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**SUPREME COURT**

**OF THE**

**STATE OF CONNECTICUT**

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**S.C. 20727**

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**EDGAR TATUM**

**v.**

**COMMISSIONER OF CORRECTION**

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# REPLY BRIEF OF PETITIONER-APPELLANT ON CERTIFICATION

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## I. Introduction

In his initial brief, Mr. Tatum argued that the Appellate Court incorrectly concluded that the habeas court properly dismissed counts six and seven of his amended habeas petition on the basis that *State v. Dickson*, 322 Conn. 410 (2016) and *State v. Guilbert*, 306 Conn. 218, (2012), did not apply retroactively on collateral review. In the alternative, Mr. Tatum argued that justice requires that the holdings in *Guilbert* and *Dickson* apply retroactively to his case because each overruled the Connecticut Supreme Court's rationale and holding regarding in-court identifications in his direct appeal. *See State v. Tatum*, 219 Conn. 721 (1991). In response, the state argued that *Guilbert* and *Dickson* do not apply retroactively, and that fairness does not demand that this Court treat Mr. Tatum any differently than others who have been convicted using similarly suggestive identification procedures simply because it was his case that the Court overruled.

Mr. Tatum relies on his initial brief for the majority of his arguments but responds to two of the state's points here. First, because mistaken eyewitness identifications are a common feature of wrongful convictions, concern for finality cannot justify treating the procedures announced in *Guilbert* and *Dickson* as anything but watershed rules, or rules that "raise the possibility that someone convicted with the use of the invalidated procedure might have been acquitted otherwise." *Casiano v. Comm'r. of Corr.*, 317 Conn. 52, 63 (2015). Moreover, as our courts have previously recognized, the fundamental requirements of due process outweigh the state's interest in finality. *See State v. Servarino,* 2000 WL 726826 (Conn. Super. Ct. May 2, 2000), referencing *State v. De Jesus*, CR95-0153067 (New Britain Superior Ct.). Second, because this Court's holdings in *Guilbert* and *Dickson* specifically repudiated the procedures used in Mr. Tatum's case,

fundamental fairness requires that Mr. Tatum be given an opportunity to challenge whether those procedures violated due process in his case.

## II. The Possibility of Wrongful Conviction is More Important than the Concern for Finality.

The state argues that defendants like Mr. Tatum, whose convictions were obtained using now invalidated eyewitness identification procedures, should not be permitted to challenge their convictions because of the state's interest in the finality of convictions. Although finality is a legitimate factor that this Court may consider, it is respectfully submitted that the concern for finality should not trump the interest in fairness and due process. On balance, the state's interest in finality should not win over the risk that exists in this kind of case, that a defendant may be wrongfully convicted, forced to languish in prison with no opportunity for relief, because their conviction resulted from the use of an outdated procedure that we now understand violates due process.

In the past 30 years since Mr. Tatum's conviction, there have been significant developments in our understanding of the science behind perception, memory, and identification. While eyewitness identification evidence was previously believed to be "common sense", it is now understood to be a complicated science, one that is unfamiliar to the average juror and many times counterintuitive. *See Guilbert*, 306 Conn. at 239. We now know that many of the assumptions and beliefs we had about memory and identification at the time of Mr. Tatum's trial were simply incorrect. This Court's holdings in *Guilbert* and *Dickson* serve as a recognition that the procedures we previously used impermissibly risked the danger of wrongful conviction.

The state argues that the exception to *Teague's* general principle against retroactively should be used "only in the rarest of cases," *see* State's Brief at 30 (citing to *Teague v. Lane,* 489 U.S. 288 (1989)), and

Mr. Tatum's case is not such an extraordinary case. Although the state does not suggest what it believes would be an extraordinary case, it is difficult to imagine that there can be a more extraordinary case than one in which there is a real and substantial risk of wrongful conviction.

In cases like Mr. Tatum's, where a conviction was obtained through the use of a now invalidated eyewitness identification procedure, the potential for wrongful conviction is not merely hypothetical. This is evidenced by the hundreds of DNA exonerations cases involving eye-witness identification evidence. As such, convictions obtained through the use of unduly suggestive identification procedures fall squarely within the exception noted by *Teague*, i.e., they "raise the possibility that someone convicted with the use of the invalidated procedure might have been acquitted otherwise." *Casiano v. Comm'r. of Corr.*, 317 Conn. 52, 63 (2015).

Importantly, this Court "must consider the importance of public confidence in our criminal justice system." *State v. Ellis*, 197 Conn. 436, 466 (1985). As this Court has recognized, "…in criminal matters, judicial economy must give way to the demand for the truth." *See State v. McDowwell*, 242 Conn. 648, 657 (1997). "[T]he essentially public objectives of the criminal law advise against the uncritical adoption of [res judicata] concepts." *Ellis*, 197 Conn. at 471. Finality "'is less relevant in criminal cases where the pre-eminent concern is to reach a correct result and where other considerations peculiar to criminal prosecutions may outweigh the need to avoid repetitive litigation....'" *Id*., at 470, quoting *People v. Plevy*, 52 N.Y.2d 58, 64 (1980).

In *Casiano v. Comm'r. of Corr.*, this Court held that the rule in *Miller*, which requires that the sentencing court conduct an individualized sentencing procedure and consider the mitigating circumstances of youth before sentencing a juvenile offender to a life sentence without parole, applies retroactively to all youth who had

received a life without parole sentence and who had been sentenced without the individualized sentencing procedure. 317 Conn. 52, 63 (2015). Despite the risk of disturbing the finality of each of those convictions, the Court in *Casiano* concluded that *Miller* is a watershed rule that deserves retroactive application because failing to consider youth and its attendant characteristics creates a risk of disproportionate punishment and implicates the fundamental fairness of a juvenile sentencing proceeding. In applying the *Teague* framework, the Court in *Casiano* noted that it was free to "apply the *Teague* analysis more liberally than the United States Supreme Court would otherwise apply it where a particular state interest is better served by a broader retroactivity ruling." *Id*. at 64, quoting *State v. Mares*, 335 P.3d 487 (2014). Similarly, in *Thiersaint v. Comm'r. of Corr.,* this Court adopted the *Teague* framework but determined that a broader application of the rule is appropriate in Connecticut cases "where the record supports a claim that a litigant has been deprived of a fundamental constitutional right and a fair trial…" 316 Conn. 89, 127 (2015).

This Court has previously recognized that mistaken eyewitness identifications are a significant cause of erroneous convictions. *See Guilbert*, 306 Conn. at 249–50 ("Mistaken eyewitness identification testimony is by far the leading cause of wrongful convictions"). Further, 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" [internal quotation marks omitted]). For these reasons, fundamental fairness is at the heart of this case. Through its decisions in *Guilbert*

and *Dickson*, this Court has recognized that unduly suggestive and unreliable eyewitness identifications undermine the truth-seeking function of the criminal justice system. Given the magnitude of the risk of wrongful conviction, the procedural rules developed in *Guilbert* and *Dickson* must apply retroactively in order to ensure fundamental fairness and the principle of due process.

## III. Mr. Tatum Should be Given an Opportunity to Challenge the Repudiated Procedures used in His Case, which the Connecticut Supreme Court Overruled.

The state argues that this Court should not permit Mr. Tatum to challenge his conviction, even though it was his case which the Court overruled on two separate occasions, because "the fact that the *Dickson* Court overruled its earlier decision in this petitioner's direct appeal when discussing its rationale for creating the new rule does not put him in a position superior to those others in terms of what fairness demands." *see* State's Brief at 28. To be clear, it is the petitioner's position that fairness demands that **all** defendants who have been convicted using the now repudiated procedures should be given the opportunity to challenge whether their convictions were the result of a due process violation. However, what makes Mr. Tatum's case unique is the fact that he raised in his direct appeal the very issues that were later decided by the Court in *Guilbert* and *Dickson* and it was **his case** that *Guilbert* and *Dickson* overturned.

In his direct appeal, Mr. Tatum challenged both the first time in-court identification and the jury instructions given in his case. *See Tatum*, 219 Conn. at 721, 727. At that time, the Court determined that the first time in-court identification was not unnecessary or impermissible because it was "necessary for the prosecution to present

evidence at the preliminary hearing to establish probable cause to believe that [Mr. Tatum] had committed the crimes charged." *Id.* at 729. Of course, this reasoning was later overruled in *Dickson*, with the Court holding 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. Similarly, Mr. Tatum 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 his 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 later repudiated and rejected in *Guilbert.* 306 Conn. at 258.

Mr. Tatum should be given the benefit of these decisions because of this Court's later recognition that the rationale the Court initially used in denying him relief was improperly decided. This Court has now recognized that the Court incorrectly analyzed Mr. Tatum's due process claims. It is respectfully submitted that Mr. Tatum should not suffer from the Court's delayed recognition of the fact that it got the holdings in his case wrong. Instead, Mr. Tatum should be given an opportunity to challenge whether the procedures used in his case violated due process.

## IV. Conclusion

For the reasons set forth herein and in the initial brief, 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 the danger of wrongful convictions, a careful review of Mr. Tatum's claims requires 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,
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Pursuant to Conn. Practice Book sections 62-7 and 67-2A(g), defendant hereby certifies that:

1) The reply brief on certification has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law;

2) A copy of the brief on certification 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 reply brief filed with the appellate clerk is a true copy of the brief that was submitted electronically;

4) The brief complies with all provisions of Practice Book §. 67-2A;

5) The word count of this brief is 1,815 words;

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

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