EDGAR TATUM *v.* COMMISSIONER OF CORRECTION (SC 20727)

Robinson, C. J., and McDonald, D'Auria, Mullins, Ecker, Dannehy and Seeley, Js.

Syllabus

The petitioner, who had been convicted of murder in 1990, filed a habeas petition, claiming, inter alia, that the trial court's admission of unduly suggestive and unreliable eyewitness identification evidence at his criminal trial violated his due process rights. The petitioner also claimed that advances in the science of eyewitness identification since his conviction highlighted the unreliability of the eyewitness identifications in his own criminal case and called into question the validity of his conviction, which the habeas court interpreted as an actual innocence claim. The habeas court granted in part the motion to dismiss filed by the respondent, the Commissioner of Correction, concluding, inter alia, that the petitioner's due process and actual innocence claims were barred by the doctrine of res judicata. The habeas court also concluded that this court's decisions in *State* v. *Guilbert* (306 Conn. 218), which held that expert testimony on eyewitness identification is admissible under certain circumstances, and *State* v. *Dickson* (322 Conn. 410), which overruled

this court's holding regarding first-time, in-court identifications in the petitioner's direct appeal, *State* v. *Tatum* (219 Conn. 721), and concluded that such identifications violate procedural due process, did not indicate that those decisions were to be retroactively applied on collateral review. The habeas court then addressed the petitioner's remaining claims and subsequently dismissed in part and denied in part the petitioner's habeas petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court. The Appellate Court disagreed with the petitioner's claim that the decisions in *Guilbert* and *Dickson* could be applied retroactively to his due process and actual innocence claims on collateral review, and affirmed the habeas court's judgment. The petitioner, on the granting of certification, appealed to this court.

Held that the Appellate Court, which lacked the benefit of this court's newly expanded formulation of the framework set forth in *Teague* v. *Lane* (489 U.S. 288) for evaluating whether a new constitutional rule applies retroactively on collateral review, should not have upheld the habeas court's dismissal of the petitioner's due process and actual innocence claims on the ground that *Dickson* did not apply retroactively to those claims on collateral review:

Under the *Teague* framework, a new rule, such as the new rules articulated in *Guilbert* and *Dickson*, will not apply retroactively to cases on collateral review under the federal constitution unless the rule is either substantive or a watershed rule of criminal procedure that implicates the fundamental fairness and accuracy of a criminal proceeding.

In the present case, the petitioner acknowledged that the new rules articulated in *Guilbert* and *Dickson* were not substantive but claimed that they were watershed rules of criminal procedure.

In light of the United States Supreme Court's recent decision to abolish the watershed rule in *Edwards* v. *Vannoy* (593 U.S. 255), this court recognized that new procedural rules no longer applied retroactively on collateral review in federal courts but nevertheless clarified that *Teague*'s watershed rule had continued vitality in Connecticut.

Moreover, in view of *Edwards* and the narrow applicability of the watershed exception, this court adopted a third exception to the *Teague* rule of nonretroactivity, concluding that a new constitutional rule of criminal procedure must be applied retroactively on collateral review if the rule was a result of developments in science that persuaded this court to reevaluate fundamental principles underlying judicial procedures, the rule significantly improves the accuracy of a conviction, and the petitioner advocated for the rule in his or her criminal proceedings or in an earlier habeas petition.

This court preliminarily observed that its recent holding in *State* v. *Harris* (330 Conn. 91) that the Connecticut constitution affords greater protec-

tion than the United States constitution with respect to the admissibility of eyewitness identification testimony militated in favor of the retroactive application of *Guilbert* and *Dickson* on collateral review, and also noted that recent case law has recognized that mistaken eyewitness identifications are the leading cause of wrongful convictions and that the risk of mistake is particularly acute when an identification has been tainted by an unduly suggestive procedure.

With respect to the retroactive application of *Guilbert* to the petitioner's due process and actual innocence claims, this court concluded that, under either *Teague*'s watershed exception or the third exception to nonretroactivity the court recognized in this case, a new rule must be of constitutional dimension in order to be applied retroactively, and the principles articulated in *Guilbert* could not be applied retroactively because that case articulated an evidentiary rather than a constitutional rule.

With respect to the retroactive application of *Dickson*, there was no question that *Dickson* announced a constitutional rule of criminal procedure when the court concluded that any first-time, in-court identification by a witness who would have been unable to reliably identify the defendant during a nonsuggestive, out-of-court procedure constitutes a procedural due process violation.

Furthermore, although the court in *Dickson* indicated in a footnote that that case should not be applied retroactively on collateral review, that statement was dictum, and this court disagreed with the earlier assertion in the same footnote in *Dickson* that the rule requiring prescreening of a first-time, in-court identification was merely an incremental change in identification procedures, as the rule articulated in *Dickson* was central to an accurate determination of innocence or guilt, such that the rule's absence would create an impermissibly high risk that innocent persons will be wrongfully convicted.

This court ultimately determined that the rule set forth in *Dickson* must apply retroactively on collateral review because the rule was a result of developments in science that persuaded this court to reevaluate the fundamental principles underlying eyewitness identification evidence, the application of the rule significantly improved the accuracy of the petitioner's conviction, and the petitioner raised eyewitness identification claims in his direct appeal from his criminal conviction.

More specifically, there was a heightened risk of a wrongful conviction in the petitioner's case because the state's case against the petitioner was largely based on two cross-racial eyewitness identifications of the petitioner, the two eyewitnesses had previously identified the same person as the shooter, who was someone other than the petitioner, and more than one year after the shooting, at a probable cause hearing, both

eyewitnesses identified the petitioner, who was the only Black man seated at defense counsel's table.

In addition, because *Dickson* was decided well after the petitioner's conviction, the petitioner did not have the opportunity in his criminal case to raise the specific claim that, in light of this court's decision in *Dickson*, the identification procedure used to secure his conviction violated his right to due process.

Argued October 20, 2023—officially released July 16, 2024*

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, granted in part the respondent's motion to dismiss; thereafter, the case was tried to the court, *Newson*, *J.*; judgment dismissing in part and denying in part the petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *Alexander*, *Clark* and *Lavine*, *Js.*, which affirmed the habeas court's judgment, and the petitioner, on the granting of certification, appealed to this court. *Reversed in part*; *new trial.*

Kara E. Moreau, assigned counsel, with whom was *Emily C. Kaas-Mansfield*, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, for the appellee (respondent).

Lisa J. Steele filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Robert J. Meredith filed a brief for the Innocence Project, Inc., et al. as amici curiae.

Opinion

McDONALD, J. "[M]istaken eyewitness identification testimony is by far the leading cause of wrongful convic-

* July 16, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

tions." *State* v. *Guilbert*, 306 Conn. 218, 249–50, 49 A.3d 705 (2012). Recognizing the developments in the cognitive science of eyewitness identification, this court has recently established new rules for cases in which eyewitness identification evidence is proffered. Specifically, in *Guilbert*, we determined 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." Id., 226. In doing so, we overruled earlier decisions from this court, which held that the factors affecting eyewitness identification were within the knowledge of an average juror. See id., 226, 229, 251–53. We reasoned that our prior case law was "out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror. This [broad-based] judicial recognition tracks a near perfect scientific consensus. The 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." (Footnotes omitted.) Id., 234–36. We also noted that a trial court retains discretion to provide "focused and informative" jury instructions on the fallibility of eyewitness identification evidence. Id., 257–58. Four years later, in *State* v. *Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, 582 U.S. 922, 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017), we further developed protections against inherently suggestive identifications. In doing so, we overruled this court's 1991 holding in *this petitioner's* direct appeal related to a first-time, in-court cross-racial eyewitness identification. See id., 434–36 (overruling in part *State* v. *Tatum*, 219 Conn. 721, 595 A.2d 322 (1991)). We concluded that "*any* [first-time] in-court identification by

a witness who would have been unable to reliably identify the [petitioner] in a nonsuggestive out-of-court procedure constitutes a procedural due process violation." (Emphasis in original.) *State* v. *Dickson*, supra, 426 n.11. The sole issue in this certified appeal is whether the principles this court set forth in *Guilbert* and *Dickson* apply retroactively to the petitioner's case on collateral review. We conclude that the principles articulated in *Dickson* do. Accordingly, we reverse in part the judgment of the Appellate Court.

In 1990, following a jury trial, the petitioner, Edgar Tatum, was convicted of murder in connection with the shooting death of the victim and sentenced to sixty years of incarceration. The state's case against the petitioner was largely based on two cross-racial eyewitness identifications of the petitioner. Both eyewitnesses had previously identified the same person as the shooter, someone other than the petitioner. The eyewitnesses, who were both white, recanted these earlier identifications and, more than one year after the shooting, at the petitioner's probable cause hearing, identified the petitioner, who was the only Black man seated at defense counsel's table, as the shooter. Significantly, both eyewitnesses were heavy drug users, one admitting to using narcotics every day and the other admitting to "freebasing cocaine" on the evening of the shooting. The petitioner appealed his conviction to this court, challenging, among other things, the trial court's admission of an unduly suggestive in-court identification and the eyewitness identification instructions given to the jury. See *State* v. *Tatum*, supra, 219 Conn. 723. This court rejected his claims and upheld the judgment of conviction. Id., 723, 742.

The petitioner has since filed four petitions for a writ of habeas corpus that are not relevant to this appeal. His fifth habeas petition, which is the subject of this appeal, was filed in 2016. In count six of the operative,

amended petition, the petitioner alleged that the admission of unduly suggestive and unreliable eyewitness identification evidence in his underlying criminal case violated his due process rights under the fourteenth amendment to the federal constitution and article first, §§ 8 and 9, of the state constitution. He also argued that the jury instructions provided by the criminal trial court were insufficient to educate jurors about certain factors that could adversely impact eyewitness identification. Finally, he argued that this court's decisions in *Guilbert* and *Dickson* should be retroactively applied to his case.

In count seven, the petitioner argued that advances in the science of eyewitness identification since his conviction highlight the unreliability of the eyewitness identifications that occurred in his criminal case and call into question the validity of his conviction. The habeas court interpreted this claim 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."

The respondent, the Commissioner of Correction, moved to dismiss the operative petition in 2018. The habeas court granted the respondent's motion to dis-

miss 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). As to counts six and seven, the habeas court construed count seven in conjunction with count six and explained that the petitioner already had litigated the identification procedures in his direct appeal and that the doctrine of res judicata 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 [Tracy] LeVasseur because neither the grounds nor the requested relief is any different [from] 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 conclude that nothing in the *Guilbert* or *Dickson* decisions indicates that they were to be retroactively applied or intended to provide an avenue for collateral relief.

The habeas court denied the respondent's motion to dismiss as to counts four (ineffective assistance of second habeas counsel) and five (ineffective assistance of third habeas counsel). The court held a hearing on those two claims, after which the parties filed posttrial briefs. The habeas court ultimately dismissed count four and denied count five of the habeas petition. The petitioner thereafter filed a petition for certification to appeal, which was granted by the habeas court. On appeal to the Appellate Court, the petitioner claimed, among other things, that the habeas court incorrectly determined that this court's decisions in *Guilbert* and *Dickson* could not be applied retroactively to the identification claims raised in counts six and seven of the habeas petition. See *Tatum* v. *Commissioner of Correction*, 211 Conn. App. 42, 44, 272 A.3d 218 (2022). The

Appellate Court disagreed and affirmed the judgment of the habeas court. Id., 44, 76.

We granted the petitioner's petition for certification to appeal, 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*, [supra, 322 Conn. 410], and *State* v. *Guilbert*, [supra, 306 Conn. 218], both of which overruled this court's rationale and holding regarding in-court identifications in the petitioner's direct appeal; see *State* v. *Tatum*, [supra, 219 Conn. 721]; did not apply retroactively to the petitioner's case on collateral review?" *Tatum* v. *Commissioner of Correction*, 343 Conn. 932, 276 A.3d 975 (2022).

On appeal to this court, the petitioner claims that the Appellate Court should not have upheld the habeas court's dismissal of counts six and seven of his petition on the basis that *Guilbert* and *Dickson* do not apply retroactively. He contends that both *Guilbert* and *Dickson* announced watershed rules of criminal procedure and, as such, should apply retroactively. Alternatively, even if this court were to conclude that *Guilbert* and *Dickson* do not apply retroactively to all criminal defendants and petitioners, the petitioner contends that justice requires that *Guilbert* and *Dickson* apply retroactively to his case because each case overruled the specific holdings in his direct appeal. The respondent contends that neither *Guilbert* nor *Dickson* applies retroactively. The respondent points to footnote 34 of *Dickson*, which he claims stated that the new constitutional rule announced in that case did not apply retroactively on collateral review. See *State* v. *Dickson*, supra, 322 Conn. 451 n.34.

We begin with a discussion of this court's recent eyewitness identification cases. First, in *Guilbert*, this

court held, for the first time, that, because certain factors that bear on the reliability of eyewitness identifications are not within the knowledge of the average juror, expert testimony on those factors does not invade the province of the jury and is admissible. *State* v. *Guilbert*, supra, 306 Conn. 226, 234–37, 251–52. We emphasized that "eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror," and this "recognition tracks a near perfect scientific consensus." Id., 234–35. As a result, we recognized that the methods typically used to alert juries to the fallibility of eyewitness identifications—cross-examination, closing argument, and generalized jury instructions—often are not sufficient to alert the jury to the factors affecting the reliability of eyewitness identifications. Id., 243. We also stated that a trial court retains the discretion to provide "focused and informative jury instructions on the fallibility of eyewitness identification evidence" that "reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at issue in the case . . . ." (Citations omitted; footnote omitted.) Id., 257–58. Significantly, we noted that "broad, generalized instructions on eyewitness identifications, such as those previously approved by this court in [the petitioner's direct appeal] . . . do not suffice." (Citations omitted.) Id., 258.

We next had occasion to consider eyewitness identification evidence in *Dickson*. We held that, contrary to our prior case law on the topic, "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." (Footnote omitted.) *State* v. *Dickson*, supra, 322 Conn. 415. We reasoned that "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 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. We again revisited the petitioner's direct appeal and concluded that our holding in that appeal that "it was 'necessary' for the state to present a [first-time] in-court identification of the [petitioner] at the probable cause hearing must be overruled." Id., 435–36. We explained that "[w]e simply can perceive no reason why the state cannot attempt to obtain an identification using a lineup or photographic array before asking an eyewitness to identify the [petitioner] 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., 436. In short, "[t]he state is not entitled to conduct an unfair procedure merely because a fair procedure failed to produce the desired result." Id.

Finally, in *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018), we explained that the due process provision of article first, § 8, of our state constitution affords greater protection than the federal constitution with respect to the admissibility of eyewitness identification testimony. See id., 114–15, 131. In *Harris*, the defendant challenged the admission of an identification that was made while he was being arraigned in court on an unrelated case. See id., 98–99. Although we concluded that the identification procedure was "overly suggestive by any measure" because "none of [the other Black, male] custodial arraignees was sufficiently similar to the defendant in height, weight and age," we also concluded that the identification was reliable in light of the circumstances of the case. Id., 107–108.

We now turn to the present case. The question of whether the principles this court set forth in *Guilbert* and *Dickson* apply retroactively to the petitioner's case on collateral review is a question of law over which our review is plenary. See, e.g., *Duperry* v. *Solnit*, 261 Conn. 309, 318, 803 A.2d 287 (2002). In *Teague* v. *Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), the United States Supreme Court set forth the framework for evaluating whether a new rule applies retroactively on collateral review under the federal constitution. See id., 299–314 (plurality opinion); see also *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 112–13, 111 A.3d 829 (2015) (adopting *Teague* framework). Under *Teague*, a court "must [first] ascertain the legal landscape as it" existed at the time the petitioner's conviction became final and "ask whether the [United States] [c]onstitution, as interpreted by the precedent then existing, compels the rule . . . . That is, the court must decide whether the rule is actually new." (Citation omitted; internal quotation marks omitted.) *Beard* v. *Banks*, 542 U.S. 406, 411, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004). A constitutional rule is "new" for purposes of *Teague* "if the result was not dictated by precedent existing at the time the [petitioner's] conviction became final." (Internal quotation marks omitted.) *Thiersaint* v. *Commissioner of Correction*, supra, 103.

The respondent concedes that *Guilbert* and *Dickson* created "new" rules, within the meaning of *Teague*. As a result, we must decide whether these "new" rules apply retroactively. "With two exceptions, a new rule will not apply retroactively to cases on collateral review. . . . First, if the new rule is substantive, that is, if the rule places certain kinds of primary, private conduct beyond the power of the criminal lawmaking authority to proscribe . . . it must apply retroactively. Such rules apply retroactively because they necessarily carry a significant risk that a [petitioner] stands con-

victed of an act that the law does not make criminal or faces a punishment that the law cannot impose [on] him." (Citations omitted; internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 62–63, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016).

"Second, if the new rule is procedural, it applies retroactively if it is a watershed [rule] of criminal procedure . . . implicit in the concept of ordered liberty . . . meaning that it implicat[es] the fundamental fairness and accuracy of [a] criminal proceeding. . . . Watershed rules of criminal procedure include those that raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. . . . The United States Supreme Court has narrowly construed [the] second exception and, in the [more than thirty-five] years since *Teague* was decided, has [never] conclude[d] that a new rule qualifie[d] as watershed." (Citations omitted; internal quotation marks omitted.) Id., 63. Indeed, the United States Supreme Court has recently abolished the watershed rule. See *Edwards* v. *Vannoy*, 593 U.S. 255, 272, 141 S. Ct. 1547, 209 L. Ed. 2d 651 (2021).[1] The court reasoned that "[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the

[1] Since *Edwards*, many scholars have advocated for the reimagining of how courts approach the retroactivity issue. See, e.g., J. Ho, Note, "Finality, Comity, and Retroactivity in Criminal Procedure: Reimagining the *Teague* Doctrine After *Edwards v. Vannoy*," 73 Stan. L. Rev. 1551, 1600 (2021) ("[i]n light of the weighty remedial interests—not just in accuracy but in human dignity and judicial integrity—a revised retroactivity framework should be more generous about granting retroactivity remedies for violations of constitutional rights"); T. Simkovic, Note, "*Ramos* Retroactivity and the False Promise of *Teague v. Lane*," 76 U. Miami L. Rev. 825, 830 (2022) ("[g]iven that *Teague*'s exception for watershed rules is now extinct, the [United States Supreme] Court should rethink its entire retroactivity framework for new rules of criminal law on habeas review").

resources of defense counsel, prosecutors, and courts. Moreover, no one can reasonably rely on an exception that is [nonexistent] in practice, so no reliance interests can be affected by forthrightly acknowledging reality. It is time—probably long past time—to make explicit what has become increasingly apparent to bench and bar over the last [thirty-five] years: New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must be regarded as retaining no vitality." (Internal quotation marks omitted.) Id.

In the present case, the petitioner does not contend that the new rules articulated in *Guilbert* and *Dickson* are substantive. Rather, the petitioner argues that these new procedural rules are watershed ones. As we discussed, new procedural rules no longer apply retroactively on federal collateral review. See id. Nevertheless, we have explained that, although "federal decisions applying *Teague* may be instructive, this court will not be bound by those decisions in any particular case . . . but will conduct an independent analysis and application of *Teague*." *Thiersaint* v. *Commissioner of Correction*, supra, 316 Conn. 113. We take this opportunity to clarify the viability of the watershed exception in Connecticut in light of the United States Supreme Court's decision to abolish the watershed rule in *Edwards*.

We have applied the *Teague* framework "more liberally than the United States Supreme Court [might] otherwise apply it . . . ." (Internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 64; see also, e.g., *Rhoades* v. *State*, 149 Idaho 130, 139, 233 P.3d 61 (2010) (because comity concerns do not apply to state court's review of state convictions, Idaho courts are "not required to blindly follow [the United States Supreme Court's] view of . . . whether a new rule is a watershed rule"), cert. denied, 562 U.S. 1258, 131 S. Ct. 1571, 179 L. Ed. 2d 477 (2011);

State v. *Mares*, 335 P.3d 487, 504 (Wyo. 2014) (applying *Teague* more broadly than United States Supreme Court when "a particular state interest is better served by a broader retroactivity ruling").

For example, we have applied the *Teague* analysis and concluded that the United States Supreme Court's decision in *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), applied retroactively on collateral review. *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 62, 69, 71. *Miller* forbade mandatory life without parole sentences for juvenile offenders. *Miller* v. *Alabama*, supra, 465. In *Casiano*, we reasoned that *Miller* created a new watershed rule of criminal procedure; *Casiano* v. *Commissioner of Correction*, supra, 62, 69; because, among other things, "the individualized sentencing prescribed by *Miller* is central to an accurate determination . . . that the sentence imposed is a proportionate one." (Citation omitted; internal quotation marks omitted.) Id., 70. Several months later, the United States Supreme Court similarly deemed *Miller*'s ruling retroactive in *Montgomery* v. *Louisiana*, 577 U.S. 190, 206, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). The Supreme Court, however, based its decision on a different premise, namely, that *Miller* had created a new substantive rule, thus bypassing *Teague*'s watershed analysis. See id., 206, 208–209. Given that we are not bound by the United States Supreme Court's application of *Teague*, our conclusion in *Casiano* remains binding in Connecticut. See K. Kurland, "With Unanimity and Justice for All: The Case for Retroactive Application of the Unanimous Jury Verdict Requirement," 17 Nw. J.L. & Soc. Policy 49, 75 (2021).

Although *Teague*'s watershed rule may be "moribund" in the federal courts; *Edwards* v. *Vannoy*, supra, 593 U.S. 272; we conclude that it has continued vitality in Connecticut. The United States Supreme Court has explained that "the *Teague* rule of nonretroactivity was

fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings. It was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own [s]tate's convictions." *Danforth* v. *Minnesota*, 552 U.S. 264, 280–81, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008). In other words, the particular concerns that serve to limit habeas relief "are unique to *federal* habeas review of state convictions." (Emphasis in original.) Id., 279. Whereas federal habeas review for state prisoners risks "render[ing] the actions of state courts a serious disrespect"; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 263, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (Powell, J., concurring); state postconviction proceedings "merely [reflect] and [confirm] the [state] courts' own inherent and discretionary power, firmly established in English practice long before the foundation of our [r]epublic, to set aside a judgment whose enforcement would work inequity." (Internal quotation marks omitted.) *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 233–34, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995). Accordingly, the federalism rationales for *Teague* "simply do not apply" to state postconviction proceedings. *State* v. *Preciose*, 129 N.J. 451, 475, 609 A.2d 1280 (1992). Whereas concerns about the relationship between state and federal courts warrant caution in the federal habeas context, these same concerns suggest that states should be particularly willing to provide fulsome postconviction procedures. See, e.g., *Case* v. *Nebraska*, 381 U.S. 336, 338–40, 85 S. Ct. 1486, 14 L. Ed. 2d 422 (1965) (Clark, J., concurring); id., 344–47 (Brennan, J., concurring).

Considerations of finality are certainly very important in state habeas proceedings, but they are somewhat less important in state postconviction proceedings as compared to federal habeas proceedings, as the federal

proceedings typically occur last and, therefore, must take into account the finality of the state proceedings. See, e.g., C. Lasch, "The Future of *Teague* Retroactivity, or 'Redressability,' After Danforth v. Minnesota: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings," 46 Am. Crim. L. Rev. 1, 4–5, 57 (2009). Moreover, there is good reason to conclude that the benefits of retroactivity on collateral review in appropriate cases outweigh finality concerns. The United States Supreme Court has observed that "[t]he finality interest is more at risk" in postconviction proceedings than on direct review and that "the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases." *Weaver* v. *Massachusetts*, 582 U.S. 286, 302, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017). "For the same reasons, those 'costs and uncertainties' are lower in state [postconviction] proceedings than in federal habeas, and place less of a thumb on the scale in favor of nonretroactivity. Furthermore, to the extent finality concerns refer to the finality of a state court decision (as opposed to a state court conviction), they are reduced in state [postconviction] proceedings, which are often the state courts' first look at a constitutional claim." (Emphasis omitted.) J. Rutledge, "With Great (Writ) Power Comes Great (Writ) Responsibility: A Modified *Teague* Framework for State Courts," 59 Crim. L. Bull. 480, 494 (2023).

Again, we do not discount the importance of finality; we simply acknowledge that this court's opportunity to review certain constitutional claims may arise for the first time in the habeas context, and the interest in finality plainly does not automatically outweigh interests in fairness and justice in every circumstance. We do not believe that we should follow the Supreme Court's lead in *Edwards* by foreclosing the possibility of the retroactive application of new procedural rules

in all cases. Cf. *State* v. *Reddick*, 351 So. 3d 273, 297 (La. 2022) (Griffin, J., dissenting) ("[t]he imperative to correct past injustices manifest in the deprivation of a constitutionally guaranteed right should not cede to reliance interests and administrative concerns," and courts should "not perpetuate something [they] all know to be wrong only because [they] fear the consequences—and costs—of being right"). As we have explained in a similar context, "in criminal matters, judicial economy must give way to the demand for the truth." *State* v. *McDowell*, 242 Conn. 648, 657, 699 A.2d 987 (1997); see, e.g., *State* v. *Ellis*, 197 Conn. 436, 471, 497 A.2d 974 (1985) ("the essentially public objectives of the criminal law advise against the uncritical adoption of [res judicata] concepts"). In short, finality "is less relevant in criminal cases [in which] the [preeminent] concern is to reach a correct result and [in which] other considerations peculiar to criminal prosecutions may outweigh the need to avoid repetitive litigation . . . ." (Internal quotation marks omitted.) *State* v. *Ellis*, supra, 470.

Accordingly, we continue to see vitality in *Teague*'s watershed exception. Rather than "blindly follow" the United States Supreme Court's application of *Teague*, this court will continue to "independently review cases when applying the *Teague* standard," including when determining whether a new procedural rule is watershed, notwithstanding the United States Supreme Court's holding in *Edwards* v. *Vannoy*, supra, 593 U.S. 272.[2]

[2] State courts have regularly applied the *Teague* watershed exception, despite the United States Supreme Court's aversion to doing so. They have done so for a variety of rules: rules protecting the right to counsel; see, e.g., *Talley* v. *State*, 371 S.C. 535, 544, 640 S.E.2d 878 (2007) (holding that *Alabama* v. *Shelton*, 535 U.S. 654, 122 S. Ct. 1764, 152 L. Ed. 2d 888 (2002), announced watershed rule); see also *Alford* v. *State*, 287 Ga. 105, 106–108, 695 S.E.2d 1 (2010) (same); rules protecting the right to trial by jury and the right not to be convicted without proof beyond a reasonable doubt; see, e.g., *Powell* v. *Delaware*, 153 A.3d 69, 70, 74, 76 (Del. 2016) (holding that *Rauf* v. *State*, 145 A.3d 430 (Del. 2016), announced watershed rule); *People* v. *Beachem*, 336 Ill. App. 3d 688, 693–700, 784 N.E.2d 285 (2002) (holding that *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), announced watershed rule), appeal denied, 203 Ill. 2d 552, 788 N.E.2d 730,

Rhoades v. *State*, supra, 149 Idaho 139; see also, e.g., *Danforth* v. *State*, 761 N.W.2d 493, 500 (Minn. 2009); *State* v. *Mares*, supra, 335 P.3d 504.

Despite our disagreement with the conclusion reached in *Edwards*, the case did highlight the overly rigid strictures of the *Teague* watershed exception. As the United States Supreme Court has explained, "no new rules of criminal procedure can satisfy the watershed exception." *Edwards* v. *Vannoy*, supra, 593 U.S. 271. One scholar has even described the watershed exception as being so restrictive because "nothing is as important as *Gideon* [v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)], so nothing is retroactive." J. Marceau, "*Gideon*'s Shadow," 122 Yale L.J. 2482, 2488 (2013); cf. *Howard* v. *United States*, 374 F.3d 1068, 1081 (11th Cir. 2004) ("[a]t the risk of oversimplification, for purposes of the second *Teague* exception there are new rules, and then there are new *Gideon*-extension rules"). In light of the "confused and confusing" history of the retroactivity doctrine; *Danforth* v. *Minnesota*, supra, 552 U.S. 271; we think it prudent to continue to develop our application of *Teague* to ensure that its application is not so rigid that it "never actually applies in practice [and] offers [only] false hope to defendants, distorts the law, misleads judges, and wastes the resources of

cert. denied, 540 U.S. 897, 124 S. Ct. 243, 157 L. Ed. 2d 177 (2003); rules regarding sentencing in capital cases; see, e.g., *State* v. *Zuniga*, 336 N.C. 508, 512, 514, 444 S.E.2d 443 (1994) (recognizing that *Mills* v. *Maryland*, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), and *McKoy* v. *North Carolina*, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), announced watershed rules); rules announced by the United States Supreme Court; see, e.g., *Alford* v. *State*, supra, 106–108; *People* v. *Beachem*, supra, 693–700; *State* v. *Zuniga*, supra, 512, 514; *Talley* v. *State*, supra, 544; and rules announced by state high courts. *Powell* v. *Delaware*, supra, 70, 74, 76. They have also done so even when the United States Supreme Court has reached the opposite conclusion. Compare *State* v. *Zuniga*, supra, 512, 514 (recognizing that *Mills* and *McKoy* announced watershed rule under state version of *Teague*), with *Beard* v. *Banks*, supra, 542 U.S. 408, 410, 419–20 (recognizing that *Mills* and *McKoy* did not announce watershed rule under federal *Teague* standard).

defense counsel, prosecutors, and courts." *Edwards* v. *Vannoy*, supra, 272. We take this opportunity to provide greater clarity regarding the independent review this court undertakes when determining whether a rule applies retroactively on collateral review.

Specifically, in light of *Edwards* and the admittedly narrow applicability of the watershed exception, we think it necessary to adopt a third exception to the *Teague* rule of nonretroactivity. See *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 64 ("[w]e . . . remain free to apply the *Teague* analysis more liberally than the United States Supreme Court would otherwise apply it [when] a particular state interest is better served by a broader retroactivity ruling" (internal quotation marks omitted)); *Thiersaint* v. *Commissioner of Correction*, supra, 316 Conn. 108 ("the United States Supreme Court . . . held in *Danforth* v. *Minnesota*, [supra, 552 U.S. 282], that the restrictions *Teague* imposes on the fully retroactive application of new procedural rules are not binding on the states" (internal quotation marks omitted)).[3] We conclude that a new constitutional rule of criminal procedure must be applied

[3] State courts have adopted a variety of caveats to the *Teague* standard. See, e.g., J. Rutledge, supra, 59 Crim. L. Bull. 486–87; see also, e.g., id., 486–87 n.55, 487 nn.56–59 (citing cases).

Since *Edwards* was decided, only four states, namely, Colorado, Louisiana, Mississippi and Oklahoma, have explicitly addressed the future of the watershed exception. See *People* v. *Melendez*, 549 P.3d 1028, 1031 (Colo. App. 2024) (acknowledging that, in absence of ruling from Colorado Supreme Court, "the watershed rule remain[ed] embedded in Colorado jurisprudence" (internal quotation marks omitted)); *State* v. *Reddick*, supra, 351 So. 3d 281 (explicitly rejecting *Teague*'s watershed rule); *Wess* v. *State*, 348 So. 3d 333, 344 (Miss. App. 2022) (same); *State ex rel. Matloff* v. *Wallace*, 497 P.3d 686, 688–89 (Okla. Crim. App. 2021) (court did not explicitly decide whether it would continue to apply watershed exception but spoke of exception in past tense and predicted that "such a rule is unlikely ever to be announced"), cert. denied sub nom. *Parish* v. *Oklahoma*, U.S. , 142 S. Ct. 757, 211 L. Ed. 2d 474 (2022); see also, e.g., *Aili* v. *State*, 963 N.W.2d 442, 448 n.4 (Minn. 2021) (declining to decide whether watershed exception continues to exist under state law because it would not apply to case at hand).

retroactively on collateral review if the rule was a result of developments in science that persuaded us to reevaluate fundamental principles underlying judicial procedures, the rule significantly improves the accuracy of a conviction, and the petitioner advocated for the rule in the direct proceedings or in an earlier habeas petition.

As one scholar has explained, "for state [postconviction] proceedings to fulfill the traditional role of habeas corpus as the instrument by which due process [can] be insisted [on], they must allow prisoners to litigate the constitutional claims [the prisoners] were prevented from raising before their convictions became final." (Footnote omitted; internal quotation marks omitted.) J. Rutledge, supra, 59 Crim. L. Bull. 497. Courts have also reasoned that the possibility of overruling erroneous precedent may be a component of a meaningful opportunity to present a defense. See, e.g., *McCarthan* v. *Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1087 (11th Cir.) (concluding that petitioner "had a meaningful opportunity to present his claim" because he had "the chance to have precedent overruled en banc or by the [United States] Supreme Court"), cert. denied sub nom. *McCarthan* v. *Collins*, 583 U.S. 1012, 138 S. Ct. 502, 199 L. Ed. 2d 385 (2017). Because retroactivity under *Teague* is a threshold question, petitioners advocating for a new constitutional rule of criminal procedure do not enjoy that possibility. "Even if the court wholeheartedly agreed that the [c]onstitution required overruling precedent, [a petitioner] could not receive the benefit of that overruling." J. Rutledge, supra, 498. As a result, scholars have encouraged state courts to "treat [a] petitioner's first opportunity to raise a constitutional claim as a form of direct review for purposes of that claim." Id., 499. It strikes us as eminently reasonable, then, that a new constitutional rule of criminal procedure be applied retroactively on collateral review when the petitioner had previously raised

that claim on direct appeal or in an earlier habeas proceeding. Just because a petitioner was ahead of scientific advancements that now call into question the fundamental principles underlying judicial procedures and the accuracy of a criminal conviction does not mean that the petitioner should be precluded from the application of that new rule.

A case from Louisiana highlights the injustice that occurs when a criminal defendant or petitioner is unable to obtain the benefit of a new constitutional rule for which he or she had previously argued. At his second jury trial, the defendant, Corey Miller, was found guilty by a jury vote of ten to two. *State* v. *Miller*, 83 So. 3d 178, 182 and nn.1–2 (La. App. 2011), writ denied, 89 So. 3d 1191 (La. 2012), cert. denied, 568 U.S. 1157, 133 S. Ct. 1238, 185 L. Ed. 2d 177 (2013). At the time, the Louisiana constitution permitted a nonunanimous guilty verdict so long as at least ten out of twelve jurors vote in favor of conviction. Id., 204 and n.10; see also La. Const., art. I, § 17 (A) (2018) ("[a] case for an offense committed prior to January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict"). Miller was sentenced to life in prison without the possibility of parole. *State* v. *Miller*, supra, 83 So. 3d 182. Miller claimed, both at the trial and appellate levels, that the nonunanimous verdict violated the federal constitution. See id., 204. Both the trial court and the Louisiana Court of Appeal rejected this contention. See id., 205. Miller thereafter sought review from the Louisiana Supreme Court and the United States Supreme Court on the unanimity issue, but both courts denied review. See *Miller* v. *Louisiana*, supra, 568 U.S. 1157; *State* v. *Miller*, supra, 89 So. 3d 1191; see also, e.g., Petition for Writ of Certiorari, *Miller* v. *Louisiana*, 568 U.S. 1157 (No. 12-162) pp. 2, 6.

Seven years after Miller's conviction became final, the United States Supreme Court in *Ramos* v. *Louisiana*, 590 U.S. 83, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), determined that the conviction of a criminal defendant in state court following a nonunanimous jury verdict violates the federal constitution. See id., 89–93. The Supreme Court reasoned that the provision of the Louisiana constitution allowing for nonunanimous jury verdicts in criminal cases was adopted at a constitutional convention that had as its "avowed purpose . . . the supremacy of the white race"; (internal quotation marks omitted) id., 87; and that the provision was adopted "to ensure that [African American] juror service would be meaningless." (Internal quotation marks omitted.) Id., 88. Despite being "a Black man who did not match the witness description of the killer" and who was "convicted over the dissent of two Black jurors" in his criminal trial, Miller "remains imprisoned for life and cannot claim the retroactive benefit of the rule for which he advocated at every opportunity." J. Rutledge, supra, 59 Crim. L. Bull. 501; see also *State* v. *Miller*, supra, 83 So. 3d 193. "The idea that like cases should be decided alike is a basic principle of justice. But that principle is sacrificed when those like . . . Miller receive no relief while others raising the same argument receive new trials simply because of the accident of when the [United States] Supreme Court chose to consider the question. The same is true with equal force when the court that eventually decides the issue is a state's own high court." (Footnote omitted; internal quotation marks omitted.) J. Rutledge, supra, 502. Accordingly, when a petitioner has previously advocated for a rule in his direct proceedings or in an earlier habeas petition, and scientific advances subsequently persuade this court to reevaluate fundamental principles underlying judicial procedures that calls into question the accuracy of a conviction, we will apply that new constitutional rule retroactively on collateral review.

This third exception to *Teague* is similar to the unavailability by exhaustion doctrine Texas courts apply in deciding whether to consider the merits of a petitioner's habeas petition when the petitioner has previously filed one or more petitions. See *Ex parte Hood*, 211 S.W.3d 767, 776–77 (Tex. Crim. App.), cert. denied sub nom. *Hood* v. *Texas*, 552 U.S. 829, 128 S. Ct. 48, 169 L. Ed. 2d 43 (2007). The unavailability by exhaustion doctrine allows a court to consider a petition if it "is based on binding and directly relevant" precedent "decided after [the petitioner] had exhausted" the claim in a previous proceeding. *Ex parte Martinez*, 233 S.W.3d 319, 322 (Tex. Crim. App. 2007); see also *Ex parte Hood*, supra, 776 ("[i]f we [had] decide[d] an issue adversely to a [petitioner] in a way that contradicts a later legal development, that later legal development constitutes a legal basis that was not presented and could not have been presented at the time [the petitioner's prior habeas petition was filed]"). The *Teague* exception we adopt today balances the need to expand the circumstances in which retroactivity will work to prevent injustice with the importance of finality because it does not open the floodgates in a way that would seriously undermine finality. The limiting principles of unavailability by exhaustion applied by Texas courts would also apply to this exception. Namely, the petitioner must actually have raised the claim himself; see *Ex parte Hood*, supra, 776; and must have done so in the court that eventually announces the rule. The intervening decision must come from the United States Supreme Court or this court. Cf. id. ("a change in the law under the exhaustion doctrine . . . must come from a binding authority, i.e. cases from [a state's high court] and the United States Supreme Court" (internal quotation marks omitted)).

Having adopted this third exception to *Teague*, we turn to the issue of whether our decisions in *Guilbert*

and *Dickson* apply retroactively on collateral review. We first note the unique requirements and history of the due process provisions under our state constitution. We have explained that the due process provision of article first, § 8, of our state constitution affords greater protection than the federal constitution with respect to the admissibility of eyewitness identification testimony. See *State* v. *Harris*, supra, 330 Conn. 114–15, 131. In *Harris*, this court disagreed with its earlier decision holding that the state constitution did not afford greater protection than the federal constitution in this area. See id., 116–21, 131. We explained that our prior decision was "premised in part on our reservations about scientific studies that we now find persuasive." (Internal quotation marks omitted.) Id., 119. After conducting our analysis under *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992); see *State* v. *Harris*, supra, 116–30; we concluded that "[Connecticut's] precedent, persuasive federal and sister state precedent, and contemporary understandings of economic and sociological norms favor[ed] the defendant's claim . . . [that] the state constitution [affords greater protection than the federal constitution with respect to eyewitness identification testimony]." Id., 130. This militates in favor of retroactivity.

Our case law regarding eyewitness identification evidence has also progressed, steadily following scientific developments in the field. We now know that the accuracy of a criminal conviction based solely on eyewitness identification is not as strong as courts once believed. "Nationally, [approximately] 69 [percent] of DNA exonerations—252 out of 367 cases—have involved eyewitness misidentification, making it the leading contributing cause of these wrongful convictions. Further, the National Registry of Exonerations has identified at least 450 [non-DNA based] exonerations involving eyewitness misidentification." Innocence Project,How Eyewitness

Misidentification Can Send Innocent People to Prison (April 15, 2020), available at https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/#:~:text=Eyewitness%20misidentification%20is%20a,cause%20of%20these%20wrongful%20convictions (last visited July 15, 2024). It is no wonder, then, that mistaken eyewitness identification testimony is "by far the leading cause of wrongful convictions." *State* v. *Guilbert*, supra, 306 Conn. 249–50.

In recent years, we have "recognized that mistaken eyewitness identifications are a significant cause of erroneous convictions; [id.] ('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. [See] *United States* v. *Wade*, 388 U.S. 218, 229, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) ('[t]he influence of improper suggestion [on] 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' . . .)." (Footnote omitted.) *State* v. *Dickson*, supra, 322 Conn. 425–26. Accordingly, this court has established new rules aimed at bringing our case law in line with our advanced understanding of eyewitness identifications. These rules strive to ensure that there is an accurate determination as to innocence or guilt.

As to the retroactive application of *Guilbert*, we conclude that the principles articulated in *Guilbert* may not be applied retroactively because that case articulated an *evidentiary* rule, not a *constitutional* one. See *State* v. *Guilbert*, supra, 306 Conn. 265 and n.45. Under either *Teague*'s watershed exception or the third exception we adopt today, in order to have retroactive application, the new rule must be of constitutional dimension. In *Guilbert*, we concluded that trial courts have the discre-

tion to admit expert testimony on the reliability of eyewitness identifications. Id., 257. Because this new rule is evidentiary, it cannot be applied retroactively to the petitioner's case on collateral review.

There is no question, however, that *Dickson* announced a constitutional rule of criminal procedure. We reasoned that placing a witness on the stand, confronting the witness with the person whom the state has accused of committing the crime, and asking that witness to identify the person who committed the crime is likely the most suggestive identification procedure. *State* v. *Dickson*, supra, 322 Conn. 423. In addition to the suggestive nature of an in-court identification, "[t]he pressure of being asked to make an identification in the formal courtroom setting and the lack of anonymity . . . create conditions under which a witness is most likely to conform his or her recollection to expectations . . . ." E. Mandery, "Due Process Considerations of In-Court Identifications," 60 Alb. L. Rev. 389, 417 (1997). Among other reasons, this is why eyewitness identification is among the least reliable forms of evidence. See, e.g., D. Medwed, "Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions," 51 Vill. L. Rev. 337, 358 (2006) ("[v]irtually all . . . pertinent studies . . . have pinpointed eyewitness misidentification as the single most pervasive factor in the conviction of the innocent"). There is no doubt that, in cases in which the identity of the person who committed the crime is at issue, first-time, in-court identifications are unnecessarily suggestive and, therefore, raise concerns regarding an accurate conviction, and "the fundamental fairness of [a] trial . . . is seriously diminished" in such a situation. (Citations omitted.) *Teague* v. *Lane*, supra, 489 U.S. 312–13 (plurality opinion). As a result, in *Dickson*, we concluded that "any [first-time] in-court identification by a witness who would have been unable to reliably identify the [petitioner] in a nonsuggestive

out-of-court procedure constitutes a procedural due process violation." (Emphasis omitted.) *State* v. *Dickson*, supra, 426 n.11. Thus, we conclude that it is necessary to apply *Dickson* retroactively to the petitioner's case on collateral review to ensure the reliability of his criminal trial.

The respondent, however, claims that, in footnote 34 of *Dickson*, this court concluded that *Dickson* should not be applied retroactively on collateral review. See id., 451 n.34. Although we agree that there is language in footnote 34 to that effect, we conclude that this comment was dictum. See, e.g., *Cruz* v. *Montanez*, 294 Conn. 357, 376–77, 984 A.2d 705 (2009) ("[d]ictum includes those discussions that are merely passing commentary . . . those that go beyond the facts at issue . . . and those that are unnecessary to the holding in the case" (internal quotation marks omitted)). First, we note that the parties in *Dickson* did not significantly discuss retroactivity concerns in their briefing.[4] The issue of retroactivity was not necessary to determine the outcome in *Dickson*, which was a direct appeal. Moreover, we disagree with this court's assertion in *Dickson* that "the rule [requiring prescreening of a first-time, in-court identification] is merely an incremental change in identification procedures." *State* v. *Dickson*, supra, 322 Conn. 451 n.34. As we have explained, "[t]he influence of improper suggestion [on] 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

[4] In passing, the state addressed retroactivity in the context of this court's using its supervisory authority rather than announcing a constitutional prophylactic rule. See *State* v. *Dickson*, Conn. Supreme Court Records & Briefs, December Term, 2015, State's Brief p. 50; see also id., State's Supplemental Brief p. 5; id., State's Supplemental Reply Brief pp. 1–2, 5. The defendant did not address retroactivity in his primary brief but briefly discussed the issue in his supplemental reply brief. See id., Defendant's Supplemental Reply Brief p. 5.

combined . . . .” (Internal quotation marks omitted.) Id., 426. We cannot conclude that prescreening an eyewitness prior to a first-time, in-court identification is merely an “incremental change” that serves only to remove “some remote possibility” of a wrongful conviction. (Internal quotation marks omitted.) Id., 451 n.34. Thus, we disagree with the respondent’s contention that footnote 34 in *Dickson* is dispositive of the retroactivity issue.

In sum, the rule articulated in *Dickson* is “central to an accurate determination of innocence or guilt”; *Teague* v. *Lane*, supra, 489 U.S. 313 (plurality opinion); such that the rule’s absence would create an impermissibly large risk that innocent persons will be convicted. We agree with the brief of the amici curiae, the Innocence Project, Inc., and the Connecticut Innocence Project, that “[t]he issue of inaccurate eyewitness identification testimony . . . strikes at the heart of whether a criminal proceeding is fair and accurate.” We therefore conclude that the rule set forth in *Dickson* must apply retroactively on collateral review because the rule was a result of developments in science that persuaded us to reevaluate the fundamental principles underlying eyewitness identification evidence, the application of the rule significantly improves the accuracy of the petitioner’s conviction, and the petitioner advocated for the rule in his direct appeal.

In the petitioner’s criminal trial, there were two eyewitnesses. LeVasseur, a white female, initially identified someone other than the Black petitioner from a photographic array as the shooter. *State* v. *Tatum*, supra, 219 Conn. 724. It was not until almost three months after the shooting, during a subsequent array, that she identified the petitioner. See id. The second witness also identified someone other than the petitioner as the shooter—the same individual the first witness had identified—but later declined to identify anyone until he

could see the suspect in person. Id. More than one year after the shooting, at the probable cause hearing, both witnesses identified the petitioner, who was the only Black man seated at defense counsel's table.[5] See id., 724–25. Notwithstanding the prior identifications of another individual, both eyewitnesses later testified that they had no doubt about their identifications of the petitioner.

One additional fact weighs heavily in favor of applying *Dickson* retroactively in this particular case. More than thirty years ago, in his direct appeal, the petitioner challenged the procedures related to an eyewitness identification used in his criminal case. See id., 723, 725, 728. At that time, this court concluded that the first-time, in-court identification of the petitioner at the probable cause hearing was not unnecessarily suggestive because it was "necessary for the prosecution to present evidence at the preliminary hearing to establish probable cause to believe that [the petitioner] had committed the crimes charged." (Emphasis omitted.) Id., 728. Twenty-five years later, recognizing the inherent suggestiveness of a first-time, in-court identification, this court overruled the holding in the petitioner's direct appeal regarding the procedure that was used to identify the petitioner, calling the first time, in-court identification of the petitioner "unfair . . . ." *State* v. *Dickson*, supra, 322 Conn. 435–36.[6] Despite this conclusion in

[5] On appeal, the petitioner contends that, because he was arrested approximately two months prior to the probable cause hearing and remained incarcerated through the hearing, it is "highly likely that he was wearing prison clothes, rather than street clothes, at the time of [the witness'] identification." We note, however, that the record indicates that the petitioner was wearing a "green, plaid shirt" at the probable cause hearing.

[6] During his direct appeal, the petitioner also raised a challenge to the eyewitness identification jury instructions given in his criminal case. See *State* v. *Tatum*, supra, 219 Conn. 732. This court concluded that the instructions were "adequate to alert the jury to the dangers inherent in eyewitness identification." Id., 734. Of course, more than two decades later, on the basis of developed science on the reliability of eyewitness identifications, we recognized that eyewitness identifications are potentially unreliable in

Dickson, which explicitly rejected the eyewitness identification procedures used in his criminal case, the petitioner has not yet had the opportunity to raise the claim that, in light of our decision in *Dickson*, the identification procedures used in his criminal case violated his right to due process.

The central purpose of a criminal trial is "to ascertain the truth which is the sine qua non of a fair trial." *Estes* v. *Texas*, 381 U.S. 532, 540, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965). Mistaken eyewitness identifications are the leading cause of wrongful convictions. See, e.g., *State* v. *Guilbert*, supra, 306 Conn. 249–50. The risk of mistaken eyewitness identifications is particularly acute when the identification has been tainted by an unduly suggestive procedure. See, e.g., *United States* v. *Wade*, supra, 388 U.S. 229. As a result, unduly suggestive and unreliable eyewitness identifications undermine the truth seeking function of the criminal justice system. Given the developments in the science of eyewitness identification, the heightened risk of a wrongful conviction, and the fact that the petitioner raised eyewitness identification claims in his direct appeal, we conclude that the

a number of ways unknown to the average juror; *State* v. *Guilbert*, supra, 306 Conn. 234; and, as such, the jury instructions used in the petitioner's criminal trial were not sufficient to alert the jury to factors affecting the reliability of the eyewitness identifications. See id., 258; see also id., 247 n.27. Many of the factors that could adversely impact eyewitness identifications and that are unknown to the average juror were present in the petitioner's criminal case. For example, both eyewitnesses in the petitioner's criminal case testified that they had no doubt regarding their identification of the petitioner, notwithstanding their earlier identification of another individual as the shooter. Cf. id., 253–54. Both eyewitnesses also had only a limited opportunity during the high stress situation to view the individual they later identified; we now understand that high stress situations involving weapons can impact the reliability of an identification. See id., 253. Moreover, both eyewitness identifications were cross-racial, which we know are "considerably less accurate than identifications involving the same race . . . ." Id. Nevertheless, given our conclusion that *Guilbert* announced an evidentiary rule, not a constitutional one, *Guilbert* does not apply retroactively on collateral review.

rule articulated in *Dickson* must be applied retroactively on collateral review in the petitioner's case. See, e.g., *Colwell* v. *State*, 118 Nev. 807, 820, 59 P.3d 463 (2002), cert. denied, 540 U.S. 981, 124 S. Ct. 462, 157 L. Ed. 2d 370 (2003). Accordingly, we conclude that the Appellate Court, which lacked the benefit of our newly expanded formulation of the *Teague* rule, should not have upheld the habeas court's dismissal of counts six and seven of the petitioner's operative petition on the ground that *Dickson* does not apply retroactively to the petitioner's case on collateral review.

CONCLUSION

Thirty-three years ago, the petitioner argued before this court that the trial court had improperly admitted an in-court eyewitness identification of him at his criminal trial that was tainted by an unnecessarily suggestive pretrial identification procedure. See *State* v. *Tatum*, supra, 219 Conn. 723, 725. At that time, this court rejected that claim; see id., 723; and the petitioner has served decades in prison as a result. In recent years, however, this court's jurisprudence has benefitted from significant developments related to the cognitive science associated with eyewitness identifications. In light of those scientific developments, in *Dickson*, we recognized that this court was clearly wrong when it rejected the petitioner's original claim in his direct appeal regarding the unnecessarily suggestive in-court, pretrial identification, and we overruled the holding in the petitioner's direct appeal. See *State* v. *Dickson*, supra, 322 Conn. 434–36. We do not lightly overrule holdings in prior cases. It is only "[w]hen a prior decision is seen so clearly as error that its enforcement [is] for that very reason doomed" that we will overrule it. (Emphasis omitted; internal quotation marks omitted.) *Conway* v. *Wilton*, 238 Conn. 653, 659, 680 A.2d 242 (1996); see, e.g., *Kluttz* v. *Howard*, 228 Conn. 401, 406, 636 A.2d 816 (1994) ("a court should not overrule its earlier decisions

unless the most cogent reasons and inescapable logic require it" (internal quotation marks omitted)). Had the petitioner made the same claim today that he raised in his direct appeal more than thirty years ago, he would prevail. It is long past time that the petitioner be afforded the opportunity to challenge the procedures related to the eyewitness identification used in his criminal case in light of the principles we articulated in *Dickson*.

The judgment of the Appellate Court is reversed insofar as it upheld the habeas court's dismissal of counts six and seven of the petitioner's operative habeas petition and the case is remanded to the Appellate Court with direction to reverse the judgment of the habeas court with respect to those counts and to remand the case to that court for a trial on counts six and seven and with direction to apply the holding of *Dickson* retroactively to the petitioner's case.

In this opinion the other justices concurred.

CENTRIX MANAGEMENT CO., LLC *v.* DONALD W. FOSBERG (SC 20927)

Robinson, C. J., and McDonald, D'Auria, Mullins, Ecker, Alexander and Dannehy, Js.

Syllabus

Pursuant to statute (§ 42-150bb), when a consumer contract or lease includes a unilateral attorney's fees provision benefiting the commercial party, a prevailing consumer is entitled to an award of attorney's fees, the size of which "shall be based as far as practicable upon the terms governing the size of the fee for the commercial party."

The plaintiff landlord brought this summary process action, seeking to gain possession of an apartment occupied by the defendant tenant. After the trial court rendered judgment for the defendant, the defendant filed a motion for attorney's fees pursuant to § 42-150bb, relying on the unilateral provision in the party's lease agreement providing that, if the plaintiff prevailed in an action on the lease agreement, the defendant would be responsible for reasonable attorney's fees up to $750. The trial court

granted the defendant's motion and awarded him $3500 in attorney's fees. In doing so, the court relied on the equitable purpose of § 42-150bb, that is, to achieve parity between the parties, and reasoned that limiting the defendant's recovery to the maximum amount allowed by the lease agreement would not result in true parity between the parties. On appeal, the plaintiff challenged the trial court's award of attorney's fees, claiming that, under § 42-150bb, the court had the discretion to award the defendant only up to $750, which was the maximum amount of attorney's fees that the plaintiff could have recovered pursuant to the terms of the lease agreement.

Held that, although trial courts, pursuant to § 42-150bb, have discretion to award a prevailing consumer reasonable attorney's fees in excess of the maximum amount that a prevailing commercial party could recover under the terms of the consumer contract or lease when the court determines that it is not practicable to base the award of attorney's fees on those contractual or lease terms, in the present case, the trial court did not make that threshold determination, and, accordingly, this court vacated the award of attorney's fees and remanded the case for a new hearing on the defendant's motion for attorney's fees:

This court's examination of the phrase "based . . . upon," as used in § 42-150bb, led it to conclude that, when a contract or lease caps a commercial party's recovery of attorney's fees at a specific dollar amount, the trial court's discretion to award a prevailing consumer attorney's fees pursuant to § 42-150bb is subject to the same limit, as long as applying that limit is practicable.

This court also determined that the term "practicable," as used in § 42-150bb, had to be construed with reference to the statute's equitable purpose, and both the statutory language and this court's prior decisions supported the conclusion that the term "practicable" means feasible under the circumstances, which are circumstances that achieve equity or fairness.

Accordingly, when a unilateral attorney's fees provision that triggers the application of § 42-150bb caps a commercial party's recovery of attorney's fees at a specific dollar amount, the court must base a prevailing consumer's award of attorney's fees on the terms governing the amount of the commercial party's fee, unless the consumer demonstrates that doing so would be impracticable under the circumstances, specifically, that such an award would not achieve the equitable purpose of 42-150bb.

In cases in which the consumer demonstrates impracticability, the court should exercise its discretion, consistently with established law, to award the prevailing consumer reasonable attorney's fees.

In making the threshold practicability determination, a court should consider all relevant circumstances, including the complexity and length

of the litigation, the size of the cap and its proportion in relation to the prevailing consumer's reasonable attorney's fees, and the commercial party's fee arrangement.

Although the trial court relied on the equitable purpose of § 42-150bb in awarding the defendant reasonable attorney's fees, it did not consider whether it was practicable to base the award of attorney's fees on the contractual terms governing the amount of the plaintiff's fees, and, accordingly, this court directed the trial court to do so on remand in accordance with this court's opinion.

Argued February 6—officially released July 18, 2024*

Procedural History

Summary process action, brought to the Superior Court in the judicial district of New Britain, Housing Session, and tried to the court, *Baio*, *J.*; judgment for the defendant; thereafter, the court, *Baio*, *J.*, granted the defendant's motion for attorney's fees, and the plaintiff appealed; subsequently, Henry C. Winiarski was substituted as the defendant. *Vacated*; *further proceedings.*

Robert Shluger, for the appellant (plaintiff).

Chad Borgman, law student intern, with whom were *Will Krueger*, law student intern, *Jeffrey Gentes* and, on the brief, *Anika Singh Lemar*, and *Miriam Pierson* and *Erica Henry*, law student interns, for the appellee (substitute defendant).

Opinion

DANNEHY, J. When a consumer contract or lease includes a unilateral attorney's fees provision benefiting the commercial party, a consumer who successfully prosecutes or defends an action based on the contract is entitled as a matter of law to attorney's fees, and "the size of the attorney's fee awarded to the consumer shall be based as far as practicable upon the terms governing the size of the fee for the commercial party."

* July 18, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

General Statutes § 42-150bb.[1] In this appeal, the plaintiff landlord, Centrix Management Co., LLC, challenges the trial court's award of reasonable attorney's fees in the amount of $3500, following the judgment rendered in favor of the defendant tenant, Donald W. Fosberg.[2] The plaintiff contends that, because doing so would be "practicable" pursuant to § 42-150bb, the court had discretion to award the defendant only up to $750, which was the maximum amount of attorney's fees that the plaintiff could have recovered pursuant to the terms of the lease agreement. The defendant responds that the plaintiff's claim rests on an overly narrow construction of two key statutory terms in § 42-150bb, "based . . . upon" and "practicable." Consistent with the equitable purpose of the statute, the defendant contends, the trial court had discretion to award him reasonable attorney's fees in excess of $750. Although we conclude that trial courts have discretion to award a prevailing consumer reasonable attorney's fees pursuant to § 42-150bb when the court determines that it is not practicable to base the award upon the contractual terms governing the commercial party's recovery, in the present case, the trial court did not make this threshold determination. Accordingly, we vacate the trial court's award of attorney's fees and remand the case with direction to conduct a new hearing on the defendant's motion for attorney's fees consistent with this opinion.

The record reveals the following relevant undisputed facts and procedural background. In September, 2021, the plaintiff served the defendant, who had rented an

[1] Section 42-150bb defines "commercial party" to include lessors and "consumer" to include lessees. Accordingly, for the sake of simplicity, we use the terms "commercial party" and "consumer" to include landlords and tenants, respectively.

[2] During the pendency of this appeal, Henry C. Winiarski, in his capacity as the conservator of the estate and person of Fosberg, was substituted as the defendant. For ease of reference, we refer in this opinion to both Fosberg and Winiarski as the defendant.

apartment in a building owned by the plaintiff, with notice to quit possession of the premises, alleging that the defendant had violated his responsibilities pursuant to General Statutes § 47a-11 (c) and (g).[3] The defendant remained in possession of the apartment, and the plaintiff subsequently commenced this summary process action. After a two day bench trial, the court rendered judgment in favor of the defendant, who was represented by a nonprofit group, the Connecticut Veterans Legal Center. The defendant subsequently moved, pursuant to § 42-150bb, to recover attorney's fees in the amount of $6622.15. The defendant relied on language in the lease agreement providing that, if the plaintiff prevailed in an action on the lease, the defendant would be responsible for "reasonable attorney's fees . . . but only up to a maximum amount of $750, and costs."[4] The defendant claimed that the plaintiff's unilateral right to attorney's fees under the lease triggered the application of § 42-150bb. The plaintiff conceded that the defendant was entitled to attorney's fees pursuant to § 42-150bb but argued that the trial court's discretion was limited to awarding fees in the maximum amount of $750.

Following oral argument on the motion, the court awarded the defendant $3500 in attorney's fees. The

[3] General Statutes § 47a-11 (c) and (g) provides in relevant part: "A tenant shall . . . (c) remove from his dwelling unit all ashes, garbage, rubbish and other waste in a clean and safe manner to the place provided by the landlord pursuant to subdivision (5) of subsection (a) of section 47a-7 . . . [and] (g) conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises or constitute a nuisance, as defined in section 47a-32, or a serious nuisance, as defined in section 47a-15 . . . ."

[4] Section 11 of the lease agreement provides: "Upon violation of any term of this [l]ease, [y]ou are responsible for reasonable attorney's fees, but only up to a maximum amount of $750, and costs incurred by [u]s. If [w]e incur legal fees to defend a suit as to [o]ur obligations under this [l]ease, including security deposit disputes, and if [w]e are the prevailing party, [y]ou will be responsible for payment of legal fees, but only up to a maximum amount of $750, and costs."

trial court grounded its decision to award the defendant attorney's fees in excess of the lease agreement's cap of $750 on the equitable purpose of § 42-150bb, namely, to achieve parity between the parties. The court explained that, although limiting the defendant's recovery to the maximum amount allowed to the plaintiff by § 11 of the lease agreement would render the unilateral provision reciprocal, doing so would not result in "true 'parity' " between the parties, as intended by the legislature. In light of the equitable purpose of the statute, the court concluded that the defendant was entitled to reasonable attorney's fees. The plaintiff appealed from the trial court's decision granting the defendant's motion for attorney's fees to the Appellate Court, and this court transferred the appeal to itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

The question of whether the trial court abused its discretion in awarding the defendant reasonable attorney's fees in the amount of $3500 turns on the construction of two statutory terms in § 42-150bb. First, we must resolve whether, when a contract or lease includes a unilateral attorney's fees provision capping the commercial party's recovery at a specific dollar amount, the trial court is obligated to apply an identical cap on fees to a prevailing consumer's award, because § 42-150bb provides in relevant part that, as far as practicable, the award should be "based . . . upon" the terms governing the size of the attorney's fees of the commercial party. Second, we must determine under what circumstances it would not be "practicable" for the trial court to base a prevailing consumer's award of attorney's fees upon the terms of the contract or lease.

Both issues present questions of statutory construction: the first question turns on the meaning of the phrase "based . . . upon" in § 42-150bb, and the second turns on the meaning of the term "practicable." Accordingly, our review is plenary. See *Wind Colebrook*

South, LLC v. *Colebrook*, 344 Conn. 150, 161, 278 A.3d 442 (2022). In construing statutes, we follow the plain meaning rule set forth in General Statutes § 1-2z. Id.

I

We first consider whether, when a contract or lease caps a commercial party's recovery of attorney's fees at a specific dollar amount, the trial court's discretion to award attorney's fees to a prevailing consumer pursuant to § 42-150bb is limited to awarding only up to the maximum amount that the commercial party could recover under the contract or lease.

We begin with the language of the statute. Section 42-150bb provides in relevant part: "Whenever any contract or lease . . . to which a consumer is a party, provides for the attorney's fee of the commercial party to be paid by the consumer, an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease. Except as hereinafter provided, the size of the attorney's fee awarded to the consumer shall be based as far as practicable upon the terms governing the size of the fee for the commercial party. No attorney's fee shall be awarded to a commercial party who is represented by its salaried employee. In any action in which the consumer is entitled to an attorney's fee under this section and in which the commercial party is represented by its salaried employee, the attorney's fee awarded to the consumer shall be in a reasonable amount regardless of the size of the fee provided in the contract or lease for either party. . . ."[5]

[5] Section 42-150bb is an example of an exception to the American rule, pursuant to which "attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975); *Fleischmann Distilling* [*Corp.*] v. *Maier Brewing Co.*, 386 U.S. 714, 717, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967)." (Internal quotation marks omitted.) *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 72, 689 A.2d 1097 (1997).

The question of whether the trial court's discretion in awarding attorney's fees to a prevailing consumer is confined to awarding an amount equal to that which the commercial party would be entitled to recover under the contract turns first on the meaning of the phrase "based . . . upon" in § 42-150bb. Because that phrase is not defined in § 42-150bb or in related statutes, we examine its ordinary meaning. See General Statutes § 1-1 (a) ("[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language"). Dictionaries in print around the time that the statute was enacted in 1979; see Public Acts 1979, No. 79-453; define the verb "to base" to mean "to make or form a base or foundation for . . . to put or rest (on) as a base or basis . . . ." Webster's New World College Dictionary (2d Ed. 1972) p. 116. A "base," in turn, is defined as "the thing or part on which something rests . . . the fundamental or main part . . . the principal or essential ingredient . . . anything from which a start is made"; id.; and "the bottom of something considered as its support: foundation . . . ." Webster's New Collegiate Dictionary (1981) p. 91. Interpreting a different statute, this court recently looked to Black's Law Dictionary to define " 'based on' as '[d]erived from, and therefore similar to . . . .' " *Costanzo* v. *Plainfield*, 344 Conn. 86, 103, 277 A.3d 772 (2022), quoting Black's Law Dictionary (10th Ed. 2014) p. 180. These different meanings of the term "base" all share a core principle: to base something on another thing means to use the base as the foundation. Section 42-150bb provides that the trial court "shall" base a prevailing consumer's award upon the "terms governing the size of the fee for the commercial party," as far as practicable. Accordingly, trial courts are required to look to the contractual terms governing the size of the commercial party's fee

to determine the prevailing consumer's award of attorney's fees.[6] When, as in the present case, the contract specifies a maximum dollar amount that the commercial party may recover, the prevailing consumer's recovery is subject to the same limit, as long as applying that limit is practicable.[7]

II

Although the trial court's task in awarding a prevailing consumer attorney's fees pursuant to § 42-150bb begins with the terms governing the size of the fee of the commercial party, it does not necessarily end there. Section 42-150bb provides that, "as far as practicable," the court "shall" base a prevailing consumer's fees upon the terms governing the size of the commercial party's fees. In other words, when it is practicable to base the prevailing consumer's award of attorney's fees upon the contractual terms, § 42-150bb cabins the trial court's discretion by requiring the court to use the contractual terms to determine the consumer's award of attorney's fees. If doing so is not practicable, however, the terms governing the size of the attorney's fees of the commer-

[6] The defendant does not claim that, in awarding him reasonable attorney's fees, the trial court "based" its award "upon" the terms of the lease agreement pursuant to § 42-150bb, and the court's memorandum of decision does not indicate that it did so.

[7] Depending on the contractual terms, "basing" the prevailing consumer's award of attorney's fees "upon" the contractual terms governing the size of the attorney's fees of the commercial party may, as in the present case, where the contract sets a ceiling of a specific dollar amount, yield an equal recovery, or at least an equal maximum recovery. We recognize, however, that different contractual terms will not necessarily entitle a prevailing consumer to an equal *dollar amount*, such as when a contract expressly entitles the commercial party to reasonable attorney's fees. See *Centrix Management Co., LLC* v. *Valencia*, 145 Conn. App. 682, 693, 76 A.3d 694 (2013) (when consumer contract unilaterally entitles commercial party to recover reasonable attorney's fees, prevailing consumer is also entitled to reasonable attorney's fees pursuant to § 42-150bb). Under those circumstances, the award of a prevailing consumer will naturally depend on, among other things, the extent and complexity of the litigation.

cial party no longer serve as the foundation for the prevailing consumer's fees. We must determine, therefore, the meaning of the term "practicable," as it is used in § 42-150bb.

Like the phrase "based . . . upon," the term "practicable" is not defined in § 42-150bb. Contemporary to the passage of that statute, dictionaries generally defined the term "practicable" to mean "feasible" or "possible." See, e.g., Webster's New Collegiate Dictionary, supra, p. 895 ("possible to practice or perform: feasible"); Webster's New World College Dictionary, supra, p. 1117 ("that can be done or put into practice; feasible"). Legal dictionaries recognize that the term also may mean "feasible under the circumstances." See, e.g., Black's Law Dictionary (5th Ed. 1979) p. 1055 (citing, as one meaning of "[p]racticable," "feasible in the circumstances").

The plaintiff, which advocates that any award greater than nothing would be practicable, essentially argues that, as long as an award is "possible," it is practicable. Construing the term "practicable" in § 42-150bb to mean "possible," however, would render that term meaningless.[8] Specifically, if "practicable" means "possible,"

[8] Indeed, some courts have questioned the aptness of equating practicability with possibility, noting that impossibility presents a significantly greater hurdle than impracticability. See, e.g., *Outfitter Properties, LLC* v. *Wildlife Conservation Board*, 207 Cal. App. 4th 237, 247, 143 Cal. Rptr. 3d 312 (2012) ("[s]ome courts have said that 'practicable' in a government context means that an entity is vested with discretion to consider the 'advisability' of an action, and have explained that 'practicable' does not mean 'possible' "); *James H. Q. Davis Trust* v. *JHD Properties, LLC*, Docket No. 22 CVS 8617, 2022 WL 17573944, *5 (N.C. Super. December 9, 2022) (In interpreting statute providing that limited liability company may be dissolved if it is not practicable to conduct business in conformance with operating agreement, court concluded that " 'practicable' is synonymous with 'feasible' and does not mean simply 'possible.' Indeed, the [c]ourt notes that something may be possible yet not *feasible* without extra time or resources in a particular circumstance. Following this same logic, the [c]ourt also concludes that 'not practicable' is likewise synonymous with 'unfeasible' and does not mean 'impossible.' " (Emphasis in original.)).

there is no meaningful distinction between a requirement that an award be based upon the terms governing the size of the fee for the commercial party and a requirement that an award be based upon the size of the fee for the commercial party "as far as practicable . . . ." General Statutes § 42-150bb. An award of *any* amount, no matter how small, is practicable in the sense that it is possible.[9] If we were to construe the term "practicable" to mean possible, therefore, in every instance the trial court would be required to base a prevailing consumer's award of attorney's fees upon the contractual terms governing the size of the attorney's fees for the commercial party. Under that construction, the term "practicable" would be rendered superfluous. See, e.g., *American Promotional Events, Inc.* v. *Blumenthal*, 285 Conn. 192, 203, 937 A.2d 1184 (2008) ("[i]nterpreting a statute to render some of its language superfluous violates cardinal principles of statutory interpretation").

[9] We find unpersuasive the plaintiff's reliance on dictum in this court's decision in *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 78 n.19, 689 A.2d 1097 (1997) (*Rizzo Pool*). As we explain herein, in that case, the issue presented was whether the phrase "the terms governing the size of the fee for the commercial party" in § 42-150bb implicitly referenced General Statutes § 42-150aa (b). *Rizzo Pool Co.* v. *Del Grosso*, supra, 73, 76. In a footnote, we observed that, "in some instances, the parties' contract may provide for attorney's fees based upon 15 percent of the recovery. In these circumstances, should the consumer prevail in defending an action brought by the commercial party, the consumer would receive pursuant to the contractual terms 15 percent of nothing—which would, of course, be nothing. Accordingly, an award of attorney's fees based upon the terms of the contract would not be practicable." Id., 78 n.19.

The plaintiff seizes on this dictum to argue that only an award that renders § 42-150bb absurd, in particular, an award of zero dollars, would be impracticable. As we noted previously in this opinion, the quoted language in footnote 19 of *Rizzo Pool* is dictum. The court in *Rizzo Pool* did not have before it the question of the meaning of the term "practicable." Moreover, even if we agreed with the plaintiff that the language is not dictum, nothing in footnote 19 of *Rizzo Pool* suggests that the example used by this court was intended to define every instance in which it would be impracticable to base a prevailing consumer's award upon the contractual terms.

The language of § 42-150bb offers some insight into the nature of the circumstances that serve as the limiting principle for the meaning of the term "practicable." The statute identifies one instance in which the trial court will have no discretion to look to the contractual terms in determining the amount of a prevailing consumer's award of attorney's fees, namely, when the commercial party is represented by a salaried employee. Section 42-150bb dictates two consequences that flow from these circumstances. First, the statute provides in relevant part that "[n]o attorney's fee shall be awarded to a commercial party who is represented by its salaried employee . . . ." General Statutes § 42-150bb. This bar to recovery indicates that the legislature did not intend that litigation costs should always be irrelevant for purposes of applying § 42-150bb. Implicit in the bar is that it would be inequitable to allow a commercial party to recover attorney's fees when the commercial party incurred no additional costs in bringing the action.[10] This language, therefore, suggests that the concept of fairness is embedded in § 42-150bb.

Second, if a consumer contract includes a unilateral attorney's fees clause in favor of a commercial party represented by its salaried employee—a clause that is rendered invalid by § 42-150bb—a prevailing consumer is entitled to attorney's fees "in a reasonable amount

[10] Our interpretation, that the bar to recovery when a commercial party is represented by a salaried employee is grounded in principles of fairness, finds support in the legislative history of § 42-150bb. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 3, 1979 Sess., p. 802, testimony of Attorney Raphael Podolsky of Connecticut Legal Services' Legislative Office (Podolsky explained that there "seems to be a consensus . . . that, where you use an in-house employee, you should not be claiming attorney's fees at all. For example, the Retail Installment Sales Financing Act [General Statutes § 36a-770 et seq.], which has a 15 percent limit [on attorney's fees] specifically says that, to get the 15 percent, you have to farm it out to someone who is not a salaried employee. In other words, you have to have extra incurred cost[s], not merely using one of your regular salaried people to bring the lawsuit.").

regardless of the size of the fee provided in the contract or lease for either party." General Statutes § 42-150bb. In the present case, for example, if the plaintiff had been represented by a salaried employee, in determining the defendant's award of attorney's fees, the trial court would have lacked discretion to rely on the contractual terms limiting the plaintiff's recovery of attorney's fees to a maximum of $750, and, instead, the defendant would have been entitled to recover reasonable fees without reference to the contractual cap of $750. Accordingly, the statute suggests that, when it would be unfair to base a prevailing consumer's award upon the contractual terms, the consumer is entitled to reasonable attorney's fees. We therefore conclude that, as used in § 42-150bb, "practicable" means "feasible under the circumstances," which are circumstances that achieve equity or fairness.[11]

Our prior decisions interpreting § 42-150bb, which consistently have looked to its equitable purpose in interpreting the statute, provide support that the meaning of the term "practicable" must be understood in light of that purpose. In *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 689 A.2d 1097 (1997) (*Rizzo Pool*), this court rejected the claim that the phrase "the terms

[11] We emphasize that, notwithstanding dictum in *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 76–77 n.18, 689 A.2d 1097 (1997) (*Rizzo Pool*) to the contrary, we do not read the term "practicable" in § 42-150bb to mean "reasonable." Specifically, in *Rizzo Pool*, we stated in dictum that " 'reasonable' will be the operative term controlling attorney's fees generated in connection with the defense to [a commercial party's] action." Id. As we explained previously in this opinion; see footnote 9 of this opinion; in *Rizzo Pool*, this court did not have before it the question of the meaning of the term "practicable," as used in § 42-150bb. In an action based on a contract that includes a unilateral provision capping the commercial party's recovery of attorney's fees at a specific dollar amount, a prevailing consumer is entitled to recover reasonable fees pursuant to § 42-150bb only upon a showing that awarding the consumer attorney's fees based upon the contractual terms governing the commercial party's recovery would be impracticable in light of the equitable purpose of the statute.

governing the size of the fee for the commercial party" in § 42-150bb implicitly referenced General Statutes § 42-150aa (b), which limits the attorney's fees of a "holder of a contract or lease" who is subject to § 42-150aa to "fifteen per cent of the amount of any judgment which is entered."[12] *Rizzo Pool Co.* v. *Del Grosso*, supra, 73. Although our review of the plain language of § 42-150bb persuaded us that the 15 percent limit did not apply, we also looked to the legislative history of § 42-150bb, which clarified that the statutory phrase "the terms governing the size of the fee for the commercial party" referred to the phrase "the contract or lease" in § 42-150bb, not to the language of § 42-150aa.[13] *Rizzo Pool Co.* v. *Del Grosso*, supra, 74. In arriving at that conclusion, we relied heavily on the purpose of § 42-150bb, which is to convert unilateral attorney's fees clauses benefiting commercial parties to reciprocal clauses that also benefit consumers. Id., 74–75. In support of our statutory interpretation, we specifically cited the remarks of Representative Richard D. Tulisano, who explained: "[T]he legislation before us today provides [for] the first time the ability for consumers in this state to obtain attorney's fees, of [a] reasonable amount, as a result of defending or prosecuting any action in which the commercial party has provided for attorney's fees

[12] General Statutes § 42-150aa (b) provides: "If a lawsuit in which money damages are claimed is commenced by an attorney who is not a salaried employee of the holder of a contract or lease subject to the provisions of this section, such holder may receive or collect attorney's fees, if not otherwise prohibited by law, of not more than fifteen per cent of the amount of any judgment which is entered."

[13] We recognize that *Rizzo Pool* was decided prior to the enactment of § 1-2z and that this court looked to the legislative history and purpose of § 42-150bb, notwithstanding our conclusion that the language was plain and unambiguous. We are not, however, barred from relying on this court's construction of § 42-150bb in that decision, which remains good law and has precedential authority unless it is overturned. See, e.g., *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 498–99, 923 A.2d 657 (2007) (rejecting proposition that § 1-2z overruled prior decisions construing statutes in manner inconsistent with requirements of § 1-2z).

for their own behalf. What this does is give some equity to the situation. At the present time, many form contracts include attorney's fees provisions for the commercial party, and even though . . . that party may be wrong and a consumer successfully defends an action against him, or her, they would not be entitled to receive attorney's fees in defending that action. This will put some equity in the situation to the same extent that any commercial party will receive. [22 H.R. Proc., Pt. 22, 1979 Sess.], pp. 7487, 7489–90." (Internal quotation marks omitted.) *Rizzo Pool Co.* v. *Del Grosso*, supra, 75–76.

This court and the Appellate Court have subsequently relied on the equitable purpose of § 42-150bb in construing the statute broadly for the benefit of consumers. This court, for instance, has relied on the statute's equitable purpose in holding that a decedent's daughter could be considered a "personal representative" for purposes of § 42-150bb, notwithstanding the fact that she was not a legal representative of the decedent, who was a party to the contract at issue in the case. *Aaron Manor, Inc.* v. *Irving*, 307 Conn. 608, 611, 617, 57 A.3d 342 (2013). In so concluding, we cited to the equitable purpose of the statute, reasoning that "[i]t would be wholly incongruous with this design to conclude that the plaintiff would be entitled to fees for successfully prosecuting the present action but that the defendant would not be entitled to fees for mounting a successful defense." Id., 618. Then, in *Connecticut Housing Finance Authority* v. *Alfaro*, 328 Conn. 134, 176 A.3d 1146 (2018), this court declined to construe § 42-150bb narrowly to require a consumer, in order to be entitled to attorney's fees, to prevail on the merits. Id., 147–48. This court reasoned that such a narrow construction would be inconsistent with the remedial purpose of the statute. Id. Instead, this court held that, when a commercial plaintiff withdraws an action as a matter of right, for

purposes of determining whether the consumer is entitled to attorney's fees pursuant to § 42-150bb, the commercial party bears the burden of proving that "the withdrawal was unrelated to the defense mounted by the consumer." Id., 148. Similarly, in *Meadowbrook Center, Inc.* v. *Buchman*, 169 Conn. App. 527, 151 A.3d 404 (2016), aff'd, 328 Conn. 586, 181 A.3d 550 (2018), the Appellate Court relied on the equitable purpose of § 42-150bb to hold that trial courts have discretion to excuse late filings that do not comply with the timing provision set forth in Practice Book § 11-21. Id., 532–33 n.4, 538.

In light of the significance that this court and the Appellate Court have given to the equitable purpose of § 42-150bb in construing the statute, we conclude that the term "practicable," like other statutory terms in § 42-150bb, must be understood with reference to that purpose. The statute was intended to rectify, at least in this one aspect, the inequities resulting from the unequal bargaining power between the parties to consumer contracts. "It is common knowledge that parties with superior bargaining power, especially in 'adhesion' type contracts, customarily include [attorney's] fee[s] clauses for their own benefit. This places the other contracting party at a distinct disadvantage. Should he lose in litigation, he must pay legal expenses of both sides and even if he wins, he must bear his own attorney's fees. One-sided attorney's fees clauses can thus be used as instruments of oppression to force settlements of dubious or unmeritorious claims." *Coast Bank* v. *Holmes*, 19 Cal. App. 3d 581, 596–97, 97 Cal. Rptr. 30 (1971).

Accordingly, in cases such as the present one, where the unilateral attorney's fees provision that triggers the application of § 42-150bb caps the commercial party's recovery of attorney's fees at a specific dollar amount, the court shall base a prevailing consumer's award of attorney's fees upon the terms governing the size of the

commercial party's fee, unless the consumer demonstrates that doing so would be impracticable under the circumstances, that is, that doing so would not achieve the equitable purpose of § 42-150bb.[14] In making this threshold determination, the trial court should consider all relevant circumstances, including, but not limited to, the complexity and length of the litigation, the size of the cap and its proportion in relation to the prevailing consumer's reasonable attorney's fees, and the commercial party's fee arrangement.[15]

If the trial court concludes that basing the prevailing consumer's award of attorney's fees upon the terms governing the size of the commercial party's recovery would be inconsistent with the equitable purpose of § 42-150bb, the court should exercise its discretion to award the prevailing consumer reasonable attorney's fees consistent with this court's decision in *Smith* v. *Snyder*, 267 Conn. 456, 477, 839 A.2d 589 (2004). Id., 477 ("to support an award of attorney's fees, there must be a clearly stated and described factual predicate for

[14] Placing the burden on the prevailing consumer to show that basing his attorney's fees award upon the contractual terms governing the commercial party's recovery of fees is consistent with our case law requiring the party seeking attorney's fees to show that the requested amount is reasonable. See, e.g., *Commission on Human Rights & Opportunities* v. *Sullivan*, 285 Conn. 208, 238, 939 A.2d 541 (2008) ("[t]he burden of showing reasonableness rests on the party requesting the fees, and there is an undisputed requirement that the reasonableness of attorney's fees and costs must be proven by an appropriate evidentiary showing" (internal quotation marks omitted)).

[15] Before this court, the defendant asserts that, in summary process actions, the average amount of attorney's fees incurred by prevailing tenants is higher than that incurred by prevailing landlords. The defendant contends that landlords frequently obtain default judgments, which involve a minimal expenditure of time and resources, and which allow attorneys to represent landlords in a high volume of cases, while charging a flat rate. The defendant does not claim, however, that the plaintiff was charged a flat rate in the present case, and the defendant did not present any evidence to that effect before the trial court. This court is not a fact-finding body. See, e.g., *State* v. *Lawrence*, 282 Conn. 141, 156–57, 920 A.2d 236 (2007) (appellate tribunal's function is to review proceedings before trial court, not to find or retry facts).

the fees sought, apart from the trial court's general knowledge"). Setting reasonable fees as the alternative, when it is not practicable to base the prevailing consumer's award upon the contractual terms, is consistent both with § 42-150bb, which entitles a prevailing consumer to reasonable attorney's fees when the commercial party is represented by a salaried employee, and also with the general rule that, when a prevailing party is entitled to attorney's fees, those fees must be reasonable. See, e.g., General Statutes § 10-153m (authorizing award of reasonable attorney's fees, under specified circumstances, "[i]n any action brought pursuant to section 52-418 to vacate an arbitration award rendered in a controversy between a board of education and a teacher or the organization which is the exclusive representative of a group of teachers, or to confirm, pursuant to section 52-417, such an arbitration award"); General Statutes § 35-54 (in action brought pursuant to Connecticut Uniform Trade Secrets Act, General Statutes § 35-50 et seq., authorizing award of reasonable attorney's fees to prevailing party "[i]f a claim of misappropriation is made in bad faith or a motion to terminate an injunction is made or resisted in bad faith"); General Statutes § 42-180 (authorizing reasonable attorney's fees, under specified circumstances, in consumer actions against motor vehicle manufacturers); *Lederle* v. *Spivey*, 332 Conn. 837, 844, 213 A.3d 481 (2019) (courts have "inherent authority" to award reasonable attorney's fees when losing party has acted in bad faith (internal quotation marks omitted)).

In the present case, although the trial court relied on the equitable purpose of § 42-150bb in awarding the defendant reasonable attorney's fees, the court did not first consider whether it was practicable to base the defendant's award of attorney's fees upon the contractual terms governing the size of the plaintiff's fees. Accordingly, we direct the trial court to hold a hearing

on remand to determine whether it is practicable, that is, consistent with the equitable purpose of § 42-150bb, to award the defendant attorney's fees in an amount based upon the terms in the lease agreement governing the plaintiff's recovery of attorney's fees. If the trial court determines that it is not practicable to do so, the court should award the defendant reasonable attorney's fees, consistent with this court's decision in *Smith* v. *Snyder*, supra, 267 Conn. 477.

The award of attorney's fees is vacated and the case is remanded with direction to conduct a new hearing on the defendant's motion for attorney's fees in accordance with this opinion.

In this opinion the other justices concurred.