**Filed Under the Electronic Briefing Rules**

# SUPREME COURT

of the

# State of Connecticut

Judicial District of Tolland

at G.A. 19 (Rockville)

## S.C. 20727

**EDGAR TATUM**

**V.**

**COMMISSIONER OF CORRECTION**

Brief of the Commissioner of Correction–
Appellee with attached appendix

*To be argued by:*

James A. Killen
Senior Assistant State's Attorney
Office of the Chief State's Attorney
Appellate Bureau
300 Corporate Place
Rocky Hill, CT 06067
Tel. (860) 258-5807
Fax (860) 258-5828
Juris No.401852
James.Killen@ct.gov
Dcj.Ocsa.Appellate@ct.gov

## Table of contents

## Statement of the issues

A. Did the Appellate Court incorrectly conclude that the habeas court had properly dismissed counts six and seven of the petitioner's operative, amended habeas petition on the ground that *State v. Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, —— U.S. ——, 137 S. Ct. 2263 [(2017)], and *State v. Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), both of which overruled this court's rationale and holding regarding in-court identifications in the petitioner's direct appeal; see *State v. Tatum*, 219 Conn. 721, 595 A.2d 322 (1991); did not apply retroactively to the petitioner's case on collateral review?

## Table of authorities

**Page**

**Cases**

**Statutes**



**Miscellaneous**

**Constitutional Provisions**

## I. Nature of the proceedings

This is an appeal by the petitioner, Edgar Tatum, from the Appellate Court's decision in *Tatum v. Comm'r of Correction*, 211 Conn. App. 42, 44–47, 272 A.3d 218 (2022), wherein the Appellate Court affirmed the judgment of the habeas court (*Newson*, *J.*) dismissing in part, and denying in part, the petitioner's petition for a writ of habeas corpus. The sole issue in this certified appeal is whether the Appellate Court erred in concluding that this Court's decisions in *State v. Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), and *State v. Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, —— U.S. ——, 137 S. Ct. 2263 (2017), which established new rules in cases in which witness identification evidence is proffered, could not be applied retroactively to the claims raised in two counts of the habeas petition.

## II. Statement of the facts

The Appellate Court summarized the pertinent facts as follows:

> The petitioner was convicted of murder following a jury trial and sentenced to a term of sixty years of incarceration on April 6, 1990. In *State v. Tatum*, 219 Conn. 721, 595 A.2d 322 (1991), our Supreme Court affirmed the petitioner's underlying murder conviction and recited the following facts that the jury reasonably could have found in the criminal trial. "At approximately 10:30 p.m. on February 25, 1988, Larry Parrett was shot and killed in his home in Waterbury, where he lived with his girlfriend, Tracy LeVasseur. Anthony Lombardo, who lived on the same street, was also shot and wounded at the same time and place. Earlier that evening, Lombardo had been out walking his dog when he noticed a tall black man, later identified as the [petitioner], knocking on the door of Parrett's apartment. Lombardo approached the [petitioner], after

having recognized him as someone he had seen at the apartment on other occasions. When LeVasseur opened the door from within, the [petitioner] forced himself and Lombardo into the living room, where LeVasseur and Parrett were smoking cocaine. LeVasseur recognized the [petitioner] as 'Ron Jackson,' a man from California who, along with other visitors from California, had spent a number of nights at the apartment selling drugs during the months preceding the incident. Parrett also had been involved in the sale of drugs. When the [petitioner] and Parrett began to argue, Lombardo and LeVasseur left the room and went into the kitchen, where three other men were present. A few moments later, Lombardo returned to the living room to find the [petitioner] pointing a gun at Parrett. Lombardo stepped between the two men, thinking that the [petitioner] might be dissuaded from firing. The [petitioner] nevertheless fired four shots from the gun, striking Lombardo in the shoulder and fatally wounding Parrett. ...

"That night at the Waterbury police station Lombardo was shown a photographic array from which he chose a photograph of a black man named Jay Frazer as that of the man who had shot him and Parrett. The same night LeVasseur also selected a photograph of Frazer from an array shown to her by the police. Neither array contained a photograph of the [petitioner]. One week later, however, LeVasseur went to the Waterbury police and told them that she had identified the wrong man. A nine person lineup was then conducted in which Frazer participated but the [petitioner] did not. After seeing Frazer in person, LeVasseur told the police that he was

> definitely not the assailant. Thereafter, the police showed another photographic array to LeVasseur from which she chose the [petitioner's] photograph as that of the person who had shot the victim. Lombardo was subsequently shown a photographic array that included the [petitioner's] picture, but he declined to identify anyone, explaining that he preferred to see the individuals in person. At the probable cause hearing and at trial, both Lombardo and LeVasseur identified the [petitioner] as the man who had shot Lombardo and Parrett." (Footnotes omitted.) *State v. Tatum*, *supra*, 219 Conn. at 723–25, 595 A.2d 322.

*Tatum*, 211 Conn. App. at 44–46.

> On direct appeal, the petitioner had claimed, *inter alia*, that the trial court deprived him of his due process rights under the fourteenth amendment to the United States constitution when it admitted Lombardo's in-court identification of him which, he argue[d], was tainted by an unnecessarily suggestive pretrial identification procedure in that Lombardo had viewed the [petitioner] at the probable cause hearing. The [petitioner] argue[d on appeal] that the fact that he was the only black man seated at the defense table "conveyed a clear message to Lombardo that [the prosecution] believed Edgar Tatum was the man who had shot him." He claim[ed] that Lombardo's subsequent identification of him at trial was the product of that unnecessarily suggestive procedure rather than the product of his independent recollection of the crime.

(Footnotes omitted.) *Tatum*, 219 Conn. at 725. The petitioner had "conceded that the claim was not preserved at trial, and therefore [sought] appellate review pursuant to *State v. Golding*, 213 Conn. 233,

567 A.2d 823 (1989)." *Id*. at 726. This Court concluded that the third condition of *Golding* had not been met because the petitioner had "failed to establish that [the witness's] pretrial identification of him was the result of an unconstitutional procedure…." *Id*. Specifically, this Court held that an initial identification at a probable cause hearing is not unnecessarily suggestive. *Id*. at 730-32.

In his direct appeal, the petitioner also had claimed

> that the jury was not adequately alerted to the dangers inherent in eyewitness identification because, although the court did instruct the jury on many of the specific dangers, it did not instruct on: (1) the danger that Lombardo had misidentified the defendant due to the one year time lapse between the shooting and his positive identification of the defendant at the probable cause hearing; or (2) the fact that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness. The defendant concede[d] that the court did warn the jury of all the other dangers raised in his request to charge, but claim[ed] that the omission of these two points constitute[d] reversible error.

*Tatum*, 219 Conn. at 732–33. This Court rejected that claim as well, concluding that, upon review of the entire charge, it "provided sufficient guidance to the jury on the issue of eyewitness identification." *Id*. at 735.

> Following his direct appeal, the petitioner filed numerous petitions for a writ of habeas corpus…. The petition that is the subject of the present appeal initially was filed on February 11, 2016. The petitioner filed an amended petition on June 27, 2018, and the respondent, the Commissioner of Correction,

> moved to dismiss the operative petition on July 20, 2018. The habeas court granted the respondent's motion to dismiss as to counts one (ineffective assistance of trial counsel), two (ineffective assistance of appellate counsel), three (ineffective assistance of first habeas counsel), six (due process), and seven (newly discovered evidence), but denied the motion as to counts four (ineffective assistance of second habeas counsel) and five (ineffective assistance of third habeas counsel). The habeas court held a hearing on the two remaining claims on various dates between January 17 and April 11, 2019, after which the parties were given the opportunity to file posttrial briefs. In a memorandum of decision dated August 28, 2019, the habeas court dismissed count four and denied count five of petitioner's petition. On September 9, 2019, the petitioner filed a petition for certification to appeal. The habeas court granted the petition [for certification]….

*Tatum*, 211 Conn. App. at 46–47.

> On appeal to the Appellate Court, the petitioner claimed that the [habeas] court improperly (1) dismissed counts one, two, and three of the petition on the basis of res judicata; (2) determined that our Supreme Court's decisions in [*Guilbert*] and [*Dickson*] could not be applied retroactively to the identification claims raised in counts six and seven of the petitioner's petition; and (3) denied count five of the operative complaint alleging ineffective assistance against his third habeas counsel.

*Tatum*, 211 Conn. App. at 44. The Appellate Court disagreed and affirmed the habeas court's judgment in all respects. *Id*.

On June 21, 2022, this Court granted the petitioner's petition for certification to appeal the Appellate Court's judgment, limited to the following issue:

> Did the Appellate Court incorrectly conclude that the habeas court had properly dismissed counts six and seven of the petitioner's operative, amended habeas petition on the ground that *State v. Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, —— U.S. ——, 137 S. Ct. 2263 [(2017)], and *State v. Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), both of which overruled this court's rationale and holding regarding in-court identifications in the petitioner's direct appeal; see *State v. Tatum*, 219 Conn. 721, 595 A.2d 322 (1991); did not apply retroactively to the petitioner's case on collateral review?

*Tatum v. Comm'r of Correction*, 343 Conn. 932, 276 A.3d 975 (2022).

## III. Argument

### A. The Appellate Court Correctly Concluded That The Habeas Court Properly Dismissed Counts Six And Seven Of The Petition On The Ground That *Guilbert* And *Dickson* Did Not Apply Retroactively To The Petitioner's Case On Collateral Review

The answer to the certified question should be no because the Appellate Court correctly determined that the new rules declared in *Dickson* and *Guilbert* do not apply retroactively to cases brought by way of collateral review.

#### 1. *Guilbert* and *Dickson*

In *Guilbert*, this Court held, for the first time, that because certain factors that can bear on the reliability of eyewitness identifications are not within the knowledge of the average juror, expert testimony on those factors does not improperly invade the

province of the jury and is admissible. *Guilbert*, 306 Conn. at 251-52. In so holding, this Court overruled *State v. Kemp*, 199 Conn. 473, 477, 507 A.2d 1387 (1986), and *State v. McClendon*, 248 Conn. 572, 586, 730 A.2d 1107 (1999), which had held to the contrary. *Id*. at 252. The Court nevertheless allowed that, in lieu of permitting expert testimony on the subject, "a trial court retains the discretion to decide whether, under the specific facts and circumstances presented, focused and informative jury instructions on the fallibility of eyewitness identification evidence … would alone be adequate to aid the jury in evaluating the eyewitness identification at issue." *Guilbert*, 306 Conn. at 257–58 The Court emphasized, however, that "any such instructions should reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at issue in the case; broad, generalized instructions on eyewitness identifications, such as those previously approved by this court in [*Tatum*, 219 Conn. at 734–35] … do not suffice." (Footnote omitted.) *Guilbert*, 306 Conn. at 258.

The *Guilbert* Court ultimately concluded that the trial court's error in refusing to permit the defendant's identification expert to testify was harmless error. *Guilbert*, 306 Conn. at 365-67. Importantly, in so concluding, the Court noted that there was no basis for any claim by the defendant that the error "was of constitutional magnitude." *Guilbert*, 306 Conn. at 265 n.45.

In *Dickson*, this Court rejected its earlier holding in this petitioner's direct appeal and held that in cases where identity is at issue, first time in-court identifications are unnecessarily suggestive. *Dickson*, 322 Conn. at 435-36, overruling *State v. Tatum*, 219 Conn. at 730-31. The Court held that, while such suggestive identification procedures do not necessarily result in the finding of a violate due process in every case, they nevertheless would not be permitted

henceforth as a prophylactic measure to protect against the possibility of such a violation. *Dickson*, 322 Conn. at 426 n.11. The *Dickson* Court expressly held that the new rule it was announcing would not apply retroactively on collateral review to cases that were final by the time *Dickson* was decided. *Id*. at 451 n.34. The Court also concluded that the new rule does not constitute a "watershed rule" that would meet the exception to the general rule of non-retroactivity set forth in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989), discussed further *infra*. *Id*.

In Count Six of the petitioner's habeas petition below, he brought a freestanding due process challenge to both the in-court identification procedure employed in his case and the adequacy of the jury instructions on factors that may affect the reliability of eyewitness identification. Appendix to Petitioner's Brief (hereinafter "App.") at 48-49. Although this Court had rejected both of these claims in his direct appeal, he alleged that this "Court's decisions in *Guilbert* and *Dickson* should be retroactively applied to his case, and justice requires that he receive the benefit of those decisions." *Id*. at 49.

In Count Seven of the petition, the petitioner sought habeas relief, purportedly on the grounds of "Newly Discovered Evidence"; App. at 49-50; although he cited no authority for granting habeas relief on such a claim. While not expressly citing *Guilbert* and *Dickson* in Count Seven, the essence of his claim appeared to be that the "scientific advancements/studies" that were relied upon by this Court in those cases constituted newly discovered evidence which, in combination with other evidence in his case, "demonstrate that no reasonable fact finder would find the petitioner guilty of murder." App. at 49-50.

Notwithstanding any perceived distinction between Counts Six and Seven that the petitioner was attempting to make when formulating his habeas petition, his claim, during the course of his proceedings below and now before this Court, has been distilled to one claim, namely, that the lower courts allegedly erred in rejecting his argument that *Guilbert* and *Dickson* may be applied retroactively to potentially afford him habeas relief.

### 2. The Appellate Court correctly concluded that *Dickson* and *Guilbert* do not apply retroactively on collateral review

#### a. Standard of review and governing law

The issue of whether a decision announced a new constitutional principle that should be applied retroactively in a collateral proceeding presents a question of law over which this Court's review is plenary. See *Duperry v. Solnit*, 261 Conn. 309, 318, 803 A.2d 287 (2002).

As to the law governing whether a new rule applies retroactively to cases brought by way of collateral review, the starting point

> is the framework set forth in *Teague v. Lane*, 489 U.S. 288 …. See *Thiersaint v. Commissioner of Correction*, 316 Conn. 89, 112, 111 A.3d 829 (2015) (adopting *Teague* framework). Under *Teague*, the court "must [first] ascertain the legal landscape" as it existed at the time the petitioner's conviction became final and "ask whether the [United States] [c]onstitution, as interpreted by the precedent then existing, compels the rule.... That is, the court must decide whether the rule is actually new." (Citation omitted; internal quotation marks omitted.) *Beard v. Banks*, 542 U.S. 406, 411, 124 S.Ct. 2504 [(2004)]. A constitutional rule is "new" for purposes of *Teague* "if the

result was not dictated by precedent existing at the time the defendant's conviction became final." (Internal quotation marks omitted.) *Thiersaint v. Commissioner of Correction*, *supra*, at 103, 111 A.3d 829.

With two exceptions, a new rule will not apply retroactively to cases on collateral review. *Teague v. Lane*, *supra*, 489 U.S. at 311–13, 109 S.Ct. 1060. First, if the new rule is "substantive," that is, if the rule "places certain kinds of primary, private conduct beyond the power of the criminal lawmaking authority to proscribe"; (internal quotation marks omitted) *Thiersaint v. Commissioner of Correction*, *supra*, 316 Conn. at 108 n. 8, 111 A.3d 829; it must apply retroactively. "Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." (Internal quotation marks omitted.) *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S.Ct. 2519 [(2004)].

Second, if the new rule is procedural, it applies retroactively if it is "a watershed [rule] of criminal procedure ... implicit in the concept of ordered liberty"; (citation omitted; internal quotation marks omitted) *Beard v. Banks*, *supra*, 542 U.S. at 417, 124 S.Ct. 2504; meaning that it "implicat[es] the fundamental fairness and accuracy of [a] criminal proceeding." (Internal quotation marks omitted.) Id.; see also *Sawyer v. Smith*, 497 U.S. 227, 242, 110 S.Ct. 2822 [(1990)] (rule is watershed when it improves accuracy and "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding" [emphasis omitted; internal

quotation marks omitted]), quoting *Teague v. Lane*, *supra*, 489 U.S. at 311, 109 S.Ct. 1060. Watershed rules of criminal procedure include those that "raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Schriro v. Summerlin*, supra, 542 U.S. at 352, 124 S.Ct. 2519. The United States Supreme Court has narrowly construed this second exception and, in the twenty-five years since *Teague* was decided, has yet to conclude that a new rule qualifies as watershed. See *id*. (class of watershed rules of criminal procedure "is extremely narrow, and it is unlikely that any ... ha[s] yet to emerge" [internal quotation marks omitted])….[1]

[A]lthough this court [has] concluded that [it] will apply the *Teague* framework, [it] did so "with the caveat that, while federal decisions applying *Teague* may be instructive, this court will not be bound by those decisions in any particular case, but will conduct an independent analysis and application of *Teague*." *Thiersaint v. Commissioner of Correction*, *supra*, 316 Conn. at 113, 111 A.3d 829; see also *Danforth v. Minnesota*, 552 U.S. 264, 280–81, 128 S.Ct. 1029 [(2008)]….

---

[1] As will be discussed further *infra*, the United States Supreme Court more recently has declared that "[t]he purported watershed exception [to *Teague*] is moribund" because it cannot envision any future procedural rule that could satisfy the extremely high standard that would have to be met to justify its exemption from the general *Teague* rule of non-retroactivity to cases brought on collateral review. *Edwards v. Vannoy*, ___ U.S. ___, 141 S. Ct. 1547, 1561 (2021).

*Casiano v. Comm'r of Correction*, 317 Conn. 52, 62–64, 115 A.3d 1031 (2015), cert. denied, 577 U.S. 1202 (2016).

The petitioner rightly has never claimed that *Dickson* and *Guilbert* did not create "new" rules, within the meaning of *Teague*. As discussed *supra*, the holdings of both cases were "not *dictated* by precedent existing at the time the defendant's conviction became final." (Emphasis in original.) *Teague*, 489 U.S. at 30.[2]

Nor has the petitioner ever claimed that these holdings constitute "substantive" new rules, rather than procedural ones. See *Dickson*, 322 Conn. at 451 n.34 ("the rule that we adopt in the present case is a new procedural rule"). See also *Casiano*, 317 Conn. at 68 quoting *Schriro*, 542 U.S. at 353 ("[R]ules that regulate only the manner of determining the defendant's culpability are procedural.") (Emphasis and internal quotation marks omitted.). Indeed, he acknowledges to the contrary. See Petr. Br. at 24; see also *Tatum*, 211 Conn. App. at 58 (citing petitioner's recognition below "that *Dickson*'s holding is 'not necessarily a substantive "rule" as courts tend to interpret that phrase ....'.").

Consequently, the petitioner's challenge to the rulings below focuses on whether *Dickson* and *Guilbert* established "watershed"

---

[2]If these decisions cannot be said to have announced "new" rules – i.e., if they merely constituted the "application of [a] principle that governed a prior decision to a different set of facts"; *Thiersaint*, 316 Conn. 103 – then the petitioner's habeas claims would have been barred under the principle of res judicata insofar as this Court, on direct appeal, already rejected his claims applying the "old" rules to this petitioner's set of facts. See *Bowens v. Comm'r of Correction*, 333 Conn. 502, 529, 217 A.3d 609 (2019) (if issue litigated on appeal, petitioner not entitled to bring habeas petition challenging outcome).

constitutional procedures, warranting retroactive application in collateral proceedings pursuant to that *Teague* exception. For the reasons discussed *infra*, the Appellate Court correctly concluded that they did not.

### b. The Appellate Court correctly declined to apply *Dickson* retroactively

In concluding that *Dickson* should not be applied retroactively, the Appellate Court reasoned as follows:

> Although it appears that the petitioner may be arguing that our Supreme Court did not address the retroactivity of the constitutional rule that it promulgated in *Dickson*, such argument is meritless. Our Supreme Court explicitly addressed the applicability of its decision, stating: "[T]he new rule that we adopt today applies to the parties to the present case and to all pending cases." [*State v. Dickson*, *supra*, 322 Conn. at 450–51, 141 A.3d 810].
>
> * * *
>
> The court went on to address *Dickson*'s applicability to collateral challenges. It stated: "The new rule would not apply, however, on collateral review. This question is governed by the framework set forth in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). See *Casiano*[, 317 Conn. at 62]. Under *Teague*, a 'new' constitutional rule, i.e., a rule that 'was not dictated by precedent existing at the time the defendant's conviction became final,' generally does not apply retroactively.... *Id*. There are two exceptions, however, to this general rule. Specifically, a new rule will apply retroactively if it is substantive or, if the new rule is procedural, when it is 'a watershed [rule] of criminal procedure ... implicit in the

concept of ordered liberty ....' ... *Id.*, at 63, 115 A.3d 1031. Because the rule that we adopt in the present case is a new procedural rule, we must determine whether it is a watershed rule. To be considered a watershed rule, the rule must 'implicat[e] the fundamental fairness and accuracy of [a] criminal proceeding'; ... *id.*; or '[alter] our understanding of the bedrock procedural elements essential to the fairness of a proceeding ....' *Id.* Watershed rules 'include those that raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.' ... *Id.* The exception is 'narrowly construed ... and, in the twenty-five years since *Teague* was decided, [the United States Supreme Court] has yet to conclude that a new rule qualifies as watershed.' *Id.*; but see id., at 64, 115 A.3d 1031 (this court may construe *Teague* more liberally than United States Supreme Court); *id.*, at 69, 115 A.3d 1031 (concluding that new procedural rule requiring individualized sentencing of juvenile before life sentence may be imposed is watershed rule under *Teague*). In the present case we conclude that the rule requiring prescreening of first-time, in-court identification does not fall within the narrow exception because: (1) as we have explained, the rule is prophylactic and a violation of the rule does not necessarily rise to the level of a due process violation; and (2) the rule is merely an incremental change in identification procedures. Cf. *Beard v. Banks*, 542 U.S. [at 419–20] ('the fact that a new rule removes some remote possibility of arbitrary infliction of the death sentence does not suffice to bring it within *Teague*'s second exception'); *id.*, at 419, 124 S. Ct. 2504 (although new rule was intended to enhance accuracy of capital sentencing, 'because it effected an

> incremental change, [the United States Supreme Court] could not conclude that ... [it was] an absolute prerequisite to fundamental fairness' ...)." (Emphasis added.) *State v. Dickson*, supra, 322 Conn. at 451 n.34, 141 A.3d 810.
>
> Contrary to the petitioner's assertions, it is clear from *Dickson* that the constitutional rule set forth therein was not intended to provide an avenue for collateral relief. See id. ("[t]he new rule would not apply, however, on collateral review"); see also *Bennett v. Commissioner of Correction*, 182 Conn. App. 541, 560, 190 A.3d 877 (in *Dickson*, our Supreme Court "stated that its holding regarding prescreening was to apply only to future cases and pending related cases, and was not to be applied retroactively in habeas actions" (emphasis added)), cert. denied, 330 Conn. 910 [(2018)]. Although our Supreme Court did reject and overrule the rationale it previously employed in *State v. Tatum*, supra, 219 Conn. 721, 595 A.2d 322 (decision resolving petitioner's direct appeal) in reaching its conclusion in *Dickson*, the petitioner has provided us with no authority, and we have found none, that suggests that the new rule in *Dickson* can apply retroactively to him on collateral review. We similarly reject his invitation to construe more narrowly our Supreme Court's retroactivity analysis in footnote 34 of *Dickson*; see *State v. Dickson*, supra, 322 Conn. at 451 n.34, 141 A.3d 810; "to apply only to the specific facts of the *Dickson* case." We remind him that our Supreme Court "has the final say on matters of Connecticut law and that the Appellate Court and Superior Court are bound by [its] precedent." *Stuart v. Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010).

*Tatum*, 211 Conn. App. at 58–61.

### i. The Appellate Court correctly determined that this Court already ruled, in *Dickson* itself, that the new rule of procedure mandated in that case does not apply retroactively to cases on collateral review

Under the *Teague* analysis, "the question 'whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision.' Mishkin, Foreword: the High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv.L.Rev. 56, 64 (1965). Cf. *Bowen v. United States*, 422 U.S. 916, 920, 95 S.Ct. 2569 [(1975)] (when 'issues of both retroactivity and application of constitutional doctrine are raised,' the retroactivity issue should be decided first)." *Teague*, 489 U.S. at 300. Consistent with this approach, the *Dickson* Court itself expressly and definitively concluded that its new rule should be *not* given retroactive effect in a collateral proceeding, stating its reasons in footnote 34 to that opinion; *Dickson*, 322 Conn. at 451 n.34; which is quoted verbatim in the Appellate Court's opinion, as set forth *supra*. *Tatum*, 211 Conn. App. at 59-61.[3]

[3] Because the *Teague* analysis, adopted by this Court in *Thiersaint*, directs that the issue of retroactivity should be decided when a new rule itself is announced, there is no merit to the argument by one of the amici that the *Dickson* Court's decision that its rule does not apply to cases on collateral review "was dicta." Amicus Brief of Innocence Project and Connecticut Innocence Project at 12.

Having unquestionably resolved the issue of retroactivity only seven years ago, it is both unnecessary and contrary to well-established policy to reconsider it at this juncture.

> [I]t is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon an arbitrary discretion. The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton). See also *Vasquez v. Hillery*, 474 U.S. 254, 265 [106 S.Ct. 617] (1986) (stare decisis ensures that the law will not merely change erratically and permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals)." (Internal quotation marks omitted.).
>
> * * *
>
> Any other conclusion would send the message that, whenever there is a hotly contested issue in this court that results in a closely divided decision, anyone who disagrees with the decision and has standing to challenge it need only wait until a member of the original majority leaves the court to mount another assault.... [T]hat would be a very dangerous message to send.

(Internal citation omitted.) *State v. Peeler*, 321 Conn. 375, 378, 381, 140 A.3d 811 (2016) (*Rogers, C.J.*, concurring).

The petitioner proffers three unpersuasive reasons why this Court's decision in *Dickson* relative to retroactivity should not control here. He first asserts that "[a]rguably" the *Dickson* Court did not decide the issue of retroactivity as it pertains to anyone's case other than Mr. Dickson's. Petr. Br. at 24. In support, the petitioner emphasizes that the *Dickson* Court stated, "*In the present case*, we

conclude that the rule requiring prescreening of first time in-court identification does not fall within the narrow [watershed] exception…." (Emphasis added by petitioner.) Petr. Br. at 24, quoting *Dickson*, 322 Conn. at 452 n.34. However, the petitioner misperceives the meaning of the phrase "[i]n the present case" within the context of the *Dickson* Court's discussion. Just prior to the quoted sentence, the Court had been discussing the *Teague* analysis as it applies to cases and new rules generally. After doing so, the Court then focused on "the present case" to signal that it was going to apply these general *Teague* principles to the specific issue of whether the new rule it was creating "in the present case" (i.e., Mr. Dickson's case) would qualify for retroactive application under that general *Teague* analysis. Nothing in the *Dickson* Court's use of that phrase in any way suggested that its conclusion that the new rule would not apply retroactively on collateral review was directed "only to the specific *facts* of the *Dickson* case," as this petitioner claims. (Emphasis added.) Petr. Br. at 24.

Moreover, the petitioner fails to explain why this Court would choose to single out Mr. Dickson, and only Mr. Dickson, as a person who would not be entitled to retroactive application of its new rule on collateral review. On the contrary, it would have made no sense for the *Dickson* Court to discuss the retroactivity of the new rule in Mr. Dickson's case at all, if that were the sole purpose of the footnote. The Court was hearing Mr. Dickson's case on direct appeal and, therein, *did* apply the rule to the facts of his case already, concluding that admission of the witness's in-court identification was, in fact, improper under that new rule but nevertheless concluding that it was harmless error. *Dickson*, 322 Conn. at 460. Thus, Dickson was the only person for whom the *Dickson* Court would *not* have had to determine the retroactivity of its new rule on collateral review

because Dickson already was obtaining the benefit of it on direct appeal.

The second reason why the petitioner submits that the doctrine of stare decisis, and the important policies it furthers, should be overridden in his case is that he disagrees with the *Dickson* Court's conclusion that its new rule should not apply retroactively on collateral review. Petr. Br. at 24-25. However, for the compelling reasons cogently set forth in Chief Justice Rogers' concurrence in *Peeler*, this Court should reject the petitioner's invitation to reconsider and overrule its recent decision in *Dickson* on the issue of retroactivity, simply in the hope that new members of this Court will believe it was wrongly decided.

Finally, the petitioner posits that, even if the non-retroactivity of *Dickson* on collateral review is considered settled law as to everyone else, this Court nevertheless should, under its supervisory authority, create an additional exception to the *Teague* general principle of non-retroactivity of a new procedural rule whenever, as here, the petitioner's own case on direct appeal was overruled in order to create the new rule. Petr. Br. at 25-32. He cites no authority for such an exception. Furthermore, he proffers no reason why he alone should be entitled to the benefit of the new *Dickson* rule while other potential habeas petitioners who may have been subject to the same or similar in-court identification procedures as were employed in his case would not. He simply invokes his unexplicated belief that "fairness and justice" require it. Petr. Br. at 26. Undoubtedly, however, many of the potential habeas petitioners who could not avail themselves of the special exception this petitioner seeks to create for himself would disagree that doing so would foster "fairness and justice."

Ultimately, there will always be some perception of unfairness in *Teague*'s general rule that, due to the timing and the procedural

posture of one's case, i.e., whether or not one's direct appellate rights have been exhausted when the new rule happens to be announced, some criminal defendants will get the benefit of a new rule while others will not. Nevertheless, for reasons already set forth in *Teague*, as well as by this Court in *Thiersaint*, and discussed further *infra*, important policy concerns compel such an outcome. Moreover, the *Teague* Court already considered and determined under what circumstances it would be *fundamentally* unfair and unjust to preclude a petitioner from obtaining the benefit of a new rule on collateral review. To that end, the *Teague* analysis recognizes that equitable exceptions are warranted (1) for those who no longer should be considered guilty of the crimes charged because the new decision has reinterpreted the statutory offenses of which they were convicted (the substantive rule exception) and (2) for those who were deprived of a newly-recognized "bedrock" constitutional procedure so essential to "the concept of ordered liberty" that no reasonable person could have any faith whatsoever in the outcome of their criminal trial (the watershed exception). In contrast, whatever sense of unfairness there would be in denying this petitioner the benefit of the *Dickson* procedural rule change, it is one inherent in every case in which *Teague* may bar application of a new rule on collateral review and, importantly, one shared by other potential habeas petitioners who were convicted after trials in which similar identification procedures were employed but who also can no longer challenge those procedures.

Furthermore, the fact that the *Dickson* Court overruled its earlier decision in this petitioner's direct appeal when discussing its rationale for creating the new rule does not put him in a position superior to those others in terms of what fairness demands. In overruling the petitioner's appellate case, the *Dickson* Court was simply signaling that it no longer considered its rationale persuasive,

a rationale that previously had sanctioned such procedures, not only in this petitioner's case, but in any and all others where the same or similar procedures could have been challenged successfully if the new *Dickson* rule had been in place. Thus, the fact that the *Dickson* Court chose to discuss and overrule this petitioner's appellate case in particular in order to make its point does not support his argument that he has a special claim to equitable relief, superior to others whose criminal trials also were not conducted in a manner consistent with the new *Dickson* rule.

### ii. If this Court does not agree that the issue of *Dickson*'s retroactivity is settled law, it nevertheless should affirm its rationale in *Dickson* and conclude that its new rule does not apply retroactively on collateral review

Regardless of whether this Court decides that the issue of *Dickson*'s retroactivity is settled law, the rationale supporting the *Dickson* Court's conclusion that its new rule should not be applied retroactively in collateral proceedings is both sound and persuasive. With respect to *Dickson*, the only disputed issue in this appeal is whether the new rule adopted in that case should apply retroactively to cases on collateral review because it constitutes a "watershed" rule. The Appellate Court correctly concluded that it does not.

As a preliminary matter, it is necessary to revisit the important policy reasons underlying *Teague*'s general principle that new rules should not apply retroactively to cases on collateral review, in order to emphasize why it is essential that a watershed exception to that

general rule be recognized only in the rarest of cases. As the *Teague* Court observed,

> [a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality' should not have as much place in criminal as in civil litigation, not that they should have none." Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U.Chi.L.Rev. 142, 150 (1970). "[I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv.L.Rev. 441, 450–451 (1963) (emphasis omitted). See also *Mackey* [*v. United States*, 401 U.S. 667, 691, 91 S. Ct. 1160 (1971) (*Harlan, J.*, concurring in judgments in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation").

*Teague*, 489 U.S. at 309.

In subsequently adopting the *Teague* approach in *Thiersaint*, this Court

> agree[d] with the court's observation in *Teague* that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the

> principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, supra, 489 U.S. at 309, 109 S.Ct. 1060. [This Court] also agree[d] with the court in *Teague* that "[t]he costs imposed upon the [states] by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits.... In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions ... for it continually forces the [s]tates to marshal resources in order to keep in prison defendants whose trials and appeals conformed to the then-existing constitutional standards." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Id.*, at 310, 109 S.Ct. 1060.

*Thiersant*, 316 Conn. at 111-12.[4]

---

[4] The amicus argues that this Court must hold that *Dickson* and *Guilbert* meet the watershed exception to permit retroactive application on collateral review because "[i]njustices from the past call for a remedy from the Court, and the notion that constitutional rights only matter to correct *future* injustices is illogical." Amicus Brief of Innocence Project and Connecticut Innocence Project at 16. However, this is not an argument in favor of finding that the *Dickson* and *Guilbert* rules meet the watershed exception so much as it is a direct challenge to *Teague* in its entirety, as well as this Court's decision in *Thiersaint*, both of which firmly established that, as a general rule, new constitutional rules that govern future cases will not be applied on collateral review to undermine past convictions.

This concern for finality is not unique to the issue of retroactivity, but rather is reflected throughout our habeas jurisprudence, in recognition of the deleterious effect that collateral review and relief can have on the effectiveness of the criminal justice system as a whole. See *Summerville v. Warden*, 229 Conn. 397, 432, 641 A.2d 1356, 1373 (1994) ("What 'law and justice require' [within the meaning of General Statutes § 52-470(a) governing habeas actions] is not a one-sided question. The standard must strike an appropriate balance between, on one hand, the risk that an actually innocent person may be incarcerated … and, on the other hand, the risk that an actually guilty person … may nonetheless be set free years later, principally because of the effect of the passage of time on the state's evidence and on the reliability of the fact-finding process.").[5]

---

[5] This well-established caselaw belies the argument by one of the amici that concern for finality has "little force in the state system." Amicus Brief of Innocence Project and Connecticut Innocence Project at 16-17.

Equally questionable is the argument that upsetting convictions, some decades old, that followed criminal proceedings considered fair and reliable at the time, but which now might be viewed as flawed in one way or another because of a new decision, is essential to "get[ting] it right." *Id*. at 17. The murder conviction at issue in the present case was obtained over thirty years ago. If "getting it right" is defined, as it should be, as acquitting the truly innocent and convicting the truly guilty, then Justice Borden's caution in *Summerville* as to the deleterious effect that the passage of time has on the ability to achieve that goal is well-heeded. Conversely, if "getting it right" is defined as insuring that every defendant's criminal proceeding is perpetually deemed to be flawless under any new rules that may be promulgated

It is for these compelling reasons that the watershed exception has been "extremely narrow." (Internal quotation marks omitted.) *Whorton v. Bockting*, 549 U.S. 406, 417, 127 S. Ct. 1173 (2007) quoting *Schriro*, 542 U.S. at 352. To that end, our courts have defined a watershed rule of criminal procedure as

> one that (1) is "implicit in the concept of ordered liberty," and that "alter[s] our understanding of the bedrock procedural elements" essential to a proceeding; (emphasis omitted; internal quotation marks omitted) *Teague v. Lane*, *supra*, 489 U.S. at 311, 109 S.Ct. 1060; such that a proceeding conducted without the benefit of that rule "implicate[s] ... fundamental fairness"; *id.*, at 312, 109 S.Ct. 1060; and (2) is "central to an accurate determination of innocence or guilt," such that the rule's absence creates an impermissibly large risk that innocent persons will be convicted. *Id.*, at 313, 109 S.Ct. 1060; see also *Sawyer v. Smith*, *supra*, 497 U.S. at 242, 110 S.Ct. 2822.

---

in the future, as the amicus suggests, then "getting it right" will always be temporary, at best, if not hopelessly elusive. See *McCleskey v. Zant*, 499 U.S. 467, 492, 111 S. Ct. 1454 (1991) ("Perpetual disrespect for the finality of convictions disparages the entire criminal justice system. A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of underlying substantive commands.... There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.") (Internal quotation marks omitted.).

(Footnote omitted.) *Casiano*, 317 Conn. at 69.

Notably, these elements of a watershed rule are set forth in the conjunctive, and for good reason. Taken separately, they have the potential to be misapplied to find innumerable exceptions that cannot help but eat away at the general rule of non-retroactivity and the important goals that it furthers. See *Thiersaint*, 316 Conn. at 122 n.19 (eschewing reliance solely on "fundamental fairness," which "permits an overly broad interpretation," as controlling principle determining whether *Teague* exception met); accord *id.*, 316 Conn. at 129 n.1 (Palmer, J., dissenting) (same, noting this "approach … would, in practice, lead to near universal retroactivity for all constitutional rules, and that a new trial will be required in every such case, no matter when the conviction was obtained…. [T]he concept of 'fundamental fairness' is so amorphous that virtually all constitutional rules of criminal procedure pertaining to a criminal trial or plea may be said to implicate 'fundamental fairness' in one way or another. Insofar as the vast majority of such rules would be subject to retroactive applicability under [such a] test, I do not believe that the test takes sufficient account of the state's significant interest in finality."). See also *Sawyer*, 497 U.S. at 242 ("not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.") (Emphasis in original; internal quotation marks omitted.).

Nevertheless, even considered in the conjunctive, terms such as "fundamental fairness," "ordered liberty," "bedrock procedural elements," and "impermissibly large risk," while helpful, remain highly subjective assessments and invite considerable disagreement

and inconsistent application. See, e.g., *Casiano*, 317 Conn. 52 (Court sharply divided on whether rule regarding juvenile sentences announced in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012) constituted watershed rule). For example, the fact that *Teague* applies to new constitutional rules invites arguments that any such rules should be considered "watershed" rules, given that it could be argued that the very purpose of a constitution is to set forth "bedrock" principles of "fundamental fairness" that its framers considered necessary for "ordered liberty." Such reasoning, if accepted, would turn *Teague* on its head.[6]

Nor is it particularly helpful to ask whether the new rule increases the reliability of the criminal trial and likely accuracy of the

---

[6] For example, in *Whorton*, the United States Supreme Court noted that the Court of Appeals erroneously had given in to the temptation to reason that the new rule in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), was a watershed rule because it is grounded in the constitutional right of confrontation, stating that

> [c]ontrary to the suggestion of the Court of Appeals, see [*Bockting v. Bayer*, 399 F.3d 1010, 1019 (9th Cir. 2005)], (relying on the conclusion that "the right of cross-examination as an adjunct to the constitutional right of confrontation" is a "bedrock procedural rul[e]"), th[e watershed] requirement cannot be met simply by showing that a new procedural rule is based on a "bedrock" right. We have frequently held that the *Teague* bar to retroactivity applies to new rules that are based on "bedrock" constitutional rights…. Similarly, "[t]hat a new procedural rule is 'fundamental' in some abstract sense is not enough." *Summerlin*, *supra*, at 352, 124 S.Ct. 2519.

*Whorton*, 549 U.S. at 420–21.

resulting verdict. Presumably, that is why *any* new constitutional rule governing criminal procedure is created in the first place and such a low standard invariably would lead to the watershed exception to non-retroactivity swallowing the rule. See *Sawyer*, 497 U.S. at 243 ("All of [the] [e]ighth [a]mendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense. Indeed, [the petitioner in *Sawyer*] has not suggested any [e]ighth [a]mendment rule that would not be sufficiently fundamental to qualify for the proposed definition of the exception, and at oral argument ... counsel was unable to provide a single example.") (Internal quotation marks omitted.).

Adding to these cautions is the natural inclination to view each decision that sets forth a new constitutional rule as so groundbreaking that a court will attribute more significance to it, particularly in its more immediate aftermath, than is truly warranted under the narrow *Teague* watershed exception.

It is for these reasons that the United States Supreme Court has not only singled out its decision in *Gideon v. Wainwright*, 372 U.S. 335, 343–44, 83 S.Ct. 792 (1963), affording indigent defendants a right to appointed counsel, as the classic example of a watershed rule; *Whorton*, 549 U.S. at 419–21[7]; but subsequently determined that, because this was the *only* rule that would have satisfied that

[7] See also *Beard*, 542 U.S. at 418 ("[W]e have not hesitated to hold that less sweeping and fundamental rules [than that announced in *Gideon*] do not fall within *Teague*'s second exception."); *Saffle v. Parks*, 494 U.S. 484, 495, 110 S. Ct. 1257 (1990) ("Although the precise contours of [the watershed] exception may be difficult to discern, we have usually cited *Gideon* … to illustrate the type of rule coming within the exception.").

exception, the watershed exception no longer serves any purpose in federal jurisprudence. *Vannoy*, 141 S. Ct. at 1561. It is not necessary for this Court to decide in the present case whether the watershed exception can ever be satisfied by future claims in our state courts that defendants might attempt to litigate under this *Teague* exception.[8] See *Danforth*, 552 U.S. at 280–81 (state courts not bound

---

[8] In *Casiano*, this Court concluded that the *Miller* decision relative to juvenile sentences applies retroactively to cases on collateral review because it also constitutes a watershed rule. *Casiano*, 317 Conn. at 69-71. However, while *Casiano*'s holding that the United States Supreme Court's decision in *Miller* applies retroactively remains good law, the Court's analysis in *Casiano* has been undermined considerably by the United States Supreme Court's subsequent decision in *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 736 (2016). In *Casiano*, this Court concluded that "for purposes of *Teague*, *Miller* announced a procedural rule"; *Casiano*, 317 Conn. at 69; and the Court then proceeded to reason that it applies retroactively to cases on collateral review nonetheless because it met the watershed exception. *Id*. at 69-71. However, the United States Supreme Court in *Montgomery* later concluded that *Miller* "announced a substantive rule of constitutional law"; *Montgomery*, 577 U.S. at 212; and, accordingly, held that it applied retroactively for that reason, not because it announced a watershed procedural rule.

While states are free to determine whether, or to what degree, the *Teague* standard for retroactivity will apply in their own jurisdictions; *Danforth*, 552 U.S. at 280–81; a state court cannot reclassify a federal constitutional rule as procedural when the United States Supreme Court has definitively classified it as substantive. Consequently, while the *Casiano* Court's holding that the *Miller* rule

by federal *Teague* standard). Nevertheless, reference to the *Gideon* example remains an essential part of any *Teague* analysis because it gives practical meaning to the "watershed rule" exception that lofty terms such as "fundamental fairness," "ordered liberty," "bedrock procedural elements," and "impermissibly large risk," unilluminated by *Gideon*'s concrete example, simply cannot.

Tellingly, neither the petitioner nor the amici make any effort to compare the rule declared in *Dickson* (or the one declared in *Guilbert*, discussed *infra*) to the watershed rule announced in *Gideon*. This is not surprising, insofar as any such comparison would not be well-taken. The *Dickson* Court's ruling did not declare a whole new, yet now-essential, "bedrock procedural element" so "implicit in the [very] concept of ordered liberty"; *Thiersaint*, 316 Conn. at 108 n. 8; that its absence would completely undermine confidence in the fairness and reliability of the criminal proceeding even similar to the way in which the denial of one's right to appointed counsel would. Instead, it simply fashioned a prophylactic rule to further ward off potential due process violations from an unnecessarily suggestive in-court identification in cases in which there was no prior identification. In doing so, it only "added to [the] existing guarantee of due process protection against fundamental unfairness" in potentially suggestive and unreliable eyewitness identifications already recognized and safeguarded, albeit to a lesser degree, under the constitutional procedure set forth in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375 (1972), which first mandated judicial screening of such identifications before their admission into

---

applies retroactively remains good law, it is questionable, at best, whether its holding that the *Miller* rule, like the *Gideon* rule, constitutes a watershed procedural rule remains good law.

evidence. See *Dickson*, 322 Conn. at 451 n. 34 ("the rule is merely an incremental change in identification procedures").[9]

Furthermore, it would be impossible to reconcile any interpretation of *Dickson* as establishing a "watershed" rule with that Court's ultimate conclusion that the error in that case was harmless. See *Dickson*, 322 Conn. at 453-60. It is inconceivable that the *Dickson* Court could have, on the one hand, announced a "bedrock" rule that was implicit in, and absolutely essential to the "concept of ordered liberty"; *Casiano*, 317 Conn. at 63; yet, at the same time, concluded that the failure to comply with that rule caused no harm requiring a new trial. See, e.g., *Newland v. Comm'r of Correction*, 331 Conn. 546, 556, 206 A.3d 176 (2019) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice

---

[9] Most of the discussion in the amicus briefs presents arguments that already have been settled. Specifically, there is much statistical information presented in support of their view that prior safeguards against mistaken identifications were inadequate to prevent them. See Amicus Brief of Innocence Project and Connecticut Innocence Project at 7-8, 13-14 ; Amicus Brief of CCDLA at 6-13. It is this very type of information that already persuaded this Court, in both *Guilbert* and *Dixon*, to fashion the new rules at issue in the present case. Thus, the issue presented in this case is not whether these new rules are necessary but rather whether they constitute "watershed" rulings akin to *Gideon*. Regardless of whether this Court agrees that the *Dickson* Court's holding as to the non-retroactivity of its new rule on collateral review is now binding precedent, the fact that the very Court that fashioned the new rule recognized that its work consisted of a mere "incremental change" in the law should weigh heavily against the efforts by the petitioner and amici to argue otherwise.

calculations as to the amount of prejudice arising from its denial.") (Internal quotation marks omitted.).

For these reasons, the Appellate Court correctly held that *Dickson* did not announce a watershed rule that applies retroactively under *Teague*.

### c. The Appellate Court correctly declined to apply *Guilbert* retroactively

In concluding that *Guilbert* should not be applied retroactively, the Appellate Court reasoned as follows:

> There can be little dispute that *Guilbert* involved a nonconstitutional state evidentiary claim involving the reliability of eyewitness identifications. See *State v. Guilbert*, *supra*, 306 Conn. at 265 n.45, 49 A.3d 705 ("[t]he defendant makes no claim—and there is no basis for such a claim —that the impropriety was of constitutional magnitude"). Although our Supreme Court has established "the general rule that 'judgments that are not by their terms limited to prospective application are presumed to apply retroactively ... to cases that are pending' " … it generally does not permit complete retroactive application of these judgments on collateral review. Instead, our Supreme Court has clarified that "[c]omplete retroactive effect is most appropriate in cases that announce a new constitutional rule or a new judicial interpretation of a criminal statute." (Emphasis added; internal quotation marks omitted.) *State v. Turner*, 334 Conn. 660, 677 n.6, 224 A.3d 129 (2020), quoting *State v. Ryerson*, 201 Conn. 333, 339, 514 A.2d 337 (1986); see also *Luurtsema v. Commissioner of Correction*, 299 Conn. 740, 764, 12 A.3d 817 (2011) (full retroactivity for new judicial interpretation of criminal statute); *Johnson v.*

*Warden*, 218 Conn. 791, 798, 591 A.2d 407 (1991) ("there is nothing in *Teague* or *Griffith* [*v. Kentucky*, 479 U.S. 314, 322–23, 107 S. Ct. 708 (1987)]), that suggests that nonconstitutional rules of criminal procedure are to be given retroactive effect").

Here, because *Guilbert* did not announce a new constitutional rule or a new judicial interpretation of a criminal statute, complete retroactive application is inappropriate. See, e.g., *State v. Ryerson*, *supra*, 201 Conn. at 339, 514 A.2d 337. Accordingly, we conclude that the nonconstitutional evidentiary rule set forth in *Guilbert* does not apply retroactively on collateral review.

Our discussion, however, does not end there. Following *Guilbert*, our Supreme Court decided *State v. Harris*, 330 Conn. 91, 95, 191 A.3d 119 (2018), in which the defendant in that case argued that he was deprived of his right to due process under the federal and state constitutions when the trial court denied his motion to suppress an out-of-court and subsequent in-court identification of him by an eyewitness to the crimes of which the defendant was convicted. The court concluded that, for purposes of the federal constitution, the defendant was not entitled to suppression of the identifications in question. *Id.*, at 96, 191 A.3d 119. In regard to the state constitution claim, however, the court concluded "that the due process guarantee of the state constitution in article first, § 8, provides somewhat broader protection than the federal constitution with respect to the admissibility of eyewitness identification testimony ...." (Footnote omitted.) *Id.* In

concluding that the federal analysis set forth in *Neil v. Biggers*, 409 U.S. [at 196–97], was inadequate to prevent the admission of unreliable identifications that are tainted by an unduly suggestive procedure for purposes of our state constitution, it adopted the *Guilbert* framework, finding it "preferable ... for state constitutional as well as evidentiary claims involving the reliability of eyewitness identifications." *State v. Harris*, *supra*, at 120–21, 191 A.3d 119. As the respondent points out in his brief to this court, our Supreme Court essentially treated *Guilbert* as creating a new state constitutional rule of criminal procedure that safeguards the due process protection against the admission of an unreliable identification.

Even if we were to construe *Guilbert*, through the lens of *Harris*, as a "new" constitutional rule of criminal procedure[10], this rule still would not apply on collateral review. Our conclusion is informed by the framework set forth in *Teague v. Lane*, *supra*, 489 U.S. 288, 109 S.Ct. 1060. See *Thiersaint*, [316 Conn. at 112] (adopting *Teague* framework). As already noted, it is well known that a new constitutional rule will not apply retroactively to cases on collateral review unless one of two exceptions apply: the rule is substantive or, if the new rule is procedural, it must be "a watershed [rule] of criminal procedure ... implicit in the concept of ordered liberty ...." (Internal quotation marks omitted.) *Casiano v. Commissioner of Correction*, *supra*, 317 Conn. at 63, 115 A.3d 1031.

---

[10] As will be discussed *infra*, the Appellate Court misconstrued this statement in the respondent's Appellate Court brief in this regard.

* * *

> In the present case, we conclude that the *Guilbert* framework for evaluating the reliability of an identification that is the result of an unnecessarily suggestive identification procedure, which was adopted by our Supreme Court in *Harris*, does not fall within the narrow watershed exception pursuant to *Teague* because, like in *Dickson* (1) this rule is "prophylactic and a violation of the rule does not necessarily rise to the level of a due process violation," and (2) the rule amounts to an incremental change in identification procedures. See *State v. Dickson*, *supra*, 322 Conn. at 451 n.34, 141 A.3d 810. As the court in *Harris* explained, the adopted *Guilbert* framework will "enhance the accuracy of the constitutional inquiry into the reliability of an identification that has been tainted by improper state conduct" and allow the "reliability analysis to evolve as the relevant science evolves." (Emphasis added.) *State v. Harris*, *supra*, 330 Conn. at 120–21, 191 A.3d 119. Accordingly, *Guilbert* does not apply on collateral review for these reasons too.

(Footnote omitted.) *Tatum*, 211 Conn. App. at 64–67.

#### d. The Appellate Court correctly held that *Guilbert* did not set forth a constitutional rule

##### i. The petitioner misstates the new rule set forth in *Guilbert*

Before determining whether the Appellate Court correctly concluded that the new rule set forth in *Guilbert* does not apply retroactively on habeas review, the respondent disagrees with the petitioner's assertion that the *Guilbert* Court not only adopted a new rule governing the admissibility of expert testimony on eyewitness

identification but also a new rule mandating particular jury instructions on the issue of eyewitness identification. Petr. Br. at 16-17.

As noted above, the "new rule" declared in *Guilbert* provided that, contrary to the rule under previous caselaw, trial courts after *Guilbert* would have the discretion to admit expert testimony on the reliability of eyewitness identification. *Guilbert*, 306 Conn. at 251-52 ("In summary, we conclude that the reliability of eyewitness identifications frequently is not a matter within the knowledge of an average juror and that the admission of expert testimony on the issue does not invade the province of the jury to determine what weight to give the evidence."). In neither the habeas petition below, nor in any of the trial and appellate proceedings that have followed, has the petitioner claimed that the trial court improperly precluded him from presenting expert testimony on that subject.

The petitioner nevertheless mistakenly interprets *Guilbert* as also mandating that even in cases like his, in which there is no claim that he was deprived of an opportunity to present expert testimony on eyewitness identifications, trial courts nevertheless must provide jury instructions that specifically reference the variables discussed in the relevant scientific literature which motivated the *Guilbert* Court to rule that expert testimony on that topic should now be permitted. Petr's Br. at 17. Specifically, he claims as follows:

> [T]he *Guilbert* Court held that any jury instructions about the reliability of eyewitness identification "should reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at issue in the case." [*Guilbert*, 306 Conn.] at 258. Importantly, the *Guilbert* Court specifically repudiated Mr. Tatum's case, finding that "broad, generalized instructions on eyewitness

> identifications such as those previously approved by this court in *State v. Tatum* … do not suffice." *Id.* at 258…. *Id.* at 246, note 27 ("Contrary to our prior holdings, and consistent with the recent scientific findings on the subject, we agree with the New Jersey Supreme Court that such generalized jury instructions are inadequate to apprise the jury of the various ways in which eyewitness identification testimony may be unreliable.").

Petr. Br. at 17.

Contrary to the petitioner's claim, however, *Guilbert* set forth no rule mandating the content of jury instructions in cases, such as this petitioner's, in which there has been no claim that the defense was precluded from proffering an expert witness on the issue of identification. The *Guilbert* Court's discussion of jury instructions came, not as a mandate, but as a caveat to its new rule permitting expert testimony on the potential fallibility of eyewitness identifications. The Court indicated that it

> wish[ed] to reiterate that a trial court retains the discretion to decide whether, under the specific facts and circumstances presented, focused and informative jury instructions on the fallibility of eyewitness identification evidence of the kind contemplated by the New Jersey Supreme Court in *Henderson*; see *State v. Henderson*, 208 N.J. [208, 219, 27 A.3d 872, 878 (2011), holding modified by *State v. Chen*, 208 N.J. 307, 27 A.3d 930 (2011), and holding modified by *State v. Anthony*, 237 N.J. 213, 204 A.3d 229 (2019)]; would alone be adequate to aid the jury in evaluating the eyewitness identification at issue. We emphasize, however, that any such instructions should reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at

> issue in the case; broad, generalized instructions on eyewitness identifications, such as those previously approved by this court in *State v. Tatum*, 219 Conn. [at 734–35] … do not suffice.

(Footnote omitted.) *Guilbert*, 306 Conn. at 257–58. However, the *Guilbert* Court specifically repudiated any suggestion that it was rendering any holding with respect to the adequacy of jury instructions on eyewitness identification in cases in which a defendant does not seek to present expert testimony on the subject. The petitioner fails to note the remainder of footnote 27 of the *Guilbert* Court's opinion, wherein the Court stressed that the question of proper jury instructions was not before it because "the defendant [in *Guilbert*] did not seek such enhanced or focused jury instructions." *Guilbert*, 306 Conn. at 246 n.27. The Court went on to state that it "believe[d], moreover, that the proper approach to this issue is to leave the development of any such jury instructions to the sound discretion of our trial courts on a case-by-case basis, subject to appellate review." *Id.*

Thus, contrary to the petitioner's assertion, the *Guilbert* Court did not create a new rule mandating any particular jury instructions on eyewitness identification as a matter of course. Rather, it simply held that, notwithstanding its new rule permitting expert testimony, a trial court in a given case retained the discretion to fashion a proper jury instruction addressing the potential fallibility of eyewitness identifications if it believed that such an instruction would constitute an adequate *substitute* for the proffered expert testimony. Indeed, the Court would not have indicated that it was within a trial court's "discretion" to provide such instructions in a proper case, in lieu of permitting expert testimony, if the Court had intended to mandate

such instructions even in cases in which expert testimony is not at issue, as in the present case.[11]

### ii. The new rule set forth in *Guilbert* is not constitutional in nature

The Appellate Court correctly concluded that *"Guilbert* involved a nonconstitutional state evidentiary claim"; *Tatum*, 211 Conn. App. at 64; for all of the reasons the Appellate Court set forth in support thereof. As discussed *supra*, the only "new rule" announced in *Guilbert* was that expert testimony on the issue of potential eyewitness misidentification is admissible in our courts. *Guilbert*, 306 Conn. at 251-52. Such rules regarding the admissibility of expert testimony consistently have been characterized as evidentiary, not constitutional, in nature. See *Guilbert*, 306 Conn. at 265 n.45 ("The defendant makes no claim—and there is no basis for such a claim—that the impropriety [in refusing to admit the testimony of the defendant's eyewitness identification expert] was of constitutional magnitude."); see also *State v. Iban C.*, 275 Conn. 624, 640, 881 A.2d 1005 (2005) ("A claim that the trial court improperly admitted the testimony of an expert is an evidentiary impropriety [and] not constitutional in nature ... [thus] the defendant bears the burden of demonstrating harm.") (Internal quotation marks omitted.); *State v.*

---

[11] Given that *Guilbert*'s holding pertains only to the admissibility of expert testimony, it is unclear how that case would afford this petitioner any relief, even if it were applied retroactively, because the petitioner has made no claim that he was denied an opportunity to present such testimony. However, because the certified issue in this appeal is limited to the issue of retroactivity, the question of whether this petitioner ultimately could prevail under *Guilbert* is not before this Court at this juncture.

*Joyner*, 225 Conn. 450, 480, 625 A.2d 791 (1993) ("[T]he admissibility of expert testimony is a matter of state evidentiary law that, in the absence of timely objection, does not warrant appellate review… because it does not, per se, raise a question of constitutional significance."); *State v. Forrest*, 216 Conn. 139, 146, 578 A.2d 1066 (1990) ("[T]he admissibility of expert opinion testimony is a matter of state evidentiary law, rather than a matter of constitutional significance.").

Despite correctly concluding that the new *Guilbert* rule was only evidentiary in nature, the Appellate Court appears to have interpreted a statement by the respondent in his brief below as a concession that *Guilbert* announced a rule of constitutional magnitude. Specifically, the Appellate Court noted the respondent's statement that "in *Harris*, the Court effectively treated *Guilbert* as creating a new state constitutional rule of criminal procedure that safeguarded the due process protection against the admission of an unreliable identification." *Tatum*, 211 Conn. App. at 65. However, this statement in the Respondent's Appellate Court brief was immediately preceded by the unequivocal assertion that "[a]s for the *Guilbert* decision, it enunciates an evidentiary or nonconstitutional rule of criminal procedure that involves the expansion of expert testimony regarding the reliability of eyewitness identification; *State v. Harris*, 330 Conn. 91, 115 (2018) (*Guilbert* identifies factors for determining identification reliability based on 'state evidentiary law'); and an evidentiary rule cannot be applied retroactively on collateral review. *Johnson*, 218 Conn. at 797-98." Respondent's Appellate Court Brief at 25. The respondent's subsequent assertion cited by the Appellate Court, while inartfully phrased, meant to convey that the factors relied upon by the *Guilbert* Court when announcing *Guilbert*'s new evidentiary rule served as the foundation for – i.e., was responsible for

"creating" – the new state constitutional rule later announced in *Harris* relating to "the admission of an unreliable identification."

In any event, regardless of whether the Appellate Court correctly construed the respondent's statement, the court did not express agreement with any suggestion that *Guilbert* announced a new rule of constitutional magnitude. Rather it went on to hold, in the alternative, that "[e]ven if" it were to construe *Harris* and *Guilbert* in that manner, the rule announced in *Guilbert* did not satisfy the "watershed" exception for retroactive application of procedural rules under *Teague*, for reasons that will be addressed further *infra*. Consequently, the respondent's statement, however interpreted, ultimately had no effect on the Appellate Court's conclusion that *Guilbert* does not apply retroactively to cases on collateral review.[12]

Accordingly, this Court should affirm the Appellate Court's conclusion that the new rule declared in *Guilbert* is not constitutional in nature and, for that reason alone, the petitioner's claim that he was entitled to retroactive application of that decision on collateral review was properly rejected by the Appellate Court.

---

[12] Moreover, even if this Court were to construe the respondent's statement as a concession, an appellate court is never bound by such a concession. See *State v. Sawyer*, 335 Conn. 29, 35 n.2, 225 A.3d 668, 674 (2020) (court not bound by state's concession). This is particularly so where the concession involves a question of law. To hold otherwise would empower a party to dictate the appropriate legal – even constitutional – analysis that a court would then be required to apply in resolving an issue, even if the court believes that analysis should not apply. It also would empower a party in one case, through misstep or otherwise, to alter constitutional principles that would then become controlling law with respect to other parties in subsequent cases.

### iii. The Appellate Court correctly concluded, in the alternative, that *Guilbert* did not set forth a watershed rule

In the alternative, the Appellate Court also correctly rejected the petitioner's claim that the *Guilbert* Court established a "watershed rule" that would require its retroactive application to cases on collateral review. *Tatum*, 211 Conn. at 65-67. The Appellate Court properly concluded that, like the new rule set forth in *Dickson*, the new *Guilbert* rule did not meet the exceptionally high standard that must be satisfied to qualify as a watershed rule, as discussed *supra*.

Any suggestion that the *Guilbert* evidentiary rule permitting expert testimony on eyewitness identification is in any way comparable to the rule announced in *Gideon* is baseless. Once again, the fact that the trial court's error in this regard was, as in *Dickson*, found to be harmless; *Guilbert*, 306 Conn. at 265-67; should be fatal to the argument by the petitioner and amici that compliance with *Guilbert*'s new rule is a watershed rule, essential to the "concept of ordered liberty." *Casiano*, 317 Conn. at 63.

Moreover, even assuming *arguendo* that *Guilbert* were to be interpreted to mandate particular jury instructions, as the petitioner claims, it likewise would fall well short of meeting the criteria necessary to be characterized as a watershed rule. As with *Dickson*, any such directive would, at best, be considered a mere "incremental change" in the procedures to be employed when instructing juries on eyewitness identification. See *Dickson*, 322 Conn. at 451 n.34. In short, whatever one may think of the importance of any alleged rule regarding such jury instructions, "it has none of the primacy and

centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception." *Saffle*, 494 U.S. at 495.

Accordingly, the Appellate Court also correctly rejected the petitioner's claim that *Guilbert* announced a watershed rule that required retroactive application to cases on collateral review.[13]

---

[13] There is much discussion in the petitioner's brief, as well as the amicus briefs, regarding the specific facts of this petitioner's case. See Petitioner's Brief at 25-32; Amicus Brief of Innocence Project and Connecticut Innocence Project at 18-19; Amicus Brief of CCDLA at 11-12, 13. However, the certified question before this Court was limited to whether the lower courts properly ruled that *Guilbert* and *Dickson* did not apply retroactively to this petitioner's case. The question of whether this petitioner would be entitled to habeas relief *if* this Court were to hold that those cases apply retroactively was never decided by the lower courts, nor even litigated before the habeas court. Moreover, the only relief the petitioner seeks is a "remand[] for a new [habeas] trial on counts Six and Seven with direction to apply" *Guilbert* and *Dickson* retroactively to his case. Petr. Br. at 32.

For this reason, the respondent is not attempting to rebut here most of the factual assertions made by the petitioner and amici regarding this petitioner's specific case and their arguments suggesting that he would be entitled to relief if *Guilbert* and *Dickson* were to be applied. However, neither should all of those factual assertions and arguments be taken at face value. For example, one important fact is that a prior habeas court found that Frazer and this petitioner bore a remarkable facial similarity to each other and that it was only by seeing them in person, where their significant height difference was apparent, that any confusion was quickly dispelled by the witnesses. See *Tatum v. Warden*, 1999 WL 130324, at *4 (Conn.

## IV. Conclusion

For the foregoing reasons, Appellate Court's judgment should be affirmed.

By: /s/ James A. Killen
Senior Assistant State's Attorney
Appellate Bureau
Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067
Tel: (860) 258-5807
Fax: (860) 258-5828
Juris No.: 401852

---

Super. Ct. Mar. 3, 1999) (*Zarella, J.*) ("While Frazer bore a striking facial resemblance to the petitioner, Frazer is approximately 5'3" or 5'4" tall and the petitioner is at least 6'1" tall.") aff'd sub nom. *Tatum v. Comm'r of Correction*, 66 Conn. App. 61, 783 A.2d 1151 (2001). This undermines the claim by the petitioner and amici that the initial mistaken identifications by the witnesses, based solely on photographs, undermined the trustworthiness of their subsequent in-person identifications. See Petr. Br. at 14, 27; Amicus Brief of Innocence Project and Connecticut Innocence Project at 18; Amicus Brief of CCDLA at 6.

# SUPREME COURT

of the

State of Connecticut

Judicial District of Tolland
at G.A. 19 (Rockville)

## S.C. 20727

**EDGAR TATUM**
**V.**

**COMMISSIONER OF CORRECTION**

Appendix

## Table of contents

**Page**

## Statutory provisions

**General Statutes § 52-470. Summary disposal of habeas corpus case. Determination of good cause for trial. Appeal by person convicted of crime.**

(a) The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require.

(b) (1) After the close of all pleadings in a habeas corpus proceeding, the court, upon the motion of any party or, on its own motion upon notice to the parties, shall determine whether there is good cause for trial for all or part of the petition.

(2) With respect to the determination of such good cause, each party may submit exhibits including, but not limited to, documentary evidence, affidavits and unsworn statements. Upon the motion of any party and a finding by the court that such party would be prejudiced by the disclosure of the exhibits at that stage of the proceedings, the court may consider some or all of the exhibits in camera.

(3) In order to establish such good cause, the petition and exhibits must (A) allege the existence of specific facts which, if proven, would entitle the petitioner to relief under applicable law, and (B) provide a factual basis upon which the court can conclude that evidence in support of the alleged facts exists and will be presented at trial, provided the court makes no finding that such evidence is contradicted by judicially noticeable facts. If the petition and exhibits do not establish such good cause, the court shall hold a preliminary hearing to determine whether such good cause exists. If, after considering any

evidence or argument by the parties at such preliminary hearing, the court finds there is not good cause for trial, the court shall dismiss all or part of the petition, as applicable.

(c) Except as provided in subsection (d) of this section, there shall be a rebuttable presumption that the filing of a petition challenging a judgment of conviction has been delayed without good cause if such petition is filed after the later of the following: (1) Five years after the date on which the judgment of conviction is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2017; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction.

(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the

United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

(e) In a case in which the rebuttable presumption of delay under subsection (c) or (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section.

(f) Subsections (b) to (e), inclusive, of this section shall not apply to (1) a claim asserting actual innocence, (2) a petition filed to challenge the conditions of confinement, or (3) a petition filed to challenge a conviction for a capital felony for which a sentence of death is imposed under section 53a-46a.

(g) No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless

the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies.

## Constitutional provisions

**Article first, § 8 of the Connecticut constitution. Rights of accused in criminal prosecutions. What cases bailable. Speedy trial. Due process. Excessive bail or fines. Probable cause shown at hearing, when necessary. Rights of victims of crime.** Sec. 8. [As amended] a. In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law, except in the armed forces, or in the militia when in actual service in time of war or public danger.

b. In all criminal prosecutions, a victim, as the General Assembly may define by law, shall have the following rights: (1) the right to be treated with fairness and respect throughout the criminal justice

process; (2) the right to timely disposition of the case following arrest of the accused, provided no right of the accused is abridged; (3) the right to be reasonably protected from the accused throughout the criminal justice process; (4) the right to notification of court proceedings; (5) the right to attend the trial and all other court proceedings the accused has the right to attend, unless such person is to testify and the court determines that such person's testimony would be materially affected if such person hears other testimony; (6) the right to communicate with the prosecution; (7) the right to object to or support any plea agreement entered into by the accused and the prosecution and to make a statement to the court prior to the acceptance by the court of the plea of guilty or nolo contendere by the accused; (8) the right to make a statement to the court at sentencing; (9) the right to restitution which shall be enforceable in the same manner as any other cause of action or as otherwise provided by law; and (10) the right to information about the arrest, conviction, sentence, imprisonment and release of the accused. The General Assembly shall provide by law for the enforcement of this subsection. Nothing in this subsection or in any law enacted pursuant to this subsection shall be construed as creating a basis for vacating a conviction or ground for appellate relief in any criminal case.

**Fourteenth Amendment to the United States Constitution provides:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

## Certification

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2A, that on April 6, 2023:

(1) the electronically submitted e-brief and appendix have been delivered electronically to: Kara E. Moreau, Esq., Emily C. Kaas, Esq., Sheehan and Reeve, LLC, 350 Orange Street, Suite 101, New Haven, CT 06511, Tel. (203) 787-9026; Fax. (203) 787-9031, Email: Kmoreau@sheehanandreeve.com

(2) the electronically submitted e-brief and appendix and the filed paper e-brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statue, court order or case law;

(3) a copy of the e-brief and appendix have been sent to each counsel of record in compliance with Section 62-7, on April 6, 2023;

(4) the e-brief and appendix being filed with the appellate clerk are true copies of the e-brief and appendix that were submitted electronically;

(5) the e-brief and appendix are filed in compliance with the e-briefing guidelines and no deviations were requested; and

(6) the e-brief contains 12, 210 words; and

(7) the e-brief and appendix comply with all provisions of this rule.

/s/ James A. Killen
Senior Assistant State's Attorney