Filed Under the Electronic Briefing Rules

SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 20727

EDGAR TATUM

v.

COMMISSIONER OF CORRECTION

BRIEF OF PETITIONER-APPELLANT ON CERTIFICATION WITH PARTY APPENDIX

Kara E. Moreau
Juris Number 438182
Jacobs & Dow, LLC
350 Orange Street
New Haven, CT 06511
Tel. (203) 772-3100/Email: kmoreau@jacobslaw.com

Counsel of record and arguing attorney

Table of Contents

Statement of the Certified Issue

1. Did the Appellate Court incorrectly conclude that the habeas court 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._,137S. Ct. 2263, 198 L. Ed. 2d 713 (2017), and *State v. Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), both of which overruled the Connecticut Supreme Court's rationale and holding regarding in-court identifications in the petitioner's direct appeal (*State v. Tatum*, 219 Conn. 721, 595 A.2d 322 (1991)) did not apply retroactively to his case on collateral review?

Table of Authorities

Constitutional Provisions

Federal Cases

Connecticut Cases

Miscellaneous Cases and Provisions

I. Nature of the Proceedings

On January 30, 1989, Edgar Tatum was charged with Murder, in violation of Conn. Gen. Stat. §53a-54a(a) and Assault Second, in violation of Conn. Gen. Stat. §53a-60(a)(2). A probable cause hearing was held on February 28, 1989. Following a jury trial, which began on February 15, 1990, Mr. Tatum was convicted of murder.[1] The trial court (Heiman, J.) thereafter sentenced Mr. Tatum to 60 years imprisonment.

Mr. Tatum appealed his conviction to the Connecticut Supreme Court. *State v. Tatum*, 219 Conn. 721 (1991). He challenged, *inter alia*, the trial court's admission of an unduly suggestive in-court identification and the eyewitness identification instructions given to the jury. The Court denied his claims and upheld the conviction. *Id*.

Mr. Tatum filed his first habeas petition on August 20, 1991, alleging, *inter alia*, ineffective assistance of trial counsel for failing to adequately prepare his case. On March 3, 1999, the habeas court (Zarella, J.) denied Mr. Tatum's habeas petition. *Tatum v. Warden*, 1999 Conn. Super. LEXIS 485. The Appellate Court affirmed this decision. *Tatum v. Comm'r of Corr*., 66 Conn. App. 61*, cert. denied*, 258 Conn. 937 (2001). Mr. Tatum filed a second habeas petition in 2000. Following a hearing on September 3, 2002, his petition was dismissed without prejudice. *See Tatum v. Warden*, Docket No. CV00-0440732. Mr. Tatum's third habeas petition was initially filed on August 18, 2003, and subsequently amended on June 16, 2009. It alleged, *inter alia*, ineffective assistance claims and due process violations under *Brady v. Maryland*, 373 U.S. 83 (1963). Following a habeas trial, which took place on March 23, 2010, the habeas court (Nazarro, J.) denied

[1] The jury failed to reach a verdict on the Assault charge. Consequently, the state entered a nolle on that charge.

Mr. Tatum's habeas petition. *Tatum v. Warden*, 2010 Conn. Super. LEXIS 684. This was affirmed in *Tatum v. Comm'r of Corr.*, 135 Conn. App. 901 (2012), *cert denied*, 305 Conn. 912 (2012). Mr. Tatum's fourth habeas petition, filed pro se in 2014, was summarily dismissed by the Court (Bright, J.). *See Tatum v. Warden*, Docket No. TSR-CV14-4006223-S.

Mr. Tatum's fifth habeas petition, which is the subject of this appeal, was filed on February 11, 2016. The operative amended petition was filed on June 26, 2018. *See* Fourth Amended Petition. That petition laid out seven counts.[2] Relevant to the question in this case, in Count Six of his amended petition, Mr. Tatum alleged that his due process rights under the Fourteenth Amendment and Article First, sections eight and nine of the Connecticut Constitution were violated due to the admission of unduly suggestive and unreliable eyewitness identification evidence, which was admitted in his underlying criminal trial. He further argued that the Supreme Court's decisions in *State v. Guilbert,* 306 Conn. 218 (2012), and *State v. Dickson*, 322 Conn. 410 (2016) should be retroactively applied to his case. In Count Seven, Mr. Tatum argued that the advances in the science of eyewitness identification highlight the unreliability of the eyewitness identifications that occurred in his case and call into question the validity of his conviction. The habeas court interpreted this as an actual innocence claim, rather than a newly discovered evidence claim,

---

[2] Count One alleged ineffective assistance of counsel ("IAC") as to trial counsel. Count Two alleged IAC as to appellate counsel. Count Three alleged IAC as to first habeas counsel. Count Four alleged IAC as to second habeas counsel. Count Five alleged IAC as to third habeas counsel. Counts Six and Seven, which are the subject of this appeal, will be discussed in more detail above.

determining that advancements in science did not amount to newly discovered evidence.

The Court (Newson, J) granted, in part, respondent's Motion to Dismiss on September 13, 2018, permitting only Counts Four and Five to proceed to trial.[3] *See* Memorandum of Decision: Respondent's Motion to Dismiss. As to Counts Six and Seven, the habeas court determined that Mr. Tatum had previously raised a due process claim as to in-court identification in his direct appeal and, therefore, any identification claims were barred by res judicata. Moreover, the habeas court determined that there was nothing in *Guilbert* or *Dickson* to suggest that either applied retroactively or on collateral review. A trial on Counts Four and Five was held on various dates between January 17, 2019, and April 11, 2019. In a decision dated August 28, 2019, the court denied the petition for habeas corpus. *See* Memorandum of Decision.

Mr. Tatum appealed, asserting the following arguments: (1) the habeas court erred when it granted the respondent's motion to dismiss counts one, two, and three of the operative petition (IAC claims against trial, appellate, and first habeas counsel) on the basis of res judicata; (2) the habeas court erred when it determined that *Guilbert* and *Dickson* do not apply retroactively to this case and, moreover, that any such claim was barred on the basis of res judicata; and (3) the habeas court erred in denying count five of the petition (IAC claim against third habeas counsel) and failing to find sufficient evidence existed to support a valid third-party culpability defense.

The Appellate Court affirmed the habeas court's decision. *See Tatum v. Comm'r of Corr*, 211 Conn. App 42 (2022). With respect to

---

[3] The habeas court dismissed the claims raised in Counts One, Two, Three, Six, and Seven of the petition.

Dickson, the Appellate Court determined that "the constitutional rule set forth therein was not intended to provide an avenue for collateral relief" and, further, that "[a]lthough our Supreme Court did reject and overrule the rationale it previously employed" in Mr. Tatum's case, there was nothing to suggest "that the new rule in *Dickson* can apply retroactively to him on collateral review." *Id*. at 61. With respect to *Guilbert*, the Appellate Court concluded that "the nonconstitutional evidentiary rule set forth in *Guilbert* does not apply retroactively on collateral review" and, furthermore, even if the court were to construe *Guilbert* as a constitutional rule, through the lens of *Harris*, it would still not apply retroactively on collateral review because it is not a watershed procedural rule. *See id*. at 65. Accordingly, the Appellate Court concluded that Counts Six and Seven were properly dismissed on the basis of res judicata.

This Court then granted certification on the following question:

> "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?"

See Order on Petition for Certification to Appeal.

For the reasons that follow, Mr. Tatum respectfully submits that the answer to that question is "yes."

II. Statement of Facts

At approximately 10:30 PM on February 25, 1988, Larry Parrett (hereinafter "Parrett") was shot and killed in his living room at 24 Cossett Street in Waterbury, Connecticut. 2/15/90 Trial Tr. 85-88. Anthony Lombardo (hereinafter "Lombardo") was also shot, but survived. 2/16/90 Trial Tr. 17-19. At the time of the shooting, only Parrett, Lombardo, and the shooter were present in the room. *Id.* at 15-16.

In the months prior to the shooting, Parrett had been renting the Cossett Street apartment with his girlfriend, Tracy LeVasseur (hereinafter "LeVasseur"). *Id.* at 103-04. LeVasseur was just 18 years old and addicted to cocaine. *Id.* at 91-2. Parrett was likewise an addict, and both used and sold drugs out of the apartment. *Id.* at 25. One of the people who bought drugs from Parrett was his neighbor, Lombardo. *Id.* Lombardo used narcotics almost every day. *Id.* at 25-27.

From December 1987 to January 1988, several men from California visited the Cossett Street apartment, using it as a place to sell drugs and sleep. *Id* at 89. In January of 1988, LeVasseur told Parrett that she was going to leave if he did not get "the drug dealers from California" out of their apartment. *Id.* at 116-17. Parrett then called his landlord, who in turn called the police. *Id.* at 117. The police responded to the Cossett Street apartment where they arrested two men, Jay Frazier (hereinafter "Frazier") and Lee Martin. *See id.* at 127-28.

On the night of the shooting, Parrett and LeVasseur were in the Cossett Street apartment with three men, "Rob", "Eli" and "Manuel." LeVasseur and the men were free-basing cocaine. 2/16/90 Trial Tr. 91. Around 10 PM, LeVasseur answered a knock at the door and found Lombardo and another person whom she identified as "Ron". *Id.* at 92.

Parrett then asked LeVasseur to leave the living room so he could speak with "Ron" alone. *Id*. at 97-98. LeVasseur complied and went into the kitchen. *Id*. Levasseur told one of the men in the kitchen that the men at the door were the "same men who had recently been arrested by the police."[4] 9/22/98 Habeas Trial Tr. 106; *See also* Petitioner's Exhibit 9.

In the living room, a heated exchange began between Parrett and "Ron" over "what happened between them." 2/16/90 Trial Tr. 12. Lombardo left the living room to tell those in the kitchen what was going on. *Id*. at 13. By the time Lombardo returned to the living room, "Ron" had a gun pointed at Parrett. *Id*. at 14. Lombardo testified that he stepped in front of Parrett hoping that his intervention would prevent Parrett from being shot. *Id*. at 16-17. Instead, "Ron" fired his gun. Lombardo was shot first, sustaining a bullet wound to his shoulder. *Id*. Parrett thereafter was shot several times. LeVasseur, who remained in the kitchen during the entire exchange, did not witness the shooting. *Id*. at 121.

The police were initially dispatched to 31 Cossett Street, Lombardo's house. Lombardo was found with a gunshot wound to the shoulder. 2/15/90 Trial Tr. 79-80. Officers were then directed to 24 Cossett Street where Parrett was discovered with a gunshot wound to the head. 2/21/90 Trial Tr. 83. Parrett did not survive.

Within hours of the shooting, the Waterbury police asked LeVasseur and Lombardo to review photo line-ups. Both agreed. LeVasseur picked out a photo of the man she let into the apartment, positively identifying Frazier as that person. 2/16/90 Trial Tr. 106-07.

---

[4] Frazier was one of the men arrested in January, not Mr. Tatum. See 2/16/90 Trial Tr. 127-28.

Lombardo also picked out the photo of Frazier and signed a statement swearing that Frazier was the man who shot him and Parrett. *Id.* at 57-58; *See also* Petitioner's Exhibit 18 (Lombardo "picked out photo #8 as positively being the same person who shot Larry Parrett, and him.") Based on these identifications, Frazier was charged with murder.

After being placed under arrest, Frazier told the investigating officer "I know what this is all about and I won't offer any resistance." *See* Petitioner's Exhibit 46; *See also* 1/31/19 Habeas Tr. 144-45. During his post-arrest interview, Frazier told the police that he returned to Connecticut from California after being told by his mother and a bondsman that he should come back to "face the problem." 9/23/98 Habeas Trial Tr. 15. In a subsequent interview with the police on May 3, 1988, Frazier placed himself near the scene, at the Econo-Lodge motel. 9/22/98 Habeas Trial Tr. 76; *See also* Petitioner's Exhibit 52.

Two months later, on April 29, 1988, LeVasseur recanted her identification of Frazier stating that the person she identified [Frazier] was shorter than the man at the door. 2/16/90 Trial Tr. 107-108. The Waterbury police then performed an in-person lineup with LeVasseur where she now identified "Jay" [Frazier] as someone she knew, but not the person she let into the apartment on the night of the shooting. *Id.* at 110; *See also* Petitioner's Exhibit 48. That same day, Lombardo was asked to view a second photo line-up. 2/16/90 Trial Tr. 76. This time, he did not make an identification. *Id.* at 61.

On May 16, 1988, almost three months after the shooting, LeVasseur had a meeting in her home with a member of the State's Attorney's Office. During this meeting, LeVasseur was shown a photo array and identified the shooter as appellant, Mr. Tatum. *Id.* at 115. This was the first time she identified Mr. Tatum. An arrest warrant for Mr. Tatum was then issued two days later, on May 18, 1988.

Lombardo did not identify Mr. Tatum as the shooter until the probable cause hearing, which took place more than a year after the shooting. 2/28/89 PC Hearing Tr. 47. Notably, Mr. Tatum was the only black man seated at defense counsel table when Lombardo identified him. [5] 2/16/90 Trial Tr. 60. At trial, Lombardo and LeVasseur both testified for the State and identified Mr. Tatum in open court. 2/16/90 Trial Tr. 8, 95-96. The trial court gave the then-standard jury instruction on eyewitness identification evidence.[6]

Additional facts will be set forth as necessary.

III. Argument

A. Introduction

This case presents a question of fundamental fairness: what should we do with defendants whose very cases were overturned after our understanding of scientific evidence and criminal procedure led us to conclude that our prior practices were riddled with the danger of wrongful conviction? Do we allow those defendants to languish, with no opportunity for relief, simply because their cases were tried and

---

[5] Further, although the record does not reflect what Mr. Tatum was wearing at the hearing in probable cause, he was arrested on January 9, 1989, and remained incarcerated at the time of the probable cause hearing on February 28, 1989. This makes it highly likely that he was wearing prison clothes, rather than street clothes, at the time of Lombardo's identification.

[6] For purposes of comparison, the identification instructions given by the trial are included in the Appendix. *See* Jury Instructions given in Mr. Tatum's Trial. The current model jury instruction on eyewitness identification evidence is also included. *See* Connecticut Model Jury Instruction: 2.6-4 Identification of Defendant.

decided too early? Or does equity and justice require a mechanism for relief?

There is no physical evidence connecting Mr. Tatum to the murder of Parrett. There are no ballistics, DNA, or fingerprint evidence linking him to the scene. Instead, Mr. Tatum's conviction rests primarily on the identifications of Lombardo and LeVasseur, two witnesses who *both* initially identified the same person—someone other than Mr. Tatum—and whose ultimate identifications of Mr. Tatum are riddled with the potential for error.

We now know that mistaken identifications are the leading factor in wrongful convictions. *See Guilbert*, 306 Conn. at 249. Due to the significant changes in our understanding of the science behind eyewitness identification and because in this case the Court's decisions in *Guilbert* and *Dickson* specifically overruled portions of the Court's previous holding in Mr. Tatum's direct appeal, *See Guilbert*, 306 Conn. at 258; *Dickson*, 322 Conn. at 435-46, equity and justice require that the Supreme Court's decisions in those cases be retroactively applied to Mr. Tatum's case.

B. Standard of Review

When a habeas court considers a motion to dismiss a habeas petition, "[t]he evidence offered by the [petitioner] is to be taken as true and interpreted in the light most favorable to [the petitioner], and every reasonable inference is to be drawn in [the petitioner's] favor." *See Ham v. Comm'r of Corr.*, 152 Conn. App. 212, 223-24, cert. denied, 314 Conn. 932 (2014) (internal quotation marks omitted); *see also Orcutt v. Comm'r of Corr.*, 284 Conn. 724, 739 (2007). The purpose of the [petition] is to put the [respondent] on notice of the claims, to limit the issues to be decided, and to prevent surprise." *Newland v. Comm'r of Corr.*, 322 Conn. 664, 678 (2016) (internal quotation marks omitted).

The conclusions reached by the habeas court in its decision on the motion to dismiss are matters of law, subject to *de novo* review. *See Anderson v. Commissioner of Correction*, 313 Conn. 360, 375 (2014), cert. denied sub nom. *Anderson v. Semple*, 574 U.S. 1176 (2015). The question for this Court is whether the habeas court's decision was "legally and logically correct" and whether "[it] find[s] support in the facts that appear in the record." *See Sadler v. Comm'r of Corr.*, 100 Conn. App. 659, 661, (2007)

C. Applicable Law

Since Mr. Tatum's conviction in 1990, there have been significant advances in the science involving eyewitness identification procedures and misidentification, as well as changes in the law, including the enactment of Connecticut General Statute §54-1p (2012), mandating specific eyewitness identification procedures. These changes are perhaps most evident in this Court's decisions in *Guilbert*, *Dickson*, and *Harris*. These significant advances in the science of eyewitness identification and misidentification have not only fundamentally altered our understanding of the science, but also, they have dramatically altered our rules and procedures for how this evidence is placed before juries.

1. *State of Connecticut v. Guilbert*

In 2012, the Connecticut Supreme Court decided *Guilbert*, holding, for the first time, that "expert testimony on eyewitness identification is admissible upon a determination by the trial court that the expert is qualified, and the proffered testimony is relevant and will aid the jury." *Guilbert*, 306 Conn. at 226. In doing so, the Court overruled an earlier decision in which it found that the factors affecting the reliability of eyewitness identification was within the knowledge of an average juror and, therefore, expert testimony was not necessary. *Id*. at 229 (citing to *State v. McClendon*, 248 Conn. 572, 586

(1999)). In particular, this Court held that "[w]e now conclude that [our prior decisions] are 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.* at 234. The Court noted the "near perfect scientific consensus" and "extensive and comprehensive scientific research" that "convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification." *Id*. at 234-36.

The *Guilbert* Court explained that there are a number of factors that, although widely accepted by scientists, are largely unfamiliar to the average juror and, in fact, many times counterintuitive. *Id*. at 239 Although not an exhaustive list, these include that: (1) there is at best a weak correlation between a witness' confidence in his or her identification and its 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 same race identifications (5) a person's memory diminishes rapidly over a period of hours rather than days or weeks, (6) identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure, (7) witnesses are prone to develop unwarranted confidence in their identifications if they are privy to post event or post identification information about the event or the identification, and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another. *Id*.

As the *Guilbert* Court explained, "laypersons commonly are unaware of the effect of the other aforementioned factors, including the

rate at which memory fades, the influence of post-event or post-identification information, the phenomenon of unconscious transference, and the risks inherent in the use by police of identification procedures that are not double-blind and sequential." *Id*. at 241. "As a result of this strong scientific consensus, 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*. at 243

In light of this, the *Guilbert* Court held that any jury instructions about the reliability of eyewitness identification "should reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at issue in the case." *Id*. at 258. Importantly, the *Guilbert* Court specifically repudiated Mr. Tatum's case, finding that "broad, generalized instructions on eyewitness identifications such as those previously approved by this court in *State v. Tatum* … do not suffice." *Id*. at 258 (emphasis added). *Id*. at 246, note 27 ("Contrary to our prior holdings, and consistent with the recent scientific findings on the subject, we agree with the New Jersey Supreme Court that such generalized jury instructions are inadequate to apprise the jury of the various ways in which eyewitness identification testimony may be unreliable.")

2. *State of Connecticut v. Dickson*

In 2016, the Connecticut Supreme Court decided *Dickson* and expanded the *Guilbert* Court's criticism of eyewitness identification evidence. In doing so, the Court announced a new two-part rule. First, the Court announced a new constitutional protection based on our evolved understanding of the flaws of eyewitness identification,

concluding "for the first time … that *any* first time in-court identification by a witness who would have been unable to reliably identify the defendant in a nonsuggestive out-of-court procedure constitutes a procedural due process violation." *See Dickson*, 322 Conn. at 426 n.11 (emphasis in original). Second, the Court announced a new prophylactic rule, aimed at preventing such due process violations, that incorporates certain procedures for prescreening first time in-court identifications. *See id.* at 444-52.

The *Dickson* court agreed with the defendant that first time in-court identifications are inherently suggestive. *Id.* at 424 ("…we are 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 who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime.") Following *Dickson*, in-court identifications that are not preceded by a successful identification in a non-suggestive procedure must be prescreened by the trial court to determine whether the identification violates the defendant's due process rights. *Id.* at n. 34. This procedural rule was designed as a means of enforcing the due process protections now recognized by the Court under our Constitution.

3. *State of Connecticut v. Harris*

In 2018, this Court decided *State v. Harris,* 330 Conn. 91, 96 (2018) which held that the due process guarantees of the Connecticut Constitution provide broader protection than the federal constitution with respect to the admissibility of eyewitness identification testimony and modified existing law "to conform to recent developments in social science and the law" and endorsing the *Guilbert* decision. The defendant in *Harris* challenged admission of an identification that was made while he was being arraigned in court on an unrelated robbery

case. Although the Court in *Harris* concluded that the identification procedure used was "overly suggestive by any measure" because "…none of those custodial arraignees was sufficiently similar to the defendant in height, weight and age..." it held that the identification was reliable in light of the circumstances in the case. *Id*. at 108.

D. The Appellate Court incorrectly concluded that the habeas court properly dismissed Counts Six and Seven on the basis that *Guilbert* and *Dickson* do not apply retroactively.

The issue of whether a judicial decision applies retroactively is a question of law, subject to plenary review. *See Garcia v. Comm'r of Corr*., 147 Conn. App. 669, 674 (2014). The threshold question in determining whether a case applies retroactively is "whether the rule of law under which the petitioner seeks relief is procedural or substantive in nature…. If the rule is substantive, it generally applies retroactively." *Id*. at 676-77 (footnote and internal quotation marks omitted).

A rule is substantive when it "narrows the scope of the conduct punishable under a criminal statute or is a constitutional determination that places particular conduct or persons covered by the statute beyond the State's power to punish…" *Id.* at 677 (brackets and internal quotation marks omitted). "A procedural rule, on the other hand, is only retroactive if it is considered 'watershed'." *Id*. at 676-77 (footnote and internal quotation marks omitted).

Procedural rules are considered "watershed" if they "(1) [are] necessary to prevent an impermissibly large risk of an inaccurate conviction; and (2) alter[ ] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id*. at 678 (internal quotation marks omitted). To apply retroactively, "the procedural rule

must both improve the accuracy of a trial and ensure the fundamental fairness of criminal proceedings." *Id.* Critically, "[w]atershed rules of criminal procedure include those that raise the possibility that someone convicted *with use of the invalidated procedure* might have been acquitted otherwise." *Casiano v. Comm'r*, 317 Conn. 52, 63 (2015) (emphasis added).

The habeas court erroneously dismissed Mr. Tatum's claims in Count Six and Seven on the basis that neither *Guilbert* nor *Dickson*, which both fundamentally changed the legal landscape of eyewitness identification generally and as it related specifically to Mr. Tatum's case, apply retroactively. Retroactive application of these decisions is particularly appropriate, however, given the Court's decision that our Connecticut Constitution affords broad protection with respect to issues of eyewitness identification. *See. Harris*, 330 Conn. at 114-15.

1. *Guilbert* is a watershed rule of criminal procedure and should apply retroactively.

The important procedural rules announced in *Guilbert* are precisely the type of rules designed to avoid wrongful convictions and ensure the fairness of our criminal proceedings. The Court in *Guilbert* recognized that, contrary to common assumptions, scientifically validated studies confirm that there are a number of factors that are largely unfamiliar to the average juror, and in many times counterintuitive, but greatly impact the accuracy of a witness' identification. As noted above, these include things like weapon focus, high stress, unconscious transference, and the fact that our memories dimmish rapidly over a period of hours, rather than days or weeks. By giving trial courts discretion to admit expert testimony concerning eyewitness identification evidence, the Court in *Guilbert* recognized that "…expert testimony is an effective way to educate jurors about the risks of misidentification." 306 Conn. at 252. As such, the Court

recognized that expert testimony may be necessary to guard against jurors' incorrect assumptions about factors related to eyewitness identification evidence.

The *Guilbert* Court further determined that "broad, generalized instructions on eyewitness identifications…do not suffice." *Id*. at 258. This is a direct recognition that juries need help to evaluate the fallibility of eyewitness identification evidence. When eyewitness identification evidence is admitted without specific instructions that "reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at issue in the case" jurors are left without sufficient guidance to evaluate what weight, if any, to give to the evidence. In these instances, there is a real risk that jurors will place undue weight on evidence that has largely been repudiated by the scientific community, like the impact of a witness' confidence on his or her identification.

These types of procedural rules, that fundamentally alter what the jury learns, are watershed and apply retroactively. A clear example of this can be found in this Court's decisions surrounding the kidnapping jury instructions. In *State v. Salamon*, the Court changed the statutory definition of kidnapping and, thus, determined that "a defendant is entitled to an instruction that he cannot be convicted of kidnapping if the restraint imposed on the victim was merely incidental" to another crime. 287 Conn. 509, 550 n.35 (2008). The Court later determined that the *Salamon* decision, including the change to jury instructions, applied retroactively. *See Luurtsema v. Comm'r of Corr*., 299 Conn. 740, 751, 770 (2011).

Notably, there is nothing in the text of *Guilbert* that specifically limits retroactive application of its holding. Moreover, there can be little doubt that eyewitness identification evidence is powerful evidence that is given great weight by juries. *See e.g*., *Perry v. New*

Hampshire, 132 S. Ct. 716, 730–31 (2012) (Sotomayor, J., dissenting) ("[the United States Supreme] Court has long recognized that eyewitness identifications' unique confluence of features—their unreliability, susceptibility to suggestion, *powerful impact on the jury*, and resistance to the ordinary tests of the adversarial process—can undermine the fairness of a trial") (emphasis added); *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (" [Eyewitness] testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!' "); *Kampshoff v. Smith*, 698 F.2d 581, 585 (2d Cir.1983) ("There can be no reasonable doubt that inaccurate eyewitness testimony may be one of the most prejudicial features of a criminal trial. Juries, naturally desirous to punish a vicious crime, may well be unschooled in the effects that the subtle compound of suggestion, anxiety, and forgetfulness in the face of the need to recall often has on witnesses. Accordingly, doubts over the strength of the evidence of a defendant's guilt may be resolved on the basis of the eyewitness' seeming certainty when he points to the defendant and exclaims with conviction that veils all doubt, '[T]hat's the man!'"). Both rules announced in *Guilbert* (admission of expert testimony and tailored eyewitness identification jury instructions) are necessary and essential to ensure fairness, especially in cases where the state's case primarily rests on eyewitness identification evidence. As such, they are watershed rules of criminal procedure and apply retroactively.

2. *Dickson* is a watershed rule of criminal procedure and should apply retroactively.

As noted above, *Dickson* announced a two-part rule, (1) a new constitutional protection based on our evolved understanding of the flaws of eyewitness identification, and (2) a prophylactic rule, aimed at preventing such due process violations. The *Dickson* Court announced these rules because 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 [a] crime, and then asking the witness if he can identify the person who committed the crime." 322 Conn. at 423-24. Indeed, the Fourth Circuit Court of Appeals noted that "any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant, which is the defendant's lawyer and which is the prosecutor." *United States v. Green*, 704 F.3d 298, 306 (4th Cir. 2013).

In deciding the case, the *Dickson* Court overruled its earlier decision in Mr. Tatum's direct appeal, in which it held that although Lombardo's identification, made for the first time at the probable cause hearing, was inherently suggestive, it was not "unnecessarily suggestive" because it was "necessary" for the state to present a first time in-court identification at the probable cause hearing. 322 Conn. at 729. As the *Dickson* Court explained, "[t]he state is not entitled to conduct an unfair procedure merely because a fair procedure failed to produce the desired result." *Id*. at 436.

Like the rules announced in *Guilbert*, these important procedural rules were enacted to prevent wrongful convictions and ensure the fairness of our criminal proceedings. *See, e.g*., *Harris*, 330 Conn. at 118 ("Mistaken eyewitness identification testimony is by far the leading cause of wrongful convictions … and the risk of mistake is

particularly acute when the identification has been tainted by an unduly suggestive procedure."); *United States v. Wade*, 388 U.S. 218, 229 (1967) ("[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined").

Arguably, this Court has not yet determined whether the new constitutional rule should have retroactive application. While the rule in *Dickson* is not necessarily a substantive "rule" as courts tend to interpret that phrase (*see, e.g., Garcia*, 147 Conn. App. at 677), the basis of the Court's decision is a substantial and fundamental change to our understanding of due process and constitutional protections and, thus, should apply retroactively.

Further, although we recognize that the Appellate Court has previously interpreted footnote 34 of the *Dickson* decision as a bar to retroactive application of the prophylactic rule, *see Bennett v. Comm'r of Correction*, 182 Conn. App. 541, 560 (2018) (citing to *Dickson*, 322 Conn. at 450-51, 451 n. 34), we urge the Court to reconsider that interpretation, as the footnote should be construed more narrowly to apply only to the specific facts of the *Dickson* case. *See Dickson*, 322 Conn. at 451, n. 34 ("*In the present case*, we conclude that the rule requiring prescreening of first time in-court identification does not fall within the narrow exception" to retroactive application.(Emphasis added). Additionally, although the Court noted that "[t]he new rule would not apply… on collateral review," as discussed below, this creates an impermissible chasm between similarly situated, possibly wrongfully identified defendants regarding their access to relief for due process and constitutional violations—a distinction based not on the nature of the violation, but merely on the procedural posture of their case. Nowhere is that more poignant or striking than here, where Mr.

Tatum, the very person whose case led to these advancements in eyewitness identification law, is being denied his right to relief from those changes.

The *Dickson* court recognized that jurors place great weight on identification evidence and that a witness's identification of the defendant in open court is perhaps the most suggestive identification procedure available. As such, the rules announced in *Dickson* are watershed rules of criminal procedure and should apply retroactively.

E. Justice requires that the holdings in *Guilbert* and *Dickson* apply retroactively to Mr. Tatum's case because each overruled holdings *in his case*.

Even if the Court disagrees that *Guilbert* and *Dickson* have general retroactive application, this Court should give retroactive application in this case because fairness and justice require such a result. The Court's decisions in *Guilbert* and *Dickson* specifically overruled portions of the Court's previous holding in Mr. Tatum's direct appeal. *See Guilbert*, 306 Conn. at 258; *Dickson*, 322 Conn. at 435-46. As such, he should receive the benefit of both decisions. *See, e.g., Shirley P. v. Norman P.*, 329 Conn. 648, 656-57 (2018) ("When a judgment loses preclusive effect because it is reversed, the great weight of authority holds that the court in a later action … should then normally set aside the later judgment.").

It is well settled that "[a]ppellate courts possess an inherent supervisory authority over the administration of justice." *State v. Lockhart,* 298 Conn. 537, 576 (2010) (internal quotation marks omitted); *see also State v. Rose* 305 Conn. 594, 607 (2012). That power includes the power to reverse a judgment.

Use of supervisory authority by Connecticut Appellate Courts generally falls into two categories: (1) "… to articulate a procedural

rule as a matter of policy, either as [a] holding or dictum, but without reversing [the underlying judgment] or portions thereof." And (2) "…to articulate a rule or otherwise take measures necessary to remedy a perceived injustice with respect to a preserved or unpreserved claim on appeal." *See State v. Elson*, 311 Conn. 726, 768 n.30 (2014). "In other words, in the first category of cases we employ only the rule-making power of our supervisory authority; in the second category we employ our rule-making power *and* our power to reverse a judgment." *State v. Carrion*, 313 Conn. 823, 851–52 (2014).

Although this Court has been clear that the use of supervisory authority to reverse a judgment is not meant to be a "last bastion of hope for every untenable appeal," *id*. at 851, invocation of this Court's supervisory authority may be necessary when the traditional protections (constitutional, statutory, and procedural limitations) are inadequate to ensure the fair and just administration of the courts. *Id*. "[O]nly in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts" will we exercise our supervisory authority to reverse a judgment. *Id.* (internal quotation marks omitted). In such a circumstance, "the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of [the] utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." *Id*. (internal quotation marks omitted). Although these standards are demanding, they are also "flexible and are to be determined in the interests of justice." *State v. Connor*, 292 Conn. 483, 518 n.23 (2009) (internal quotation marks omitted).

If ever there was a case in which fairness and justice require the Court to use its supervisory authority, Mr. Tatum's case is that case. There were no DNA, ballistics, or fingerprint evidence tying Mr. Tatum

to the scene or to the murder weapon, and the weapon was never recovered. The risk of wrongful conviction based on flawed eyewitness identification evidence was overwhelming. The state's evidence against Mr. Tatum primarily focused on the two witness identifications, both of whom identified *the same other person* [Frazier] before each recanted their identifications. Moreover, it was revealed during Mr. Tatum's first habeas trial that one of the men who was in the kitchen with LeVasseur, Roger Williams, a/k/a/ "Eli", a/k/a/ Charles Wilson, told police that LeVasseur said the men at the door were the "same men who had recently been arrested by the police." 9/22/98 Habeas Trial Tr. 106; *See also* Petitioner's Exhibit 9. This is important because Frazier was one of the men arrested in January, not Mr. Tatum. See 2/16/90 Trial Tr. 127-28.

Further, in Mr. Tatum's case, nearly all the factors noted in *Guilbert* were present in Lombardo's and LeVasseur's eyewitness identification testimony. First, Lombardo and LeVasseur both testified at trial that they were confident about their identification, despite having previously and independently identified another person--Frazier--just hours after the incident. Indeed, LeVasseur testified at trial that she had "[no doubt] at all" about her identification, 2/28/90 Trial Tr. 47, and Lombardo testified that he had "no doubt in his mind" that Mr. Tatum was the person who shot him. *Id*. at 75. Lombardo's testimony was particularly striking given that, in April of 1988, he told the police he did have some doubt as to who shot him and Parrett. *Id*. at 61.

We now know that the most reliable identification is the first one given, and that subsequent identifications, especially after a period of time, become "more and more biased and distorted and more prone to error." 1/31/19 Habeas Tr. 107 (testimony of Ayanna Thomas, expert witness in memory processes). We also know that "there is at best a

weak correlation between a witness' confidence in his or her identification and its accuracy." *See Guilbert*, 306 Conn. at 237.

Second, both Lombardo and Levasseur had a limited opportunity to view the individual they later identified. Lombardo testified that he did not know the shooter and interacted with him for a total of approximately twenty minutes from the time he got to the apartment to when he was shot. 2/16/90 Trial Tr. 22. LeVasseur saw the man briefly when she was letting him into the apartment but did not see him again during or after when the shots were fired. While Lombardo arguably had a better opportunity to view the shooter, as he confronted the individual following a heated exchange with Parrett, this was in a high-stress situation, where there was a weapon involved for him to focus on. We now know that high stress situations involving weapons can impact the reliability of eyewitness identification.

Third, both identifications were cross-racial. LeVasseur and Lombardo, neither of whom are African American, were making an identification of an African American shooter. We now know that "cross-racial identifications are considerably less accurate than identifications involving same race."

Fourth, LeVasseur's identification came months after the shooting, and Lombardo's over a year later, for the first time during the probable cause hearing. As noted by the Oregon Court of Appeals, "…a factfinder would have to not only disregard the scientific precepts …but to turn them upside down by believing that memory improves over time." *State v. Hickman*, 255 Or. App. 688, 699 (2013). Additionally, both witnesses admitted to being heavy drug users, with LeVasseur admitting that she was actively freebasing cocaine on the evening of the shooting and Lombardo admitting that he used narcotics nearly every day.

Finally, both identifications occurred after Frazier had already been arrested and the charges against him dismissed. As such, it is quite likely that both Lombardo and LeVasseur were privy to prejudicial post-event information. Even further, Lombardo, who had always indicated that it was an African American male that shot him, was asked at the probable cause hearing to make an identification with Mr. Tatum being the only African American male seated next to his lawyer at the defense table. The unquestionably clear message conveyed to Lombardo in this one to one in-court show-up was that Mr. Tatum was the shooter.

Lombardo's first-time in-court identification of Mr. Tatum was an unquestionably suggestive procedure. Critically, and likely in recognition of that, the *Dickson* Court overruled its earlier decision in Mr. Tatum's direct appeal, explaining that "[t]he state is not entitled to conduct an unfair procedure merely because a fair procedure failed to produce the desired result." 322 Conn. at 436. As such, the first part of the *Dickson* holding, the constitutional recognition of the court's evolved understanding of the flaws of eyewitness identification, should apply retroactively here, and Mr. Tatum should receive the benefit of society's—and, more importantly, the Court's—changes in acceptance and understanding of eyewitness identification evidence.

The *Dickson* holding was a direct recognition that at the time of Mr. Tatum's direct appeal, the Court incorrectly analyzed his due process claim. Indeed, the constitutional analysis that was applied in his case on direct appeal has now been changed. Given that the prior legal analysis is fatally flawed, justice requires that he receive the benefit of the subsequent decision.

Further, the prophylactic rule announced in *Dickson*, regarding the specific procedures surrounding first time in-court identifications, should also apply retroactively to Mr. Tatum. Unlike the identification

in *Dickson*, which the Court found was harmless beyond a reasonable doubt even if improperly admitted, the identifications in Mr. Tatum's case were unquestionably harmful. Indeed, this Court, in Mr. Tatum's direct appeal, agreed that the "setting of the probable cause hearing was inherently suggestive." *Tatum*, 219 Conn. at 727.

On Mr. Tatum's direct appeal, he additionally raised a due process challenge to the eyewitness identification jury instructions given in his case. *See Tatum*, 219 Conn. at 721. At that time, the Court denied this claim, determining that the instruction was "adequate" to alert the jury to the dangers inherent in eyewitness identification. *Id.* at 734, 742. Of course, the instructions in Mr. Tatum's case were repudiated and rejected in *Guilbert.*

There is no doubt that there have been significant advances in the research of eyewitness identification. *See, e.g., Harris*, 330 Conn. at 114-138 (discussing the "recent developments in social science and the law" and "contemporary understandings of economic and sociological norms"); *Henderson*, 208 N.J. 208, 287 (2011) (noting the vast body of scientific research about human memory that has emerged since the United States Supreme Court announced a test for the admission of eyewitness identification evidence in *Manson v. Brathwaite*, 432 U.S. 98 (1977)). As this Court noted, "…although cross-examination may expose the existence of factors that undermine the accuracy of eyewitness identifications, it cannot effectively educate the jury about the import of these factors." *See Guilbert*, 306 Conn. at 243.

In *State v. Torres*, the defendant raised a due process challenge to the trial court's admission of a witness's in-court identification of him after that witness was unable to identify the shooter in a photographic lineup shortly after the incident. 175 Conn. App. 138 (2017). While the identification procedure in that case was strikingly similar to Lombardo's identification of Mr. Tatum in this case (*i.e.*, an

in-court identification made following an unsuccessful identification attempt through the use of a photo array), Mr. Torres was afforded relief under *Dickson* because his case was still pending on appeal at the time *Dickson* was decided. ("In cases like the present one, where the suggestive in-court identification occurred before *Dickson* was decided, the court created an alternative procedure for reviewing courts to retroactively apply the *Dickson* principles and determine whether the suggestive in-court identification was nonetheless reliable and, therefore, admissible. '[I]n *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.'" *Id*., at 150 (quoting *Dickson*, 322 Conn. at 452.))

To follow such a rule and to afford relief only to defendants whose cases were still pending on direct appeal means that Mr. Tatum is treated differently than similarly situated defendants simply because his case was tried and decided too early. Such fundamental unfairness cannot stand when our Court has recognized that the due process clauses of our federal and state constitution require the exclusion of eyewitness identifications when they are obtained by unnecessarily suggestive procedures and are determined to be unreliable under the totality of the circumstances. *See State v. Reid*, 254 Conn. 540, 554-555 (2000).

Had the jury been precluded from hearing Lombardo's first time in-court identification, which would likely happen now under *Dickson*, or been informed, through the use of expert testimony now permitted through *Guilbert*, of the issues surrounding both identifications, or been instructed to consider the issues highlighted and necessitated by

the new model jury instructions, the jury could have considered the circumstances and factors of the identifications in the context of the dangers of misidentification. This very likely would have substantially affected the verdict. Accordingly, the constitutional analysis and prophylactic procedural rule set forth by the Court in *Dickson* should apply retroactively here, and Mr. Tatum should receive a new trial where all of our nuanced understandings as to the reliability of eyewitness identifications will be applied.

The new procedures announced in *Guilbert* and *Dickson*, and the rejection of the jury instructions in Mr. Tatum's case, were made in recognition of the fact that "mistaken eyewitness identification testimony is by far the leading cause of wrongful convictions." *Harris*, 330 Conn. at 118. These 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 Mr. Tatum should receive the benefit of these decisions.

IV. Conclusion

For the reasons set forth herein, the Appellate Court erroneously determined that the Habeas Court properly dismissed Mr. Tatum's claims in Counts Six and Seven. Considering the significant changes in our understanding of the science behind eyewitness identification procedures and misidentification, as well as changes in the law, including the Connecticut Supreme Court's holdings in *Guilbert* and *Dickson*, which overruled a portion of Mr. Tatum's direct appeal, a careful review of Mr. Tatum's claims require vacatur of the habeas court's dismissal and the habeas case remanded for a new trial on counts Six and Seven with direction to apply the holdings in *Guilbert* and *Dickson* retroactively to Mr. Tatum's case.

Respectfully submitted,
Edgar Tatum
Petitioner/Appellant

By: /s/ Kara E. Moreau
Juris. No. 438182
Jacobs & Dow, LLC
350 Orange Street
New Haven, CT 06511
Tel. (203) 772-3100
Fax (203) 772-1691
Email: kmoreau@jacobslaw.com
Attorney on Appeal

Index to Appendix

DOCKET NO. TSR-CV-16-4007857-S	SUPERIOR COURT
EDGAR TATUM	JUDICIAL DISTRICT OF TOLLAND
V.	AT ROCKVILLE
WARDEN	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.

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.

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~~ 721 (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.

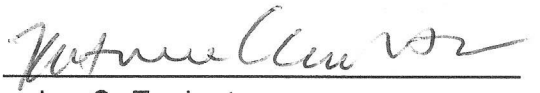
91. The scientific developments referenced in paragraph (90) constitute newly discovered evidence not reasonably available to the Petitioner at the time of the prior proceedings.

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: 

Katherine C. Essington
Juris No. 420490
190 Broad St., Suite 3W
Providence, RI 02903
(401) 351-2889- phone
(401) 351-2899- fax
katyessington@me.com

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.

Waterbury, CT 06702
Eva.lenczewski@ct.gov

And mailed, first class mail to:

Edgar Tatum
MacDougal Correctional
1153 East South St.
Suffield, MA 06080

Katherine C. Essington

FACSIMILE FILING COVER SHEET

JD-CL-73 Rev. 5-10

CONNECTICUT JUDICIAL BRANCH
SUPERIOR COURT
www.jud.ct.gov

INSTRUCTIONS

1. *See the back/page 2 for Procedures and Technical Standards for Electronic Filing.*
2. *Do not fax the back/page 2 of this form to the court.*
3. *Type or print legibly. One cover sheet must be submitted for each document.*
4. *The filing party shall keep the signed copy of the pleading, document or other paper while the action is pending, during any appeal period and during any applicable appellate process.*
5. *The transmission record of each filing shall be the filing party's confirmation of receipt by the Court. Please **do not** call the Clerk's Office to confirm receipt.*

TO: The Superior Court named below.

☑ Judicial District at: **Tolland**
☐ Geographical Area No.: _____

☐ Housing Session at: _____
☐ Juvenile Matters at: _____

☐ Small Claims Area at: _____
☐ Child Protection Session at Middletown

Fax number of above Court
860 870-3241

Docket number
TSR-CV-16-4007857-S
(Include prefix: for example, CI, CP, CR, CV, FA, HC, JV, MI, MV, SC, SP)

Title of document faxed
Fourth Amended Petition For A Writ Of Habeas Corpus/ Response To State's Request For A More Specific Statemer

Number of pages
18
(Unless otherwise directed by the court, documents shall not be more than 20 pages (including cover sheet) .)

The filing party assumes the risk of incomplete transmission or other factors that result in the document not being accepted for filing.

From:

Name *(Print or type full name of person to be contacted, if necessary)*
Katherine C. Essington

Date
6/27/18

I am an attorney or law firm excluded from e-filing: ☐ Yes ☑ No Juris number: _____

Telephone number *(Include area code)*
(401) 351-2889

Fax number *(Include area code)*
(401) 351-2899

To Be Completed By The Court Only

The document was not filed by the clerk's office for the following reason(s):

☐ The document is not in compliance with procedures and technical standards established by the Office of the Chief Court Administrator. See the Judicial Branch procedure at *www.jud.ct.gov.*

☐ The document is longer than 20 pages.

☐ The document is: ☐ incomplete. ☐ illegible.

☐ The document was not accompanied by the required fax cover sheet.

☐ The document was faxed to the wrong court.

☐ Other _____

Under the Procedures and Technical Standards for Electronic Filing set up by the Office of the Chief Court Administrator, the documents will not be returned by the clerk.

From (Print name and title)

Date

Print Form Reset Form

STATE OF CONNECTICUT
SUPERIOR COURT
G.A. 19

2018 SEP 13 P 2:26

DOCKET NO: CV16-4007857	)	STATE OF CONNECTICUT SUPERIOR COURT
EDGAR TATUM	)	
v.	)	JUDICIAL DISTRICT OF 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*

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

---

[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/APPEAL mailed to
Petitioner & both counsel
By: Kathryn Stoughton,
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).

DOCKET NO: CV16-4007857	)	STATE OF CONNECTICUT
	)	SUPERIOR COURT
EDGAR TATUM	)	
	)	JUDICIAL DISTRICT OF
v.	)	TOLLAND AT ROCKVILLE
	)	
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 Jdgmt

> 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

---

[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

---

[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.

---

[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

[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).

---

[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 <u>*at the time*</u> 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.

---

[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

Copies mailed to:
Edgar Tatum w/petcert/apfecc
Atty Katherine Essington w/petcert/apfecc
Atty Sebastian DeSantis w/petcert/apfecc
Atty Eva Lenczewski
OCPD-LSU (Hartford)
Reporter of Judicial Decisions
Judge Newson

by: Kathryn Stalfoike, Asst. Clerk
8/28/2019

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. *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 claim 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]

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 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.

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.

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 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 pre-trial 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 thresh-

old 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 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.

[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.

[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 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).

[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 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.

[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.' "

[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).

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

Petition Filed: April 27, 2022
Clerk, Superior Court, TSR CV16-4007857-S
Hon. John M. Newson
Clerk, Appellate Court
Reporter of Judicial Decisions
Staff Attorneys' Office
Counsel of Record

Within 20 days from the issuance of notice that certification to appeal has been granted, the party who filed the petition for certification, who shall be considered the appellant, shall file the appeal in accordance with the procedure set forth in Practice Book § 63-3 and shall pay all required fees in accordance with the provisions of Practice Book §§ 60-7 or 60-8. The appeal form generated at the time of the electronic filing will bear the Supreme Court docket number assigned to the appeal.

Pursuant to Practice Book § 84-11 (d), and in light of the October 1, 2021 amendments to the rules of appellate procedure, the appellant shall file a docketing statement and is asked to file a designation of the contents of the clerk appendix within 10 days of the filing of the appeal with the Supreme Court. No other § 63-4 papers on a certified appeal may be filed without permission of the Supreme Court.

Your case manager is Attorney René L. Robertson at phone number (860) 757-2229.

The appellant's brief is due 45 days after the clerk appendix is sent to the parties.

Statement of Charles Wilson age 20 of 26 Cossette St. Wtby no phone

Given to Det.Palladino on 2/26/88

VOLUNTARY STATEMENT

That my name is Charles Wilson I am 20 years of age and I live at 26 Cossett St. in Waterbury, Ct.and I am dictating this statement to Detective Palladino of the Waterbury Police Department of my own free will and I also realize that my statement will be used in Court and it is the complete truth to the best of my knowledge and recollection;

That on February 25,1988 shortly before 11:00PM I was inside the kitchen of 24 Cossette St. which is the residence of Larry (last name not known), a white male about 24 years old, a female named Tracy(last name not known) who is Larry's girlfriend. I was sitting at the kitchen table having a soda and Larry was in the living room as he went to answer the front door. Tracy was also in the living room with Larry.

Tracy came C.W. into the kitchen and told me some people had come to the door and they were the same men who had been recently arrested by the police. I started to go into the living room with Tracy and that was when I heard several gun shots coming from the living room. At that time both Tracy and I ran out of the rear door and upstairs to my apartment.

I then went back downstairs and learned that Larry had been shot and Tony Lombardo also. Tony lives at 31 Cossette St. whic is right across from where I live.

I got a glimsp of the guy that did the shooting, he was a black male, age unknown, 6'3" tall, 170lbs.or so, wearing a long trench coat, brown hat.

I was shown a series of mug shot photos but I was not able to positively identify anyone.

End of my statement, nothing else to follow;;

I have read this statement consisting of 1 pages.

The facts therein contained are true and correct and I have given the above statement of my own free will after my constitutional rights had been explained to me.

Signed in the presence of:

Signed: Charles Wilson

Witness: _____

Sworn and subscribed before me this 26th. day of February 1988

TIME STATEMENT FINISHED _____ A.M. _____ P.M.

Det. Patrick [illegible]

SUPPLEMENTARY REPORT

NO. 13687

Classification

Name of Complainant	Address	Phone No.
Anthony Lombardo	31 Cossett St, Wtby Ct	754-6271

Offense

Homicide/Assault 1st

DETAILS OF OFFENSE, PROGRESS OF INVESTIGATION, ETC.:
(Investigating Officer must sign)

Page No. 11 Date 2/26/88 19

That on the above date and time I Detective Howard Jones, took a signed and subscribed statement from Anthony Lombardo in regards to his being shot, and also his witnessing of the shooting of Larry Parrett (Homicide)

That also while at the Detective Division Mr. Lombardo, was shown a photo display consisting of 8 photo of black male. That Mr. Lombardo picked out photo # 8 as positively being the same person who shot Larry Parrett, and him. That Mr. Lombardo was asked, and did signed the back of photo # 8. photo # 4936, he also dated said photo

That said photo display was placed into evidents by this writer

That also a statement was taken from Miquel Vargas in regards to what he saw and heard on Cossett St on 2/25/88

INVESTIGATING OFFICER(S) Off. Guglielmi 26 REPORT MADE BY Det Howard Jones DATE 2/26/88

CASE FILED Yes ☐ No ☐

28 THIS CASE IS Cleared by arrest ☐ Unfounded ☐ Inactive ☐ Other ☐

29 APPROVED BY [signature]

SUPPLEMENTARY REPORT

NO. File # 88-06023 | Murder, Assault 1st (Classification) | NO: CR# 13687

Name of Complainant	Address	Phone No.
Anthony Lombardo	#31 Cossett St.	#754-6271

Offense

Murder, Assault 1st

DETAILS OF OFFENSE, PROGRESS OF INVESTIGATION, ETC.:
(Investigating Officer must sign)

Page No. 17 Date March 22, 1988 19

That on March 8th, 1988 at approximately 1030 hrs. this writer was at the Kendrick Avenue courthouse, #7 Kendrick Ave. Waterbury, Ct. That this writer saw Mr. James Frazier, A.K.A. Jay Randly, Jackson, Ron Jackson, on his way walk into the courthouse, that this writer knew that Mr. Frazier was wanted by this department for the charge of murder, that this writer called the departments detective bureau and spoke to Lt. Boccocchio who told this writer over the phon that this department still had an outstanding warrant for Mr. Frazier for the charge of murder. That this writer asked two court sheriffs John Britt, and Richard Cerutti to assist this officer in apprehending Mr. Frazier because he was now inside the courthouse, #7 Kendrick Avenue, GA #4. That these sherriffs did assist this writer as this writer grabbed Mr. Frazier and told him he was under arrest for muredr. Mr. Frazier said without being asked any questions # I know what this is all about and I wont offer any resistance", that Mr. Fraz was then handcuffed and taker downstairs into the court lockup facility for holding. That Lt. Deely and Det. J. Augelli came to the courthouse with the muredr warrant for Mr. Frazier. That Mr. Frazier was then transported back to police headquarters by this writer and Lt. Deely via detective car. That this W and Det. Lt. Deely brought Mr. Frazier to this departments detective bureau. That Mr. Frazier was told that he had the right to remain silent. That Mr. Fraz was'nt asked any questions by this officer and just began speaking on his own and said "I flew out of LaGuardia airport and went back to California, LA, I ca back because after speaking to my mother and a bail bondsman in california they said it would be in my best interests to return back here and face the problem, mr Frazier then said"Idont think I should say anything else". Then became silen

25 INVESTIGATING OFFICER(S) Lt. Deely & Det. Clary 26 REPORT MADE BY Det. Clary DATE 3/22/88

27 CASE FILED	28 THIS CASE IS	29 APPROVED BY
Yes ☐ No ☐	Cleared by arrest ☐ Unfounded ☐ Inactive ☐ Other ☐	Lt. Robert [illegible]

88-06023 CN 13687

VOLUNTARY STATEMENT

Voluntary statement of Tracy LeVasseur age eighteen of 20 Grove Court Meriden, Connecticut. Tel.# 237-6479 given to Lieutenant Robert Deely on April 29,1988 at the Waterbury Police Department at 1600 hrs.

Or April 29,1988 at approximately 3:30p.m., I Tracy LeVasseur viewed a line up at the Waterbury Police Department consisting of eight black males. I could not identify any of these males as the person I let into the house at 24 Cossett St., on February 25,1988 at approximately 10:00 p.m.

I did identify one person in the line up as someone I know to be "Jay". Said "Jay" was at my house located at 24 Cossette St., on ore occasion when I was home. However, said "Jay" was not the same person I let into the house on February 25,1988. At approximately 10:00 p.m.

I have read this statement consisting of 1. pages.

The facts therein contained are true and correct and I have given the above statement of my own free will after my constitutional rights had been explained to me.

Signed in the presence of:

Signed: Tracy S. LeVasseur

Witness: _____ Sworn and subscribed to befcre me this

TIME STATEMENT FINISHED _____ A.M. 1608 P.M. 29th day of April 1988.

Lieutenant Deschacht

SUPPLEMENTARY REPORT

NO. 88-06023 Classification NO. 13687

Name of Complainant | Address | Phone No.

Lombardo, Anthony 31 Cossett St.

Offense

Murder/Assault 1st.

DETAILS OF OFFENSE, PROGRESS OF INVESTIGATION, ETC.:
(Investigating Officer must sign)

Page No. 40 Date Feb. 25th, 19 88

That on May 3rd, 1988 Insp. Healy interviewed Jay Randle Frazier along with his attorney Denise DeJong. Frazier stated that he met Ron Jackson in Waterbury for the first time. Frazier stated that he came to Waterbury with Patrone Collins (A/K/A-Roland Hoffler) on 1-15-88, and while in Waterbury he went to Cossett St. and met the victim Larry Parrett Tracy LeVasseur, Ron Jackson, and also met Walt & "Psych". He did not know these people until he came to Waterbury, Jay Frazier stated that on the night of 2-25-88 he was at the Econo Lodge in Southington, having a few drinks. He stated that he called Ervins home and spoke with Nate Ervin after leaving a message for Nate to call him back at the motel. When Nate Ervin called him back he told Frazier that emergency equipment was at Larry Parrett's home. Nate Ervin and Patrone Collins came to the Econo Lodge picked him up and then drove him to Sandra's home where he stayed until the next day. Sandra is Patrone Collins cousin and may live on Cooke St. in Waterbury. Ct. Frazier stated that he left Waterbury on 2-29-88 from Laguardia but did not remember the airlines. Frazier also stated that Ron Jackson has a tattoo on the back of one of his hands, and that Ron Jackson is about 6'3" or 6'4" tall. Ron Jackson told Frazier that he had been in prison in Calif. and could not go back. Frazier stated that he had seen Ron Jackson with a gun.

25 INVESTIGATING OFFICER(S) 26 REPORT MADE BY Lt. R. Segal/Insp.Healy DATE 5-23-

27 CASE FILED Yes ☐ No ☐ | 28 THIS CASE IS Cleared by arrest ☐ Unfounded ☐ Inactive ☐ Other ☐ | 29 APPROVED BY

Connecticut General Statute §54-1p (2012)

(a) For the purposes of this section:

(1) "Eyewitness" means a person who observes another person at or near the scene of an offense;

(2) "Photo lineup" means a procedure in which an array of photographs, including a photograph of the person suspected as the perpetrator of an offense and additional photographs of other persons not suspected of the offense, is presented to an eyewitness for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator;

(3) "Live lineup" means a procedure in which a group of persons, including the person suspected as the perpetrator of an offense and other persons not suspected of the offense, is presented to an eyewitness for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator;

(4) "Identification procedure" means either a photo lineup or a live lineup; and

(5) "Filler" means either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure.

(b) Not later than February 1, 2013, the Police Officer Standards and Training Council and the Division of State Police within the Department of Emergency Services and Public Protection shall jointly develop and promulgate uniform mandatory policies and appropriate guidelines for the conducting of eyewitness identification procedures that shall be based on best practices and be followed by all municipal and state law enforcement agencies. Said council and division shall also develop and promulgate a standardized form to be used by municipal and state law enforcement agencies when conducting an identification procedure and making a written record thereof.

(c) Not later than May 1, 2013, each municipal police department and the Department of Emergency Services and Public Protection shall adopt procedures for the conducting of photo lineups and live lineups that are in accordance with the policies and guidelines developed and promulgated by the Police Officer Standards and Training Council and the Division of State Police within the Department of Emergency Services and Public Protection pursuant to subsection (b) of this section and that comply with the following requirements:

(1) Whenever a specific person is suspected as the perpetrator of an offense, the photographs included in a photo lineup or the persons participating in a live lineup shall be presented sequentially so that the eyewitness views one

photograph or one person at a time in accordance with the policies and guidelines developed and promulgated by the Police Officer Standards and Training Council and the Division of State Police within the Department of Emergency Services and Public Protection pursuant to subsection (b) of this section;

(2) The identification procedure shall be conducted in such a manner that the person conducting the procedure does not know which person in the photo lineup or live lineup is suspected as the perpetrator of the offense, except that, if it is not practicable to conduct a photo lineup in such a manner, the photo lineup shall be conducted by the use of a folder shuffle method, computer program or other comparable method so that the person conducting the procedure does not know which photograph the eyewitness is viewing during the procedure;

(3) The eyewitness shall be instructed prior to the identification procedure:

(A) That the eyewitness will be asked to view an array of photographs or a group of persons, and that each photograph or person will be presented one at a time;

(B) That it is as important to exclude innocent persons as it is to identify the perpetrator;

(C) That the persons in a photo lineup or live lineup may not look exactly as they did on the date of the offense because features like facial or head hair can change;

(D) That the perpetrator may or may not be among the persons in the photo lineup or live lineup;

(E) That the eyewitness should not feel compelled to make an identification;

(F) That the eyewitness should take as much time as needed in making a decision; and

(G) That the police will continue to investigate the offense regardless of whether the eyewitness makes an identification;

(4) In addition to the instructions required by subdivision (3) of this subsection, the eyewitness shall be given such instructions as may be developed and promulgated by the Police Officer Standards and Training Council and the Division of State Police within the Department of Emergency Services and Public Protection pursuant to subsection (b) of this section;

(5) The photo lineup or live lineup shall be composed so that the fillers generally fit the description of the person suspected as the perpetrator and, in the case of a photo lineup, so that the photograph of the person suspected as the perpetrator resembles his or her appearance at the time of the offense and does not unduly stand out;

(6) If the eyewitness has previously viewed a photo lineup or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the person suspected as the perpetrator participates or in which the photograph of the person suspected as the perpetrator is included shall be different from the fillers used in any prior lineups;

(7) At least five fillers shall be included in the photo lineup and at least four fillers shall be included in the live lineup, in addition to the person suspected as the perpetrator;

(8) In a photo lineup, no writings or information concerning any previous arrest of the person suspected as the perpetrator shall be visible to the eyewitness;

(9) In a live lineup, any identification actions, such as speaking or making gestures or other movements, shall be performed by all lineup participants;

(10) In a live lineup, all lineup participants shall be out of the view of the eyewitness at the beginning of the identification procedure;

(11) The person suspected as the perpetrator shall be the only suspected perpetrator included in the identification procedure;

(12) Nothing shall be said to the eyewitness regarding the position in the photo lineup or the live lineup of the person suspected as the perpetrator;

(13) Nothing shall be said to the eyewitness that might influence the eyewitness's selection of the person suspected as the perpetrator;

(14) If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning such person prior to obtaining the eyewitness's statement regarding how certain he or she is of the selection; and

(15) A written record of the identification procedure shall be made that includes the following information:

(A) All identification and nonidentification results obtained during the identification procedure, signed by the eyewitness, including the

eyewitness's own words regarding how certain he or she is of the selection;

(B) The names of all persons present at the identification procedure;

(C) The date and time of the identification procedure;

(D) In a photo lineup, the photographs presented to the eyewitness or copies thereof;

(E) In a photo lineup, identification information on all persons whose photograph was included in the lineup and the sources of all photographs used; and

(F) In a live lineup, identification information on all persons who participated in the lineup.

(P.A. 11-252, S. 1; P.A. 12-111, S. 1.)

Constitutional Provisions

a. Fourteenth Amendment to the United States Constitution

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.
Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.
No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

b. Article First, §8, of the Connecticut Constitution

In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the militia when in actual service in time of war or public danger.

c. Article First, §9, of the Connecticut Constitution

No person shall be arrested, detained or punished, except in cases clearly warranted by law.

guilty, unless you are convinced beyond a reasonable doubt that he committed the crimes charged.

In this regard, you are instructed that it is not necessary Mr. Tatum prove that someone else committed the crimes, nor is the burden on Mr. Tatum to prove his innocence. If, from the evidence or lack of evidence in this case, you have a reasonable doubt, as I have explained that term to you, as to whether or not Mr. Tatum committed the crimes with which he is charged, then you must find him not guilty.

Now, as I have told you, you must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. It is my recollection, but again, it's your recollection which controls, that Anthony Lombardo identified the defendant as his assailant and the person who shot the decedent, Larry Parrett.

I also discussed with you a few minutes ago the prior identifications, which the defendant claims were made by Lombardo from photographs. You will also recall the other evidence adduced by Lombardo through the state concerning other

identification made in other forums.

It is also my recollection, but again, it's your recollection that controls, Tracy LeVasseur testified that she admitted the defendant and Lombardo to the home that she shared with the decedent about ten or ten-thirty p.m. on the night of the shooting. She also testified, as I recall, that she knew the defendant as Ron Jackson and that he had been in her home a number of times before the night in question.

It is also my recollection, but again, it's your memory that controls, that shortly after Lombardo and the defendant arrived, that Lombardo returned to the living room, after having gone from the living room into the kitchen. And, it was at that time, that is, when Mr. Lombardo went back into the living room Ms. LeVasseur heard gunshots.

She also testified, as I recall, that she picked the person from a photographic line-up, telling the police that he looked like the person, but that she was not sure of her identification.

Again, it's your memory which controls. But, it is my recollection, further, that she

testified that about a week later she told the police that the person she had tentatively identified from the photo was not the person, that the shooter was a much taller man. Subsequently, she identified the defendant as the person who was at her home on the night of the shooting.

Again, it's up to you to recall the testimony of these various witnesses and determine the weight to be ascribed to it. The state claims that this evidence establishes the defendant's presence at the scene of the crime and that the testimony of Mr. Lombardo establishes the commission of the crime.

Identification is a question of fact for you to decide, taking into consideration all the evidence which you have seen and heard in the course of the trial.

Again, the state has the burden of proving beyond a reasonable doubt that the defendant was the perpetrator of these crimes. The identification of the defendant by a single witness as the one involved in the commission of the crime is, in and of itself, sufficient to justify a conviction of such a person, provided,

of course, you are satisfied beyond a reasonable doubt of the identity of the defendant as the one who committed the crime.

When arriving at a determination as to the matter of identification, you should consider all the facts and circumstances which existed at the time of the observations of the perpetrator by each witness. In this regard, the reliability of each witness is of paramount importance, since identification is an expression of belief or impression by the witness.

Due to the possibility of an honest mistake, the testimony of any witness on the issue of identity should be thoroughly scrutinized. Its value depends upon the opportunity and ability of the witness to observe the offender at the time of the event and to make an accurate identification later on. It is for you to decide how much weight to place upon such testimony.

In appraising the identification of any witness, you should take into account the opportunity which the witness had to observe the person, the degree of certainty of the

identification made in court, whether the witness knew or had seen the person before the identification, the circumstances and degree of certainty or uncertainty of any out of court identifications made, whether by photograph or in line-up or other display of a person and the length of time available to make the observations of the perpetrator.

And, you may also consider, in making your appraisal, the lighting conditions at the time of the crime, any physical descriptions that the witness may have given to the police, the physical and emotional condition of the witness at the time of the incident and the witness's powers of observation, in general.

In short, you must consider the totality of all of the circumstances affecting identification. Remember, you must be satisfied beyond a reasonable doubt of the identity of the defendant as the one who committed the crime or you must find him not guilty.

As you are aware, the defendant is charged in this information in two counts. You will recall that the document, called the information, is merely the charging document and

2.6-4 Identification of Defendant

Revised to June 2, 2021

The state has the burden of proving beyond a reasonable doubt that the defendant was the perpetrator of the crime.

[<*Include if appropriate:*> The defendant denies that (he/she) is the person who was involved in the commission of the alleged offense(s).]

In this case, the state has presented evidence that an eyewitness identified the defendant in connection with the crime charged. Identification is a question of fact for you to decide, taking into consideration all the evidence that you have seen and heard in the course of the trial.

The identification of the defendant by a single witness as the one involved in the commission of a crime is, in and of itself, sufficient to justify a conviction of such a person, provided, of course, that you are satisfied beyond a reasonable doubt of the identity of the defendant as the one who committed the crime. In arriving at a determination as to the matter of identification, you should consider all the facts and circumstances that existed at the time of the observation of the perpetrator by each witness. In this regard, the reliability of each witness is of paramount importance, since identification testimony is an expression of belief or impression by the witness. Its value depends upon the opportunity and ability of the witness to observe the perpetrator at the time of the event and to make an accurate identification later. It is for you to decide how much weight to place upon such testimony.

Capacity and opportunity of the witness to observe the perpetrator[1]
In appraising the identification of the defendant as the perpetrator by any witness, you should take into account whether the witness had adequate opportunity and ability to observe the perpetrator on the date in question. This will be affected by such considerations as the length of time available to make the observation; the distance between the witness and the perpetrator; the lighting conditions at the time of the offense; whether the witness had known or seen the person in the past; the history, if any, between them, including any degree of animosity; and whether anything distracted the attention of the witness during the incident. You should also consider the witness's physical and emotional condition at the time of the incident, and the witness's powers of observation in general. High stress at the time of an observation may render a witness less able to retain an accurate perception and memory of the observed events.

[<*Include if appropriate:*> In general, a witness bases any identification on (his/her) sense of sight. But this is not necessarily so. An identification based on other senses, such as smell or the sound of the perpetrator's voice is just as valid.]

[<*Include if appropriate:*> The reliability of an identification can be diminished by a witness's focus on a weapon, particularly if the crime is of short duration. If the crime is not of short duration, the witness may adapt to the presence of the weapon and focus on other details.]

Circumstances of identification
Furthermore, you should consider the length of time that elapsed between the occurrence of the

crime and the identification of the defendant by the witness. A witness's memory diminishes most rapidly in the hours immediately following the witnessed event and less dramatically in the days and weeks thereafter. You also should consider any physical descriptions that the witness may have given to police, and all the other factors which you find relating to the reliability or lack of reliability of the identification of the defendant.

[<*Include if appropriate:*> For instance, cross-racial identifications are considerably less accurate than identifications in which a witness and the perpetrator are of the same race. You should consider whether <*insert name of witness*> and the defendant are of the same race.]

You may also consider the strength of the witness's initial identification of the defendant, including the degree of certainty expressed by the witness at the time of that identification. Certainty, however, does not necessarily mean accuracy. You should also take into account the circumstances under which the witness first viewed and identified the defendant and the suggestibility, if any, of the procedure used in that viewing.

[<*Include if appropriate:*> If a witness identifies a suspect with high confidence from an initial (lineup/photo array) conducted by the police using proper, non-suggestive procedures,[2] there is a strong correlation between the witness's confidence level and the accuracy of the identification. That correlation is substantially weakened, however, if the (lineup/photo array) is not conducted using proper, non-suggestive procedures. I remind you that identification is a question of fact for you to decide.]

[<*Include if appropriate:*> If a witness identifies a suspect with low confidence, under any conditions, there is a high probability of error.]

[<*Include if appropriate*:> The identification of the defendant by the witness, <*insert name of* witness> (was/was not) made from a group of similar looking individuals. An identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.]

[<*Include if appropriate*:>[3] The identification of the defendant by the witness, <*insert name of witness*>, was the result of an identification procedure in which the individual conducting the procedure either indicated to the witness that a suspect was present in the procedure or failed to warn the witness that the perpetrator may or may not be in the procedure.

Indicating to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure may increase the likelihood that the witness will select one of the individuals in the procedure even when the perpetrator is not present. Thus, such action on the part of the procedure administrator may increase the probability of a misidentification.]

[<*Include if appropriate:*> The identification of the defendant by the witness, <*insert name of witness*>, was the result of an identification procedure conducted by an individual who knew that the defendant was a suspect for the crime(s) that (is/are) the subject of this trial. An identification may be less reliable when the individual conducting the identification procedure

knows that a suspect is present in the procedure, because that individual may convey that knowledge to the witness, either intentionally or unintentionally.]

[<*Include if appropriate:*] An identification may be made using either sequential or simultaneous procedures. In a sequential procedure, the witness looks at one (individual/photograph) at a time; in a simultaneous procedure, the witness looks at all of the (individuals/photographs) at the same time. Identifications made pursuant to simultaneous identification procedures may be less reliable than those made pursuant to sequential identification procedures. The identification of the defendant by the witness, <*insert name of witness*>, was the result of an identification procedure in which the (individuals/photographs) were presented to the witness (simultaneously/sequentially).][4]

[<*Include if appropriate:*> The accuracy of an initial identification may be affected by information that the witness receives after the witnessed event but before the identification is made. Similarly, a subsequent identification made by the witness in court may be affected by information that (he/she) receives following (his/her) initial identification. Such information may include identifications made by other witnesses, physical descriptions of the perpetrator given by other witnesses, photographs or media accounts, or any other information that may affect the independence or accuracy of a witness's identification. Exposure to such information may affect not only the accuracy of an identification, but also the witness's certainty in the identification and the witness's memory about the quality of (his/her) opportunity to view the perpetrator during the event in question. Additionally, the witness may not realize that (his/her) memory has been affected by this information.]

[<*Include if appropriate:*> The accuracy of an identification may be undermined by unconscious transference, which occurs when a person seen by the witness in one context is confused with a person (he/she) saw in another context. In this case evidence was presented that <*insert name of witness*> saw (the defendant/the defendant's image) in a context other than the event in question prior to identifying (him/her) as the perpetrator.]

The foregoing information is not intended to direct you to give more or less weight to the eyewitness identification evidence offered by the state. It is your duty to determine what weight to give to that evidence. You may, however, take into account this information, as just explained to you, in making that determination.

Consistency of identification
You may consider whether the witness at any time either failed to identify the defendant or made an identification that was inconsistent with the identification testified to at trial.

Credibility of witness
You will subject the testimony of any identification witness to the same standards of credibility that apply to all the witness. When assessing the credibility of the testimony as it relates to the issue of identification, keep in mind that it is not sufficient that the witness be free from doubt as to the correctness of the identification of the defendant; rather, you must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may find (him/her) guilty on any charge.

[<*If there has been expert testimony of eyewitness identification*:> You heard the testimony of <*insert name of witness*> on the (psychological / sociological / statistical) research on eyewitness identification. You should evaluate that testimony as I have instructed you on expert testimony.][5]

Conclusion

In short, you must consider the totality of the circumstances affecting the identification. Remember, the state has the burden to not only prove every element of the crime but also the identity of the defendant as the perpetrator of the crime. You must be satisfied beyond a reasonable doubt of the identity of the defendant as the one who committed the crime, or you must find the defendant not guilty. If you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

---

[1] In *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), the court proposed a model instruction which has been followed substantially by many jurisdictions. While Connecticut courts "have used the model *Telfaire* instruction as an aid in determining the adequacy of an instruction on eyewitness identification . . . [the Connecticut Supreme Court has] never required that it be given verbatim in order to ensure that the jury is properly guided." (Citations omitted; internal quotation marks omitted.) *State v. Tatum*, 219 Conn. 721, 733-34 (1991), overruled on other grounds, *State v. Dickson*, 322 Conn. 410 (2016), cert. denied, 137 S. Ct. 2263 (2017). The *Telfaire* instruction has four components: 1) the capacity and opportunity of the witness to observe the offender; 2) the circumstances surrounding the subsequent identification; 3) whether the witness at any time either failed to identify the defendant or made an identification inconsistent with that made at trial; and 4) the credibility of the witness making the identification. This instruction complies with the substantive requirements of *Telfaire* in all respects, with several additional components based on more recent Connecticut decisions, but should be modified according to the specific facts of the case and the particular claims of the defendant regarding the identification(s).

[2] See General Statutes § 54-1p (requiring, inter alia, that police lineups be conducted using double-blind procedures using only one suspect and four [for a live lineup] or five [for a photo array] innocent fillers that fit the suspect's description, that the witness be cautioned that the perpetrator may or may not be present in the lineup/photo array, and that a written record of the procedure, including the witness's own words regarding the certainty of his/her selection, be made); see also J.T. Wixted and G.L. Wells, The Relationship between Eyewitness Confidence and Identification Accuracy: A New Synthesis, 18 (1) Psychological Science in the Public Interest 10 (2017) (discussing research showing that, when the foregoing practices are utilized, high witness confidence correlates strongly with an accurate identification).

[3] *State v. Ledbetter*, 275 Conn. 534 (2005), cert. denied, 547 U.S. 1082 (2006), overruled on other grounds, *State v. Harris*, 330 Conn. 91, 130-31 (2018) requires specific instructions on identification procedures under certain circumstances. See discussion of *Ledbetter* below.

[4] Note that more recent studies considering sequential versus simultaneous procedures have produced conflicting information. See *State v. Dickson*, supra, 322 Conn. 463 n.4 (*Zarella, J.*, concurring).

[5] See *State v. Guilbert*, 306 Conn. 218 (2012), for a thorough discussion of allowing expert testimony on eyewitness identification. If expert testimony conflicts with any portion of this instruction, the court should consider the propriety of including that portion.

Commentary

A defendant who raises the defense of mistaken identity is entitled to an instruction. *State v. Whipper*, 258 Conn. 229, 285 (2001) ("trial court properly charged the jury that the state had to prove beyond a reasonable doubt that the defendant had committed the offenses charged and that the jury should consider the defendant's defense of mistaken identity and the evidence he had submitted in support of that defense"), overruled on other grounds by *State v Cruz*, 269 Conn. 97 (2004); *State v. Dubose*, 75 Conn. App. 163, 172-73 (reviewing nearly identical instruction), cert. denied, 263 Conn. 909 (2002).

"[A] trial court's refusal to give any special instruction whatsoever on the dangers inherent in eyewitness identification constitutes reversible error where the conviction of the defendant turns upon the testimony of eyewitnesses who were uncertain, unclear or inconsistent." (Internal quotation marks omitted.) *State v. Tatum*, supra, 219 Conn. 733 n.18; see also *State v. Cerilli*, 222 Conn. 556, 567 (1992); *State v. Taft*, 57 Conn. App. 19, 30 n.8 (2000), aff'd, 258 Conn. 412 (2001); *State v. Askew*, 44 Conn. App. 280, 287-90 (1997), rev'd on other grounds, 245 Conn. 351 (1998); *State v. Collins*, 38 Conn. App. 247, 254 n.6 (1995).

Overly suggestive identification procedures -- the Ledbetter instruction

In a challenge to the standard identification procedures employed by law enforcement prior to the enactment of General Statutes § 54-1p, the Supreme Court, in *State v. Ledbetter*, supra, 275 Conn. 534, declined to adopt a per se rule that juries should be instructed that such identifications have a high potential for unreliability. It did conclude, however, that "an indication by the identification procedure administrator that a suspect is present in the procedure is an unnecessarily suggestive element of the process that should be considered by the trial court in its analysis. . . . [The Court] also [agreed] that the trial court, as part of its analysis, should consider whether the identification procedure administrator instructed the witness that the perpetrator may or may not be present in the procedure and should take into account the results of the research studies concerning that instruction." (Citations omitted.) Id., 574-75. Consequently, the Court held that trial courts should instruct the jury as to the possible risk of misidentification "in those cases where the identification procedure administrator fails to provide such a warning, unless no significant risk of misidentification exists." Id., 575.

Specifically, trial courts must give the instruction in those cases in which:

1) the state has offered eyewitness identification evidence;
2) that evidence resulted from an identification procedure; and
3) the administrator of that procedure failed to instruct the witness that the perpetrator may or may not be present in the procedure.

Note that the Supreme Court "decline[d] to delineate all of the potential factual variations that might result in the trial court finding no significant risk of misidentification, [but noted] that one example would be where the defendant was known by the witness before the incident occurred. The trial court should make its determination of whether a significant risk of misidentification exists on the basis of the totality of the circumstances." Id., 579 n.26.

Because police now are statutorily required to instruct a witness, prior to conducting an

identification procedure, "[t]hat the perpetrator may or may not be among the persons in the photo lineup or live lineup"; General Statutes § 54-1p (c) (3) (D); the foregoing instruction typically should not be necessary.

Where court disallows first time in-court identification

The Supreme Court, in *State v. Dickson*, supra, 322 Conn. 410, concluded that "in cases in which identity is an issue, in-court identifications that are not preceded by a successful identification in a nonsuggestive identification procedure implicate due process principles and, therefore, must be prescreened by the trial court." Id., 415. In the event that the court does not permit an in-court identification, the Supreme Court approved the following instruction if requested by the state: "An in-court identification was not permitted because inherently suggestive first time in-court identifications create a significant risk of misidentification and because either the state declined to pursue other, less suggestive means of obtaining the identification or the eyewitness was unable to provide one." Id., 449. If requested, do not deviate.

Focused jury instructions on fallibility of eyewitness identifications

In *State v. Guilbert*, supra, 306 Conn. 246 n.27, 257-58, and *State v. Harris*, supra, 330 Conn. 134-35, the Supreme Court encouraged trial courts to give focused and informative instructions on the fallibility of eyewitness identification evidence, reflecting the findings and conclusions of relevant scientific literature, and it suggested that such instructions could in some instances obviate the need for expert testimony on that topic. The court identified several propositions pertaining to identifications which, in its view, had gained widespread scientific support. It recognized, however, that scientific research is evolving and dynamic. This instruction provides the guidance suggested by the court on several identified factors and is based on scientific literature existing at the time of the last revision.

Certification of Service and Format

Pursuant to Conn. Practice Book sections 62-7 and 67-2A(g), defendant hereby certifies that:

1) The brief on certification and party appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law;

2) A copy of the brief on certification with party appendix was sent electronically to: James Killen, Juris No. 401852, A.S.A., Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, tel. no. (860) 258-5807, fax (860) 258-5828, email: james.killen@ct.gov; and a copy of the brief on certification with party appendix was mailed to defendant;

3) The brief and party appendix filed with the appellate clerk are true copies of the brief and party appendix that were submitted electronically;

4) The brief and party appendix comply with all provisions of Practice Book §. 67-2A;

5) The word count of this brief is 7,978 words;

6) No deviations from this rule were requested or approved; and

7) The electronic brief is filed in compliance with the guidelines.

By: *Kara E. Moreau*

Kara E. Moreau