Supreme Court

of the

State of Connecticut

SC 20727

Edgar Tatum

v.

Commissioner of Correction

Clerk Appendix

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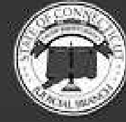
[1] Included for context. The operative petition is the fifth amended petition, included as item 9 in this appendix.
[2] Objection filed solely as a memorandum of law and is not included in this appendix.
[3] Footnote 1 of the Appellate Court opinion provides that "[t]he habeas court indicated that the parties agreed to allow the earlier return and reply to the fourth amended petition to stand as the responsive pleadings."



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Case Look-up
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TSR-CV16-4007857-S **TATUM, EDGAR #177213 v. COMMISSIONER OF CORRECTION**

Suffix: IAC **Case Type:** M30 **File Date:** 02/11/2016 **Return Date:** 04/19/2016

Case Detail | Notices | History | Scheduled Court Dates | E-Services Login | Screen Section Help | Exhibits

To receive an email when there is activity on this case, click here.

Information Updated as of: 07/07/2022

Case Information

Case Type: M30 - Misc - Habeas Corpus (extradition release from Penal Institution)
Court Location: ROCKVILLE-GA19
List Type: COURT (CT)
Trial List Claim: 04/04/2017
Last Action Date: 06/22/2022 (The "last action date" is the date the information was entered in the system)

Disposition Information

Disposition Date: 08/28/2019
Disposition: JUDGMENT AFTER COMPLETED TRIAL TO THE COURT WITH NO JURY
Judge or Magistrate: HON JOHN NEWSON

Party & Appearance Information

Party		No Fee Party	Category
P-01 EDGAR TATUM #177213			Plaintiff
Attorney: KATHERINE C ESSINGTON (420490) 1727 MAPLETON AVE., #2 BOULDER, CO 80304	File Date: 03/24/2016		
Attorney: DESANTIS LAW FIRM LLC (432215) 157 CHURCH STREET 19TH FLR #1945 NEW HAVEN, CT 06510	File Date: 10/25/2018		
D-01 COMMISSIONER OF CORRECTION			Defendant
Attorney: STATE'S ATTORNEY-JD WATERBURY (401816) STATE'S ATTORNEY OFFICE 400 GRAND STREET RM 230 WATERBURY, CT 067021913	File Date: 07/25/2016		

Viewing Documents on Civil, Housing and Small Claims Cases:

If there is an *e* in front of the docket number at the top of this page, then the file is electronic (paperless).

- Documents, court orders and judicial notices in electronic (paperless) civil, housing and small claims cases with a return date on or after January 1, 2014 are available publicly over the internet.* For more information on what you can view in all cases, view the Electronic Access to Court Documents Quick Card.
- For civil cases filed prior to 2014, court orders and judicial notices that are electronic are available publicly over the internet. Orders can be viewed by selecting the link to the order from the list below. Notices can be viewed by clicking the **Notices** tab above and selecting the link.*
- Documents, court orders and judicial notices in an electronic (paperless) file can be viewed at any judicial district courthouse during normal business hours.*
- Pleadings or other documents that are not electronic (paperless) can be viewed only during normal business hours at the Clerk's Office in the Judicial District where the case is located.*
- An Affidavit of Debt is not available publicly over the internet on small claims cases filed before October 16, 2017.*

*Any documents protected by law Or by court order that are Not open to the public cannot be viewed by the public online And can only be viewed in person at the clerk's office where the file is located by those authorized by law or court order to see them.

Motions / Pleadings / Documents / Case Status

Entry No	File Date	Filed By	Description	Arguable
101.00	02/11/2016	P	**APPLICATION FOR WRIT OF HABEAS CORPUS**	No
102.00	02/11/2016	P	**MOTION TO WAIVE ENTRY FEE AND PAY COSTS OF SERVICE** *RESULT:* Granted 2/19/2016 BY THE COURT	No
103.00	02/19/2016	C	**ORDER SEE FILE** *RESULT:* Order 2/19/2016 BY THE COURT	No
104.00	07/25/2016	D	**MOTION FOR ORDER** *RESULT:* Withdrawn 1/26/2017 HON VERNON OLIVER	No
105.00	08/01/2016	C	**ORDER SEE FILE** *RESULT:* Order 8/1/2016 HON VERNON OLIVER	No
106.00	08/03/2016	P	**MOTION - SEE FILE** *RESULT:* Denied 8/11/2016 HON VERNON OLIVER	No
107.00	09/09/2016	P	**OBJECTION**	No
108.00	09/19/2016	D	**PLEADING - SEE FILE**	No
109.00	09/26/2016	D	**MOTION FOR CONTINUANCE** *RESULT:* Order 9/28/2016 HON VERNON OLIVER	No
110.00	01/13/2017	P	**MOTION FOR CONTINUANCE** *RESULT:* Order 1/27/2017 HON VERNON OLIVER	No
111.00	01/26/2017	D	**WITHDRAWAL OF MOTION** *RESULT:* Accepted 1/26/2017 HON VERNON OLIVER	No
112.00	03/31/2017	C	**SCHEDULING ORDER**	No
113.00	03/31/2017	C	**CERTIFICATE OF CLOSED PLEADINGS AND CLAIM FOR TRIAL LIST**	No
114.00	01/19/2018	P	**AMENDED COMPLAINT**	No
115.00	03/08/2018	P	**MOTION FOR DEFAULT-FAILURE TO PLEAD** *RESULT:* Denied 3/16/2018 BY THE CLERK	No
116.00	03/16/2018	D	**REQUEST**	No
117.00	03/26/2018	P	**MOTION - SEE FILE** *RESULT:* Denied 5/11/2018 HON HUNCHU KWAK	No
118.00	03/26/2018	P	**MOTION TO OPEN DEFAULT** *RESULT:* Denied 5/11/2018 HON HUNCHU KWAK	No
119.00	04/17/2018	P	**AMENDED COMPLAINT**	No
120.00	05/11/2018	D	**REQUEST**	No
121.00	05/11/2018	C	**SCHEDULING ORDER** *RESULT:* Accepted 5/14/2018 HON HUNCHU KWAK	No
122.00	05/25/2018	P	**AMENDED COMPLAINT**	No
123.00	05/25/2018	P	**OBJECTION** *RESULT:* Order 6/20/2018 HON JOHN NEWSON	No
124.00	06/27/2018	P	**AMENDED COMPLAINT**	No
125.00	07/09/2018	P	**CASEFLOW REQUEST (JD-CV-116)** *RESULT:* Granted 7/10/2018 HON HUNCHU KWAK	No
126.00	07/12/2018	D	**REQUEST TO REVISE** *RESULT:* Denied 7/13/2018 HON JOHN NEWSON	No
127.00	07/13/2018	C	**SCHEDULING ORDER** *RESULT:* Order 7/13/2018 HON JOHN NEWSON	No
128.00	07/16/2018	D	**RETURN TO WRIT OF HABEAS CORPUS**	No
129.00	07/19/2018	P	**REPLY**	No
130.00	07/19/2018	P	**CERTIFICATE**	No
131.00	07/20/2018	P	**DISCLOSURE OF EXPERT WITNESS**	No
132.00	07/20/2018	P	**DISCLOSURE OF EXPERT WITNESS**	No

133.00	07/20/2018	P	**DISCLOSURE OF EXPERT WITNESS**	No
134.00	07/20/2018	D	**MOTION TO DISMISS - HABEAS CORPUS PB 23-29** *RESULT:* Order 9/13/2018 HON JOHN NEWSON **Last Updated:** Result Information - 09/13/2018	Yes
135.00	07/20/2018	D	**MEMORANDUM IN SUPPORT OF MOTION**	No
136.00	07/23/2018	C	**ORDER SEE FILE**	No
137.00	07/24/2018	P	**MOTION TO REARGUE/RECONSIDER** *RESULT:* Denied 7/25/2018 HON TEJAS BHATT	No
138.00	07/25/2018	D	**LIST OF WITNESSES**	No
139.00	07/25/2018	P	**LIST OF WITNESSES**	No
140.00	08/07/2018	P	**OBJECTION TO MOTION**	No
141.00	09/13/2018	C	**MEMORANDUM OF DECISION ON MOTION**	No
142.00	09/13/2018	C	**JUDGMENT IN PART - GENERAL CASE REMAINS PENDING** *RESULT:* Judgment 9/13/2018 HON JOHN NEWSON	No
143.00	10/22/2018	P	**MOTION FOR COMMISSION FOR DEPOSITION** *RESULT:* Order 11/1/2018 HON JOHN NEWSON **Last Updated:** Legend Code - 10/24/2018	No
143.10	11/01/2018	C	**ORDER SEE FILE** *RESULT:* Denied 11/1/2018 HON JOHN NEWSON	No
144.00	10/29/2018	P	**MOTION FOR CONTINUANCE** *RESULT:* Order 11/1/2018 HON JOHN NEWSON	No
144.10	11/01/2018	C	**ORDER SEE FILE** *RESULT:* Denied 11/1/2018 HON JOHN NEWSON	No
145.00	11/16/2018	P	**MOTION FOR COMMISSION FOR DEPOSITION** *RESULT:* Order 11/29/2018 HON JOHN NEWSON	No
145.10	11/29/2018	C	**ORDER SEE FILE** *RESULT:* Order 11/29/2018 HON JOHN NEWSON	No
146.00	11/23/2018	D	**OBJECTION TO MOTION** *RESULT:* Sustained 11/29/2018 HON JOHN NEWSON	No
146.10	11/29/2018	C	**ORDER SEE FILE** *RESULT:* Order 11/29/2018 HON JOHN NEWSON	No
147.00	12/14/2018	P	**MOTION FOR CONTINUANCE** *RESULT:* Order 12/17/2018 HON JOHN NEWSON	No
147.10	12/17/2018	C	**ORDER SEE FILE** *RESULT:* Denied 12/17/2018 HON JOHN NEWSON	No
148.00	12/18/2018	P	**MOTION FOR PERMISSION TO AMEND MOTION OR PLEADING** *RESULT:* Order 1/3/2019 HON JOHN NEWSON	No
148.10	01/03/2019	C	**ORDER SEE FILE** *RESULT:* Order 1/3/2019 HON JOHN NEWSON	No
149.00	12/18/2018	P	**LIST OF WITNESSES** **Last Updated:** Legend Code - 12/31/2018	No
150.00	12/18/2018	P	**DISCLOSURE OF EXPERT WITNESS** **Last Updated:** Legend Code - 12/31/2018	No
151.00	01/07/2019	P	**AMENDED COMPLAINT** **Last Updated:** Multiple Field Correction - 01/07/2019	No
152.00	01/08/2019	P	**PRETRIAL MEMORANDUM**	No
153.00	01/17/2019	C	**LIST OF EXHIBITS (JD-CL-28/JD-CL-28a)**	No
154.00	01/25/2019	P	**MOTION FOR COMMISSION FOR DEPOSITION** *RESULT:* Order 1/25/2019 HON JOHN NEWSON	No
154.10	01/25/2019	C	**ORDER SEE FILE** *RESULT:* Granted 1/25/2019 HON JOHN NEWSON	No
155.00	02/20/2019	P	**CASEFLOW REQUEST (JD-CV-116)** *RESULT:* Granted 2/22/2019 HON JOHN NEWSON	No
155.10	02/22/2019	C	**ORDER SEE FILE** *RESULT:* Granted 2/22/2019 HON JOHN NEWSON	No
156.00	04/05/2019	P	**MEMORANDUM IN SUPPORT OF MOTION**	No
157.00	04/05/2019	D	**MEMORANDUM IN OPPOSITION TO MOTION**	No

158.00	04/11/2019	C	**ORDER SEE FILE** *RESULT:* Order 4/11/2019 HON JOHN NEWSON	No
159.00	05/30/2019	P	**MOTION FOR PERMISSION TO AMEND MOTION OR PLEADING** *RESULT:* Denied 5/31/2019 HON JOHN NEWSON	No
159.10	05/31/2019	C	**ORDER SEE FILE** *RESULT:* Denied 5/31/2019 HON JOHN NEWSON	No
160.00	06/07/2019	P	**BRIEF**	No
161.00	06/07/2019	D	**BRIEF**	No
162.00	06/07/2019	C	**TRIAL COMPLETED-DECISION RESERVED** *RESULT:* HON JOHN NEWSON	No
163.00	08/28/2019	C	**MEMORANDUM OF DECISION**	No
164.00	08/28/2019	C	**JUDGMENT AFTER COMPLETED TRIAL TO THE COURT WITH NO JURY** *RESULT:* HON JOHN NEWSON	No
165.00	09/09/2019	P	**PETITION FOR CERTIFICATION - HABEAS** *RESULT:* Granted 9/10/2019 HON JOHN NEWSON	No
165.10	09/10/2019	C	**ORDER SEE FILE** *RESULT:* Granted 9/10/2019 HON JOHN NEWSON	No
166.00	09/27/2019	P	**APPLICATION FOR APPOINTMENT OF COUNSEL AND WAIVER OF FEES ON APPEAL** *RESULT:* Granted 10/17/2019 HON COURTNEY CHAPLIN **Last Updated:** Result Information - 09/27/2019	No
166.10	09/27/2019	C	**ORDER SEE FILE** *RESULT:* Order 9/27/2019 HON COURTNEY CHAPLIN	No
167.00	11/06/2019	P	**APPEAL TO APPELLATE COURT**	No
168.00	11/06/2019	C	**COMPLETE COPIES OF COURT FILE SENT TO SUPREME/APPELLATE COURT - PB SEC 68-1**	No
169.00	08/17/2021	C	**EXHIBITS ENTERED IN SUPERIOR COURT DELIVERED TO SUPREME/APPELLATE COURT CHIEF CLERK'S OFFICE**	No
170.00	03/08/2022	C	**APPELLATE COURT DECISION JUDGMENT/ORDER OF TRIAL COURT AFFIRMED** *RESULT:* BY THE COURT	No
171.00	04/27/2022	P	**PETITION FOR CERTIFICATION** *RESULT:* Granted 6/21/2022 BY THE COURT	No
171.10	06/21/2022	C	**ORDER** *RESULT:* Granted 6/21/2022 BY THE COURT	No

Scheduled Court Dates as of 07/07/2022				
TSR-CV16-4007857-S - TATUM, EDGAR #177213 v. COMMISSIONER OF CORRECTION				
#	**Date**	**Time**	**Event Description**	**Status**
			No Events Scheduled	

Judicial ADR events may be heard in a court that is different from the court where the case is filed. To check location information about an ADR event, select the **Notices** tab on the top of the case detail page.

Matters that appear on the Short Calendar and Family Support Magistrate Calendar are shown as scheduled court events on this page. The date displayed on this page is the date of the calendar.

All matters on a family support magistrate calendar are presumed ready to go forward.

The status of a Short Calendar matter is not displayed because it is determined by markings made by the parties as required by the calendar notices and the civil standing orders. Markings made electronically can be viewed by those who have electronic access through the Markings History link on the Civil/Family Menu in E-Services. Markings made by telephone can only be obtained through the clerk's office. If more than one motion is on a single short calendar, the calendar will be listed once on this page. You can see more information on matters appearing on Short Calendars and Family Support Magistrate Calendars by going to the Civil/Family Case Look-Up page and Short Calendars By Juris Number or By Court Location.

Periodic changes to terminology that do not affect the status of the case may be made.

DOCKET NO. TSR-CV-16-4007857-S

EDGAR TATUM

V.

WARDEN

SUPERIOR COURT

JUDICIAL DISTRICT OF TOLLAND

AT ROCKVILLE

JUNE 26, 2018

FOURTH AMENDED PETITION FOR A WRIT OF HABEAS CORPUS/ RESPONSE TO STATE'S REQUEST FOR A MORE SPECIFIC STATEMENT

The Petitioner, Edgar Tatum, through counsel, hereby amends his Petition for a Writ of Habeas Corpus previously filed as follows:

NATURE OF THE PROCEEDINGS

1. The Petitioner was the defendant in State v. Tatum, CR4-161659, Judicial District of Waterbury.
2. The Respondent is the Warden/ Commissioner Of Correction for the State of Connecticut.
3. The Petitioner is being illegally held and deprived of his liberty in the custody of the Respondent.
4. This is a habeas corpus proceeding.
5. The Petitioner is collaterally attacking the judgment in State v. Tatum, CR4-161659.

2018 JUN 27 AM 11 47
STATE OF CONNECTICUT
SUPERIOR COURT
G.A. 19

JURISDICTION AND SCOPE OF REVIEW

6. This Court has jurisdiction based on Conn. Gen. Stat. sec. 52-466(b).
7. The Petitioner has the right, pursuant to Conn. Gen Stat. sec. 52-470 (a) to a summary proceeding, and to have this Court hear testimony and argument.
8. The Petitioner has the right, pursuant to Conn. Gen. Stat. sec. 52-470 (a) and Article First, sec. 12 to have this Court inquire fully into the cause of the Petitioner's imprisonment.

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AMNDCOM

9. The Petitioner has the right, pursuant to Conn. Gen. Stat. sec. 52-470 (a) and Article First, sec. 12 to have this Court hear the testimony and arguments related to claims raised in the petition.
10. The Petitioner has the right, pursuant to Conn. Gen. Stat. sec. 52-470 (a) and Article First, sec. 12 to have this Court determine the facts and issues related to the claims raised in this petition.
11. The Petitioner has the right, pursuant to Conn. Gen. Stat. sec. 52-470 (a) and Article First, sec. 12 to have this Court dispose of the case as law and justice require.
12. There is good cause, pursuant to Conn. Gen. Stat. sec. 52-470(b) for a trial on all claims raised in this petition.
13. This Court has authority, under Conn. Gen. Stat. Sec. 52- 493 to issue any interlocutory or final order that may appear to be an appropriate form of relief for the claims raised in this petition.

CASE HISTORY

14. The State charged the Petitioner in Case No. CR4-161659 with murder and assault in the second degree in an amended information in the Judicial District of Waterbury.
15. The charges arose from the February 25, 1988 homicide of Larry Parrett and the wounding of Anthony Lombardo at 24 Cossett Street, Waterbury.
16. The Petitioner was represented in the trial court by Attorney Thomas McDonough.
17. Following a jury trial, the Petitioner was found guilty of murder, but no verdict was reached on the assault charge. The State subsequently dismissed the assault charge.
18. The Petitioner was sentenced to sixty years incarceration.
19. The Petitioner is in the custody of the Respondent as a result of the judgment in CR4-161659.

20. The Petitioner appealed his murder conviction to the Connecticut Supreme Court which affirmed his conviction in State v. Tatum, 219 Conn. 719 (1991).
21. The Petitioner was represented in his direct appeal by Attorneys Sally King, Alicia Davenport, and Steven Barry.
22. The decision in the Petitioner's direct appeal has been overruled in both State v. Guilbert, 306 Conn. 218, 258 (2012) and State v. Dickson, 322 Conn. 410, 435-6 (2016).
23. In 1991, Mr. Tatum filed a petition for a writ of habeas corpus in Tatum v. Warden, CV-91-0001263S.
24. The Petitioner was represented by R. Bruce Lorenzen, Esq.
25. On September 24, 1998, the petition was tried to the court, Zarella, J, presiding.
26. On March 3, 1999, the court entered a judgment dismissing the petition.
27. On January 18, 2000, the Petitioner appealed the habeas court's judgment.
28. The Petitioner was represented on appeal by Felix Esposito, Esq.
29. The Appellate Court affirmed the dismissal of the petition in Tatum v. Commissioner, 66 Conn. App. 61 (2001).
30. The Petitioner's petition for certification was denied by the Supreme Court in Tatum v. Commissioner, 258 Conn. 937 (2001).
31. In 1993, the Petitioner filed a petition for a new trial in Waterbury Superior Court, case no. CV-93-0112504.
32. The court denied the Petitioner's request for appointed counsel, and the Petitioner represented himself.
33. The court, Sullivan, J, denied the petition for a new trial.

34. In 2000, the Petitioner filed a second writ for a petition of habeas corpus which was dismissed without prejudice in 2002.
35. He was represented in his second habeas petition by Attorney Chris DeMarco, Esq.
36. In 2003, the Petitioner filed a third petition for a writ of habeas corpus, CV03-0004175S.
37. He was represented by Paul Kraus, Esq.
38. Following a trial to the court in 2010, the court, Nazzaro, J, denied the petition.
39. The Petitioner appealed the habeas court's judgment. He was again represented by Paul Kraus, Esq.
40. The Appellate Court affirmed the judgment of the habeas court in Tatum v. Commissioner, 135 Conn. App. 901 (2012).
41. The Petitioner's petition for certification was denied by the Supreme Court in Tatum v. Commissioner, 305 Conn. 912 (2012).
42. In 2014, the Petitioner filed a fourth petition for a writ of habeas corpus, TSR-CV-14-4006223-S.
43. On June 11, 2014, the court, Bright, J, dismissed the petition as presenting the same ground as a prior petition and failing to state new facts or new evidence not reasonably available at the time of the prior petition.

PERTINENT FACTS

44. There is no physical evidence linking the Petitioner to the murder of Parrett and the wounding of Lombardo.
45. Parrett's girlfriend, Tracy LaVasseur, who let the shooter into the apartment, initially identified an individual named Jay Frazier as the shooter based on a photo array.
46. Separately, Lombardo also identified Frazier as the shooter from a photo array.

47. LaVasseur recanted her identification of Frazier a few months later, after a visit from Frazier's lawyer, and identified the Petitioner as the shooter from a second photo array.
48. Lombardo declined to identify anyone from the second photo array and identified the Petitioner as the shooter for the first time at the probable cause hearing after he had seen the Petitioner's photo on at least one occasion.
49. LaVassuer claimed to be acquainted with both Frazier and the Petitioner.
50. The identifications of the Petitioner were cross racial.
51. LaVassuer was using drugs on the day of the shooting.
52. Lombardo was a habitual drug user who had been arrested numerous times.
53. Lombardo was paid money to relocate by the State's Attorney's Office following Mr. Tatum's trial, a fact which was never disclosed to the defense and which was the subject of the Petitioner's second habeas trial (third petition).

COUNT ONE- INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

54. Paragraphs 1-53 are incorporated by reference.
55. The Petitioner has not deliberately bypassed a direct appeal of this claim because the development of factual evidence is necessary to fully present it.
56. The Petitioner has previously brought a claim of ineffective assistance of trial counsel, but due to the ineffective assistance of habeas counsel, his claims were not fully and fairly litigated.
57. Attorney McDonough was ineffective in his representation of the Petitioner in the following areas:
    a. McDonough failed to consult with an eye-witness identification expert who would have aided in his trial preparation.

b. McDonough failed to waive the probable cause hearing and let the eye-witnesses view the Petitioner at the hearing.

c. McDonough failed to file a motion to suppress Lombardo's identification, and did not request a hearing concerning any motion to suppress filed with respect to LaVasseur's identification.

d. McDonough failed to make an adequate record of how many identification procedures Lombardo had participated in, or how many times he had been shown photographs of the Petitioner prior to the probable cause hearing.

e. McDonough failed to object to the court's eye witness identification jury instruction which varied from the one he proposed on the basis that it was too general and omitted reference to specific facts in the case that likely impacted the reliability of the identifications, including, but not limited to, drug use by both eye witnesses, the time lapse between the crime and Lombardo's identification, weapon stress, cross racial identification, the extremely suggestive circumstances of Lombardo's in court identification, and the previous identification of another individual as the perpetrator by both witnesses.

f. McDonough failed to adequately cross examine both Lombardo and LaVasseur about estimator and system variables that could have affected their ability to perceive the shooter, remember his appearance, and make an accurate identification.

g. McDonough failed to call an eye-witness Miguel Vargas at trial who saw the shooter running away and whose testimony would have called into question the identification of the Petitioner.

58. But for the deficient performance of Attorney McDonough, there is a reasonable possibility that the results of the proceeding would have been different and more favorable to the Petitioner.

59. The Petitioner's conviction is in violation of the Sixth and Fourteenth Amendments and Article First, secs. eight and nine of the Connecticut Constitution based on ineffective assistance of trial counsel.

COUNT TWO- INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

60. Paragraphs 1-59 are incorporated by reference.

61. The Petitioner has previously raised a claim of ineffective assistance of appellate counsel, but because of the ineffective assistance of habeas counsel, his claims were not fully and fairly litigated in his previous habeas cases.

62. The Petitioner has not deliberately bypassed a direct appeal of this claim because the development of factual evidence is necessary to fully present it.

63. The performance of Attorneys King, Davenport, and Barry was defective because, in the Petitioner's direct appeal, they failed to make the following claims:

    a. The Petitioner's due process rights were violated by Lombardo's identification of him at the probable cause hearing because it was unduly suggestive and insufficiently reliable, and Lombardo's trial identification was tainted by the probable cause identification;

    b. The Petitioner's due process rights were violated by Lavassuer's in and out of court identifications because they were unduly suggestive and insufficiently reliable.

64. But for the deficient performance of appellate counsel, there is a reasonable probability the results of the proceeding would have been different and more favorable to the Petitioner.

65. The Petitioner's conviction is in violation of the Sixth and Fourteenth Amendments and Article first, secs. eight and nine of the Connecticut Constitution based on ineffective assistance of appellate counsel.

COUNT THREE- INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL (LORENZEN)

66. Paragraphs 1-65 are incorporated by reference.

67. The Petitioner has previously raised claims that habeas counsel Lorenzen was ineffective, however, because of the ineffective assistance of subsequent habeas counsel, DeMarco and Kraus, and the judicial dismissal of his fourth habeas petition, his claims were not fully and fairly litigated in his previous habeas cases.

68. The Petitioner has not deliberately bypassed a direct appeal of these claims because the development of factual evidence is necessary to fully present them.

69. Prior habeas counsel, Lorenzen, was ineffective in the following areas:

   a. Failure to fully investigate, raise, and adequately present claims of ineffective assistance of trial and appellate counsel including, but not limited to, trial counsel's failure to file a motion to suppress Lombardo's identification of the Petitioner, trial counsel's failure to pursue his motion to suppress LaVassuer's identification of the Petitioner, trial counsel's failure to object to the court's eye witness identification instruction, trial counsel's failure to waive the probable cause hearing or otherwise prevent the extremely suggestive setting for Lombardo's identification of the Petitioner, trial counsel's failure to make an

adequate record as to the number and nature of pretrial identification procedures used, trial counsel's failure to effectively cross examine the eye witnesses at trial, trial counsel's *failure to call* Miguel Vargas as a witness, appellate counsel's failure to argue that the identification of the Petitioner at the probable cause by Lombardo hearing violated his due process rights, and appellate counsel's failure to argue that LaVasseur's identification of the Petitioner violated his due process rights.

b. Abandonment of various arguments and claims concerning trial counsel's and appellate counsel's performance including, but limited to, those listed in paragraph 69(a), by failing to raise them in his final amended petition, question the witnesses at the habeas trial concerning trial counsel's deficiencies as listed in Paragraph 57, argue these matters to the court, and/or adequately brief those issues.

c. Failure to consult with and/or call an eye witness identification expert in the habeas proceedings.

d. Failure to raise a claim of newly discovered evidence based on developments in the science of eye witness identification.

e. Failure to claim that the Petitioner's conviction was in violation of his due process rights based on unduly suggestive identification procedures and unreliable identifications.

70. But for the deficient performance of counsel, there is a reasonable probability the results of the proceeding would have been different and more favorable to the Petitioner.

71. The Petitioner's conviction is in violation to his right to effective assistance of habeas counsel pursuant to Conn. Gen. Stat. sec. 51-296, the Sixth and Fourteenth Amendments and Article First, secs eight and nine of the Connecticut Constitution.

COUNT FOUR- INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL (DEMARCO)

72. Paragraphs 1-71 are incorporated by reference.
73. The Petitioner has previously raised claims that habeas counsel DeMarco was ineffective, however, because of the ineffective assistance of subsequent habeas counsel, Kraus, and the judicial dismissal of his fourth habeas petition, his claims were not fully and fairly litigated in his previous habeas cases.
74. The Petitioner has not deliberately bypassed a direct appeal of these claims because the development of factual evidence is necessary to fully present them.
75. Prior habeas counsel, DeMarco, was ineffective in the following areas:
    a. Failure to fully investigate, raise, and adequately present claims of ineffective assistance of trial and appellate counsel including, but not limited to, trial counsel's failure to file a motion to suppress Lombardo's identification of the Petitioner, trial counsel's failure to pursue his motion to suppress LaVassuer's identification of the Petitioner, trial counsel's failure to object to the court's eye witness identification instruction, trial counsel's failure to waive the probable cause hearing or otherwise prevent the extremely suggestive setting for Lombardo's identification of the Petitioner, trial counsel's failure to make an adequate record as to the number and nature of pretrial identification procedures used, trial counsel's failure to effectively cross examine the eye witnesses, trial counsel's failure to call Miguel Vargas as a witness, appellate counsel's failure to

argue that the identification of the Petitioner at the probable cause by Lombardo hearing violated his due process rights, and appellate counsel's failure to argue that LaVasseur's identification of the Petitioner violated his due process rights.

b. Abandonment of various arguments and claims concerning trial counsel's and appellate counsel's performance including, but limited to, those listed in paragraph 75(a) by failing to file an amended petition and ask for a trial.

c. Failure to consult with and/or call an eye witness identification expert in the habeas proceedings.

d. Failure to raise a claim of newly discovered evidence based on developments in the science of eye witness identification.

e. Failure to claim that the Petitioner's conviction was in violation of his due process rights based on unduly suggestive identification procedures and unreliable identifications.

f. Failure to fully investigate, raise, and present claims of ineffective assistance of habeas counsel including, but not limited to, habeas counsel's failure to fully investigate, raise, and adequately present the claims referenced in 75(a) and/ or abandonment thereof, habeas counsel's failure to consult with or call an eye witness identification expert, and habeas counsel's failure to raise claims of straight due process violations based on the eye witness identifications, and newly discovered evidence. (See Counts Six and Seven of this Petition).

g. Failure to consult with and/or call a legal expert on the issue of ineffective assistance of counsel.

76. But for the deficient performance of counsel, there is a reasonable probability the results of the proceeding would have been different and more favorable to the Petitioner.

77. The Petitioner's conviction is in violation to his right to effective assistance of habeas counsel pursuant to Conn. Gen. Stat. sec. 51-296, the Sixth and Fourteenth Amendments and Article First, secs eight and nine of the Connecticut Constitution.

COUNT FIVE- INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL (KRAUS)

78. Paragraphs 1-77 are incorporated by reference.

79. The Petitioner has not previously raised claims that habeas counsel Kraus was ineffective.

80. The Petitioner has not deliberately bypassed a direct appeal of these claims because the development of factual evidence is necessary to fully present them.

81. Prior habeas counsel, Kraus, was ineffective in the following areas:

    a. Failure to fully investigate, raise, and adequately present claims of ineffective assistance of trial and appellate counsel including, but not limited to trial counsel's failure to file a motion to suppress Lombardo's identification of the petitioner, trial counsel's failure to pursue his motion to suppress LaVassuer's identification of the Petitioner, trial counsel's failure to object to the court's eye witness identification instruction, trial counsel's failure to waive the probable cause hearing or otherwise prevent the extremely suggestive setting for Lombardo's identification of the Petitioner, trial counsel's failure to effectively cross examine the eyewitnesses, trial counsel's failure to make an adequate record as to the number and nature of pretrial identification procedures used, trial

counsel's failure to call Miguel Vargas as a witness, appellate counsel's failure to argue that the identification of the Petitioner at the probable cause by Lombardo hearing violated his due process rights, and appellate counsel's failure to argue that LaVasseur's identification of the Petitioner violated his due process rights.

b. Abandonment of various arguments and claims concerning trial counsel's and appellate counsel's performance including, but limited to, those listed in paragraph 81(a) by not raising them in his amended petition, questioning witnesses at the habeas trial about those issues, or adequately briefing them.

c. Failure to consult with and/or call an eye witness identification expert in the habeas proceedings.

d. Failure to raise a claim of newly discovered evidence based on developments in the science of eye witness identification.

e. Failure to claim that the Petitioner's conviction was in violation of his due process rights based on unduly suggestive identification procedures and unreliable identifications.

f. Failure to fully investigate, raise, and present claims of ineffective assistance of habeas counsel including, but not limited to, habeas counsel's failure to fully investigate, raise, and adequately present the claims referenced in 81(a) and/ or abandonment thereof, habeas counsel's failure to consult with or call an eye witness identification expert, and habeas counsel's failure to raise claims of straight due process violations based on the eye witness identifications, and newly discovered evidence. (See Counts Six and Seven of this Petition).

g. Failure to consult with and/or call a legal expert on the issue of ineffective assistance of counsel.

82. But for the deficient performance of counsel, there is a reasonable probability the results of the proceeding would have been different and more favorable to the Petitioner.

83. The Petitioner's conviction is in violation to his right to effective assistance of habeas counsel pursuant to Conn. Gen. Stat. sec. 51-296, the Sixth and Fourteenth Amendments and Article First, secs eight and nine of the Connecticut Constitution.

COUNT SIX- DUE PROCESS (FEDERAL AND STATE)

84. Paragraphs 1-83 are incorporated by reference.

85. The Petitioner's due process rights under the Fourteenth Amendment as well as Article First, secs. eight and nine were violated because:

    a. His conviction was based solely on eye witness identification evidence that is now understood to be unduly suggestive and unreliable.

    b. The jury was not adequately informed about the factors affecting the accuracy of eye witness identification evidence which were present in his case, including but not limited to; procedures used or not used in presenting photos to the eye witnesses, weapon focus, fear, lighting, length of observation, familiarity, intoxication, habitual drug use, unconscious transference, relative judgment, cross racial identification, confidence statements, unduly suggestive settings, multiple viewings, and the length of time between the event and the identification.

    c. Scientific studies have shown that factors affecting the accuracy of eye witness identification are not within jurors' common knowledge.

c. Lombardo and LaVasseur's in court identifications were tainted by unduly suggestive pre trial identification procedures and should not have been admitted into evidence.

d. The court's jury instruction on eye witness identification was scientifically unsound, and did not adequately reference many of the factors that likely affected the accuracy of Lombardo and LaVasseur's identifications of the Petitioner.

86. Because there was no physical evidence connecting the Petitioner to the crimes and eye witness identification evidence is inherently unreliable when some or all of the following factors in listed in 85 (b) are present, the evidence in the Petitioner's case was insufficient to rise to the level of proof beyond a reasonable doubt.

87. The Supreme 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.

COUNT SEVEN- NEWLY DISCOVERED EVIDENCE

88. Paragraphs 1-87 are incorporated by reference.

89. The Petitioner has not raised this claim at any prior proceeding.

90. Since the time of the Petitioner's trial, appeal, and/or prior habeas trials, there have been significant advances in the science of eye witness identification, and the causes of mistaken identification are better understood. Some of those scientific advancements/ studies are referenced in State v. Henderson, 208 N.J. 208 (2011) and in the 64 page report of the special master in that case.

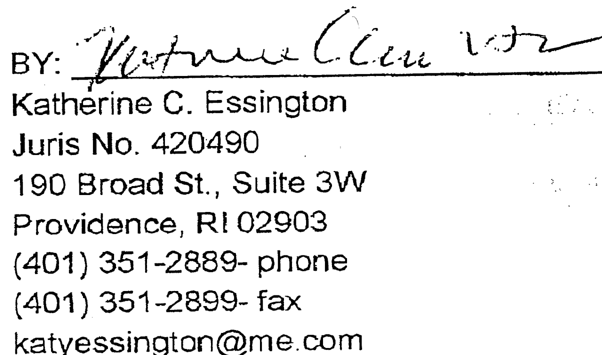
91. The scientific developments referenced in paragraph (90) constitute newly discovered evidence not reasonably available to the Petitioner at the time of the prior proceedings.

92. The evidence adduced at the Petitioner's prior proceedings and the evidence to be adduced at this habeas trial demonstrate that no reasonable fact finder would find the Petitioner guilty of murder.

WHEREFORE, the Petitioner respectfully requests that:

1. A writ of habeas corpus be issued to bring him before this Court in order that justice may be done.
2. That the conviction and sentence described herein be ordered vacated or modified and the matter returned to the trial docket for further proceedings according to law.
3. Such other relief as law and justice require.

Respectfully submitted,
The Petitioner
Edgar Tatum



BY: ______________________
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HIS ATTORNEY

CERTIFICATION

This is to certify that a copy of the foregoing was emailed this 27th day of June, 2018 to:

Eva Lenczewski, Esq.
Office of the Chief State's Attorney
400 Grand St.

Filed 7.16.18
GA19 4:08 pm
Superior Court

CV16-4007857-S	:	SUPERIOR COURT
EDGAR TATUM	:	JUDICIAL DISTRICT OF TOLLAND
V.	:	AT ROCKVILLE
WARDEN, STATE PRISON	:	JULY 16, 2018

RETURN

Now comes the respondent pursuant to Connecticut Practice Book § 23-30 and files this Return in response to the petitioner's Fourth Amended Petition for a Writ of Habeas Corpus/Response to State's Request for a More Specific Statement, dated June 27, 2018, as follows:

NATURE OF THE PROCEEDINGS

1. Admitted.
2. Admitted.
3. Denied.
4. Admitted.
5. Admitted.

JURISDICTION AND SCOPE OF REVIEW

6-13. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

CASE HISTORY

14. Admitted, to the extent that these were the charges at trial.
15. Admitted.
16. Admitted.

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HCRET
128.00

17. So much of Paragraph 17 as alleges "[t]he State subsequently dismissed the assault charge" is denied, and the remaining portion is admitted.

18. Admitted.

19. Admitted.

20. So much of Paragraph 20 as alleges "Conn. 719" is denied, and the remaining portion is admitted.

21. Admitted.

22. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

23. Admitted.

24. Admitted.

25. Admitted, to the extent that this was one of the trial dates.

26-30. Admitted.

31. So much of Paragraph 31 as alleges "1993" is denied, and the remaining portion is admitted.

32. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion as to that portion of Paragraph 32 as alleges "[t]he court denied the Petitioner's request for appointed counsel" and therefore leaves the petitioner to his proof. The remaining portion is admitted.

33. Denied.

34. Admitted, to the extent that the absence of prejudice was with respect to count two only.

35-37. Admitted.

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38. So much of Paragraph 38 as alleges "2010," is denied, and the remaining portion is admitted.

39-43. Admitted.

PERTINENT FACTS

44-53. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

COUNT ONE – INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

54. Paragraphs 1 through 53 are re-pleaded and incorporated by reference herein.

55. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

56. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

57a-g. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

58. Denied.

59. Denied.

Failure to State a Claim Upon Which Relief May be Granted

60. The petitioner cannot obtain habeas corpus review of the claim raised in Count One as the Connecticut Supreme Court has held that its new rules regarding eyewitness identification do not apply retroactively to cases on collateral review, such as habeas corpus proceedings. *State v. Dickson*, 322 Conn. 410, 450-51, (2016), *cert. denied*, 137 S. Ct. 2263 (2017). Consequently, the petitioner's claim fails to support a

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legal basis upon which this Court could offer relief pursuant to § 23-29 of the Connecticut Practice Book.

Failure to State a Claim Upon Which Relief May be Granted

61. The petitioner cannot obtain habeas corpus review of the claim raised in Count One that trial counsel was ineffective in regard to allegations pertaining to various aspects of eyewitness identification as, at the time of his criminal proceedings, these pursuits would have been considered novel theories. *State v. Kemp*, 199 Conn. 473, 476 (1986) and *State v. McClendon*, 248 Conn. 572, 586 (1999), *both overruled by State v. Guilbert*, 306 Conn. 218 (2012). "[C]ounsel's failure to advance novel legal theories does not constitute ineffective performance." *State v. Ledbetter,* 275 Conn. 451, 459-60 (2005). Consequently, the petitioner has failed to state a claim upon which habeas corpus relief may be granted.

Res Judicata / Collateral Estoppel

62. The petitioner cannot obtain habeas corpus review of the claim raised in Count One that trial counsel was ineffective in regard to allegations pertaining to various aspects of eyewitness identification as this claim and its underlying principles were addressed previously at the appellate and habeas levels. Thus, this claim is barred by the doctrine of res judicata / collateral estoppel.

Successive Petition

63. The petitioner cannot obtain habeas corpus review of the claim raised in Count One that trial counsel was ineffective in regard to allegations pertaining to various aspects of eyewitness identification as the petitioner previously has claimed ineffective assistance of counsel and sought the same relief thereon.

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COUNT TWO – INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

60. Paragraphs 1 through 59 are re-pleaded and incorporated by reference herein.

61. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

62. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

63a-b. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

64. Denied.

65. Denied.

Failure to State a Claim Upon Which Relief May be Granted

66. The petitioner cannot obtain habeas corpus review of the claim raised in Count Two as the Connecticut Supreme Court has held that its new rules regarding eyewitness identification do not apply retroactively to cases on collateral review, such as habeas corpus proceedings. *State v. Dickson*, 322 Conn. 410, 450-51 (2016), *cert. denied*, 137 S. Ct. 2263 (2017). Consequently, the petitioner's claim fails to support a legal basis upon which this Court could offer relief pursuant to § 23-29 of the Connecticut Practice Book.

Failure to State a Claim Upon Which Relief May be Granted

67. The petitioner cannot obtain habeas corpus review of the claim raised in Count Two that appellate counsel were ineffective for failing to allege due process violations pertaining to the eyewitness identifications as, at the time of his criminal and

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appellate proceedings, these allegations would have been considered novel theories. *State v. Kemp*, 199 Conn. 473, 476 (1986) and *State v. McClendon*, 248 Conn. 572, 586 (1999), *both overruled by State v. Guilbert*, 306 Conn. 218 (2012). "[C]ounsel's failure to advance novel legal theories does not constitute ineffective performance." *State v. Ledbetter*, 275 Conn. 451, 459-60 (2005). Consequently, the petitioner has failed to state a claim upon which habeas corpus relief may be granted.

Procedural Default

68. The petitioner cannot obtain habeas corpus review of the claim raised in Count Two that appellate counsel were ineffective for failing to allege due process violations pertaining to the eyewitness identifications. Although the petitioner could have, he did not raise such a claim before the trial judge. Thus, this claim is procedurally defaulted. The petitioner cannot establish (1) good cause for his failure to raise this claim at trial or on direct appeal and (2) actual prejudice sufficient to excuse his default.

Res Judicata / Collateral Estoppel

69. The petitioner cannot obtain habeas corpus review of the claim raised in Count Two that appellate counsel were ineffective for failing to allege due process violations pertaining to the eyewitness identifications as this claim and its underlying principles were addressed previously at the appellate and habeas levels. Thus, this claim is barred by the doctrine of res judicata / collateral estoppel.

Successive Petition

70. The petitioner cannot obtain habeas corpus review of the claim raised in Count Two that appellate counsel were ineffective for failing to allege due process

violations pertaining to the eyewitness identifications as the petitioner previously has claimed ineffective assistance of appellate counsel and sought the same relief thereon.

COUNT THREE – INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL (LORENZEN)

66. Paragraphs 1 through 65 are re-pleaded and incorporated by reference herein.

67. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

68. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

69a-e. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

70. Denied.

71. Denied.

Failure to State a Claim Upon Which Relief May be Granted

72. The petitioner cannot obtain habeas corpus review of the claim raised in Count Three as the Connecticut Supreme Court has held that its new rules regarding eyewitness identification do not apply retroactively to cases on collateral review, such as habeas corpus proceedings. *State v. Dickson*, 322 Conn. 410, 450-51, (2016), *cert. denied,* 137 S. Ct. 2263 (2017). Consequently, the petitioner's claim fails to support a legal basis upon which this Court could offer relief pursuant to § 23-29 of the Connecticut Practice Book.

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Failure to State a Claim Upon Which Relief May be Granted

73. The petitioner cannot obtain habeas corpus review of the claim raised in Count Three that Habeas Counsel Lorenzen was ineffective in regard to allegations pertaining to various aspects of eyewitness identification as, at the time of his criminal, appellate, and habeas proceedings, these allegations would have been considered novel theories. *State v. Kemp*, 199 Conn. 473, 476 (1986) and *State v. McClendon*, 248 Conn. 572, 586 (1999), *both overruled by State v. Guilbert*, 306 Conn. 218 (2012). "[C]ounsel's failure to advance novel legal theories does not constitute ineffective performance." *State v. Ledbetter*, 275 Conn. 451, 459-60 (2005). Consequently, the petitioner has failed to state a claim upon which habeas corpus relief may be granted.

Res Judicata / Collateral Estoppel

74. The petitioner cannot obtain habeas corpus review of the claim raised in Count Three that Habeas Counsel Lorenzen was ineffective in regard to allegations pertaining to various aspects of eyewitness identification as this claim and its underlying principles were addressed previously at the trial, appellate, and habeas levels. Thus, this claim is barred by the doctrine of res judicata / collateral estoppel.

Procedural Default

75. The petitioner cannot obtain habeas corpus review of the claim raised in Count Three that Habeas Counsel Lorenzen was ineffective in regard to allegations pertaining to various aspects of eyewitness identifications. Although the petitioner could have, he did not raise such a claim at trial or on habeas appeal. Thus, this claim is procedurally defaulted. The petitioner cannot establish (1) good cause for his failure to

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raise this claim at trial or on habeas appeal and (2) actual prejudice sufficient to excuse his default.

Successive Petition

76. The petitioner cannot obtain habeas corpus review of the claim raised in Count Three that Habeas Counsel Lorenzen was ineffective in regard to allegations pertaining to various aspects of eyewitness identification as the petitioner previously has claimed ineffective assistance of counsel and sought the same relief thereon.

COUNT FOUR – INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL (DEMARCO)

72. Paragraphs 1 through 71 are re-pleaded and incorporated by reference herein.

73. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

74. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

75a-g. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

76. Denied.

77. Denied.

Failure to State a Claim Upon Which Relief May be Granted

78. The petitioner cannot obtain habeas corpus review of the claim raised in Count Four as the Connecticut Supreme Court has held that its new rules regarding eyewitness identification do not apply retroactively to cases on collateral review, such as habeas corpus proceedings. *State v. Dickson*, 322 Conn. 410, 450-51, (2016), *cert.*

denied, 137 S. Ct. 2263 (2017). Consequently, the petitioner's claim fails to support a legal basis upon which this Court could offer relief pursuant to § 23-29 of the Connecticut Practice Book.

Failure to State a Claim Upon Which Relief May be Granted

79. The petitioner cannot obtain habeas corpus review of the claim raised in Count Four that Habeas Counsel DeMarco was ineffective in regard to allegations pertaining to various aspects of eyewitness identification as, at the time of his criminal, appellate, and habeas proceedings these allegations would have been considered novel theories. *State v. Kemp*, 199 Conn. 473, 476 (1986) and *State v. McClendon*, 248 Conn. 572, 586 (1999), *both overruled by State v. Guilbert*, 306 Conn. 218 (2012). "[C]ounsel's failure to advance novel legal theories does not constitute ineffective performance." *State v. Ledbetter*, 275 Conn. 451, 459-60 (2005). Consequently, the petitioner has failed to state a claim upon which habeas corpus relief may be granted.

Res Judicata / Collateral Estoppel

80. The petitioner cannot obtain habeas corpus review of the claim raised in Count Four that Habeas Counsel DeMarco was ineffective in regard to allegations pertaining to various aspects of eyewitness identifications as this claim and its underlying principles were addressed previously at the trial, appellate, and habeas levels. Thus, this claim is barred by the doctrine of res judicata / collateral estoppel.

Procedural Default

81. The petitioner cannot obtain habeas corpus review of the claim raised in Count Four that Habeas Counsel DeMarco was ineffective in regard to allegations pertaining to various aspects of eyewitness identification. Although the petitioner could

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have, he did not raise such a claim at his habeas appeal. Thus, this claim is procedurally defaulted. The petitioner cannot establish (1) good cause for his failure to raise this claim at his habeas appeal and (2) actual prejudice sufficient to excuse his default.

Successive Petition

82. The petitioner cannot obtain habeas corpus review of the claim raised in Count Four that Habeas Counsel DeMarco was ineffective in regard to allegations pertaining to various aspects of eyewitness identification as the petitioner previously has claimed ineffective assistance of counsel and sought the same relief thereon.

COUNT FIVE - INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL (KRAUS)

78. Paragraphs 1 through 77 are re-pleaded and incorporated by reference herein.

79. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

80. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

81a-g. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

82. Denied.

83. Denied.

Failure to State a Claim Upon Which Relief May be Granted

84. The petitioner cannot obtain habeas corpus review of the claim raised in Count Five as the Connecticut Supreme Court has held that its new rules regarding eyewitness identification do not apply retroactively to cases on collateral review, such as

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habeas corpus proceedings. *State v. Dickson*, 322 Conn. 410, 450-51, (2016), *cert. denied*, 137 S. Ct. 2263 (2017). Consequently, the petitioner's claim fails to support a legal basis upon which this Court could offer relief pursuant to § 23-29 of the Connecticut Practice Book.

Failure to State a Claim Upon Which Relief May be Granted

85. The petitioner cannot obtain habeas corpus review of the claim raised in Count Five that Habeas Counsel Kraus was ineffective in regard to allegations pertaining to various aspects of eyewitness identification as, at the time of his criminal proceedings and direct appeal in 1989-91, these allegations would have been considered novel theories. *State v. Kemp*, 199 Conn. 473, 476 (1986) and *State v. McClendon*, 248 Conn. 572, 586 (1999), *both overruled by State v. Guilbert*, 306 Conn. 218 (2012). "[C]ounsel's failure to advance novel legal theories does not constitute ineffective performance." *State v. Ledbetter*, 275 Conn. 451, 459-60 (2005). Consequently, the petitioner has failed to state a claim upon which habeas corpus relief may be granted.

Res Judicata / Collateral Estoppel

86. The petitioner cannot obtain habeas corpus review of the claim raised in Count Five that Habeas Counsel Kraus was ineffective in regard to allegations pertaining to various aspects of eyewitness identification as this claim and its underlying principles were addressed previously at the appellate and habeas levels. Thus, this claim is barred by the doctrine of res judicata / collateral estoppel.

COUNT SIX – DUE PROCESS (FEDERAL AND STATE)

84. Paragraphs 1 through 83 are re-pleaded and incorporated by reference herein.

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85a-d. Denied.

86. Denied.

87. Denied.

Failure to State a Claim Upon Which Relief May be Granted

88. The petitioner cannot obtain habeas corpus review of the claim raised in Count Six as the Connecticut Supreme Court has held that its new rules regarding eyewitness identification do not apply retroactively to cases on collateral review, such as habeas corpus proceedings. *State v. Dickson*, 322 Conn. 410, 450-51 (2016), *cert. denied,* 137 S. Ct. 2263 (2017). Consequently, the petitioner's claim fails to support a legal basis upon which this Court could offer relief pursuant to § 23-29 of the Connecticut Practice Book.

Failure to State a Claim Upon Which Relief May be Granted

89. The petitioner cannot obtain habeas corpus review of the claim raised in Count Six as the studies and various factors pertaining to eyewitness identification were not part of the legal standard at the time of his criminal proceedings and direct appeal in 1989-91. *State v. Kemp*, 199 Conn. 473, 476 (1986) and *State v. McClendon*, 248 Conn. 572, 586 (1999), *both overruled by State v. Guilbert*, 306 Conn. 218 (2012). Consequently, the petitioner has failed to state a claim upon which habeas corpus relief may be granted.

Procedural Default

90. The petitioner cannot obtain habeas corpus review of the claim raised in Count Six that he was denied a fair trial as a result of due process violations pertaining to various aspects of eyewitness identifications. Although the petitioner could have, he did

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not raise such a claim before the trial judge or on direct appeal. Thus, this claim is procedurally defaulted. The petitioner cannot establish (1) good cause for his failure to raise this claim at trial or on direct appeal and (2) actual prejudice sufficient to excuse his default.

Res Judicata / Collateral Estoppel

91. The petitioner cannot obtain habeas corpus review of the claim raised in Count Six pertaining to various aspects of eyewitness identification as this claim and its underlying principles were addressed previously at the appellate and habeas levels. Thus, this claim is barred by the doctrine of res judicata / collateral estoppel.

COUNT SEVEN – NEWLY DISCOVERED EVIDENCE

88. Paragraphs 1 through 87 are re-pleaded and incorporated by reference herein.

89. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

90. The respondent submits that it is without sufficient knowledge or information upon which to form an opinion, and therefore, leaves the petitioner to his proof.

91. Denied.

92. Denied.

Failure to State a Claim Upon Which Relief May be Granted

93. The petitioner cannot obtain habeas corpus review of the claim raised in Count Seven as the Connecticut Supreme Court has held that its new rules regarding eyewitness identification do not apply retroactively to cases on collateral review, such as habeas corpus proceedings. *State v. Dickson*, 322 Conn. 410, 450-51, (2016), *cert.*

denied, 137 S. Ct. 2263 (2017). Consequently, the petitioner's claim fails to support a legal basis upon which this Court could offer relief pursuant to § 23-29 of the Connecticut Practice Book.

Failure to State a Claim Upon Which Relief May be Granted

94. The petitioner cannot obtain habeas corpus review of the claim raised in Count Seven as the studies and advancements pertaining to eyewitness identification were not part of the legal standard at the time of his criminal proceedings, appeal, and prior habeas proceedings. *State v. Kemp*, 199 Conn. 473, 476 (1986) and *State v. McClendon*, 248 Conn. 572, 586 (1999), *both overruled by State v. Guilbert*, 306 Conn. 218 (2012).

Res Judicata / Collateral Estoppel

95. The petitioner cannot obtain habeas corpus review of the claim raised in Count Seven pertaining to various aspects of eyewitness identification as this claim and its underlying principles were addressed previously at the appellate and habeas levels. Thus, this claim is barred by the doctrine of res judicata / collateral estoppel.

WHEREFORE, the respondent prays that this Court deny the petitioner's prayer for relief and dismiss the amended petition for writ of habeas corpus.

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Respectfully submitted,
RESPONDENT-WARDEN

BY S/Eva B. Lenczewski
EVA B. LENCZEWSKI
Supervisory Assistant State's Attorney
Judicial District of Waterbury

CERTIFICATION

I hereby certify that a copy of the foregoing was or will immediately be e-mailed and sent by facsimile on this 16th day of July 2018 to: Attorney Katherine C. Essington, 190 Broad Street, Suite 3W, Providence, RI 02903, Facsimile 401-351-2899.

BY S/Eva B. Lenczewski
EVA B. LENCZEWSKI

STATE OF CONNECTICUT SUPERIOR COURT G.A. 19
2018 JUL 19

DOCKET NO. TSR-CV-16-4007857-S SUPERIOR COURT

EDGAR TATUM JUDICIAL DISTRICT OF TOLLAND

AT ROCKVILLE

V.

WARDEN JULY 19, 2018

PETITIONER'S REPLY TO STATE'S RETURN

The Petitioner, Edgar Tatum, through counsel, hereby files this Return in Response to the State's Reply:

COUNT ONE- INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Failure To State A Claim Upon Which Relief May be Granted

1. Denied. The Petitioner is not alleging in Count One that the "new rules" regarding eyewitness identification should be applied retroactively, rather he is alleging that counsel did not meet the objective standard of care for a criminal defense attorney at the time the case was tried.

Failure To State A Claim Upon Which Relief May be Granted

2. Denied. The Petitioner's claim in Count One is not based on novel legal theories but on the objective standard of care at the time the case was tried.

Res Judicata/ Collateral Estoppel

3. Denied. While certain claims of ineffective assistance of trial counsel were litigated in the petitioner's first habeas trial, many claims related to eyewitness identification were abandoned by Attorney Lorenzen, including trial counsel's failure to seek suppression of any in court identifications of the Petitioner by Lombardo and LaVassuer, to clarify the number any nature of any out of court identifications, and to adequately prepare for his cross examinations of Lombardo and LaVassuer. As a result, there was no full and fair

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hearing in Tatum v. Warden, CV91-0001263S due to the ineffectiveness of habeas counsel Lorenzen.

4. In addition, the current claims of ineffective assistance of trial counsel are different than those raised in Tatum v. Commissioner, CV03-0004175S, therefore neither res judicata nor collateral estoppel applies.
5. In addition, due to the ineffectiveness of habeas counsel Paul Kraus in not raising claims related to trial counsel's performance in the area of eyewitness identification, there was no full and fair hearing in Tatum v. Commissioner, CV03-0004175S.

Successive Petitions

6. Denied. Due to the ineffectiveness of prior habeas counsel Lorenzen, there was no full and fair hearing of the Petitioner's claims in Tatum v. Warden, CV91-0001263S
7. In addition, due to the ineffectiveness of prior habeas counsel DeMarco, the petitioner's second habeas petition was dismissed without a full and fair hearing.
8. In addition, due to the ineffectiveness of habeas counsel Kraus, the Petitioner did not receive a full and fair hearing in Tatum v. Commissioner, CV03-0004175S.
9. In addition, due to the court's dismissal of the Petitioner's fourth habeas petition, he did not receive a full and fair hearing in Tatum v. Commissioner, TSR-CV14-4006223S.
10. In addition, the claim is not barred by the doctrine of successive petitions because the Petitioner will present new evidence, that because of the ineffectiveness of prior counsel, was not presented at any prior proceeding.

COUNT TWO- INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Failure To State A Claim Upon Which Relief May be Granted

11. Denied. The Petitioner is not alleging in Count Two that the "new rules" regarding eyewitness identification should be applied retroactively, rather he is alleging that counsel did not meet the objective standard of care for a criminal appellate attorney at the time the case was appealed.

Failure To State A Claim Upon Which Relief May be Granted

12. Denied. The Petitioner's claims in Count Two are not based on novel legal theories but on the objective standard of care at the time the case was appealed.

Procedural Default

13. Denied. The Petitioner could not have raised a claim of ineffective assistance of appellate counsel either in his underlying trial or during his direct appeal. He could have raised a claim of ineffective assistance of appellate counsel in his habeas petitions, however, the ineffectiveness of prior habeas counsel Lorenzen provides sufficient cause and prejudice to excuse any default. Prior habeas counsel rendered deficient performance in not raising the claim in Count Two, and there is a reasonable probability that had he made such a claim, the results of the proceedings would have been different.

14. In addition, the ineffectiveness of prior habeas counsel DeMarco provides sufficient cause and prejudice to excuse any default. Prior habeas counsel rendered deficient performance in not raising the claim in Count Two, and there is a reasonable probability that had he made such a claim, the results of the proceedings would have been different.

15. In addition, the ineffectiveness of prior habeas counsel Kraus provides sufficient cause and prejudice to excuse any default. Prior habeas counsel rendered deficient

performance in not raising or arguing the specific claims of ineffective assistance of appellate counsel in Count Two, and there is a reasonable probability that had he made such a claim, the results of the proceedings would have been different.

Res Judicata/ Collateral Estoppel

16. Due to the ineffectiveness of prior habeas counsel Lorenzen, there was no full and fair hearing of the Petitioner's claims in Tatum v. Warden, CV91-0001263S 16.
17. In addition, due to the ineffectiveness of habeas counsel Kraus, the Petitioner did not receive a full and fair hearing in Tatum v. Commissioner, CV03-0004175S.
18. In addition, the current claims of ineffective assistance of appellate counsel are different than those raised in Tatum v. Commissioner, CV03-0004175S so neither res judicata nor collateral estoppel applies.

Successive Petitions

19. Denied. Due to the ineffectiveness of prior habeas counsel Lorenzen, there was no full and fair hearing of the Petitioner's claims in Tatum v. Warden, CV91-0001263S
20. In addition, due to the ineffectiveness of prior habeas counsel DeMarco, the petitioner's second habeas petition was dismissed without a full and fair hearing.
21. In addition due to the ineffectiveness of habeas counsel Kraus, the Petitioner did not receive a full and fair hearing in Tatum v. Commissioner, CV03-0004175S.
22. In addition, due to the court's dismissal of Mr. Tatum's fourth habeas petition, he did not receive a full and fair hearing in Tatum v. Commissioner, TSR-CV14-4006223S.
23. In addition, the claim is not barred by the doctrine of successive petitions because the Petitioner will present new evidence, that because of the ineffectiveness of prior counsel, was not presented at any prior proceeding.

COUNT THREE- INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL (LORENZEN)

Failure To State A Claim Upon Which Relief May be Granted

24. Denied. The Petitioner is not alleging in Count Three that the "new rules" regarding eyewitness identification should be applied retroactively, rather he is alleging that counsel did not meet the objective standard of care for a habeas attorney at the time the case was tried.

Failure To State A Claim Upon Which Relief May be Granted

25. Denied. The Petitioner's claims in Count Three are not based on novel legal theories but on the objective standard of care at the time the case was tried.

Res Judicata/ Collateral Estoppel

26. Denied. While the Petitioner did raise a claim that Attorney Lorenzen was ineffective in his third petition, these claims are not the same ones he is raising in the present petition, but instead related to the failure to discover the State's payment to Lombardo and the trial court's intent instruction. Because the Petitioner's claims in this present habeas were not adjudicated in any prior proceeding, neither res judicata nor collateral estoppel applies.

27. In addition, due to the ineffectiveness of habeas counsel Kraus, the Petitioner did not receive a full and fair hearing in Tatum v. Commissioner, CV03-0004175S.

Procedural Default

28. Denied. Raising a claim of ineffective assistance of counsel on appeal is disfavored and does not constitute procedural default. See State v. Greene, 274 Conn. 134, 151-2, (2005), cert. denied, 548 U.S. 926, 126 S. Ct, 2981, 165 L.Ed.2d 988 (2006)

29. In addition, the ineffectiveness of prior habeas counsel DeMarco provides sufficient cause and prejudice to excuse any default. Prior habeas counsel rendered deficient performance in not pleading, proving or arguing this claim, and there is a reasonable probability that had he made such a claim, the results of the proceedings would have been different.
30. In addition, the ineffectiveness of prior habeas counsel Kraus provides sufficient cause and prejudice to excuse any default. Prior habeas counsel rendered deficient performance in not pleading, proving or arguing this claim, and there is a reasonable probability that had he made such a claim, the results of the proceedings would have been different.

Successive Petitions

31. Due to the ineffectiveness of prior habeas counsel DeMarco, the petitioner's second habeas petition was dismissed without a full and fair hearing.
32. In addition, due to the ineffectiveness of habeas counsel Kraus, the Petitioner did not receive a full and fair hearing in Tatum v. Commissioner, CV03-0004175S.
33. In addition, due to the court's dismissal of Mr. Tatum's fourth habeas petition, he did not receive a full and fair hearing in Tatum v. Commissioner, TSR-CV14-4006223S.
34. In addition, the claim is not barred by the doctrine of successive petitions because the Petitioner will present new evidence, that because of the ineffectiveness of prior counsel, was not presented at any prior proceeding.

COUNT FOUR- INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL (DEMARCO)

Failure To State A Claim Upon Which Relief May be Granted

35. Denied. The Petitioner is not alleging in Count Four that the "new rules" regarding eyewitness identification should be applied retroactively, rather he is alleging that counsel did not meet the objective standard of care for a habeas attorney at the time the case was assigned.

Failure To State A Claim Upon Which Relief May be Granted

36. Denied. The Petitioner's claims are not based on novel legal theories but on the objective standard of care at the time the case was handled by Attorney DeMarco.

Res Judicata/ Collateral Estoppel

37. Denied. No ineffective assistance claims against DeMarco have ever been tried or adjudicated by the Petitioner.

Procedural Default

38. Denied. The Petitioner's Fourth petition was dismissed by the habeas court without a hearing. An appeal is not the proper forum for a claim of ineffective assistance of counsel. See State v. Greene, 274 Conn. at 151-2.

Successive Petitions

39. Due to the ineffectiveness of habeas counsel Kraus, the Petitioner did not receive a full and fair hearing in Tatum v. Commissioner, CV03-0004175S.

40. In addition, due to the court's dismissal of Mr. Tatum's fourth habeas petition, he did not receive a full and fair hearing in Tatum v. Commissioner, TSR-CV14-4006223S.

41. In addition, the claim is not barred by the doctrine of successive petitions because the Petitioner will present new evidence, that because of the ineffectiveness of prior counsel, was not presented at any prior proceeding.

COUNT FIVE- INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL (KRAUS)

Failure To State A Claim Upon Which Relief May be Granted

42. Denied. The Petitioner is not alleging in Count Five that the "new rules" regarding eyewitness identification should be applied retroactively, rather he is alleging that counsel did not meet the objective standard of care for a habeas attorney at the time the case was tried.

Failure To State A Claim Upon Which Relief May be Granted

43. Denied. The Petitioner's claims are not based on novel legal theories but on the objective standard of care at the time the case was handled by Attorney Kraus.

Res Judicata/ Collateral Estoppel

44. Denied. Claims of ineffective assistance of counsel against Kraus have never been raised or adjudicated.

COUNT SIX- DUE PROCESS (FEDERAL AND STATE)

Failure To State A Claim Upon Which Relief May be Granted

45. Denied. While it is true that the Connecticut Supreme Court did not make the rule of Dickson, 322 Conn. at 450-1, retroactive, there are other reasons in addition to Lombardo's unduly suggestive probable cause hearing identification of the Petitioner that renders the Petitioner's conviction in violation of due process, including the court's jury instruction which was specifically disapproved of in State v. Guilbert, 306 Conn. 218, 258 (2012), as well as numerous factors making the eyewitness identifications in this case unreliable.

Failure To State A Claim Upon Which Relief May be Granted

46. Denied. Although some of the studies and factors pertaining to eyewitness identification were not well known at the time of the Petitioner's trial, due process is an evolving

standard. See e.g., State v. Santiago, 318 Conn. 1 (2015). This Court has the ability pursuant to Conn. Gen. Stat. secs. 52-470(e) and 52-493 to dispose of the case as the law and justice requires.

Procedural Default

47. Denied. The Petitioner did make a due process claim in his direct appeal, See Tatum, 219 Conn. 721 (1991), and that decision has since been overruled. See Dickson, 322 Conn. at 450-1.
48. In addition, Appellate counsel was ineffective in not making other due process arguments and this provides sufficient cause and prejudice to excuse any default. Prior habeas counsel rendered deficient performance and there is a reasonable probability that had he made such a claim, the results of the proceedings would have been different.
49. In addition, the ineffectiveness of prior habeas counsel Lorenzen provides sufficient cause and prejudice to excuse any default. Prior habeas counsel rendered deficient performance in not pleading, proving or arguing this claim, and there is a reasonable probability that had he made such a claim, the results of the proceedings would have been different.
50. In addition, the ineffectiveness of prior habeas counsel DeMarco provides sufficient cause and prejudice to excuse any default. Prior habeas counsel rendered deficient performance in not pleading, proving, or arguing this claim, and there is a reasonable probability that had he made such a claim, the results of the proceedings would have been different.

51. In addition, the ineffectiveness of prior habeas counsel Kraus provides sufficient cause and prejudice to excuse any default. Prior habeas counsel rendered deficient performance in not pleading, proving or arguing this claim, and there is a reasonable probability that had he made such a claim, the results of the proceedings would have been different.

Res Judicata/ Collateral Estoppel

52. Denied. While the Petitioner did make a due process claim in his direct appeal, Tatum, 219 Conn. 721, that decision has since been overruled. See Dickson, 322 Conn. at 450-1. The decision in his direct appeal therefore no longer has any precedential value.
53. In addition, due to the ineffectiveness of appellate counsel, other due process claims that could have been raised were not, and there was no full and fair hearing in State v. Tatum, 219 Conn. 721 (1991).
54. In addition, there was no full and fair hearing in Tatum v. Warden, CV91-0001263S due to the ineffectiveness of habeas counsel Lorenzen.
55. In addition, due to the ineffectiveness of habeas counsel Paul Kraus there was no full and fair hearing in Tatum v. Commissioner, CV03-0004175S.

COUNT SEVEN- NEWLY DISCOVERED EVIDENCE

Failure To State A Claim Upon Which Relief May be Granted

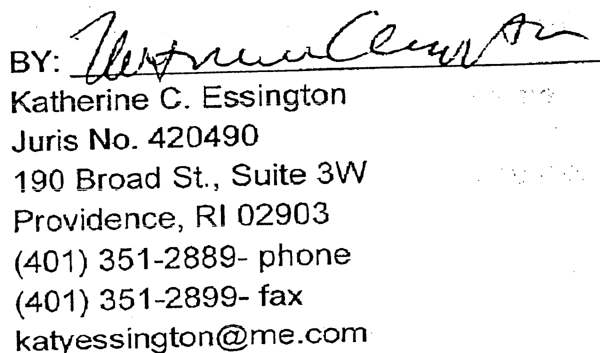
56. Denied. The Petitioner's claim does not depend on retroactive application of Supreme Court cases, but rather on newly discovered scientific studies and research.

Failure To State A Claim Upon Which Relief May be Granted

57. Denied. The Petitioner's claim in Count Seven is one of newly discovered evidence, not ineffective assistance of counsel. The legal standard at the time of his trial, appeal or habeas proceedings is therefore irrelevant.

Res Judicata/ Collateral Estoppel

58. Denied. The Petitioner has never before made this claim, therefore it has not been addressed in any prior proceeding, and neither collateral estoppel nor res judicata applies.



Respectfully submitted,
The Petitioner
Edgar Tatum

BY: ____________________
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HIS ATTORNEY

CERTIFICATION

This is to certify that a copy of the foregoing was emailed this 19th day of July, 2018 to:

Eva Lenczewski, Esq.
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400 Grand St.
Waterbury, CT 06702
Eva.lenczewski@ct.gov

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CV16-4007857-S	:	SUPERIOR COURT
EDGAR TATUM Petitioner		JUDICIAL DISTRICT OF TOLLAND
V.	:	AT ROCKVILLE
WARDEN, STATE PRISON Respondent	:	JULY 20, 2018

MOTION TO DISMISS

Pursuant to Connecticut Practice Book § 23-29 and in accordance with the court's scheduling order of July 13, 2018, the respondent-warden moves this Court to dismiss the Fourth Amended Petition for a Writ of Habeas Corpus/Response to State's Request for a More Specific Statement, dated June 27, 2018. The respondent's motion is brought on the grounds that the claims alleged in the petition fail to state claims upon which habeas corpus relief can be granted, are precluded by the doctrines of res judicata and collateral estoppel, and are procedurally defaulted. In support of its motion, the respondent submits an accompanying memorandum of law, and requests that for the reasons set forth therein, this Court grant its Motion to Dismiss.

Respectfully submitted,
RESPONDENT-WARDEN,

BY S/ Eva B. Lenczewski
EVA B. LENCZEWSKI
Supervisory Assistant State's Attorney
Judicial District of Waterbury

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STATE OF CONNECTICUT
SUPERIOR COURT
G.A. 19

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DOCKET NO: CV16-4007857	)	STATE OF CONNECTICUT
	)	SUPERIOR COURT
EDGAR TATUM	)	
	)	JUDICIAL DISTRICT OF
v.	)	TOLLAND AT ROCKVILLE
	)	
WARDEN	)	September 13, 2018
	)	

MEMORANDUM OF DECISION: RESPONDENT'S MOTION TO DISMISS (#134.00)

I. Procedural History

The petitioner was convicted of murder following a jury trial in the matter of State v. Edgar Tatum, CR4-161659 in the Judicial District of Waterbury and sentenced to serve sixty years incarceration on April 6, 1990. The petitioner appealed his conviction, and has filed several petitions for habeas corpus prior to the present matter, the substance of which will be discussed only to the extent they are relevant to the present motion. The present petition was filed on February 2, 2016. The Fourth Amended Petition, which is the subject of the present motion, was filed on June 26, 2018, and the respondent moved to dismiss some or all of said petition on July 20, 2018. The petitioner filed a timely objection, and argument was presented to the court on August 8, 2018. Further facts and procedural details will be provided as necessary in the remainder of this decision.

II. Law and Discussion

When adjudicating a motion to dismiss, "a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Citation omitted; quotation marks omitted.) *Lawrence*

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Brunoli, Inc. v. Town of Branford, 247 Conn. 407, 410-11, 722 A.2d 271 (1999). "Because subject matter jurisdiction implicates the authority of the court, the issue, once raised, must be resolved before proceeding to the merits of the case. . . ." (Citation omitted.) *State v. Fowler*, 102 Conn. App. 154, 158, 926 A.2d 672, cert. denied, 284 Conn. 922, 933 A.2d 725 (2007).

Count One – Ineffective Assistance of Trial Counsel

In Count One of the Fourth Amended Petition, the petitioner asserts a direct claim of ineffective assistance against his criminal trial counsel, Thomas McDonough. Specifically, the petitioner claims that Attorney McDonough: 1. failed to consult with an expert on eye-witness identification issues; 2. failed to waive the petitioner's presence at the probable cause hearing, allowing eyewitnesses to view the petitioner at the hearing; 3. failed to file a motion to suppress a witness named Lombardo's identification; 4. failed to request a hearing on a motion to suppress a witness named Lavasseur's identification; 5. failed to make an adequate record of the number of times a witness named Lombardo had participated in identification procedures and had been shown photographs of the petitioner prior to the probable cause hearing; 6. failed to object to the court's instruction on eyewitness identification, in favor of one that McDonough had proposed, 7. failed to adequately cross examine witnesses Lombardo and LaVasseur about certain factors that could have impacted their identification; and 8. failed to call Miguel Vargas, an eye-witness, to present testimony that could have called into question the petitioner's identity as the shooter. The respondent asserts that this claim of ineffective assistance should be dismissed on grounds of *res judicata*.

"The doctrine of res judicata provides that a former judgment [on the merits] serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which were actually made *or which might have been made. . . .*" (Emphasis added.) *Johnson v. Commissioner of Correction*, 168 Conn. App. 294, 305, 145 A.3d 416, cert. denied, 323 Conn. 937, 151 A.3d 385 (2016). "[A] final judgment, when rendered on the merits, is an absolute bar to a subsequent action, between the same parties or those in privity with them, upon the same claim." *Mazziotti v. Allstate Ins. Co.*, 240 Conn. 799, 812, 695 A.2d 1010 (1997)

"[U]nique policy considerations must be taken into account in applying the doctrine of res judicata to a constitutional claim raised by a habeas petitioner. . . . Specifically, in the habeas context, in the interest of ensuring that no one is deprived of liberty in violation of his or her constitutional rights . . . the application of the doctrine of res judicata . . . *[is limited] to claims that actually have been raised and litigated in an earlier proceeding*." (Emphasis added.) *Carter v. Commissioner of Correction*, 133 Conn. App. 387, 393, 35 A. 3d 1088 (2012). "[A] petitioner may bring successive petitions on the same legal grounds if the petitions seek different relief. . . . But where successive petitions are premised on the same legal grounds and seek the same relief, the second petition will not survive a motion to dismiss unless the petition is supported by allegations and facts not reasonably available to the petitioner at the time of the original petition." Id.

"In the context of a habeas action, a court must determine whether a petitioner actually has raised a new legal ground for relief or only has alleged different factual allegations in support of a previously litigated claim. 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. . . . Thus, a subsequent petition alleging the same ground as a previously denied petition will elude dismissal if it alleges grounds not actually litigated in the earlier petition and if it alleges new facts or proffers new evidence not reasonably available at the time of the earlier petition." (Citations omitted, internal quotation marks omitted.) *Johnson v. Commissioner of Correction*, 168 Conn. App. 294, 305-306, 145 A.3d 416, cert. denied, 323 Conn. 937, 151 A.3d 385 (2016).

"By ground, we mean simply a sufficient legal basis for granting the relief sought by the [petitioner]. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal [habeas] relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on alleged physical coercion. . . . Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant. The prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application. . . . This means that, if factual issues were raised in the prior application, and it was not denied on the basis that the files and records conclusively resolved these issues, an evidentiary hearing was held." (Citations omitted.) *Sanders v. United States*, 373 U.S. 1, 16, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963).

The petitioner litigated the alleged ineffectiveness of his criminal trial counsel in his first habeas, CV91-1263. *Tatum v. Warden,* Superior Court, judicial district of Tolland at Somers, Docket No. CV91-1263 (March 3, 1999, *Zarella, J.*). In that case, among other specific claims,

the petitioner alleged that his criminal trial counsel failed to "properly and fully utilize certain evidence consistent with third party guilt and misidentification," that he failed to waive his presence at the hearing in probable cause, thus allowing witnesses the opportunity to identify the petitioner in court, and that trial counsel failed to call certain witnesses who would have provided a description of the perpetrator as someone looking distinctly different from the petitioner. Id., p. 15. The petitioner also made a claim in that prior petition that trial counsel had failed to take proper exception to the jury instructions given by the court. Id. So, while the petitioner may have repackaged and reworded claims attacking the way trial counsel's handled issues surrounding his identification and the jury instructions at trial, the present claims cannot be said to raise any distinct issue that has not previously been litigated, nor can it be said that these issues surrounding eyewitness identification are based on new facts or proffer new evidence not reasonably available to the petitioner at the time of the earlier case. So, while the specific claims asserted in the present petition relate to his identification by witnesses different than those who actually testified at his trial or that he pointed to in his prior habeas petition, the issue regarding trial counsel's handling of his identification was readily available to the petitioner at the time of his prior habeas trial. Since the petitioner had a prior opportunity to fully litigate a claim of ineffectiveness against his criminal trial counsel, the present allegations are barred by the doctrine of *res judicata*. *Johnson v. Commissioner of Correction*, supra, 168 Conn. App. 307 ("The allegations within the petitioner's [current] habeas petition claiming ineffective assistance of trial counsel constituted the same legal ground as those found in the [prior] habeas petitions,

simply expressed in a reformulation of facts. These 'new' allegations could have been raised in those petitions.")

Count Two – Ineffective Assistance of Appellate Counsel

In the second count of the present petition, the petitioner asserts that Attorneys Sally King, Steven Barry, and Alicia Davenport, who handled the petitioner's direct appeal from his criminal conviction, were ineffective for failing to raise issues on appeal that the petitioner's due process rights were violated by unduly suggestive identification procedures at the hearing in probable cause, and by the unduly suggestive identification procedures surrounding a witness named LaVasseur's in and out of court identifications of the petitioner. By way of additional background, the petitioner's convictions were affirmed on appeal in *State v. Tatum*, 219 Conn. 721, 595 A.2d 322 (1991). The respondent has asserted that this claim ineffective assistance is barred by the doctrine of *res judicata* or has been procedurally defaulted.

The petitioner did assert the claim that his due process rights were violated by unnecessarily suggestive identification procedures in his direct appeal. Specifically, he claimed that "Lombardo's in court identification of him . . . was tainted by an unnecessarily suggestive pretrial identification procedure in that Lombardo had viewed the defendant at the probable cause hearing. . . . He claim[ed] that Lombardo's subsequent identification of him at trial was the product of that unnecessarily suggestive procedure . . . ." Id., 725. "The doctrine of res judicata bars [a] petitioner from obtaining habeas review of [claims that have been] raised, litigated and decided on direct appeal." *Robinson v. Commissioner of Correction*, 129 Conn. App. 699, 707, 21 A.3d 901, cert. denied, 302 Conn. 921, 28 A.3d 342 (2011). While the petitioner adds facts in

the current petition asserting unnecessarily suggestive identification procedures involving a different witness, LaVasseur, than the witness specified in the direct appeal, the substantive claim – due process violation due to unnecessarily suggestive identification procedures – and the relief – vacating his conviction – are the same as he sought in his direct appeal. Additionally, since LaVasseur testified at the petitioner's trial,[1] the facts supporting a claim that the identification procedures used by the police were unnecessarily suggestive were readily available to the petitioner at the time of the appeal. *Johnson v. Commissioner of Correction*, supra, 168 Conn. App. 305-306. The Appellate Court has already rejected this claim, so relitigating it here is precluded on grounds of *res judicata*. *Robinson v. Commissioner of Correction*, supra, 129 Conn. App. 707.

Count Three – Ineffective Assistance of Habeas Counsel (Lorenzen)

In his first habeas, the petitioner was represented by Attorney Bruce Lorenzen. That petition was denied by the court following a trial on the merits. *Tatum v. Warden,* Superior Court judicial district of Tolland at Rockville, Docket No. CV91-1263 (*Zarella, J.*, March 3, 1999). In a subsequent petition for habeas corpus, the petitioner alleged, among other claims, ineffective assistance of counsel against Attorney Lorenzen for his representation in CV91-1263. In that petition against Attorney Lorenzen, the petitioner alleged that Attorney Lorenzen was ineffective for failing to raise claims of ineffectiveness against his criminal trial counsel for: 1. failing to obtain evidence documenting which witnesses for the State were promised or received

[1] "At the probable cause hearing and at the trial, both Lombardo and LeVasseur identified the [petitioner] as the man who had short Lombardo and Parrett." *State v. Tatum*, 219 Conn. 721, 725, 595 A.2d 322 (1991).

benefits for their testimony; 2. failing to challenge the intent instruction given by the court, which embraced both specific and general intent; and 3. failing to preserve the intent instruction issue for appellate review. Following a trial on the merits, the court, *Nazzaro, J.*, denied the petition. *Tatum v. Warden*, Superior Court judicial district of Tolland at Rockville, Docket No. CV03-0004175 (*Nazzaro, J.*, March 23, 2010).

The petitioner also asserts a direct claim of ineffective assistance against Attorney Lorenzen in the present petition. The substance of the allegations in the present petition surround Attorney Lorenzen's alleged failure to raise and litigate various claims against petitioner's criminal trial and appellate counsel relating to the eyewitness identification instructions, identification procedures, and general investigation into various issues related to the identification of the petitioner as the perpetrator of this offense. Again, while some of the facts supporting the claims of ineffectiveness may be different than the specific facts the petitioner alleged against Attorney Lorenzen in CV03-0004175, given the fact that his 1991 appeal; *State v. Tatum*, supra, 291 Conn. 726-727; and his 1999 habeas trial; *Tatum v. Warden, supra,* Docket No. CV91-1263; focused extensively on issues related to the identification of the petitioner as the perpetrator and the identification procedures employed as to various witnesses who identified him, it is not reasonable that the particular facts to support this factual claim of ineffectiveness against Attorney Lorenzen were not reasonably available to the petitioner when he brought a claim of ineffective assistance against him in 2009 (CV03-0004175). "The allegations within the petitioner's [current] habeas petition claiming ineffective assistance of trial counsel constitute[] the same legal ground as those found in the [prior] habeas [petition], simply expressed in a

reformulation of facts. These 'new' allegations could have been raised in [the prior petition." *Johnson v. Commissioner of Correction*, supra, 168 Conn. App. 307. As such, the current claims are barred by *res judicata*. Id.

Count Four – Ineffective Assistance of Habeas Counsel (DeMarco) and
Count Five – Ineffective Assistance of Habeas Counsel (Kraus)

The petitioner also brings direct claims of ineffective assistance of counsel in the present case against Attorney Chris DeMarco, who represented him in a petition filed in the year 2000 in the Judicial District of New Haven under docket no. NNH-CV00-0440732, and Attorney Paul Kraus, who represented him in CV03-0004175. According to both parties, the matter in whichc he was represented by Attorney DeMarco was dismissed by the Court without a trial on the merits. The 2003 habeas petition, in which he was represented by Attorney Kraus, was denied following a trial on the merits. *Tatum v. Warden*, Superior Court judicial district of Tolland at Rockville, Docket No. CV03-0004175 (*Nazzaro, J.*, March 23, 2010). In reviewing the records and other information provided by the parties, it does not appear that the petitioner has ever previously alleged or litigated a direct claim of ineffective assistance against either of these attorneys. As such, these direct claims of ineffective assistance would not be barred by the doctrine of *res judicata*, and may proceed. See, *Johnson v. Commissioner of Correction*, supra, 168 Conn. App. 307.

Count Six – Due Process (Federal and State)

The petitioner alleges in count six that his due process rights under the fourteenth amendment to the Constitution of the United States, and article first, §8 and nine of the

Connecticut Constitution were violated, on the basis that the identification procedures used with certain witnesses were unduly suggestive and that the jury instructions were insufficient to educate jurors on the possibility of certain factors that could adversely impact eyewitness identification. The respondent asserts that these claims are barred by the doctrine of *res judicata*, because the petitioner raised such claims in his direct appeal, or alternatively that they are procedurally defaulted. The Court agrees with the respondent that this claim is barred on grounds of *res judicata*.

"The doctrine of res judicata bars [a] petitioner from obtaining habeas review of [claims that have been] raised, litigated and decided on direct appeal." *Robinson v. Commissioner of Correction*, supra, 129 Conn. App. 707. In his direct appeal, the petitioner raised the claim "that the trial court deprived him of his due process rights" by admitting Lombardo's identification of him, which he alleged was tainted by unduly suggestive procedures. *State v. Tatum*, supra, 219 Conn. 725. He also brought a claim in his direct appeal that the trial court's jury instruction was inadequate with respect to advising jurors of factors relating to the dangers of eyewitness misidentification. Id., 732. The Appellate Court determined that Lombardo's identification of the petitioner "was not the result of an unnecessarily suggestive procedure"; Id.; and that "[t]he instructions given included the material portions of both the [model jury charge] and the defendant's request and, as such, provided sufficient guidance to the jury on the issue of eyewitness identification." Id., 735. Since the petitioner has previously raised and litigated the claimed violation of his due process rights due to improper identification procedures on direct

appeal, he cannot now attack them collaterally before the habeas court. *Robinson*, supra, 129 Conn. App. 707.

Count Seven – Newly Discovered Evidence

The petitioner's claim in count seven is titled "newly discovered evidence." While there is no recognized habeas claim this court is aware by such a name, in reading the complaint in the light most favorable to the petitioner; *Lawrence Brunoli, Inc. v. Town of Branford*, supra, 247 Conn. 410-411; this could best be characterized as a claim of actual innocence. See, *Lewis v. Commissioner of Correction*, 116 Conn. App. 400, 409 n.6, 975 A.2d 740, 747, *cert. denied*, 294 Conn. 908, 982 A.2d 1082 (2009). Specifically, the petitioner asserts that there have been significant advancements in the science of mistaken eyewitness identification since the time of the petitioner's trial which, if presented to jurors, would have resulted in a different outcome. In other words, even giving the petitioner the benefit of the doubt the law requires, he is not actually claiming that there is "new" evidence, as in a previously undiscovered witness, an unknown video of the incident, or bodily fluids not previously subject to DNA testing. What the claim really amounts to is that subsequent developments in the science of eyewitness identification have changed the information and instructions a jury can be given in a criminal trial and, if the jurors in the petitioner's trial were allowed to apply the "new" science and instructions to the same "old" evidence presented at the petitioner's trial, they may have viewed the testimony of the eyewitnesses who identified the petitioner differently and come to a different conclusion. Alternatively, there is also a claim that some or all of the in-court

identifications of the petitioner would have prohibited under this "new" law. The court agrees with the respondent that this claim should be dismissed.

First, as was discussed earlier in this decision, the Appellate Court has already heard and decided that, "the trail court properly admitted Lombardo's identification of the [petitioner] at trial since Lombardo's previous identification of him at the probable cause hearing *was not the result of an unnecessarily suggestive procedure*." (Emphasis added.) *State v. Tatum*, supra, 219 Conn. 732. Therefore, any claim that Lombardo's in-court identifications should have been prohibited on the grounds that it was the result of an "unnecessarily suggestive" procedure is barred by *res judicata*. *Robinson v. Commissioner of Correction*, supra, 129 Conn. App. at 707. The doctrine of *res judicata* would also prohibit the petitioner from being able to relitigate this issue by changing the facts to focus on the identification procedures used in connection with witness LaVasseur, because neither the grounds nor the requested relief is any different than the issue raised on appeal. Id.

The court also agrees with the respondent that the allegations fail to state a claim upon which relief can be granted. "Actual innocence, also referred to as factual innocence . . . is different than legal innocence. Actual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt." (Citations omitted, internal quotation marks omitted.) *Gould v. Commissioner of Correction*, 301 Conn. 544, 560-561, 22 A.3d 1196 (2011). "Rather, actual innocence is demonstrated by affirmative proof that the petitioner did not commit the crime. Id., 561. "Affirmative proof of actual innocence is that which might tend to establish that the petitioner *could not* have committed the crime even though

it is unknown who committed the crime, that a *third-party* committed the crime or that *no* crime actually occurred." (Italics in original.) Id., 563.

In the present case, as referenced above, the petitioner has not alleged a single new "fact" related to his case. There is no new witness, no new affirmative test result on a piece of evidence, no recantation of a statement, and no allegation of a previously unknown piece of evidence. Instead, taken in their best light, the allegations assert that if the jurors in the petitioner's case had been allowed to consider additional information in the way of expert testimony, studies, and broader instructions on the fallibility of eyewitness identification, and if certain in-court identification procedures had been put into place, all based on holdings which Connecticut courts did not adopt until some twenty-two and twenty-six years, respectively, after the petitioner's conviction[2], the identifications by Lombardo and LaVasseuer's would not have

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[2] The petitioner relies on the decisions in *State v. Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012):

> *We depart from [our prior decisions] mindful of recent studies confirming what courts have long suspected, namely, that mistaken eyewitness identification testimony is by far the leading cause of wrongful convictions. A highly effective safeguard against this serious and well documented risk is the admission of expert testimony on the reliability of eyewitness identification. . . .*
>
> *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. Many of the factors affecting the reliability of eyewitness identifications are either unknown to the average juror or contrary to common assumptions, and expert testimony is an effective way to educate jurors about the risks of misidentification. To the extent that [our prior decisions] held to the contrary, they are hereby overruled.*

Guilbert, supra, 306 Conn. at 248–253, and *State v. Dickson,* 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017):

> *In the absence of unduly suggestive procedures conducted by state actors, the potential unreliability of eyewitness identification testimony ordinarily goes to the weight of the evidence, not its admissibility, and is a question for the jury. . . . Principles of due process require exclusion of unreliable identification evidence that is not the result of an unnecessarily suggestive procedure '[o]nly when [the] evidence is so extremely unfair that its admission violates fundamental conceptions of justice. . . .' To assist the jury in determining what weight to give to an eyewitness identification that is not tainted by an unduly suggestive identification procedure, the defendant is entitled as a matter of state evidentiary law*

been admitted into evidence and, even if they were admitted, the jury would likely have come back with a different result and.

The court finds, as a matter of law, that new case decisions changing the way in which evidence may be presented to a jury does not constitute "newly discovered" evidence in the sense intended under our case law. See, *Gould v. Commissioner of Correction*, supra, 301 Conn. 560-561 ("Rather, actual innocence is demonstrated by affirmative proof that the petitioner did not commit the crime."). There is nothing within the *Guilbert* or *Dickinson* decisions that could reasonably indicate either was to be retroactive application or was intended to provide an avenue for collateral relief for those cases which had already gone to verdict; compare, *State v. Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008)[3]; not has the petitioner presented any such legal authority.

---

to present expert testimony regarding a variety of factors that can affect the reliability of such testimony. State v. Guilbert, 306 Conn. 218, 248, 49 A.3d 705 (2012) ('[an] expert should be permitted to testify ... about factors that generally have an adverse effect on the reliability of eyewitness identifications and are relevant to the specific eyewitness identification at issue').

A different standard applies when the defendant contends that an in-court identification followed an unduly suggestive pretrial identification procedure that was conducted by a state actor. In such cases, both the initial identification and the in-court identification may be excluded if the improper procedure created a substantial likelihood of misidentification. . . . 'A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, show-ups, and photo arrays in the first place.'

In determining whether identification procedures violate a defendant's due process rights, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances." (Citations omitted; internal quotation marks omitted.)

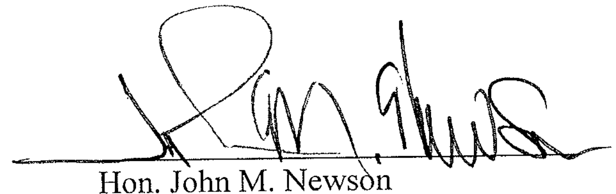
State v. Dickson, supra, 322 Conn. 419–421.

[3] *State v. Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), which held that in order for a defendant to be convicted of a kidnapping in conjunction with another crime, the jury must be instructed that, "to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." Id., 542. The *Salamon* decision modified the long-standing interpretation of the kidnapping statute, so those who were convicted prior to the *Salamon* decision are entitled retroactively to the benefit of the new interpretation to collaterally challenge their

Based on the foregoing, count seven is also dismissed for failing to state a claim upon which relief can be granted.

III. Conclusion

Based on the foregoing, the respondent's motion to dismiss is GRANTED as to counts one, two, three, six, and seven of the Fourth Amended Petition dated June 26, 2018. The motion is DENIED as to counts four and five.



Hon. John M. Newson

Copies mailed to:
Atty Katherine Essington
Atty Eva Lenczewski
Edgar Tatum
Reporter of Judicial Decisions
PETCERT/APPECO mailed to Petitioner & both counsel
by: Kathryn Stackpole, Asst. Clerk
9/13/2018

convictions as a matter of State common law. *Luurstema v. Commissioner of Correction*, 299 Conn. 740, 751, 12 A.3d 817 (2011).

STATE OF CONNECTICUT

GEOGRAPHICAL AREA NO. 19 AT ROCKVILLE

TSR-CV-16-4007857-S

EDGAR TATUM

V.

COMMISSIONER OF CORRECTION DECEMBER 18, 2018

MOTION FOR LEAVE TO FILE A FIFTH AMENDED PETITION FOR A WRIT OF HABEAS CORPUS, AN AMENDED EXPERT DISCLOSURE, AND AN AMENDED WITNESS LIST

Pursuant to Practice Book §§ 23-32, 23-35, and 23-38, the Petitioner respectfully requests leave to file a Fifth Amended Petition for a Writ of Habeas Corpus, as well as an Amended Expert Disclosure Of Legal Expert Concerning Habeas Counsel's Performance, naming Attorney Temmy Miller-Pieszak in place of Attorney Sebastian DeSantis, who is now co-counsel, as well as an Amended Witness List. More precisely, the Petitioner requests permission to amend the petition to add one additional claim, arguing for retroactive application of *State v. Harris*, 330 Conn. 91 (2018), a recent Connecticut Supreme Court case, and to add additional language to paragraphs 75a and 81a of Counts Four and Five (the only remaining counts) regarding trial counsel's failure" to adequately investigate the circumstances surrounding the eye witness identifications present evidence that disputed the witnesses' claims of familiarity with the Petitioner," and "to adequately investigate and present certain third party culpability evidence with respect to Jay Frazier, and to object to the judge's failure to give a third party culpability instruction." A proposed Fifth Amended Petition, Amended Expert Disclosure, and an Amended Witness list are being filed simultaneously herewith.

STATE OF CONNECTICUT
SUPERIOR COURT
G.A. 19
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Undersigned contacted counsel for the Respondent, who indicated that she objects to these amendments.

There is good cause to grant this motion because *Harris*, *supra*, was decided after the pleadings were closed in this case. In addition, third party culpability evidence regarding Jay Frazier was set forth in the factual allegations of the prior petitions as were claims regarding counsel's failure to sufficiently investigate and attack the eyewitness identification testimony and the witness's claimed familiarity with the Petitioner. As a result, the Respondent should not be prejudiced because of the amendments to the Petition. To the extent that Respondent needs more time to prepare for trial as a result of any of the proposed amendments, the Petitioner does not object to a continuance of the trial.

In the amended petitions previously filed with the Court in the present matter, the Petitioner presented various allegations of ineffective counsel, due process violations, and newly discovered evidence related to the eyewitness identifications in this case. Specifically, counsel alleged in the Pertinent Facts that the identifications were unreliable for a number of reasons, including that the only eye witnesses who identified the Petitioner at trial had previously identified another individual, Jay Frazier, as the shooter. The Petitioner should not be barred from presenting claims related to trial counsel's failure to investigate and present evidence of third party culpability because these claims are closely related to the eyewitness identification issue previously raised in the prior petitions. Moreover, the retroactivity claim with respect to *Harris*, *supra*, was not available at the time counsel filed the prior petition.

In addition to amending the petition to include the specified claims, the Petitioner also requests permission to file amended expert disclosure for a Legal Expert to Testify Concerning Habeas Counsel's Performance. Undersigned counsel had previously enlisted Attorney DeSantis as the habeas legal expert. Due to commitments to other cases by undersigned counsel as well as the increasing complexity of this matter based on factors such as the age of the underlying murder, the volume of information and number of previous lawyers, and the increasing number of potential witnesses in at least four different states, Attorney DeSantis graciously offered to assist as co-counsel. As a result, the Petitioner was left without a habeas legal expert. The Petitioner should not be prejudiced by undersigned counsel's recognition that she needed help in the case.

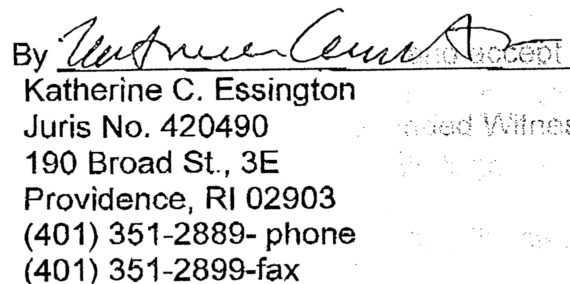
Finally, counsel seeks permission to amend the Petitioner's Witness List in light of the Court's ruling on the State's Motion to Dismiss, leaving only counts of ineffective assistance of counsel against DeMarco and Kraus remaining, and in light of additional investigation that has only recently been completed. The Petitioner notes that many of the witnesses added to his Amended Witness List, including Attorneys McDonough, Demarco, and Kraus were listed on the State's Witness List. One of the others, Tracy LaVasseur, was referenced many times in the Petitioner's prior petitions and was only recently located by Petitioner's investigator in another state. As a result, the Petitioner's listing of the additional witnesses should require very little, if any, additional preparation by the Respondent.

C. Conclusion

The Petitioner respectfully requests that the Court grant this motion and accept the Fifth Amended Petition, Amended Expert Witness Disclosure and Amended Witness List which the Petitioner has filed separately on this date.

Respectfully submitted,
EDGAR TATUM

The Petitioner



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HIS ATTORNEYS

ORDER 431663

DOCKET NO: TSRCV164007857S

SUPERIOR COURT

TATUM, EDGAR #177213
V.
COMMISSIONER OF CORRECTION

JUDICIAL DISTRICT OF TOLLAND
AT SOMERS

1/3/2019

ORDER

ORDER REGARDING:
12/18/2018 148.00 MOTION FOR PERMISSION TO AMEND MOTION OR PLEADING

The foregoing, having been considered by the Court, is hereby:

ORDER:

1. The petitioner's request to be allowed to amend their witness list is GRANTED;

2. The petitioner's request to file a late amended legal expert disclosure is GRANTED;

3. The petitioner's request for leave to amend the petition for purposes of adding claims of relating to the retroactive application of State v. Harris, 330 Conn. 91 (2018) is DENIED. Given the reference to Harris, supra, this appears to be the petitioner, again, attempting to proffer claims based on case law or legal theories that did not exist at the time of the petitioner's criminal trial. First, this court has previously issues a ruling in this case dismissing similar claims brought by the petitioner attempting to seek the retroactive application of cases addressing the issue of eyewitness identification. Secondly, similar to the cases cited in that prior decision, there is nothing within Harris, supra, that could reasonably be interpreted as an indication that its holding(s) was intended to be applied retroactively.

4. The petitioner's request to amend paragraphs 75a and 81a of Counts Four and Five to add additional factual allegations of ineffectiveness, with the exception of issues related to the retroactive application of eyewitness identification caselaw addressed above, is GRANTED.

The petitioner shall IMMEDIATELY file an amended petition complying with the orders herein, as well as any outstanding witness lists and expert disclosures.

Judicial Notice (JDNO) was sent regarding this order.

431663

Judge: JOHN M NEWSON

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STATE OF CONNECTICUT
SUPERIOR COURT
G.A. 19
2019 JAN -7 A 9: 13

DOCKET NO. TSR-CV-16-4007857-S SUPERIOR COURT

EDGAR TATUM JUDICIAL DISTRICT OF TOLLAND

V. AT ROCKVILLE

WARDEN JANAURY 7, 2019

FIFTH AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

The Petitioner, Edgar Tatum, through counsel, hereby amends his Petition for a Writ of Habeas Corpus previously filed as follows:

NATURE OF THE PROCEEDINGS

1. The Petitioner was the defendant in State v. Tatum, CR4-161659, Judicial District of Waterbury.
2. The Respondent is the Warden/ Commissioner Of Correction for the State of Connecticut.
3. The Petitioner is being illegally held and deprived of his liberty in the custody of the Respondent.
4. This is a habeas corpus proceeding.
5. The Petitioner is collaterally attacking the judgment in State v. Tatum, CR4-161659.

JURISDICTION AND SCOPE OF REVIEW

6. This Court has jurisdiction based on Conn. Gen. Stat. sec. 52-466(b).
7. The Petitioner has the right, pursuant to Conn. Gen Stat. sec. 52-470 (a) to a summary proceeding, and to have this Court hear testimony and argument.
8. The Petitioner has the right, pursuant to Conn. Gen. Stat. sec. 52-470 (a) and Article First, sec. 12 to have this Court inquire fully into the cause of the Petitioner's imprisonment.

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9. The Petitioner has the right, pursuant to Conn. Gen. Stat. sec. 52-470 (a) and Article First, sec. 12 to have this Court hear the testimony and arguments related to claims raised in the petition.
10. The Petitioner has the right, pursuant to Conn. Gen. Stat. sec. 52-470 (a) and Article First, sec. 12 to have this Court determine the facts and issues related to the claims raised in this petition.
11. The Petitioner has the right, pursuant to Conn. Gen. Stat. sec. 52-470 (a) and Article First, sec. 12 to have this Court dispose of the case as law and justice require.
12. There is good cause, pursuant to Conn. Gen. Stat. sec. 52-470(b) for a trial on all claims raised in this petition.
13. This Court has authority, under Conn. Gen. Stat. Sec. 52- 493 to issue any interlocutory or final order that may appear to be an appropriate form of relief for the claims raised in this petition.

CASE HISTORY

14. The State charged the Petitioner in Case No. CR4-161659 with murder and assault in the second degree in an amended information in the Judicial District of Waterbury.
15. The charges arose from the February 25, 1988 homicide of Larry Parrett and the wounding of Anthony Lombardo at 24 Cossett Street, Waterbury.
16. The Petitioner was represented in the trial court by Attorney Thomas McDonough.
17. Following a jury trial, the Petitioner was found guilty of murder, but no verdict was reached on the assault charge. The State subsequently dismissed the assault charge.
18. The Petitioner was sentenced to sixty years incarceration.
19. The Petitioner is in the custody of the Respondent as a result of the judgment in CR4-161659.

20. The Petitioner appealed his murder conviction to the Connecticut Supreme Court which affirmed his conviction in State v. Tatum, 219 Conn. 719 (1991).
21. The Petitioner was represented in his direct appeal by Attorneys Sally King, Alicia Davenport, and Steven Barry.
22. The decision in the Petitioner's direct appeal has been overruled in both State v. Guilbert, 306 Conn. 218, 258 (2012) and State v. Dickson, 322 Conn. 410, 435-6 (2016).
23. In 1991, Mr. Tatum filed a petition for a writ of habeas corpus in Tatum v. Warden, CV-91-0001263S.
24. The Petitioner was represented by R. Bruce Lorenzen, Esq.
25. On September 24, 1998, the petition was tried to the court, Zarella, J, presiding.
26. On March 3, 1999, the court entered a judgment dismissing the petition.
27. On January 18, 2000, the Petitioner appealed the habeas court's judgment.
28. The Petitioner was represented on appeal by Felix Esposito, Esq.
29. The Appellate Court affirmed the dismissal of the petition in Tatum v. Commissioner, 66 Conn. App. 61 (2001).
30. The Petitioner's petition for certification was denied by the Supreme Court in Tatum v. Commissioner, 258 Conn. 937 (2001).
31. In 1993, the Petitioner filed a petition for a new trial in Waterbury Superior Court, case no. CV-93-0112504.
32. The court denied the Petitioner's request for appointed counsel, and the Petitioner represented himself.
33. The court, Sullivan, J, denied the petition for a new trial.

34. In 2000, the Petitioner filed a second writ for a petition of habeas corpus which was dismissed without prejudice in 2002.

35. He was represented in his second habeas petition by Attorney Chris DeMarco, Esq.

36. In 2003, the Petitioner filed a third petition for a writ of habeas corpus, CV03-0004175S.

37. He was represented by Paul Kraus, Esq.

38. Following a trial to the court in 2010, the court, Nazzaro, J, denied the petition.

39. The Petitioner appealed the habeas court's judgment. He was again represented by Paul Kraus, Esq.

40. The Appellate Court affirmed the judgment of the habeas court in Tatum v. Commissioner, 135 Conn. App. 901 (2012).

41. The Petitioner's petition for certification was denied by the Supreme Court in Tatum v. Commissioner, 305 Conn. 912 (2012).

42. In 2014, the Petitioner filed a fourth petition for a writ of habeas corpus, TSR-CV-14-4006223-S.

43. On June 11, 2014, the court, Bright, J. dismissed the petition as presenting the same ground as a prior petition and failing to state new facts or new evidence not reasonably available at the time of the prior petition.

PERTINENT FACTS

44. There is no physical evidence linking the Petitioner to the murder of Parrett and the wounding of Lombardo.

45. Parrett's girlfriend, Tracy LaVasseur, who let the shooter into the apartment, initially identified an individual named Jay Frazier as the shooter based on a photo array.

46. Separately, Lombardo also identified Frazier as the shooter from a photo array.

47. LaVasseur recanted her identification of Frazier a few months later, after a visit from Frazier's lawyer, and identified the Petitioner as the shooter from a second photo array.
48. Lombardo declined to identify anyone from the second photo array and identified the Petitioner as the shooter for the first time at the probable cause hearing after he had seen the Petitioner's photo on at least one occasion.
49. LaVassuer claimed to be acquainted with both Frazier and the Petitioner.
50. The identifications of the Petitioner were cross racial.
51. LaVassuer was using drugs on the day of the shooting.
52. Lombardo was a habitual drug user who had been arrested numerous times.
53. Lombardo was paid money to relocate by the State's Attorney's Office following Mr. Tatum's trial, a fact which was never disclosed to the defense and which was the subject of the Petitioner's second habeas trial (third petition).

COUNT ONE- INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Count Dismissed 9/13/18 Newson, J. (See #141.00)

54. Paragraphs 1-53 are incorporated by reference.
55. The Petitioner has not deliberately bypassed a direct appeal of this claim because the development of factual evidence is necessary to fully present it.
56. The Petitioner has previously brought a claim of ineffective assistance of trial counsel, but due to the ineffective assistance of habeas counsel, his claims were not fully and fairly litigated.
57. Attorney McDonough was ineffective in his representation of the Petitioner in the following areas:
    a. McDonough failed to consult with an eye-witness identification expert who would have aided in his trial preparation.

b. McDonough failed to waive the probable cause hearing and let the eye-witnesses view the Petitioner at the hearing.

c. McDonough failed to file a motion to suppress Lombardo's identification, and did not request a hearing concerning any motion to suppress filed with respect to LaVasseur's identification.

d. McDonough failed to make an adequate record of how many identification procedures Lombardo had participated in, or how many times he had been shown photographs of the Petitioner prior to the probable cause hearing.

e. McDonough failed to object to the court's eye witness identification jury instruction which varied from the one he proposed on the basis that it was too general and omitted reference to specific facts in the case that likely impacted the reliability of the identifications, including, but not limited to, drug use by both eye witnesses, the time lapse between the crime and Lombardo's identification, weapon stress, cross racial identification, the extremely suggestive circumstances of Lombardo's in court identification, and the previous identification of another individual as the perpetrator by both witnesses.

f. McDonough failed to adequately cross examine both Lombardo and LaVasseur about estimator and system variables that could have affected their ability to perceive the shooter, remember his appearance, and make an accurate identification.

g. McDonough failed to call an eye-witness Miguel Vargas at trial who saw the shooter running away and whose testimony would have called into question the identification of the Petitioner.

58. But for the deficient performance of Attorney McDonough, there is a reasonable possibility that the results of the proceeding would have been different and more favorable to the Petitioner.

59. The Petitioner's conviction is in violation of the Sixth and Fourteenth Amendments and Article First, secs. eight and nine of the Connecticut Constitution based on ineffective assistance of trial counsel.

COUNT TWO- INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Count Dismissed 9/13/18 Newson J. (See #141.00)

60. Paragraphs 1-59 are incorporated by reference.

61. The Petitioner has previously raised a claim of ineffective assistance of appellate counsel, but because of the ineffective assistance of habeas counsel, his claims were not fully and fairly litigated in his previous habeas cases.

62. The Petitioner has not deliberately bypassed a direct appeal of this claim because the development of factual evidence is necessary to fully present it.

63. The performance of Attorneys King, Davenport, and Barry was defective because, in the Petitioner's direct appeal, they failed to make the following claims:

    a. The Petitioner's due process rights were violated by Lombardo's identification of him at the probable cause hearing because it was unduly suggestive and insufficiently reliable, and Lombardo's trial identification was tainted by the probable cause identification;

    b. The Petitioner's due process rights were violated by Lavassuer's in and out of court identifications because they were unduly suggestive and insufficiently reliable.

64. But for the deficient performance of appellate counsel, there is a reasonable probability the results of the proceeding would have been different and more favorable to the Petitioner.

65. The Petitioner's conviction is in violation of the Sixth and Fourteenth Amendments and Article first, secs. eight and nine of the Connecticut Constitution based on ineffective assistance of appellate counsel.

COUNT THREE- INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL (LORENZEN)

Count Dismissed 9/13/18 Newson (See #141.00)

66. Paragraphs 1-65 are incorporated by reference.

67. The Petitioner has previously raised claims that habeas counsel Lorenzen was ineffective, however, because of the ineffective assistance of subsequent habeas counsel, DeMarco and Kraus, and the judicial dismissal of his fourth habeas petition, his claims were not fully and fairly litigated in his previous habeas cases.

68. The Petitioner has not deliberately bypassed a direct appeal of these claims because the development of factual evidence is necessary to fully present them.

69. Prior habeas counsel, Lorenzen, was ineffective in the following areas:

    a. Failure to fully investigate, raise, and adequately present claims of ineffective assistance of trial and appellate counsel including, but not limited to, trial counsel's failure to file a motion to suppress Lombardo's identification of the Petitioner, trial counsel's failure to pursue his motion to suppress LaVassuer's identification of the Petitioner, trial counsel's failure to object to the court's eye witness identification instruction, trial counsel's failure to waive the probable cause hearing or otherwise prevent the extremely suggestive setting for Lombardo's identification of the Petitioner, trial counsel's failure to make an

adequate record as to the number and nature of pretrial identification procedures used, trial counsel's failure to effectively cross examine the eye witnesses at trial, trial counsel's failure to call Miguel Vargas as a witness, appellate counsel's failure to argue that the identification of the Petitioner at the probable cause by Lombardo hearing violated his due process rights, and appellate counsel's failure to argue that LaVasseur's identification of the Petitioner violated his due process rights.

b. Abandonment of various arguments and claims concerning trial counsel's and appellate counsel's performance including, but limited to, those listed in paragraph 69(a), by failing to raise them in his final amended petition, question the witnesses at the habeas trial concerning trial counsel's deficiencies as listed in Paragraph 57, argue these matters to the court, and/or adequately brief those issues.

c. Failure to consult with and/or call an eye witness identification expert in the habeas proceedings.

d. Failure to raise a claim of newly discovered evidence based on developments in the science of eye witness identification.

e. Failure to claim that the Petitioner's conviction was in violation of his due process rights based on unduly suggestive identification procedures and unreliable identifications.

70. But for the deficient performance of counsel, there is a reasonable probability the results of the proceeding would have been different and more favorable to the Petitioner.

71. The Petitioner's conviction is in violation to his right to effective assistance of habeas counsel pursuant to Conn. Gen. Stat. sec. 51-296, the Sixth and Fourteenth Amendments and Article First, secs eight and nine of the Connecticut Constitution.

COUNT FOUR- INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL (DEMARCO)

72. Paragraphs 1-71 are incorporated by reference.

73. The Petitioner has previously raised claims that habeas counsel DeMarco was ineffective, however, because of the ineffective assistance of subsequent habeas counsel, Kraus, and the judicial dismissal of his fourth habeas petition, his claims were not fully and fairly litigated in his previous habeas cases.

74. The Petitioner has not deliberately bypassed a direct appeal of these claims because the development of factual evidence is necessary to fully present them.

75. Prior habeas counsel, DeMarco, was ineffective in the following areas:

    a. Failure to fully investigate, raise, and adequately present claims of ineffective assistance of trial and appellate counsel including, but not limited to, trial counsel's failure to adequately investigate the circumstances surrounding the eye witness identifications and present evidence that disputed the witnesses' claims of familiarity with the Petitioner; file a motion to suppress Lombardo's identification of the Petitioner, trial counsel's failure to pursue his motion to suppress LaVassuer's identification of the Petitioner, trial counsel's failure to object to the court's eye witness identification instruction, trial counsel's failure to waive the probable cause hearing or otherwise prevent the extremely suggestive setting for Lombardo's identification of the Petitioner, trial counsel's failure to make an adequate record as to the number and nature of pretrial identification

procedures used, trial counsel's failure to effectively cross examine the eye witnesses, trial counsel's failure to call Miguel Vargas as a witness, counsel's failure to adequately investigate and present evidence of third party culpability with respect to Jay Frazier and to object to the court's failure to give a third party culpability instruction, appellate counsel's failure to argue that the identification of the Petitioner at the probable cause by Lombardo hearing violated his due process rights, and appellate counsel's failure to argue that LaVasseur's identification of the Petitioner violated his due process rights.

b. Abandonment of various arguments and claims concerning trial counsel's and appellate counsel's performance including, but limited to, those listed in paragraph 75(a) by failing to file an amended petition and ask for a trial.

c. Failure to consult with and/or call an eye witness identification expert in the habeas proceedings.

d. Failure to raise a claim of newly discovered evidence based on developments in the science of eye witness identification.

e. Failure to claim that the Petitioner's conviction was in violation of his due process rights based on unduly suggestive identification procedures and unreliable identifications.

f. Failure to fully investigate, raise, and present claims of ineffective assistance of habeas counsel including, but not limited to, habeas counsel's failure to fully investigate, raise, and adequately present the claims referenced in 75(a) and/ or abandonment thereof, habeas counsel's failure to consult with or call an eye witness identification expert, and habeas counsel's failure to raise claims of

straight due process violations based on the eye witness identifications, and newly discovered evidence. (See Counts Six and Seven of this Petition).

g. Failure to consult with and/or call a legal expert on the issue of ineffective assistance of counsel.

76. But for the deficient performance of counsel, there is a reasonable probability the results of the proceeding would have been different and more favorable to the Petitioner.

77. The Petitioner's conviction is in violation to his right to effective assistance of habeas counsel pursuant to Conn. Gen. Stat. sec. 51-296, the Sixth and Fourteenth Amendments and Article First, secs eight and nine of the Connecticut Constitution.

COUNT FIVE- INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL (KRAUS)

78. Paragraphs 1-77 are incorporated by reference.

79. The Petitioner has not previously raised claims that habeas counsel Kraus was ineffective.

80. The Petitioner has not deliberately bypassed a direct appeal of these claims because the development of factual evidence is necessary to fully present them.

81. Prior habeas counsel, Kraus, was ineffective in the following areas:

a. Failure to fully investigate, raise, and adequately present claims of ineffective assistance of trial and appellate counsel including, but not limited to trial counsel's failure to adequately investigate the circumstances surrounding the eye witness identifications and present evidence that disputed the witnesses' claims of familiarity with the Petitioner, to file a motion to suppress Lombardo's identification of the Petitioner, trial counsel's failure to pursue his motion to

suppress LaVassuer's identification of the Petitioner, trial counsel's failure to object to the court's eye witness identification instruction, trial counsel's failure to waive the probable cause hearing or otherwise prevent the extremely suggestive setting for Lombardo's identification of the Petitioner, trial counsel's failure to effectively cross examine the eyewitnesses, trial counsel's failure to make an adequate record as to the number and nature of pretrial identification procedures used, trial counsel's failure to call Miguel Vargas as a witness, failure to adequately investigate and present evidence of third party culpability with respect to Jay Frazier and to object to the court's failure to give a third party culpability instruction, appellate counsel's failure to argue that the identification of the Petitioner at the probable cause by Lombardo hearing violated his due process rights, and appellate counsel's failure to argue that LaVasseur's identification of the Petitioner violated his due process rights.

b. Abandonment of various arguments and claims concerning trial counsel's and appellate counsel's performance including, but limited to, those listed in paragraph 81(a) by not raising them in his amended petition, questioning witnesses at the habeas trial about those issues, or adequately briefing them.

c. Failure to consult with and/or call an eye witness identification expert in the habeas proceedings.

d. Failure to raise a claim of newly discovered evidence based on developments in the science of eye witness identification.

e. Failure to claim that the Petitioner's conviction was in violation of his due process rights based on unduly suggestive identification procedures and unreliable identifications.

f. Failure to fully investigate, raise, and present claims of ineffective assistance of habeas counsel including, but not limited to, habeas counsel's failure to fully investigate, raise, and adequately present the claims referenced in 81(a) and/ or abandonment thereof, habeas counsel's failure to consult with or call an eye witness identification expert, and habeas counsel's failure to raise claims of straight due process violations based on the eye witness identifications, and newly discovered evidence. (See Counts Six and Seven of this Petition).

g. Failure to consult with and/or call a legal expert on the issue of ineffective assistance of counsel.

82. But for the deficient performance of counsel, there is a reasonable probability the results of the proceeding would have been different and more favorable to the Petitioner.

83. The Petitioner's conviction is in violation to his right to effective assistance of habeas counsel pursuant to Conn. Gen. Stat. sec. 51-296, the Sixth and Fourteenth Amendments and Article First, secs eight and nine of the Connecticut Constitution.

COUNT SIX- DUE PROCESS (FEDERAL AND STATE)

Count Dismissed 9/13/18 Newson, J. (See #141.00)

84. Paragraphs 1-83 are incorporated by reference.

85. The Petitioner's due process rights under the Fourteenth Amendment as well as Article First, secs. eight and nine were violated because:

a. His conviction was based solely on eye witness identification evidence that is now understood to be unduly suggestive and unreliable.

b. The jury was not adequately informed about the factors affecting the accuracy of eye witness identification evidence which were present in his case, including but not limited to; procedures used or not used in presenting photos to the eye witnesses, weapon focus, fear, lighting, length of observation, familiarity, intoxication, habitual drug use, unconscious transference, relative judgment, cross racial identification, confidence statements, unduly suggestive settings, multiple viewings, and the length of time between the event and the identification.

c. Scientific studies have shown that factors affecting the accuracy of eye witness identification are not within jurors' common knowledge.

c. Lombardo and LaVasseur's in court identifications were tainted by unduly suggestive pre trial identification procedures and should not have been admitted into evidence.

d. The court's jury instruction on eye witness identification was scientifically unsound, and did not adequately reference many of the factors that likely affected the accuracy of Lombardo and LaVasseur's identifications of the Petitioner.

86. Because there was no physical evidence connecting the Petitioner to the crimes and eye witness identification evidence is inherently unreliable when some or all of the following factors in listed in 85 (b) are present, the evidence in the Petitioner's case was insufficient to rise to the level of proof beyond a reasonable doubt.

87. The Supreme 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.

Count Dismissed 9/13/18 Newson, J. (See #141.00)

COUNT SEVEN- NEWLY DISCOVERED EVIDENCE

88. Paragraphs 1-87 are incorporated by reference.

89. The Petitioner has not raised this claim at any prior proceeding.

90. Since the time of the Petitioner's trial, appeal, and/or prior habeas trials, there have been significant advances in the science of eye witness identification, and the causes of mistaken identification are better understood. Some of those scientific advancements/ studies are referenced in State v. Henderson, 208 N.J. 208 (2011) and in the 64 page report of the special master in that case.

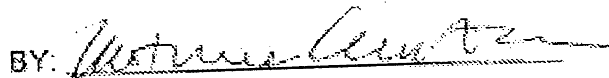
91. The scientific developments referenced in paragraph (90) constitute newly discovered evidence not reasonably available to the Petitioner at the time of the prior proceedings.

92. The evidence adduced at the Petitioner's prior proceedings and the evidence to be adduced at this habeas trial demonstrate that no reasonable fact finder would find the Petitioner guilty of murder.

WHEREFORE, the Petitioner respectfully requests that:

1. A writ of habeas corpus be issued to bring him before this Court in order that justice may be done.
2. That the conviction and sentence described herein be ordered vacated or modified and the matter returned to the trial docket for further proceedings according to law.
3. Such other relief as law and justice require.

Respectfully submitted,
The Petitioner
Edgar Tatum

BY: 

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HIS ATTORNEY

CERTIFICATION

This is to certify that a copy of the foregoing was emailed this 7th day of Janaury, 2019 to:

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And mailed, first class mail to:

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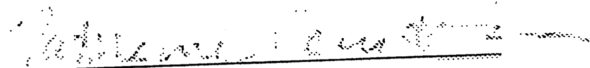

Katherine C. Essington

DOCKET NO: CV16-4007857	)	STATE OF CONNECTICUT
	)	SUPERIOR COURT
EDGAR TATUM	)	
	)	JUDICIAL DISTRICT OF
	)	TOLLAND AT ROCKVILLE
v.	)	
WARDEN	)	AUGUST 28, 2019
	)	

MEMORANDUM OF DECISION

I. Procedural History

The petitioner was the defendant in the matter of State v. Edgar Tatum, CR4-161659 in the Judicial District of Waterbury, where he was charged with Murder, in violation of General Statutes § 53a-54a, and one count of Assault Second Degree, in violation of General Statutes § 53a-60 (a) (2).[1] At all relevant times during the trial portion of the matter, he was represented by Attorney Thomas McDonough. The petitioner elected to be tried by a jury, which could have reasonably found the following facts based on the evidence:

> 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 defendant, knocking on the door of Parrett's apartment. Lombardo approached the defendant, after having recognized him as someone he had seen at the apartment on other occasions. When LeVasseur opened the door from within, the defendant forced himself and Lombardo into the living room, where LeVasseur and Parrett were smoking cocaine. LeVasseur recognized the defendant as "Ron Jackson," [a known alias of the petitioner] 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 defendant 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

[1] **General Statutes § 53a–60** provided, in pertinent part: "(a) A person is guilty of assault in the second degree when ... (2) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument...."

163.00 Memodec 164.00 7dg?d

> room to find the defendant pointing a gun at Parrett. Lombardo stepped between the two men, thinking that the defendant might be dissuaded from firing. The defendant 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 defendant. One week later, however, LeVasseur went to the Waterbury police and told them that she had identified the wrong man.[6] A nine person lineup was then conducted in which Frazer participated but the defendant 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 defendant's photograph as that of the person who had shot the victim. Lombardo was subsequently shown a photographic array that included the defendant'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 defendant as the man who had shot Lombardo and Parrett.

State v. Tatum, 219 Conn. 721, 723–25, 595 A.2d 322, 324–25 (1991). The jury found the petitioner guilty of murder, but failed to reach a verdict on the assault charge.[2] On April 6, 1990, the trial court imposed a sentence of sixty years. The petitioner appealed his conviction, which was affirmed. Id. He has also filed several petitions for habeas corpus prior to the present matter, the substance of which will be discussed only to the extent they are relevant to the present decision.

The petitioner commenced the present action on February 11, 2016. The Fifth Amended Petition, filed on January 7, 2019,[3] originally set forth seven separate counts asserting challenges to the petitioner's conviction, however, all but Count Four, ineffective assistance against Attorney Chris DeMarco, counsel for the petitioner's second habeas, and Count Five, ineffective assistance against Attorney Paul Kraus, who represented the petitioner in his third habeas petition, were

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[2] The State nolled the assault charge after a mistrial was declared.

[3] Although the Fifth Amended Petition (#151.00) was filed subsequent to the dates of the active Return (#128.00, July 16, 2018) and Reply (#129.00, July 19, 2018), the amendments were only to correct scrivener's errors and did not modify the substantive allegations, so the parties agreed to allow the earlier Return and Reply to stand as the active responsive pleadings.

dismissed prior to trial.[4] The respondent filed a Return (see footnote 3), generally denying the allegations in the petition and raising several affirmative and special defenses, to which the petitioner filed a timely Reply. The matter was tried before the Court on various dates between January 17 and April 11, 2019, after which the parties were given the opportunity to file post-trial briefs.[5]

II. Law and Discussion

"As enunciated in *Strickland v. Washington,* [466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] . . . [a] claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong ... the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law.... To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.... A court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong. . . .

With respect to the performance prong of *Strickland,* we are mindful that '[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for

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[4] See, #141.00-Memorandum of Decision: Respondent's Motion to Dismiss (#134.00) (*Newson, J.*, Sept. 13, 2018)

[5] The respondent declined the opportunity to file a post-trial brief, electing to rely on the evidence presented at trial (#161.00).

a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a *strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'

Similarly, the United States Supreme Court has emphasized that a reviewing court is 'required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did. . . .' '[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" (Internal citations omitted; internal quotation marks omitted.) *Michael T. v. Commissioner of Correction*, 319 Conn. 623, 631–33, 126 A.3d 558 (2015). "In its analysis, a reviewing court may look to the performance [1st] prong or to the prejudice [2nd] prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Internal quotation marks

omitted.) *Hall v. Commissioner of Correction*, 124 Conn. App. 778, 783, 6 A.3d 827 (2010), cert. denied, 299 Conn. 928, 12 A.3d 571 (2011).

Count Four – Ineffective Assistance of Attorney Christopher DeMarco – Second Habeas Counsel

Attorney Chris DeMarco represented the petitioner in a habeas filed in the Judicial District of New Haven, which was given Docket No. CV00-0440732. The petitioner makes numerous allegations of ineffectiveness against him, including failure to investigate, failure to call certain witnesses, and for allegedly abandoning certain claims and arguments concerning claims of ineffectiveness against trial and appellate counsel. This particular petition never proceeded to trial, however, because the Respondent filed a Motion to Dismiss. The motion attacked the self-represented petition dated June 21, 2000[6], filed by the petitioner, and was heard on September 3, 2002. At the hearing, Attorney DeMarco indicated that he had discussed the matter with his client[7] and that they would not be offering any objection to the State's motion. The Court, *Fracasse, J.*, then dismissed both counts, specifically indicating that count two, a claim of prosecutorial misconduct, was dismissed "without prejudice"[8] in order to allow for further investigation.

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[6] There is no date stamp or other marking on the petition to indicate when it was received by the clerk. (Exhibit F.)

[7] For reasons that are not made clear from the record, the petitioner was not transported to court for this hearing, but Attorney DeMarco represented that he had discussed the matter with the petitioner and obtained his permission to proceed in his absence. See Practice Book (Rev. 1998) § 23-40 (a) (petitioner's right to be present at hearing on question of law, unless the right to be present is waived)

[8] Although not necessary to discuss in detail here, it is likely that the "without prejudice" statement was a distinction without a difference with respect to the petitioner's future habeas rights, since a dismissal is not considered a judgment on the merits of an action. E.g., *Cayer Enterprises, Inc. v. DiMasi*, 84 Conn. App. 190, 194, 852 A.2d 758, 761 (2004) ("In considering a defense of res judicata, our Supreme Court has stated that '[t]he appropriate inquiry ... is whether the party had an *adequate opportunity to litigate the matter in the earlier proceeding*. . . . If not, res judicata is inappropriate. . . . [A] pretrial dismissal . . . is not the logical or practical equivalent of a full and fair opportunity to litigate." (Citations omitted; emphasis in original.' ")

To put this claim in perspective, the petitioner is asserting that he received ineffective representation in a matter where the underlying merits of the claims involved were never determined. Because there was never a determination of the merits of the petitioner's claims, he suffered no real harm, other than time. "A dismissal without prejudice terminates litigation and the court's responsibilities, while leaving the door open for some new, future litigation. . . . It is well established that a dismissal without prejudice has no res judicata effect on a subsequent claim. . . . The petitioner has suffered no harm due to the dismissal of the allegation . . . . He, therefore, is not aggrieved by the judgment of the habeas court, and we lack subject matter jurisdiction to consider his claim with respect to the [dismissed] allegation . . . ." (Citation omitted; internal quotation marks omitted.) *Tyson v. Commissioner of Correction*, 155 Conn. App. 96, 105, 109 A.3d 510, 515 (2015). Since there has never been an adverse factual finding on the merits of the claims in CV00-0440732, there is no true controversy for this court to resolve regarding Attorney DeMarco's representation. "A case becomes moot when due to intervening circumstances a controversy between the parties no longer exists." (Citation omitted.) *Paulino v. Commissioner of Correction*, 155 Conn. App. 154, 160, 109 A.3d 516, 521 (2015). As such, the claim against Attorney DeMarco must be dismissed. Id.

Count Five – Ineffective Assistance against Attorney Paul Kraus – Third Habeas Counsel

The final remaining claim is the petitioner's claim of ineffective assistance against Attorney Paul Kraus, who represented him in his last habeas (CV03-4004175), which was denied following a trial on the merits. *Tatum v. Warden,* Superior Court judicial district of Tolland, Docket No. CV03-4004175 (*Nazzaro, J.*, June 8, 2010), appeal dismissed per curium, 135 Conn.

App. 901, 40 A.3d 824, cert. denied, 305 Conn. 912, 45 A.3d 98 (2012). In all, the petitioner makes some twenty (20) separate factual claims of ineffective assistance against Attorney Kraus, however, a number of these have been indirectly disposed of by this Court's prior ruling on the motion to dismiss or by Appellate Court rulings in the direct appeal.

Many of the claims made by the petitioner against Attorney Kraus are an attempt to relitigate the issue of the appropriateness of the admission of Anthony Lombardo's admission of the petitioner at the criminal trial, which was specifically addressed in the direct appeal. *State v. Tatum*, supra, 219 Conn. at 725-732. The current petition alleges that Attorney Kraus failed to allege and prove a claim for trial counsel's failure to file a motion to suppress Lombardo's identification of the petitioner; failed to allege trial counsel's failure to object to the trial court's eyewitness identification instruction; failed to allege trial counsel's failure to waive the probable cause hearing or otherwise to prevent the extremely suggestive setting for Lombardo's identification of the petitioner; and failing to allege a claim against appellate counsel for not arguing that the identification of the petitioner by Lombardo at the probable cause hearing violated his due process rights. As discussed in the memorandum of decision on Motion to Dismiss (#134.00)[9], however, the Appellate Court specifically considered a claim asserting the unduly suggestive nature of Lombardo's identification and found that the identification was properly admitted into evidence, which bars the petitioner from relitigating those claims here. See, *Henderson v. Commissioner of Correction*, 129 Conn. App. 188, 199–203, 19 A.3d 705, 712–14

[9] *Tatum v. Warden*, supra, Docket No. CV16-4007857, Memorandum of Decision on Motion to Dismiss (*Newson, J.*, Sept. 13, 2018)

(2011), cert. denied, 303 Conn. 901, 31 A.3d 1177 (2011) (claims raised on direct appeal may not be relitigated in habeas proceeding).

The petitioner also claims that Attorney Kraus failed to pursue an allegation about trial counsel's failure to object to the eyewitness identification instruction given to the jury, however, the correctness of the eyewitness identification instructions given by the trial court was also previously challenged by the petitioner in his direct appeal. *State v. Tatum*, supra, 219 Conn. at 732.[10] The Appellate Court's finding that the eyewitness jury instruction was correct *collaterally estops* the petitioner from asking this court to determine that his criminal trial counsel was deficient, or that the petitioner was prejudiced, by trial counsel's failure to object. See, *Henderson v. Commissioner of Correction*, 129 Conn. App. 188, 199–203, 19 A.3d 705, 712–14 (2011), cert. denied, 303 Conn. 901, 31 A.3d 1177 (2011) (claims raised on direct appeal may not be relitigated in habeas proceeding).

Another allegation is that Attorney Kraus failed to raise a claim of newly discovered evidence based on advancements in the science of eyewitness identification. In dismissing Count Seven, however, which is a free-standing claim of "newly discovered" evidence[11] based on the same alleged advancements in science, this Court has already determined that these allegations are not based on previously undiscovered nuggets of information that existed and could have been discovered by "due diligence" at the time of the petitioner's trial, but actual changes or

[10] "First, he argues that the charge given on the dangers of eyewitness misidentification was inadequate, because it omitted two specific points contained in the request to charge. . . ."

[11] As in the Motion to Dismiss, the Court considers the claim of "newly discovered" evidence as a claim of Actual Innocence.

advancements in science and case decisions on eyewitness identification, some of which did not occur until more than twenty years after the petitioner's trial. See, *State v. Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012).[12] This claim fails, as a matter of law. "[N]umerous state and federal courts have concluded that counsel's failure to advance novel legal theories or arguments does not constitute ineffective performance. . . . Nor is counsel required to change then-existing law to provide effective representation. . . . Counsel instead performs effectively when he elects to maneuver within the existing law, declining to present untested . . . legal theories." *Gray v. Commissioner of Correction*, 138 Conn. App. 171, 180, 50 A.3d 406 (2012). Therefore, this claim fails. Id.

The petitioner also claims that Attorney Kraus failed to call or consult with an expert in eyewitness identification at the habeas trial. This is a slightly different claim from above, because it can be viewed as an assertion regarding Attorney Kraus' obligation to conduct an investigation and educate himself on the issues present in a case, and to present evidence on information that prior counsel before him could have learned if they had educated themselves. However, Attorney Kraus testified that he was very familiar with issues surrounding eyewitness identification, that he had educated himself on the matters and read literature. More importantly, he also testified that

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[12] For instance, one of the cases oft cited and argued by the petitioner throughout these proceedings has been *State v. Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), which held that defendants should be allowed to present experts on eyewitness identification before the jury. The *Guilbert* decision overruled twenty six (26) years of precedent holding that expert testimony was not allowed on the subject of eyewitness identification, because such matters were believed to be within the common knowledge of the average juror. See, *State v. Kemp,* 199 Conn. 473, 477, 507 A.2d 1387 (1986).

the focus of his investigation into the petitioner's case was not so much that Lombardo and LaVasseur had mistakenly identified the petitioner, but on whether their identifications had been influenced by monetary payments or other forms of *quid pro quo* compensation from the Office of the State's Attorney.[13] As to this claim, the petitioner has failed to establish that Attorney Kraus was deficient in his performance.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . [A] decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "[A]lthough it is incumbent upon a trial counsel to conduct a prompt investigation of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction . . . counsel need not track down each and every lead or personally investigate every evidentiary possibility . . . . In a habeas corpus proceeding, the petitioner's burden of proving that a fundamental unfairness had been done [by counsel's failure to investigate] is not met by speculation . . . but by demonstrable realities . . . . One cannot successfully attack, with the advantage of hindsight, a trial counsel's trial choices and strategies that otherwise constitutionally comport with the standards of competence." Johnson v. Commissioner of Correction, 285 Conn. 556, 583-84, 941 A.2d 248 (2008).

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[13] Although nobody has been able to present any credible evidence that this Court can determine, Attorney Kraus was following down what had long been a claim that Lombardo was "paid off" for his identification of the petitioner by the State through funneling money to him through Crime Stoppers under the auspices of an award for having provided information helpful to solving this crime.

In the present case, Attorney Kraus reasonably followed a lead based on investigative facts that he turned up. While his deposition of Mr. Lombardo did not reveal the "smoking gun" Attorney Kraus was looking for[14], the failure of the investigation does not defeat the fact that he followed up reasonably on a claim that he decided was more fruitful than a claim of mistaken identification. Therefore, the petitioner's claim fails, because he has failed to rebut the presumption that Attorney Kraus' strategic decision of which issue to pursue was generally reasonable. Id. Attorney Kraus reasonably followed the leads he had at the time, which is all counsel can be asked to do. Id.

This particular claim also fails, because the petitioner ties his claim of Attorney Kraus' ineffectiveness to the fact that "[b]y the time of Kraus' representation" there was a growing body of cases where people wrongfully identified had been exonerated by DNA evidence, and that there was a "growing body of research." This argument is misplaced, because the barometer for ineffectiveness that Attorney Kraus was bound to present during his trial was not what the state of the law or science on eyewitness identification was *at the time* of 2003-2008 during his representation, but what Attorney McDonough could have or should have known, what information or expertise was available to him, and what evidence he could have presented at trial in 1990. "A habeas court 'may not indulge in hindsight to reconstruct the circumstances surrounding the challenged conduct, but must evaluate the acts or omissions from trial counsel's perspective at the time of the trial.' " *Thompson v. Commissioner of Correction*, 172 Conn. App.

[14] Lombardo did actually testify that there were discussions regarding possible relocation payments, but that those had all been arranged by his girlfriend at the time, and that no such discussion took place until after he testified in the petitioner's case. (See Exhibit 2 – Transcript of Anthony Lombardo Deposition).

139, 150, 158 A.3d 814, 820, cert. denied, 325 Conn. 927, 169 A.3d 232 (2017). The petitioner's consistent attempt during this case to insert developments in the law and science studies occurring subsequent to the petitioner's criminal trial as a basis for determining Attorney McDonough's alleged ineffectiveness in 1990 (see footnote 11), cannot not support a claim of ineffectiveness, as a matter of law. Id.

The petitioner also asserts that Attorney Kraus failed to allege and adequately prove that trial counsel failed to challenge Lombardo and LaVasseur's claims of familiarity with the petitioner, however, he presented no evidence in support of this allegation. Lombardo is reportedly deceased, LaVasseur was not called to testify, and no other evidence that could reasonably be said undermine their claimed familiarity with the petitioner was presented. Neither the defendant's self-serving claim that he had never been to the Cossett Street apartment before, nor the tangential testimony of Mr. Larry Foote[15] that he had "never seen him there" are sufficient, at least not without some additional examination of Lombardo and LaVasseur undermining their prior trial testimony. E.g., *Nieves v. Commissioner of Correction,* 51 Conn. App. 615, 623, 724 A.2d 508, cert. denied, 248 Conn. 905, 731 A.2d 309 (1999) (failure to present a witness before habeas court to elicit testimony petitioner claims trial counsel should have elicited is fatal to claim). Anthony Lombardo's previous deposition was admitted as a full exhibit, however, no substantive questions were put to him during that testimony about how he was familiar with the petitioner or the

[15] Additionally, from Mr. Foote's own admission, he became incarcerated on his own drug charges some time before this incident occurred. From his testimony, he was locked up for a short as a week, to as long as a month before this shooting incident occurred, which would obviously allow time for the petitioner to have been in and around the apartment.

frequency with which the petitioner supposedly hung out around the Cossett Street apartment in the time leading up to the shooting.[16] In the end, this claim fails because the petitioner has not presented either Lombardo or LaVasseur as witnesses for the Court to have the opportunity to hear the supposed helpful information that counsel could have, or should have, elicited through proper questioning. Id.

The petitioner also alleges that Attorney Kraus was ineffective for failing to allege and prove that trial counsel was ineffective for not calling Miguel Vargas as a witness. Miguel Vargas did testify before this Court, however, his testimony was not particularly credible, or helpful. His present testimony was that he remembered nothing of significance from February 25, 1988, that he did not know anyone from that area, and that could not have seen anything significant, because he was only focused on shielding his children behind nearby cars once he heard the shooting begin down the street. He denied any present memory of actually speaking with police that evening, of giving a statement to them that indicated he saw someone "about 5' 8" tall running" from a house after he heard shooting, or that the signature on the purported statement (See Exhibit 10) was his. He denied seeing anyone he could he could describe with any particularity running *away* from the area of the shooting, but what his statement to police, if he gave one, most likely meant that he saw people running *towards* the area of the shooting afterwards to see what happened. Overall,

[16] The prior testimony of Mr. Lombardo, who is now deceased, was presented at the petitioner's 2009 habeas (CV03-0004175) via deposition and was admitted as a full exhibit by agreement in this trial. (See Exhibit 2 – the transcript is inserted in this exhibit immediately following the transcript of June 24, 2009.) The questioning focused on allegations of an alleged *quid-pro-quo* of either monetary payment or payment of relocation fees in exchange for Lombardo identifying the petitioner, all of which Lombardo denied. Other than the insinuation borne by the questions, the deposition questioning failed to elicit any credible evidence that Lombardo's identification of the petitioner was brought about in any way by inappropriate or unlawful State conduct.

the testimony provided by Mr. Vargas was not credible enough or substantive enough to support a finding there is any probability that its inclusion at the trial could have changed the outcome, so the petitioner has failed to establish prejudice by trial counsel not securing his presence. *Hall v. Commissioner of Correction*, supra, 124 Conn. App. at 783.

The petitioner next alleges that Attorney Kraus failed to prove and allege that trial counsel was ineffective for failing to investigate and present a defense of third-party culpability with respect to Jay Frazier. This claim also fails. "The admissibility of evidence of third party culpability is governed by the rules relating to relevancy. . . . Relevant evidence is evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Accordingly [the requirement for the admission of third party culpability evidence] is that the proffered evidence establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party. . . . [S]uch evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of third party culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt. . . . In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would only raise a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination. . . . Whether a defendant has sufficiently established a direct connection between a third party and the crime with

which the defendant has been charged is necessarily a fact intensive inquiry." (Citation omitted.) *State v. Baltas*, 311 Conn. 786, 810-811, 91 A.3d 384 (2014).

Although there is evidence from which a reasonable fact finder could find that Jay Frazier was, at some time, present at the Cossett Street apartment, there is nothing other than the admitted misidentifications by Lombardo and LaVasseur connecting him to the apartment on the date of this incident. See, Id. Donald Foote did testify at this habeas trial that he and Jay Frazier were using the apartment together as a point of operation to sell drugs from, but the two of them were arrested together and taken into custody on drug charges shortly before the shooting, where Mr. Foot remained until he ultimately finished a prison sentence several years later. Therefore, he is not in a position to testify as to the whereabouts of the petitioner or Mr. Frazier at the time of this incident. There was no evidence presented about when Jay Frazier was released from custody in his charges, or whether he actually ever went back to the Cossett Street area after being released. That all leaves only the retracted identifications by Lombardo and LaVasseur's as the only actual evidence putting Jay Frazier at the scene of the crime, which would be insufficient to support a valid third-party culpability defense.

"Although evidence of a strong physical resemblance between the defendant and a third party, whom the defendant alleges to be responsible for the crimes with which the defendant has been charged, can be highly relevant . . . a defendant proposing such third party culpability evidence must demonstrate that the evidence is corroborative rather than merely coincidental for it to be admissible. . . . Here, although the proposed evidence may have shown that [the third-party suspect] bore a physical resemblance to the defendant, there was no evidence that [the third-

party suspect was] involved in the events that took place at the [time and place of the crime in question]." (Citations omitted.) *State v. Corley*, 106 Conn. App. 682, 689–90, 943 A.2d 501 (2008); see, also *State v. Baker,* 50 Conn. App. 268, 278-79, 718 A.2d 450 ("Evidence regarding the Latin Kings gang and the red car was inadmissible because there was no evidence that directly connected a member of that gang or an occupant of that vehicle to the crime with which the defendant was charged. 'Unless that direct connection exists it is within the sound discretion of the trial court to refuse to admit such evidence [of third-party culpability] when it simply affords a possible ground of possible suspicion against another person.' "), cert. denied, 247 Conn. 937, 722 A.2d 1216 (1998). Since the petitioner has failed to present evidence establishing that a third-party culpability claim against Jay Frazier was a viable one, he has failed to prove deficient performance or prejudice, and the claim fails. *Hall v. Commissioner of Correction*, supra, 124 Conn. App. at 783.[17]

The petitioner also claims that Attorney Kraus was ineffective for failing to allege and prove that counsel who handled the petitioner's direct appeal, Attorney Felix Esposito, was ineffective for failing to argue that LaVasseur's identification of the petitioner violated his due process rights. The respondent has raised the defense of procedural default, asserting that the petitioner challenged the identification procedures with regard to Lombardo on appeal, but failed

[17] The Court's finding that third-party culpability was not a viable defense theory also necessarily resolves the petitioner's related claim that Attorney Kraus failed to allege and prove that defense counsel was ineffective for not objecting to the trial court's failure to give a third-party culpability instruction to the jury, so that claim will not be addressed directly.

to raise any claims related to the identification procedures regarding LaVasseur. The Court finds that the petitioner has procedurally defaulted on this claim.

"Generally, [t]he appropriate standard for reviewability of habeas claims that were not properly raised at trial ... or on direct appeal ... because of a procedural default is the cause and prejudice standard. Under this standard, the petitioner must demonstrate good cause for his failure to raise a claim at trial or on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition. . . . The cause and prejudice standard is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, inadvertence or ignorance. . . . [T]he existence of cause for a procedural default must ordinarily turn on whether the [petitioner] can show that some objective factor external to the defense impeded counsel's efforts to comply with the [s]tate's procedural rule. . . . [For example] a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or . . . some interference by officials . . . would constitute cause under this standard.... Cause and prejudice must be established conjunctively. . . . If the petitioner fails to demonstrate either one, a trial court will not review the merits of his habeas claim." (Citations omitted; internal quotation marks omitted.) *Mish v. Commissioner of Correction*, 133 Conn. App. 845, 849–50, 37 A.3d 179 (2012).

If the petitioner desired, all of the information necessary to challenge LaVasseur's identification on appeal was available at the time the petitioner raised similar challenges to Lombardo's identification. Appellate Counsel was not called to testify, so the reason he chose only to attack only Lombardo's identification are unknown. The petitioner also failed to present

any other substantive evidence of the alleged viability of raising claims, or the specific nature of the claims, that supposedly could have been brought to challenge LaVasseur's identification. Having failed to do so, the petitioner has failed to overcome the presumption that appellate counsel's choice of issues to raise on appeal was based on sound appellate strategy. "[A] habeas court will not, with the benefit of hind-sight, second guess the tactical decisions of appellate counsel. Legal contentions, like the currency, depreciate through over-issue. . . . [M]ultiplying assignments will dilute and weaken a good case and will not save a bad one. . . . The effect of adding weak arguments will be to dilute the force of the stronger ones." (Internal quotation marks omitted.) *Farnum* v. *Commissioner of Correction*, 118 Conn. App. 670, 679. 984 A.2d 1126 (2009), cert. denied, 295 Conn. 905, 989 A.2d 119 (2010). Based on the above, the petitioner has failed to establish "cause" or "prejudice", so this claim is procedurally defaulted. *Mish v. Commissioner of Correction*, supra, 133 Conn. App. 849–50.[18]

The petitioner also alleges that Attorney Kraus was ineffective for failing to consult with or call a legal expert to testify on the issue of ineffective assistance of counsel. "We are not persuaded that we should adopt an inflexible requirement that expert testimony must be presented in every case raising a *Strickland* inquiry. The case-by-case approach is appropriate in a situation

[18] It is also clear from reading the arguments in the petitioner's brief on this issue that, as discussed above in this decision, counsel continues to infuse and rely on arguments supported by developments in case decisions and studies occurring long-after the petitioner's case was decided. Additionally, the arguments laid out by the petitioner really attack the weight to be given LaVasseur's identification, because of her drug use, the initial misidentification, the cross-racial identification issues, the fact that the assailant was wearing a hat, and other factors, rather than the procedures used by police and the State to obtain the identification. In fact, there is no argument in the brief that the police or State actually violated any procedure accepted *at the time* for obtaining LaVasseur's initial identification. There is no dispute that it was LaVasseur who approached authorities to tell them she had misidentified Frazier immediately after seeing Larry Frazier in person for the first time after his arrest.

involving ineffective assistance of counsel." (Citations omitted; internal quotation marks omitted.) *Evans v. Warden*, 29 Conn. App. 274, 280–81, 613 A.2d 327 (1992). The Court does not find that this particular case is one which necessarily required expert testimony on the central issue[19], nor does this court find that such testimony would have changed the outcome of the petitioner's prior habeas proceedings. The central issue in this case was whether Tracy LaVasseur and Anthony Lombardo, two admitted drug users, if not hardcore addicts, who claimed to be familiar with the petitioner from buying drugs from him, or doing drugs around him, and seeing him regularly around where they did drugs, could be found credible after having misidentified Jay Frazier as the person who entered their apartment and began shooting people on February 25, 1988. The idea of attacking the credibility of witnesses who have made statements known to be inaccurate, or who have later substantively modified their statements, is a basic tenant of trial work that this Court does not find to be beyond the knowledge of a typical judicial finder of fact, so the petitioner has failed to establish the Attorney Kraus' failure to have an expert testify previously constituted deficient performance. Id. Additionally, considering the whole of the evidence in the present case, including the testimony of the legal expert presented by the petitioner here, the Court did not find any real probability that such testimony would have changed the outcome of the prior proceeding, so he has also failed to establish prejudice. *Hall v. Commissioner of Correction*, supra, 124 Conn. App. at 783.

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[19] The Court's determination is limited to issues, practices, and procedures relevant to trial counsel's performance back at the time of the petitioner's criminal trial. As discussed previously, the Court will does not address the petitioner's claim that expert testimony was needed to the extent that counsel is arguing that expert testimony was necessary to discuss developments in the law or legal practice subsequent to the petitioner's trial.

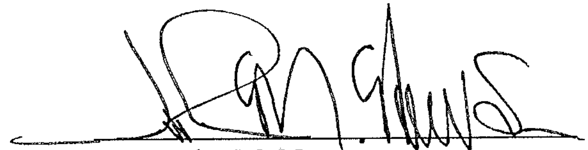
In coming to conclusion, there are a number of claims where the petitioner has failed to present any affirmative evidence. The petitioner alleges that Attorney Kraus failed to pursue a claim that trial counsel was ineffective for failing to pursue his motion to suppress LaVasseur's identification, however, there has was no evidence presented before this court as to the specific circumstances alleged to support such a suppression. Nobody involved in the identification process has testified, nor, again, has LaVasseur. Another allegation against Attorney Krause was that he failed to bring a claim against trial counsel for not making an appropriate record as to the number and nature of the pretrial identification procedures used, however, the petitioner failed to present any evidence that identification procedures outside of those disclosed in the record were used, nor did he present any witness to testify to the specifics of any of those identification procedures. The petitioner also alleges that Attorney Kraus failed to allege and prove trial counsel's failure to effectively cross examine witnesses, which was, again, focused on the identifications by Lombardo and LaVasseur, however, he failed to present either of these witnesses at the habeas trial to elicit the additional helpful information that he claims trial counsel should have elicited. The petitioner's failure to present evidence in support of these claims means they fail. E.g., *Adorno v. Commissioner of Correction*, 66 Conn. App. 179, 186, 783 A.2d 1202, 1208, cert. denied, 258 Conn. 943, 786 Conn. 428 (2001).

Finally, the petitioner also raises a number of claims against Attorney Kraus that are substantively only reworded versions of other claims, or "catchall" claims encompassing all or some of the claims addressed individually above. For instance, he alleges in paragraph 81f that Attorney Krause was ineffective for failing to allege and prove ineffectiveness against prior habeas

counsel, presumably both Attorney Lorenzen and Demarco, "for failure to investigate, raise, and present claims of ineffective assistance of habeas counsel including, but not limited to, habeas counsel's failure to investigate, raise, and adequately present the claims referenced in [paragraph] 81a . . . ." Since each of the allegations in paragraph 81a have been addressed individually as they relate to directly to Attorney Kraus, and the petitioner has failed to successfully meet his burden of as to any of those claims, it is not necessary for the Court to further address these claims directly as they relate to other prior habeas counsel. See, e.g., *Lozada v. Warden*, 223 Conn. 834, 842-44, 613 A.2d 818 (1992) (for the proposition that a petitioner litigating a claim of ineffective assistance against habeas counsel must prove ineffective assistance against each attorney going back to trial counsel in order to succeed.)

III. Conclusion

Based on the foregoing, the petition for habeas corpus is **DENIED.**



Hon. John M. Newson

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respect to the respondent's ineffective assistance of counsel claim, we conclude that this claim is not supported by the record. See *In re Peter L.*, supra, 158 Conn. App. 564 ("[m]ere allegations of ineffectiveness, unsubstantiated by the record, are inadequate to support a finding of ineffectiveness").

The judgments are affirmed.

EDGAR TATUM *v.* COMMISSIONER OF CORRECTION (AC 43581)

Alexander, Clark and Lavine, Js.

Syllabus

The petitioner, who had been convicted of murder, filed a fifth petition for a writ of habeas corpus, claiming, inter alia, that his trial counsel, appellate counsel, and his prior habeas counsel to his first, second, and third petitions had provided ineffective assistance, that his due process rights had been violated at his criminal trial, and that there had been significant developments in the science of eyewitness identification that warranted the court to vacate or modify his conviction or sentence, which the habeas court interpreted as an actual innocence claim. The habeas court rendered judgment dismissing the petitioner's claims of ineffective assistance of his trial counsel, appellate counsel, and first habeas counsel, his claim of due process violations, and his claim of actual innocence. The habeas court held a hearing on the two remaining claims and subsequently dismissed the petitioner's claim of ineffective assistance of his second habeas counsel and denied the petitioner's claim of ineffective assistance of his third habeas counsel, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly concluded that the petitioner's claims concerning ineffective assistance by his trial counsel, appellate counsel, and first habeas counsel were barred by the doctrine of res judicata; the petitioner did not allege that he was seeking different relief than the relief he sought in prior petitions alleging ineffective assistance of counsel or that there were new facts or evidence not reasonably available at the time of his original petition.
2. The habeas court properly determined that the Supreme Court's decisions in *State* v. *Guilbert* (306 Conn. 218) and *State* v. *Dickson* (322 Conn. 410) could not be applied retroactively on collateral review to the petitioner's claims concerning due process violations and actual innocence, and,

therefore, the petitioner's claims were properly dismissed on the basis of res judicata:

a. Although *Dickson* held that first-time, in-court identifications implicated due process protections and must be prescreened by the trial court, this constitutional rule did not apply retroactively on collateral review because it was neither a substantive rule nor a watershed procedural rule.

b. The petitioner could not prevail on his claim that *Guilbert*, in which a nonconstitutional state evidentiary claim involving the reliability of eyewitness identifications was at issue, applied retroactively on collateral review: because *Guilbert* did not announce a new constitutional rule or a new judicial interpretation of a criminal statute, complete retroactive application was inappropriate; moreover, the *Guilbert* framework for evaluating the reliability of an identification that was the result of an unnecessarily suggestive identification procedure did not fall within the narrow watershed exception pursuant to *Teague* v. *Lane* (489 U.S. 288) because the rule was prophylactic, a violation of the rule did not necessarily rise to the level of a due process violation, and the rule amounted to an incremental change in identification procedures.

c. Because the petitioner previously raised and litigated the claims pertaining to the admission of the in-court identification of the petitioner in his direct appeal, the habeas court's dismissal of the petitioner's claims of violations of due process and actual innocence was appropriate.

3. The habeas court's denial of the petitioner's claim alleging ineffective assistance by his third habeas counsel was affirmed on the alternative ground that it was barred by collateral estoppel: the doctrine of collateral estoppel precluded the petitioner from raising the issue of whether his third habeas counsel was ineffective for failing to argue claims against his appellate counsel based on their failure to challenge the witnesses' identifications because it previously had been determined that the admission at trial of the identifications of the petitioner was proper; moreover, the habeas court correctly determined that the petitioner's third habeas counsel did not provide ineffective assistance by failing to allege and prove a claim that trial counsel was ineffective for failing to investigate and present a third-party culpability defense, the petitioner having failed to sufficiently demonstrate that the evidence was adequate to support a viable third-party culpability defense.

Argued October 19, 2021—officially released March 8, 2022

Procedural History

Amended petition for a writ of habeas corpus brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Kara E. Moreau and *Emily C. Kaas*, for the appellant (petitioner).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Maureen T. Platt*, state's attorney, and *Eva Lenczewski*, former supervisory assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Edgar Tatum, appeals following the granting of his petition for certification to appeal from the judgment of the habeas court dismissing in part and denying in part his fifth amended petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the 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 *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, 198 L. Ed. 2d 713 (2017), 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. We disagree and, accordingly, affirm the judgment of the habeas court.

The following factual and procedural background is relevant to our resolution of the petitioner's appeal. Of necessity, it is detailed in light of the convoluted history of this case. 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.

[1] The fifth amended petition, which only corrected scrivener's errors in the fourth amended petition, was filed subsequent to the dates of the active return and reply. The habeas court indicated that the parties agreed to allow the earlier return and reply to the fourth amended petition to stand as the responsive pleadings.

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. 723–25.

Following his direct appeal, the petitioner filed numerous petitions for a writ of habeas corpus, which we will discuss, as necessary, in addressing each of the petitioner's claims on appeal. 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, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner first claims that the habeas court improperly dismissed counts one (ineffective assistance of trial counsel), two (ineffective assistance of appellate counsel), and three (ineffective assistance of first habeas counsel) of the operative petition on the basis of res judicata. We disagree.

We begin by setting forth our standard of review for a challenge to the dismissal of a petition for a writ of habeas corpus. "The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . ." (Citation omitted; internal quotation marks omitted.) *Carter* v. *Commissioner of Correction*, 133 Conn. App. 387, 392, 35 A.3d 1088, cert. denied, 307 Conn. 901, 53 A.3d 217 (2012). "[A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been

committed." (Internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 107 Conn. App. 833, 838, 947 A.2d 7, cert. denied, 288 Conn. 908, 953 A.2d 652 (2008).

With this as our backdrop, we set forth the pertinent legal principles that inform our discussion. "The doctrine of res judicata provides that a former judgment serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which were actually made or which might have been made. . . . The doctrine . . . applies to criminal as well as civil proceedings and to state habeas corpus proceedings. . . . However, [u]nique policy considerations must be taken into account in applying the doctrine of res judicata to a constitutional claim raised by a habeas petitioner. . . . Specifically, in the habeas context, in the interest of ensuring that no one is deprived of liberty in violation of his or her constitutional rights . . . the application of the doctrine of res judicata . . . [is limited] to claims that actually have been raised and litigated in an earlier proceeding." (Internal quotation marks omitted.) *Woods* v. *Commissioner of Correction*, 197 Conn. App. 597, 612–13, 232 A.3d 63 (2020), appeal dismissed, 341 Conn. 506, A.3d (2021).

"In the context of a habeas action, a court must determine whether a petitioner actually has raised a new legal ground for relief or only has alleged different factual allegations in support of a previously litigated claim." *Johnson* v. *Commissioner of Correction*, 168 Conn. App. 294, 305, 145 A.3d 416, cert. denied, 323 Conn. 937, 151 A.3d 385 (2016). "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."

(Citations omitted.) *James L.* v. *Commissioner of Correction*, 245 Conn. 132, 141, 712 A.2d 947 (1998).

"[T]he doctrine of res judicata in the habeas context must be read in conjunction with Practice Book § 23-29 (3), which narrows its application." *Kearney* v. *Commissioner of Correction*, 113 Conn. App. 223, 235, 965 A.2d 608 (2009). 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 . . . ." Thus, a subsequent petition "alleging the same ground as a previously denied petition will elude dismissal if it alleges grounds not actually litigated in the earlier petition and if it alleges new facts or proffers new evidence not reasonably available at the time of the earlier petition." *Kearney* v. *Commissioner of Correction*, supra, 235. "In this context, a ground has been defined as sufficient legal basis for granting the relief sought." (Internal quotation marks omitted.) Id. In other words, "an applicant must show that his application does, indeed, involve a different legal ground, not merely a verbal reformulation of the same ground." (Internal quotation marks omitted.) *Carter* v. *Commissioner of Correction*, supra, 133 Conn. App. 394.

On appeal, the petitioner claims that the habeas court erroneously applied the res judicata doctrine to dismiss his various ineffective assistance of counsel claims "relating to LeVasseur's identification in counts one, two, and three of the operative petition . . . ." The petitioner argues that LeVasseur's identification of the petitioner previously was never raised and litigated, and that the habeas court dismissed other claims in counts one and three on the basis of res judicata, despite

acknowledging that many of the claims brought in the operative petition were factually distinct from those previously raised. He essentially argues that because his allegation of ineffective assistance of his various counsel is premised on factual allegations different from those pleaded in his previous petitions, the claims are not improperly successive.

This court, however, flatly has rejected this argument on numerous occasions. See, e.g., *Gudino* v. *Commissioner of Correction*, 191 Conn. App. 263, 272, 214 A.3d 383, cert. denied, 333 Conn. 924, 218 A.3d 67 (2019) ("in the absence of allegations and facts not reasonably available to the petitioner at the time of the original petition or a claim for different relief, a subsequent claim of ineffective assistance directed against the same counsel is subject to dismissal as improperly successive"); *Damato* v. *Commissioner of Correction*, 156 Conn. App. 165, 174, 113 A.3d 449 ("the grounds that the petitioner asserted are identical in that each alleges ineffective assistance of counsel, and, therefore, the habeas petition was properly dismissed" (internal quotation marks omitted)), cert. denied, 317 Conn. 902, 114 A.3d 167 (2015).

For example, in *Damato* v. *Commissioner of Correction*, supra, 156 Conn. App. 174, the petitioner argued that, although his claim of ineffective assistance against trial counsel had been considered previously, the allegations in support of his new claim of ineffective assistance were different. In addressing the petitioner's argument, this court explained that, "[a]lthough we recognize that the petitioner sets forth *different allegations* in support of his claim of ineffective assistance, the claim still is one of ineffective assistance of counsel involving [trial counsel]." (Emphasis in original.) Id. This court concluded that res judicata barred the petitioner's successive petition. Id.

Here, the petitioner attempts to construe narrowly the ground for counts one, two, and three of his petition as claims "regarding LeVasseur's identification" and "factually distinct from those previously raised" but ignores the fact that these allegations are used to support claims of *ineffective assistance* of trial, appellate, and first habeas counsel, which he already has raised in his first and third habeas petitions.

To be sure, the petitioner's first habeas petition was filed on July 2, 1991, claiming that he received ineffective assistance of counsel at his criminal trial. See *Tatum* v. *Warden*, Docket No. CV-911263, 1999 WL 130324 (Conn. Super. March 3, 1999), aff'd, 66 Conn. App. 61, 783 A.2d 1151 (2001). On November 24, 1997, the petitioner filed an amended petition alleging a litany of instances of Attorney Thomas McDonough's lack of skill and diligence in representing him at trial, including, among other things, that McDonough had a wealth of available information from which to construct a case of third-party culpability or misidentification but failed to use properly this information at trial. The habeas court, *Zarella, J.*, dismissed the petition on March 3, 1999, concluding that McDonough "adequately investigated the facts surrounding the crimes committed and defended the petitioner in a manner that meets the standard of a reasonably competent criminal defense attorney." Id., *13.

The petitioner's third petition for a writ of habeas corpus was filed on August 18, 2003, and subsequently was amended on June 23, 2009. See *Tatum* v. *Warden*, Docket No. CV-03-004175-S, 2010 WL 1565487 (Conn. Super. March 23, 2010), appeal dismissed, 135 Conn. App. 901, 40 A.3d 824, cert. denied, 305 Conn. 912, 45 A.3d 98 (2012). The habeas court, *Nazzaro, J.*, explained that the petitioner's third amended petition contained numerous claims, including an assertion of various due process violations, right to counsel implications and,

as applicable here, claims regarding the "ineffective assistance by criminal trial, appellate, prior habeas corpus and habeas corpus appellate counsel." Id., *1. The petitioner argued that Attorneys Sally King, Alicia Davenport, and Steven Barry, who represented the petitioner in his direct appeal, failed to bring a claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), challenging the trial court's intent instruction as embracing both specific and general intent. *Tatum* v. *Warden*, supra, 2010 WL 1565487, *9. The habeas court disagreed, concluding that the petitioner failed to demonstrate how appellate counsel "somehow rendered ineffective assistance . . . ." Id., *11. The habeas court similarly concluded that the petitioner failed to demonstrate how Attorney R. Bruce Lorenzen, his first habeas counsel, rendered deficient performance. Id., *2, 12.

Turning our attention to count one of petitioner's operative petition, the petitioner alleges that McDonough, his criminal trial counsel, was ineffective in his representation. The petitioner's allegations largely implicate the identification of the petitioner as the shooter, including, among other things, allegations that trial counsel failed to cross-examine adequately both Lombardo and LaVasseur about variables that could have affected their ability to perceive, remember, and identify him as the shooter; failed to make an adequate record of how many identification procedures Lombardo had participated in, or how many times he had been shown photographs of the petitioner prior to the probable cause hearing; and failed to consult with an eyewitness identification expert who would have aided in his trial preparation. In count two, the petitioner alleges, inter alia, that King, Davenport, and Barry, who represented him in his direct appeal, rendered ineffective assistance by failing to claim that the petitioner's

due process rights were violated by Lombardo's identification of him at the probable cause hearing because it was unduly suggestive and insufficiently reliable, and by LeVasseur's "unduly suggestive and insufficiently reliable" "in-[court] and out-of-court identifications." Finally, in count three, the petitioner claims, inter alia, that Lorenzen, his first habeas counsel, rendered ineffective assistance of counsel by failing to challenge the effectiveness of trial and appellate counsel regarding Lombardo's and LeVasseur's identifications of him as the shooter.

Although the petitioner may have set forth some differing factual allegations in support of his claims of ineffective assistance in his present petition, he cannot gainsay the fact that they are still claims of ineffective of assistance of counsel. See *Alvarado* v. *Commissioner of Correction*, 153 Conn. App. 645, 651, 103 A.3d 169 ("[i]dentical grounds may be proven by different factual allegations, supported by different legal arguments or articulated in different language" (internal quotation marks omitted)), cert. denied, 315 Conn. 910, 105 A.3d 901 (2014). The petitioner makes no allegations in these counts that he is seeking different relief than the relief he sought in prior petitions alleging ineffective assistance of counsel or that there are newly available facts or evidence not reasonably available at the time of his original petition. Accordingly, we conclude that the court properly declined to reach the merits of counts one, two, and three of the petitioner's successive petition because the doctrine of res judicata barred their consideration.[2]

[2] We note that, in addressing count two of the petitioner's petition, it appears that the habeas court initially recognized that it was a claim of ineffective assistance but then treated it as a freestanding due process claim. The court ultimately dismissed the allegation on the basis of res judicata, concluding that our Supreme Court had previously rejected the claim in the petitioner's direct appeal. Notwithstanding this oversight, we conclude that the habeas court properly dismissed count two on the basis of res judicata, albeit for a somewhat different reason. See *Sanchez* v. *Commissioner of*

II

The petitioner next claims that the court erroneously applied the doctrine of res judicata to his due process claim in count six and his "newly discovered evidence" claim in count seven of his operative petition, arguing that the claims have never been previously raised or litigated, and that the court improperly concluded that our Supreme Court's decisions in *State* v. *Dickson*, supra, 322 Conn. 410, and *State* v. *Guilbert*, supra, 306 Conn. 218, do not apply retroactively to the petitioner's claims. The respondent disagrees, arguing that our Supreme Court explicitly held that the constitutional rule in *Dickson* did not apply retroactively on collateral review and that our jurisprudence forecloses *Guilbert*'s retroactive application. We agree with the respondent.

In count six of the operative complaint, the petitioner alleges that his due process rights under the fourteenth amendment to the United States constitution, and article first, §§ 8 and 9, of the Connecticut constitution were violated, on the basis that the identification procedures used with certain witnesses were unduly suggestive and that the jury instructions were insufficient to educate jurors on the possibility of certain factors that can adversely impact eyewitness identification. He alleges that *Guilbert* and *Dickson* "should be retroactively applied to his case, and justice requires that he receive the benefit of those decisions." The habeas court dismissed count six on the basis of res judicata, concluding that the petitioner previously had raised and litigated in his direct appeal the due process claim concerning the identification procedures used at trial.

In count seven, titled "Newly Discovered Evidence," the petitioner argues that scientific developments not

Correction, 203 Conn. App. 752, 760–61, 250 A.3d 731 ("[i]t is axiomatic that [w]e may affirm a proper result of the trial court for a different reason" (internal quotation marks omitted)), cert. denied, 336 Conn. 946, 251 A.3d 77 (2021).

reasonably available to the petitioner at the time of the prior proceedings demonstrate that no reasonable fact finder would find the petitioner guilty of murder. The petitioner requested that the court vacate or modify his conviction or sentence. The court indicated that it was unaware of a habeas claim named "newly discovered evidence" but interpreted it as a claim of actual innocence. In discussing the claim, the court explained that "even giving the petitioner the benefit of the doubt the law requires, he is not actually claiming that there is 'new' evidence, as in a previously undiscovered witness, an unknown video of the incident, or bodily fluids not previously subject to DNA testing." The court stated: "What the claim really amounts to is that subsequent developments in the science of eyewitness identification have changed the information and instructions a jury can be given in a criminal trial and, if the jurors in the petitioner's trial were allowed to apply the 'new' science and instructions to the same 'old' evidence presented at the petitioner's trial, they may have viewed the testimony of the eyewitnesses who identified the petitioner differently and come to a different conclusion." In construing count seven in conjunction with count six, the habeas court explained that the petitioner already had litigated the identification procedures in his direct appeal and that the doctrine of res judicata also prohibited the petitioner "from being able to relitigate this issue by changing the facts to focus on the identification procedures used in connection with witness LaVasseur, because neither the grounds nor the requested relief is any different than the issue raised on appeal." The court emphasized that "the petitioner has not alleged a single new 'fact' related to his case." The court then went on to find that nothing within the *Guilbert* or *Dickson* decisions indicate that they were to be retroactively applied or intended to provide an avenue for collateral relief.

As we have stated, "conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [If] 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 that appear in the record." (Internal quotation marks omitted.) *Boria* v. *Commissioner of Correction*, 186 Conn. App. 332, 338, 199 A.3d 1127 (2018), cert. granted, 335 Conn. 901, 225 A.3d 685 (2020). The issue of whether a judicial decision is retroactive is a question of law, also subject to plenary review. See, e.g., *Garcia* v. *Commissioner of Correction*, 147 Conn. App. 669, 674, 84 A.3d 1, cert. denied, 312 Conn. 905, 93 A.3d 156 (2014). "To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous." (Internal quotation marks omitted.) *Boria* v. *Commissioner of Correction*, supra, 338.

On appeal, the petitioner argues that his claims have not been litigated previously because the "rationale for the Supreme Court's decision in [the petitioner's] direct appeal has since been rejected by both *Guilbert* and *Dickson*." He argues further that "[b]ecause [he] has never before raised a claim on the basis of the retroactive application of these cases, any such claim was not previously litigated and is therefore not subject to res judicata." We disagree.

A

We first begin with a discussion of *Dickson*. In *Dickson*, our Supreme Court held that "first time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court." *State* v. *Dickson*, supra, 322 Conn. 426. In reaching this conclusion, the court

explained that it was "hard-pressed to imagine how there could be a *more* suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person whom the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime." (Emphasis in original.) Id., 423. The court explained that, "because the extreme suggestiveness and unfairness of a one-[on]-one in-court confrontation is so obvious, we find it likely that a jury would naturally assume that the prosecutor would not be allowed to ask the witness to identify the defendant for the first time in court unless the prosecutor and the trial court had good reason to believe that the witness would be able to identify the defendant in a nonsuggestive setting." Id., 425.

In arguing that first-time, in-court identifications are admissible, the state in *Dickson* raised numerous arguments in support of its claim to the contrary. Id., 431. Of relevance to the present case, the state, relying on our Supreme Court's decision in the petitioner's direct appeal; see *State* v. *Tatum*, supra, 219 Conn. 721; argued that "in-court identifications do not violate due process principles because they are necessary and, relatedly, because there is no feasible alternative to them." *State* v. *Dickson*, supra, 322 Conn. 434. Our Supreme Court concluded that "the holding in *Tatum* that it was 'necessary' for the state to present a first time in-court identification of the defendant at the probable cause hearing must be overruled. We simply can perceive no reason why the state cannot attempt to obtain an identification using a lineup or photographic array before asking an eyewitness to identify the defendant in court. Although the state is not constitutionally required to do so, it would be absurd to conclude that the state can simply decline to conduct a nonsuggestive procedure and then

claim that its own conduct rendered a first time in-court identification necessary, thereby curing it of any constitutional infirmity." (Emphasis omitted.) Id., 435–36. Having concluded that first-time, in-court identifications must be prescreened for admissibility by the trial court, the court went on to set forth the specific procedures that the parties and the trial court must follow. Id., 444–52.

In the present case, the petitioner argues that, "[a]lthough the retroactive application of the second part of the *Dickson* holding—the prophylactic rule—has arguably been addressed . . . the court has not yet determined whether this new constitutional rule should be retroactive." Without clearly identifying what other constitutional rule the petitioner is referring to, he argues that he should receive the benefit of society's and our Supreme Court's changes in acceptance and understanding of eyewitness identification, although recognizing that *Dickson*'s holding is "not necessarily a substantive 'rule' as courts tend to interpret that phrase . . . ." He argues, without case law support, that applying *Dickson* retroactively is especially appropriate here because *Dickson* explicitly overruled the holding in the petitioner's direct appeal. He goes on to argue that the "prophylactic rule announced in *Dickson*, regarding the specific procedures surrounding first time in-court identifications, should also apply retroactively, as it is a watershed rule of criminal procedure."

The respondent on the other hand argues that *Dickson* explicitly forecloses the petitioner's argument because it held that this constitutional rule did not apply retroactively on collateral review in that it was neither a substantive rule nor a watershed procedural rule. We agree with the respondent.

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. It is important to point out, however, that, in pending appeals involving this issue, the suggestive in-court identification has already occurred. Accordingly, if the reviewing court concludes that the admission of the identification was harmful, the only remedy that can be provided is a remand to the trial court for the purpose of evaluating the reliability and the admissibility of the in-court identification under the totality of the circumstances. . . . If the trial court concludes that the identification was sufficiently reliable, the trial court may reinstate the conviction, and no new trial would be required." (Citations omitted; emphasis omitted; footnotes omitted.) *State* v. *Dickson*, supra, 322 Conn. 450–52.

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* v. *Commissioner of Correction*, 317 Conn. 52, 62, 115 A.3d 1031 (2015). 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., 63. 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., 64 (this court may construe *Teague* more liberally than United States Supreme Court); id., 69 (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. 406, 419–20, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004) ('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., 419 (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. 451 n.34.

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, 193 A.3d 50 (2018). Although our Supreme Court did reject and overrule the rationale it previously employed in *State* v. *Tatum*, supra, 219 Conn. 721 (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. 451 n.34; "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).

B

We next turn to the petitioner's contention that *Guilbert* applies retroactively on collateral attack and that he should receive the benefit of this decision. In *Guilbert*, the defendant argued that the trial court improperly precluded him from presenting expert testimony on the fallibility of eyewitness identification testimony and asked our Supreme Court to overrule its decisions in *State* v. *Kemp*, 199 Conn. 473, 507 A.2d 1387 (1986), and *State* v. *McClendon*, 248 Conn. 572, 586, 730 A.2d 1107 (1999), which "concluded that the average juror knows about the factors affecting the reliability of eyewitness identification and that expert testimony on the

issue is disfavored because it invades the province of the jury to determine what weight to give the evidence." *State* v. *Guilbert*, supra, 306 Conn. 220–21. The court in *Guilbert* concluded that *Kemp* and *McClendon* were "out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror." Id., 234. The court observed that "[t]his broad based judicial recognition tracks a near perfect scientific consensus," and that "[t]he extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification." (Footnote omitted.) Id., 234–36. The court concluded 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. Many of the factors affecting the reliability of eyewitness identifications are either unknown to the average juror or contrary to common assumptions, and expert testimony is an effective way to educate jurors about the risks of misidentification."[3] (Footnote omitted.) Id., 251–52.

[3] On the basis of that comprehensive scientific research, the court listed a nonexclusive list of factors affecting the reliability of eyewitness identifications: "(1) there is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy; (2) the reliability of an identification can be diminished by a witness' focus on a weapon; (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events; (4) cross-racial identifications are considerably less accurate than identifications involving the same race; (5) memory diminishes most rapidly in the hours immediately following an event and less dramatically in the days and weeks thereafter; (6) an identification may be less reliable in the absence of a double-blind, sequential identification procedure; (7) witnesses may develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification; and (8) the accuracy of an eyewitness identification may be undermined by

The court observed that "federal and state courts around the country have recognized that the methods traditionally employed for alerting juries to the fallibility of eyewitness identifications—cross-examination, closing argument and generalized jury instructions on the subject—frequently are not adequate to inform them of the factors affecting the reliability of such identifications." Id., 243. The court reiterated 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, 283, 27 A.3d 872 (2011)]; would alone be adequate to aid the jury in evaluating the eyewitness identification at issue." *State* v. *Guilbert*, supra, 306 Conn. 257–58. The court emphasized "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," and rejected the "broad, generalized instructions on eyewitness identifications," which it previously approved in *State* v. *Tatum*, supra, 219 Conn. 734–35. *State* v. *Guilbert*, supra, 258.

On appeal, the petitioner argues that "[t]hese changes in scientific—and judicial—understanding of the flaws of eyewitness identification, and the new rules announced to reflect those changes, should apply retroactively here, and [that he] should receive the benefit of this decision." The petitioner categorizes *Guilbert* as setting forth "watershed procedural rules" and that retroactive application is appropriate here. We disagree.

unconscious transference, which occurs when a person seen in one context is confused with a person seen in another." *State* v. *Guilbert*, supra, 306 Conn. 253–54. The court concluded that these factors satisfy the test set forth in *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), for the admissibility of scientific evidence. See *State* v. *Guilbert*, supra, 254.

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. 265 n.45 ("[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' "; *State* v. *Hampton*, 293 Conn. 435, 457, 462 n.16, 988 A.2d 167 (2009); 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, 93 L. Ed. 2d 649 (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. 339. 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., 96. 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. 188, 196–97, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), 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, 120–21. 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, 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. See

Thiersaint v. *Commissioner of Correction*, 316 Conn. 89, 112, 111 A.3d 829 (2015) (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. 63.

Because the rule is clearly procedural as opposed to substantive, we must determine whether it is a "watershed" rule. The watershed exception "is reserved for those rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. . . . Beyond fundamental fairness, the new rule also must constitute a procedure without which the likelihood of an accurate conviction is seriously diminished." (Citation omitted; internal quotation marks omitted.) *Dyous* v. *Commissioner of Mental Health & Addiction Services*, 324 Conn. 163, 181–82, 151 A.3d 1247 (2016). "The United States Supreme Court has narrowly construed [the watershed] exception . . . ." *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 63. In fact, "in the 32 years since *Teague* . . . the [United States Supreme Court] has *never* found that any new procedural rule actually satisfies that purported exception." (Emphasis in original.) *Edwards* v. *Vannoy*, U.S. , 141 S. Ct. 1547, 1555, 209 L. Ed. 2d 651 (2021).[4]

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

[4] In *Edwards* v. *Vannoy*, supra, 141 S. Ct. 1557, the United States Supreme Court recently observed that it "has flatly proclaimed on multiple occasions that the watershed exception is unlikely to cover any more new rules. Even 32 years ago in *Teague* itself, the [c]ourt stated that it was 'unlikely' that additional watershed rules would 'emerge.' "

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. 451 n.34. 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. 120–21. Accordingly, *Guilbert* does not apply on collateral review for these reasons too.

C

In light of our conclusion that the rules announced in *Dickson* and *Guilbert* do not apply retroactively on collateral review, we conclude that the petitioner's count six and count seven claims were properly dismissed on the basis of res judicata. On his direct appeal before our Supreme Court, the petitioner argued that the trial court deprived him of his due process rights by allowing "the admission of an in-court identification of the [petitioner] after an unnecessarily suggestive pretrial identification procedure had been conducted . . . ." *State* v. *Tatum*, supra, 219 Conn. 723. The court concluded, inter alia, that the "identification of him at the probable cause hearing was not the result of an unnecessarily suggestive procedure." Id., 732. Because the petitioner previously has raised and litigated these claims pertaining to his identification, dismissal was appropriate. See *Woods* v. *Commissioner of Correction*, supra, 197 Conn. App. 612.

III

The petitioner's final claim is that the habeas court erred in denying count five of the operative petition, which alleged ineffective assistance against his third habeas counsel. Although the petitioner makes more than a dozen claims of ineffective assistance against his third habeas counsel, he takes issue with the court's determination as to two of them. He argues that count five should not have been denied because the habeas court erred (1) when it disposed of his ineffective assistance claim by way of procedural default for his failure to allege and prove that his appellate counsel were ineffective for failing to challenge LeVasseur's identification on the basis of due process, and (2) when it determined that his "third habeas counsel was not ineffective for failing to allege and prove a claim that trial counsel was ineffective for failing to investigate and present a defense of third-party culpability." For the reasons discussed herein, we conclude denial of count five was proper.

In the habeas court's memorandum of decision, the court addressed the petitioner's factual claim that his third habeas counsel, Paul Kraus, "was ineffective for failing to allege and prove that counsel who handled the petitioner's direct appeal . . . was ineffective for failing to argue that LaVasseur's identification of the petitioner violated his due process rights." The court stated in relevant part: "The court finds that the petitioner has procedurally defaulted on this claim. . . . If the petitioner desired, all of the information necessary to challenge LaVasseur's identification on appeal was available at the time the petitioner raised similar challenges to Lombardo's identification. Appellate counsel was not called to testify, so the reason[s] he chose only to attack only Lombardo's identification are unknown. The petitioner also failed to present any other substantive evidence of the alleged viability of raising claims,

or the specific nature of the claims, that supposedly could have been brought to challenge LaVasseur's identification. Having failed to do so, the petitioner has failed to overcome the presumption that appellate counsel's choice of issues to raise on appeal was based on sound appellate strategy." (Citation omitted.)

On appeal, the petitioner argues that this claim as a matter of law cannot be barred by procedural default. The respondent agrees with the petitioner, conceding that "the petitioner was not required to make a threshold showing of cause and prejudice as a predicate for alleging ineffective assistance of habeas counsel" in this instance. See, e.g., *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 570, 941 A.2d 248 (2008) (cause and prejudice test does not apply when petitioner brought habeas claim alleging ineffective assistance of trial counsel). Despite this misstep by the habeas court, the respondent argues that the habeas court was right to deny this claim but for the wrong reasons and argues that this court should affirm the habeas court's ruling on the alternative ground of collateral estoppel.[5] We agree with the respondent.

"The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality. . . . Collateral estoppel . . . is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly

[5] Affirmance of a judgment on alternative grounds is proper when those grounds present pure questions of law, the record is adequate for review, and the petitioner will suffer no prejudice because he has the opportunity to respond to proposed alternative grounds in the reply brief. *State* v. *Martin M.*, 143 Conn. App. 140, 151–53, 70 A.3d 135, cert. denied, 309 Conn. 919, 70 A.3d 41 (2013).

litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . .

"An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered . . . . [C]ollateral estoppel [is] based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest." (Citation omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 168 Conn. App. 310.

In this appeal, the petitioner essentially argues that he should not be prevented from pursuing the claim that his third habeas counsel, Kraus, failed to allege and prove that appellate counsel, King, Barry, and Davenport, were ineffective for failing to challenge LeVasseur's identification. Upon our review of the record, however, we conclude that the dispositive issue already has been litigated and, thus, is precluded by the doctrine of collateral estoppel. It previously has been determined that admission at trial of the identifications of the petitioner were proper. For example, following his first habeas trial, the habeas court, *Zarella, J.*, found that "the state's case was strong with regard to the identification of the petitioner despite the initial misidentifications. Not only did LeVasseur and Lombardo identify the petitioner as being at the scene but a third person, [Charles] Wilson, who was also at the scene of the shooting told the police that he saw the gunman. Despite his reluctance to testify at the criminal trial and his claim of no present recollection, Wilson's sworn

statement to the police described the gunman to the jury as [six feet, three inches] and about 170 pounds. . . . This clearly would have eliminated Frazer as the shooter . . . .'' (Citation omitted.) See *Tatum* v. *Warden*, supra, 1999 WL 130324, *11. The habeas court further explained that, ''[w]hile LeVasseur and Lombardo had both initially identified Frazer as the perpetrator, there existed a plausible and simple explanation for that identification. Frazer had striking facial similarities to the petitioner. However, when LeVasseur viewed Frazer in a lineup, he was eliminated as the perpetrator based upon his height.'' Id. As the habeas court after the first habeas trial explained, ''While Frazer bore a striking facial resemblance to the petitioner, Frazer is approximately [five feet, three inches] or [five feet, four inches] tall and the petitioner is at least [six feet, one inch] tall.'' Id., *4. Additionally, ''both witnesses prior to the events of February 25, 1988, had contact with both the petitioner and Frazer.'' Id., *11.

This previous decision, supported by the facts in the record, in addition to our Supreme Court's decision in the petitioner's direct appeal, which addressed the constitutionality and appropriateness of the identifications in the case, demonstrate that the issue of LeVasseur's identification of the petitioner as the shooter was determined to be reliable and admissible at that time. These previous decisions rejected the argument that trial counsel was ineffective for failing to properly challenge the identifications of the petitioner as the shooter. Because this already litigated issue underlies and is determinative of the petitioner's current ineffective assistance claim against Kraus, we conclude that collateral estoppel bars his claim.

As a final task, we must address the petitioner's related argument that the habeas court improperly concluded that Kraus provided effective assistance of counsel although he failed to allege and prove a claim that

trial counsel was ineffective for failing to investigate and present a defense of third-party culpability. He argues that because "LeVasseur and Lombardo separately identified Frazer within hours of the shooting, development of the third-party culpability claim in this case was critical." We are not convinced.

We begin by setting forth our well settled standard of review governing ineffective assistance of counsel claims. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *McClean* v. *Commissioner of Correction*, 103 Conn. App. 254, 262, 930 A.2d 693 (2007), cert. denied, 285 Conn. 913, 943 A.2d 473 (2008).

"Furthermore, it is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different. . . . [I]n order to demonstrate that counsel's deficient performance prejudiced his defense, the petitioner must establish that counsel's errors were so serious as to deprive the [petitioner] of . . . a trial whose result is reliable. . . . Because both prongs of *Strickland* must be demonstrated for the petitioner to prevail, failure to prove either prong is fatal to an ineffective assistance claim." (Citations omitted; internal quotation marks omitted.) *Llera* v. *Commissioner of Correction*, 156 Conn. App. 421, 426–27, 114 A.3d 178, cert. denied, 317 Conn. 907, 114 A.3d 1222 (2015).

"[J]udicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . In reconstructing the circumstances, a reviewing court is required not simply to give [counsel] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Internal quotation marks omitted.) *Cancel* v. *Commissioner of Correction*, 189 Conn. App. 667, 693, 208 A.3d 1256, cert. denied, 332 Conn. 908, 209 A.3d 644 (2019). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 680, 51 A.3d 948 (2012).

"[T]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 637, 212 A.3d 678 (2019).

For assessing claims of ineffective assistance based on the performance of prior habeas counsel, the *Strickland* standard "requires the petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that this ineffectiveness prejudiced the petitioner's prior habeas proceeding. . . . [T]he petitioner will have to prove that . . . prior habeas counsel, in presenting his claims, was ineffective and that effective representation by habeas counsel establishes a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . . Therefore, as explained by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992), a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of [appellate] counsel must essentially satisfy *Strickland* twice: he must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his [trial] counsel was ineffective." (Citations omitted; internal quotation marks omitted.) *Ham* v. *Commissioner of Correction*, 152 Conn. App. 212, 230, 98 A.3d 81, cert. denied, 314 Conn. 932, 102 A.3d 83 (2014).

At the heart of the petitioner's claim is his contention that Kraus was ineffective in failing to allege and prove a claim that trial counsel, McDonough, was ineffective in his investigation of a third-party suspect, namely, Frazer, and presentation of such defense based specifically on Frazer's culpability rather than generally on the misidentification of the petitioner. The petitioner makes various arguments that Kraus' performance was deficient as a result of not challenging trial counsel's

alleged failure (1) to ask Frazer about certain statements that were contained in his police statement, (2) to ask Frazer about his whereabouts on the night in question, (3) to question Frazer about certain equipment that had been at Parrett's apartment, which would have given Frazer a reason to go to that apartment, and (4) to call Wilson, who witnessed the shooting, to testify about certain information in his police statement, including the statement that LeVasseur told him that "the man at the door was the 'same [man] who had recently been arrested by the police.' " According to the petitioner, this information, combined with LeVasseur's and Lombardo's initial identifications of Frazer as the shooter, was sufficient to give a charge on third-party culpability.

On the basis of our review of the record, we agree with the habeas court that the petitioner failed to sufficiently demonstrate that the evidence was adequate to support a viable third-party culpability defense. See *Santiago* v. *Commissioner of Correction*, 87 Conn. App. 568, 590, 867 A.2d 70 ("[w]ithout more, none of those statements contain sufficient substance to support a viable third-party culpability defense, particularly when taken in conjunction with the considerable evidence that instead implicated the petitioner"), cert. denied, 273 Conn. 930, 873 A.2d 997 (2005). Although there is evidence from which a reasonable fact finder could find that Frazer, at some time prior to the day of the crime, was present at the apartment where the shooting occurred, the necessary factual nexus between the crime committed and Frazer is lacking. See *State* v. *Arroyo*, 284 Conn. 597, 610, 935 A.2d 975 (2007) ("[e]vidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination"). The habeas court accurately noted that nothing, other than the initial misidentifications,

raised by the petitioner "connect[ed] [Frazer] to the apartment on the date of this incident." Moreover, certain statements made to the police by Wilson, who allegedly witnessed the shooting, are no more supportive of such defense. As previously discussed, Wilson's statement to police actually identified the shooter as being six feet, three inches tall, which effectively eliminated Frazer, who was five feet, three inches or five feet, four inches tall, as the shooter. Although there is no question that Lombardo and LeVasseur initially identified Frazer as the perpetrator, they corrected their initial identifications to identify the petitioner as the shooter. As the record demonstrates, there existed a plain explanation for that initial identification—Frazer had striking facial similarities to the petitioner. There was nothing more, however, that directly tied Frazer to the crime scene on the night in question. See, e.g., *State* v. *Corley*, 106 Conn. App. 682, 690, 943 A.2d 501 ("although the proposed evidence may have shown that [the third-party suspect] bore a physical resemblance to the defendant, there was no evidence that [the third-party suspect] and the other male were involved in the" crime committed), cert. denied, 287 Conn. 909, 950 A.2d 1285 (2008).

Accordingly, we agree with the habeas court that the petitioner failed to demonstrate that his trial counsel was ineffective on this basis. Because the petitioner has failed to demonstrate that trial counsel was ineffective, the petitioner's claim necessarily fails against his third habeas counsel.

The judgment is affirmed.

In this opinion the other judges concurred.

SUPREME COURT

STATE OF CONNECTICUT

PSC-210408

EDGAR TATUM

v.

COMMISSIONER OF CORRECTION

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

The petitioner Edgar Tatum's petition for certification to appeal from the Appellate Court, 211 Conn. App. 42 (AC 43581), is granted, 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, 198 L. Ed. 2d 713 (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?"

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

Kara E. Moreau, assigned counsel, and *Emily C. Kaas*, assigned counsel, in support of the petition.
James A. Killen, senior assistant state's attorney, in opposition.

Decided June 21, 2022

By the Court,
/s/
René L. Robertson
Deputy Chief Clerk

Notice sent: June 22, 2022

☒ APPEAL ☐ JOINT APPEAL ☐ CROSS APPEAL ☐ AMENDED APPEAL ☐ CORRECTED FORM

JD-SC-33 Rev. 11-21
P.B. Sections 3-8, 60-7, 60-8, 62-7, 62-8, 63-3, 63-4, 63-10, 72-3
C.G.S. Sections 31-301b, 51-197f, 52-470

All appeals must be filed electronically unless an exemption from the requirements of electronic filing has been granted or you are an incarcerated self-represented party. For further information about e-filing or this form, see the Appeal Instructions, form JD-SC-34.

☒ To Supreme Court ☐ To Appellate Court

Name of case *(State full name of case)*

EDGAR TATUM v. COMMISSIONER OF CORRECTION

Type of appellate matter (*If a writ of error, the writ and the signed marshal's return must be filed on the same business day as this form. See Practice Book Section 72-3.*)

Appeal after Certification by the Supreme Court

Trial Court History

Tried to: **Court**

Trial court location: **GA 19 COURTHOUSE AT ROCKVILLE, 20 PARK STREET ROCKVILLE CT 06066**

Trial court judges being appealed: **HON. JOHN M. NEWSON**

List all trial court docket numbers, including location prefixes: **TSR-CV-16-4007857-S**

All other trial court judges who were involved with the case: **HON. HUNCHU KWAK Continued**

Judgment for *(Where there are multiple parties, specify those for whom judgment was rendered)*: **Defendant**

Date of judgment(s) or decision(s) being appealed: **8/28/2019**

Date of issuance of notice on any order on any motion that would render judgment ineffective:

Date for filing appeal extended to:

Case type: **CV**

For Civil/Family Case Types, Major/Minor code: **CVM30**

For Juvenile Cases: ☐ Termination of Parental Rights ☐ Order of Temporary Custody ☐ Other

Appeal

Appeal filed by *(Party name(s))*: **EDGAR TATUM**

From *(the action that constitutes the appealable judgment or decision)*: **Denial of petitioner's petition for writ of habeas corpus.**

If this appeal is taken by the State of Connecticut, provide the name of the judge who granted permission to appeal and the date of the order

Statutory Basis for Appeal to Supreme Court

By *(Signature of counsel of record)*	Telephone number	Fax number	Juris number *(If applicable)*
▶ **438182**	**203-787-9026**	**203-787-9031**	**438182**

Appearance

Type name and address of counsel of record filing this appellate matter *(This is your appearance; see Practice Book Section 62-8)*

KARA ELIZABETH MOREAU 350 ORANGE STREET SUITE 101 NEW HAVEN CT 06511

E-mail address: **kmoreau@sheehanandreeve.com**

"X" one if applicable

☐ Counsel or self-represented party who files this appeal will be deemed to have appeared **in addition to** counsel of record who appeared in the trial court.

☐ Counsel or self-represented party who files this appeal is appearing **in place of:**

Name of counsel of record | Juris number *(If applicable)*

Certification

I certify that a copy of the appeal form I am filing will immediately be delivered to each other counsel of record and I have included their names, addresses, e-mail addresses and telephone numbers; the appeal form has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and the appeal form complies with all applicable rules of appellate procedure in accordance with Practice Book Sections 62-7 and 63-3.

Date to be delivered **07/06/2022**.

If you have an exemption from e-filing under Practice Book Section 60-8, attach a list with the name, address, e-mail address, and telephone number of each counsel of record and the address where the copy was delivered.

If this appeal is a criminal or habeas corpus matter, I certify that a copy of this appeal form will immediately be delivered to the Office of the Chief State's Attorney Appellate Bureau. Date to be delivered **07/06/2022**.

Signed *(Counsel of record)*: ▶ **438182**

Date signed: **07/06/2022**

Required Documents

To be filed with the Appellate Clerk within ten days of the filing of the appeal, if applicable. See Practice Book Section 63-4.

1. Preliminary Statement of the Issues
2. Designation of the Proposed Contents of the Clerk Appendix
3. Court Reporter's Acknowledgment or Certificate that no transcript is necessary
4. Docketing Statement
5. Statement for Preargument Conference (form JD-SC-28A)
6. Constitutionality Notice
7. Sealing Order form, if any

☐ Entry Fee Paid ☐ No Fees Required ☒ Fees, Costs, and Security waived by Judge (*enter Judge's name below*)

Court Use Only
Date and time filed

Judge: **Hon. Courtney Chaplin**

Date waived: **09/27/2019**

Appeal Form (continued)

CASE NAME:
EDGAR TATUM v. COMMISSIONER OF CORRECTION

OTHER TRIAL COURT JUDGES
HON. HUNCHU KWAK
HON. VERNON OLIVER
HON. TEJAS BHATT
HON. COURTNEY M CHAPLIN

Parties & Appearances

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S.C. 20727 SUPREME COURT

EDGAR TATUM STATE OF CONNECTICUT

v.

COMMISSIONER OF CORRECTION JULY 14, 2022

DOCKETING STATEMENT

Pursuant to Practice Book § 63-4(a)(4), the petitioner submits the following information:

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B. None known or reasonably ascertainable.

C. None known or reasonably ascertainable.

D. There were physical exhibits in the trial court.

E. The defendant was convicted of one count of Murder, in violation of Conn. Gen. Stat. §53a-54a(a). He was sentenced to serve 60 years of incarceration. The defendant is currently incarcerated.

Respectfully submitted,

PETITIONER
EDGAR TATUM

BY:

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