October 26, 2020:	
Jody A. Cummings	Mashantucket Pequot Tribal Nation
Certified as of October 27, 2020:	
Lisa Ann Runyon	Castleton Commodities International
Certified as of October 28, 2020:	
Nikol G. Thompson	W.J. Deutsch & Sons Ltd.
Certified as of October 31, 2020:	
Bradley S. Galvin	Energy Financial Services, GE Capital

Hon. Patrick L. Carroll III
Chief Court Administrator