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SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. 20727

EDGAR TATUM
v.
COMMISSIONER OF CORRECTION

BRIEF OF THE AMICUS CURIAE CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION (CCDLA)

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COUNSEL OF RECORD

1. TABLE OF CONTENTS

2. TABLE OF AUTHORITIES

A. Cases

B. Statutes

C. Other Authorities

3. STATEMENT OF INTEREST OF THE AMICUS CURIAE

The Connecticut Criminal Defense Lawyers Association (CCDLA) is a non-profit, statewide organization that consists of both private criminal defense attorneys and public defenders.[1] The attorneys who make up the CCDLA represent criminal defendants in every courthouse within the state and frequently encounter identification testimony.

One of the CCDLA's bedrock principles is the advancement of the substantive and procedural rights of defendants in criminal investigations and prosecutions. The CCDLA has an interest in ensuring that evidence presented at trial is helpful to the fact-finder and does not interfere with the fact-finder's role. In addition, the CCDLA seeks to provide the Court with information to help it base its decisions on generally accepted scientific principles.

4. STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

The facts and procedural history of this case are set out in the appellant's brief. In sum, it has been 32 years since Larry Parrett (Parrett) was shot and killed in Waterbury. Tatum's murder conviction rests on identification testimony by Tracy LeVasseur (LeVasseur),

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[1]Pursuant to Practice Book § 67-7, this brief has not been authored by counsel to either party in this appeal, and no party or counsel to any party funded either the creation or submission of this brief. No person other than the CCDLA contributed money to fund either the preparation or submission of this brief.

Parrett's girlfriend, and Anthony Lombardo (Lombardo), who was also shot that night, of "Rob", a black male. Parrett sold cocaine – Lombardo was one of Parrett's customers.

On the night of the shooting, Lombardo and LeVasseur seperately identified Jay Frazer (Frazer) from a photo array as the person who shot Lombardo and killed Parrett. A week later, LeVasseur recanted that identification. Three months later, LeVasseur chose Tatum from another photo array. Lombardo saw an array, likely the same array as LeVasseur, but declined to make an identification. Instead, both Lombardo and LeVasseur identified the defendant in-court at the probable cause hearing, held a year after the shooting, and again at trial, two years after the shooting. (At the hearing and at trial, Tatum was the only black man seated at the counsel table.)

The issue before this Court is whether its decisions in *State v. Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied 137 S. Ct. 2263 (2017), and *State v. Guilbert*, 306 Conn. 218 (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 (1991) should apply retroactively to the petitioner's case on collateral review? (Order dated 6/21/22)

CCDLA was granted permission to file this amicus brief by order of March 6, 2023.

5. ARGUMENT

> "Slow and painful has been man's progress from magic to law." This proverb, inscribed at the University of Pennsylvania Law School on the statue of Hseih-Chai, a mythological Chinese beast who was endowed with the

> faculty of discerning the guilty, is a fitting metaphor for both the progress of the law and the history of this case. The law is the means by which fragile, frail, imperfect persons and institutions seek greater perfection and justice through the search for the truth. But the search for the truth is not always easy, and the path to the truth is not always clear. Sometime we find that truth eludes us. Sometimes, with the benefit of insight gained over time, we learn that what was once regarded as truth is myth, and what was once accepted as science is superstition.

Han Tak Lee v. Tennis, 2014 WL 3894306 (M.D. Pa. 2014) (discussing developments in arson science).

Thirty-two years is a long time. When Tatum's counsel tried and appealed this case in 1990-91, attorneys and judges were largely unaware of the then-existing body of scientific research into perception, memory, and identification. Identification experts were largely excluded from Connecticut courtrooms. See *State v. Kemp*, 199 Conn. 473 (1986). In-court identifications were a long-standing unquestioned custom.

The public, attorneys, and judges, harbored "common sense" beliefs about identification that were tragically wrong. See *Guilbert*:240-42. Courts and attorneys believed that cross-examination would expose good-faith mistaken-identifications; again, a tragically wrong assumption. See *Guilbert*:243-44.

In the three decades since Tatum's conviction, hundreds of DNA exoneration cases have revealed that eyewitnesses do make good-faith mistakes. This Court has considered over a dozen appeals raising eyewitness identification issues. Its decisions have gone from

assertions about identification grounded in the justices' "common sense" to modern cases discussing the latest scientific research. Our Legislature created procedural protections during police investigations in General Statutes § 54-1p. Police have adopted reformed procedures pursuant to that statute.

Most recently, this Court abolished first-time in-court identifications in *Dickson* and abandoned the decades-old federal framework for analyzing identification procedures under the state constitution in *State v. Harris*, 330 Conn. 91 (2018). In response to *Dickson* and *Harris*, the model jury instruction on eyewitness identification, 2.6-4 Identification of Defendant, was amended on 6/2/21 – replacing the instruction that Tatum had challenged in 1991.

Tatum should be able to use three decades of change in science and in law to challenge the validity of his conviction.

5A. Eyewitness Identification in 1989-91.

In 1989-91, police typically presented photo arrays to witnesses simultaneously. The officer presenting the array was typically the lead detective, and knew which image was the suspect. Witnesses were not given the cautionary instructions recommended by *State v. Ledbetter*, 275 Conn. 534 (2005); and later mandated by General Statutes §54-1p in 2011. The procedure was not audio or video recorded. The witness' statement and the officer's report were the only documentation of what occurred.

Tatum's attorney could have looked at the United States Supreme Court's trio of major identification cases – *United States v. Wade*, 388 U.S. 218 (1967); *Neil v. Biggers*, 409 U.S. 188 (1972); and *Manson v. Brathwaite*, 432 U.S. 98 (1977), which raised concerns about

good-faith mistake, and proposed a framework the justices believed would protect defendants' due process rights.

Tatum's attorney is unlikely to have consulted an expert. For five years *Kemp* had discouraged trial courts from allowing identification experts to testify – deeming the matter common sense, and at risk of invading the jury's province.

DNA exonerations were at least a year in the future – *State v. Hammond*, 221 Conn. 264 (1992) was the first Connecticut case where DNA testing called eyewitness identifications into question. See also *With 4th round of DNA tests, rape suspect freed for 2nd trial*, HARTFORD COURANT, October 22, 1992. The first widespread news story about a DNA exoneration and a mistaken eyewitness, *What Jennifer Saw*, aired on Frontline in 1997. The Department of Justice's EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT would not come out until 1999.

First-time in-court identifications were routine. Our Supreme Court was unreceptive to argument that the prosecution had any duty to fairly test the witness' ability to make an identification, writing that "At that hearing, the prosecution was thus entitled to elicit Lombardo's testimony on the issue of identification through the usual mode of putting him on the witness stand and asking him to identify his assailant if his assailant was present in the courtroom. The fact that the prosecution might have taken extraordinary steps to lessen the suggestiveness of the confrontation by using some other identification procedure does not render the routine procedure that was used unnecessary or impermissible." *Tatum*:729.

Jurors believed confident eyewitnesses. The trial court told the jury it could rely on "the degree of certainty of the identification made in court". There was no caution that certainty and accuracy are not the

same thing. In 1990-91, neither the trial court nor the Supreme Court were receptive to Tatum's efforts to challenge the then-existing jury instruction.

5B. Thirty-Years of Changes.

Between 1990-91, and 2023, there has been a revolution in both the science and law of eyewitness identification. The change has largely been driven by the DNA exoneration cases. As of 2020, "Nationally, 69% of DNA exonerations — 252 out of 367 cases — have involved eyewitness misidentification, making it the leading contributing cause of these wrongful convictions. Further, the National Registry of Exonerations has identified at least 450 non-DNA-based exonerations involving eyewitness misidentification."[2] These cases proved without doubt that the federal due process protections embodied in *Neil* and *Manson*; the simultaneous identification procedures used by police for decades; and the jury instructions routinely given were not working to expose good-faith mistake and protect innocent defendants from wrongful conviction.

Thousands of academic studies have been published in the past 30 years. See Wells, et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 L & HUM. BEHAV. 3 (2020); See also National Academic of Sciences, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION (2014). A number of these have been cited and discussed by this Court

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[2]https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/#:~:text=Eyewitness%20misidentification%20is%20a,cause%20of%20these%20wrongful%20convictions.

in its decisions.

Police-administered identification procedures are required to meet certain minimal standards, including blind administration of arrays by officers who do not know who the suspect is; presentation of images sequentially, not simultaneously; cautionary instructions; and routine recording of the procedure.

In *Guilbert*, the Court recognized research about both system and estimator variables. *Guilbert*:236 n.11 Today, a trial court would have considered "whether the eyewitness had been presented with multiple arrays in which the photograph of one suspect recurred repeatedly". *State v. Randolph*, 284 Conn. 328, 384-85 (2007). Here, LeVasseur, and likely Lombardo, saw pictures of Tatum in photo arrays months before their in-court identifications, further risking a good-faith mistake

The Court also has a more nuanced view of a witness' claim to be acquainted with the defendant than it did in 1990. *State v. Williams*, 317 Conn. 691, 707-08 (2015), held that familiarity is not a binary question. In cases where the witness has a limited, stressful encounter with a culprit whose features are largely concealed, they would need a high level of familiarity to, in that case, exclude an expert's testimony; in those where the witness has ample opportunity to view the culprit under good conditions and identifies him shortly afterwards, they would need a lesser degree of familiarity. *State v. Gore*, 342 Conn. 129, 159 (2022) goes further in discussing familiarity, directing the trial court to consider "the particular, relevant circumstances, including, but not limited to, the frequency, number and duration of any individual prior contacts; the duration of the entire course of contacts and the length of time since the contacts; the relevant viewing conditions; and the nature of the relationship

between the witness and the defendant, if any." The assumption that LeVasseur could not be mistaken because she had met Tatum[3] before would be given more scrutiny in a modern trial.

Courts are also now more aware than having two witnesses both identify the defendant does not mean that they cannot both be mistaken. Many of the DNA exoneration cases involved multiple eyewitnesses, all of whom where mistaken. Garrett, CONVICTING THE INNOCENT 50-51 (2011).

Expert testimony is now admissible in Connecticut. *Guilbert*:251-252 In addition, our Court has cautioned about the limitations of cross-examination and closing argument in exposing good-faith mistaken identifications. *Guilbert*: 243-44. See also *Dickson:* 440; *State v. Lawson*, 352 Or. 724, 758 n. 9, 291 P.3d 673 (2012) (scientific studies reflect "a dangerous inability [among jurors] to distinguish accurate from inaccurate eyewitness testimony, even with the assistance of thorough cross-examination")

First-time in-court identifications are largely prohibited. *State v. Dickson*, 322 Conn. 410 (2016). Prosecutors are required to either test a witness' identification in a proper procedure, or ask permission to ask a witness to identify a defendant in court for the first time.

State v. Guilbert:243, 245-47 focused on giving the jury specific instructions that would help them evaluate identification evidence. The jury instruction given in Tatum's trial did not tell them about the potentially adverse effects of high-stress and the presence of a weapon. It did not tell them that memory diminishes over time. The trial judge told them to consider the witness' confidence expressed at trial without the caution that certainty does not necessarily mean accuracy.

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[3]Tatum was a stranger to Lombardo.

The court also did not tell them that an identification made by picking the defendant from a group of similar individuals is generally more reliable than one which results from presenting the defendant alone to the witness. It did not tell them that a first-time in-court identification is inherent suggestive and creates a significant risk of misidentification. It said nothing about the necessity of cautioning the witness that the perpetrator might not be present, or about identifications made when the person administering the array knew who the suspect was. It did not talk about post-event information, which might include conversations between the witnesses after they had identified Frazier and before they recanted those identifications and identified Tatum.

The model jury instruction on identification, Criminal Jury Instructions 2.6-4, Identification of the Defendant (revised 2021), was amended to give jurors a framework that challenges mistaken common-sense ideas that jurors might hold and conforms the instruction to three decades of case law. The instruction provided improper guidance to the jury in 1990; but that mistake was not recognized until cases like *Ledbetter*, *Guilbert*, and *Dickson*.

5C. Applying the New Standards to Tatum.

Tatum is a rare case where the prosecution relied entirely on two eyewitnesses. There is no forensic evidence, confession, or other evidence to support his conviction. Expert testimony and the current model jury instructions would prove a modern jury with a framework to decide whether the witnesses here made a good-faith mistake that was simply absent in 1990.

In *Guilbert*:258, this Court concluded that "broad, generalized

instructions on eyewitness identifications, such as those previously approved by this court in [*Tatum*:734-35]; or those given in the present case [ ] do not suffice" to aid the jury in evaluating the eyewitness identifications at issue. If the instructions given in *Tatum* are now deemed inadequate, they were also inadequate when give at Tatum's trial.

In *Dickson*, this Court specifically overruled its holding in *Tatum*, stating that "[w]e 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." (italics original) *Dickson*:435-36.

"The state is not entitled to conduct an unfair procedure merely because a fair procedure failed to produce the desired result." *Id.*:436. That is precisely what happened in Tatum's case. Both LeVasseur and Lombardo picked a different person as the culprit on the night of the shooting and then recanted that identification. Lombardo was shown another photo array and declined to make an identification. He was allowed instead, to identify Tatum, the only black man in the courtroom, in a first time in-court procedure.

The question for this Court is whether finality is more important than due process. Watershed rules that implicate the "fundamental fairness that is implicit in the concept of ordered liberty" and "without which the likelihood of an accurate conviction is severely diminished" can be applied on collateral review. *Teague v. Lane*, 489

U.S. 288, 314 (1989). See *Casiano v. Commissioner*, 317 Conn. 52, 63, 115 A.3d 1031 (2015); *Thiersaint v. Commissioner*, 316 Conn. 89, 108 n.8, 111 A.3d 829 (2015).

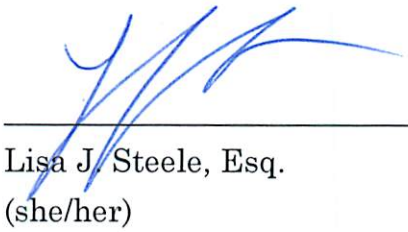
Ledbetter, *Guilbert*, *Dickson*, and *Harris* together resulted in a watershed change in how this Court understands perception, memory, and identification; that the procedures in use prior to 2005 failed to protect defendants from good-faith mis-identification testimony; and that reform was badly needed to give the jury the tools to properly evaluate identification evidence.

Where this Court overturned the decision affirming Tatum's conviction, and has so significantly re-written the legal landscape for gathering, presenting, and evaluating identification testimony, should not the defendant have the cases that overturned his conviction applied to him? Should this Court also not allow other defendants whose convictions rest on outdated assumptions about perception, memory, and identification, use modern cases to challenge whether due process occurred in their cases and whether they should continue to be incarcerated?

6. CONCLUSION.

For the reasons set forth herein, CCDLA urges this Court to apply its eyewitness identification jurisprudence retroactively in Tatum's habeas case.

Respectfully submitted
The Amicus
By his attorney,



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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Practice Book § 67-2, that:

(1) The last known address and email for the defense counsel is: Kara E. Moreau, Jacobs & Dow, LLC, 350 Orange Street, New Haven, CT 06511; kmoreau@jacobslaw.com

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(3) The last known address and email for the Connecticut Innocence Project (amicus) is Robert J. Meredith, Connecticut Innocence Project, 55 Main Street, 8th Floor, Hartford, CT 06105; Robert.Meredith@pds.ct.gov

The undersigned also certifies that on March 27, 2023:

(4) the electronically submitted e-brief has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided;

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

(6) a copy of the e-brief has been sent to each counsel of record in compliance with§ 62-7, by Minuteman Press of Waterbury, Connecticut, on March 27, 2023, two physical copies will be filed with this Court;

(7) the e-brief being filed with the appellate clerk is a true copies of the e-brief that was submitted electronically;

(8) the e-brief is filed in compliance with the e-briefing guidelines and no deviations were requested; and

(9) the e-brief contains approximately 2,800 words as counted by WordPerfect 2021 starting with the statement of interest of the amicus and ending with the conclusion, including footnotes; and

(10) the e-brief complies with all provisions of this rule.

_/s/_____
Lisa J. Steele, Esq.