

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* ELMER G., SC 20031
Judicial District of Danbury

Criminal; Whether Appellate Court Properly Concluded That Defendant’s Convictions of Violation of a Restraining Order Were Supported by Sufficient Evidence; Whether Appellate Court Properly Concluded That Defendant Was Not Deprived of His Right to a Fair Trial by Prosecutorial Impropriety. The defendant was convicted of two counts each of the crimes of sexual assault in the second degree and risk of injury to a child and of three counts of criminal violation of a restraining order in connection with his alleged sexual abuse of the victim, his daughter. The defendant appealed, claiming that the evidence was insufficient to support his convictions of violation of a restraining order and that prosecutorial impropriety deprived him of a fair trial. The Appellate Court (176 Conn. App. 343) affirmed the defendant’s conviction. In affirming the conviction of three counts of criminal violation of a restraining order, the Appellate Court rejected the defendant’s claim that the evidence was insufficient to support the conviction because the state failed to prove that the *ex parte* and temporary restraining orders that were issued applied to the victim or that the defendant, who spoke Spanish, knew the terms of those orders. The Appellate Court noted that, although the restraining orders identified the victim’s mother as the “protected person,” they also stated that they protected the minor children of the protected person, namely, the victim and her siblings, and furthermore that, at the temporary restraining order hearing, the judge, through a Spanish interpreter, had advised the defendant that his contact with his children was limited to weekly supervised visits. The court added that, even if there was an inadequate evidentiary basis for determining that the defendant knew the terms of the *ex parte* restraining order, the conviction on the third count would nevertheless stand because there was sufficient evidence to prove that the defendant sent the victim a letter during the effective period of the temporary restraining order. The Appellate Court rejected the defendant’s claim that the prosecutor engaged in impropriety by improperly bolstered the credibility of two state’s witnesses, deeming that claim an unpreserved evidentiary claim rather than a constitutional claim of prosecutorial impropriety, and refusing to review it under the framework applied to true claims of prosecutorial impropriety. Finally, the Appellate Court rejected the defendant’s claim that the prosecutor improperly vouched

for the credibility of the victim during closing argument, opining that, when the disputed remarks were viewed in the context of the entire closing argument, it was clear that the prosecutor was appealing to the jurors' common sense and inviting them to draw a conclusion on the basis of a rational appraisal of the evidence. The Supreme Court granted the defendant certification to appeal, and it will decide whether the Appellate Court properly concluded that there was sufficient evidence to support the defendant's conviction of three counts of criminal violation of a restraining order and properly concluded that the defendant was not deprived of his right to a fair trial by prosecutorial impropriety.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

JERMAINE LITTLE *v.* COMMISSIONER OF CORRECTION, SC 20051
Judicial District of Tolland

Habeas; Whether Appellate Court Correctly Concluded That *State v. Salamon* Does Not Apply Retroactively to Collateral Attack on Kidnapping Conviction Where Petitioner Pleaded Guilty to That Charge. The petitioner was charged with kidnapping in the first degree, burglary and robbery after he and three other men abducted a man at gunpoint, forced the victim into his own car, drove to the victim's house, and took cash, checks and jewelry from a safe in the victim's bedroom. In 2004, the petitioner, pursuant to a plea agreement, pleaded guilty to the kidnapping charge, and the state entered a nolle prosequi on the burglary and robbery charges. Subsequently, in *State v. Salamon*, 287 Conn. 509 (2008), the Supreme Court held that, in order to convict a defendant of kidnapping in the first degree in conjunction with another crime, the state must prove that the defendant intended to prevent the victim's liberation for a longer period of time or to a greater degree than that which was necessary to commit the other crime. The petitioner then brought this habeas action in 2013, claiming that his guilty plea was invalid because, at the time he entered it, he was not aware of the additional element of intent that was enunciated by the Supreme Court in *Salamon* four years after his conviction. The habeas court denied the petitioner's *Salamon* claim, and the petitioner appealed, claiming that *Salamon* should be applied retroactively to his case because there is no differentiation between a conviction obtained after a trial or by way of a guilty plea, and because there was a risk that, in light of *Salamon*, his conviction did not comport with the due process requirements for

guilty pleas. The Appellate Court (177 Conn. App. 337) disagreed and affirmed the habeas court's judgment. The Appellate Court noted that there was no binding precedent as to whether *Salamon* should be applied retroactively to collateral attacks on a kidnapping conviction when the defendant pleaded guilty to only that charge pursuant to a plea agreement, but, in deciding the issue, the Appellate Court adopted the rule and reasoning of the plurality opinion in *Luurtsema v. Commissioner of Correction* (299 Conn. 740). That opinion adopted a general presumption that *Salamon* applies retroactively in habeas proceedings, but left open the possibility that there could be situations in which the traditional rationales underlying the writ of habeas corpus did not favor retroactive application. The Appellate Court ruled that the traditional rationales underlying the writ of habeas corpus did not favor applying *Salamon* retroactively here. The court noted that: (1) there was no risk that the petitioner stood convicted of an act that the law did not make criminal; (2) there was no risk that the petitioner faced a punishment that the law could not impose on him; and (3) the state relied sufficiently to its detriment on the Supreme Court's pre-*Salamon* kidnapping precedent when constructing the terms of the petitioner's plea agreement such that applying *Salamon* retroactively in the present case would be inappropriate. The Supreme Court granted the petitioner certification to appeal, and it will decide whether the Appellate Court correctly declined to apply *Salamon* retroactively to allow a collateral attack on a kidnapping conviction when the defendant pleaded guilty to the kidnapping charge, and, if not, whether the petitioner is entitled to relief on his *Salamon* claim.

STATE *v.* DAVID G. LIEBENGUTH, SC 20145
Judicial District of Stamford

Criminal; Free Speech; Whether Appellate Court Properly Concluded that, Under the Circumstances in Which They Were Uttered, Racial Slurs Directed at an African-American Parking Officer Were not Fighting Words. The defendant was convicted, following a bench trial, of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (5), which prohibits the use, in a public place, of abusive or obscene language that is intended to cause annoyance or alarm. The defendant's conviction stemmed from an incident in which he twice directed racial slurs at an African-American parking authority officer (parking officer) who had just issued him a \$15 ticket. The defendant made several vulgar and racially-charged remarks during the incident, culminating in the defendant angrily shouting a racial slur at the parking officer while driving past

him. The trial court found that the defendant's speech, taken in context, amounted to "fighting words"—those words that are not constitutionally protected and that, by their very utterance, are likely to provoke the person to whom they are addressed to retaliate with immediate violence. The defendant appealed, claiming that the evidence was insufficient to support his conviction because his words were protected speech under the first amendment to the United States constitution and thus did not violate § 53a-181 (a) (5). The Appellate Court (181 Conn. App. 37) agreed and reversed the defendant's conviction, relying in part on the decision in *State v. Baccala*, 326 Conn. 232, cert. denied, 138 S. Ct. 510 (2017). In *Baccala*, the defendant was convicted of breach of peace in the second degree after she directed vulgar and offensive language at the manager of a supermarket. The Supreme Court reversed the conviction, finding that the defendant's speech did not constitute "fighting words" in that the state did not prove that, under the circumstances, an average store manager was likely to have responded with violence to the defendant's provocations. The Appellate Court observed that here, as in *Baccala*, the defendant used extremely vulgar and offensive language that was intended to personally demean the person to whom it was addressed, but it held that, under the circumstances, that language was not likely to tend to provoke a reasonable person in the parking officer's position immediately to respond with violence. The Appellate Court noted that the defendant was in his car both times that he directed racial slurs toward the parking officer, and it reasoned that a parking officer would expect some level of hostility from a person receiving a ticket and therefore that a reasonable person acting in the capacity of a parking official would not be likely to retaliate with immediate violence under the circumstances. The state appeals, and the Supreme Court will decide whether the Appellate Court properly reversed the defendant's conviction on concluding that his words directed at the parking officer were constitutionally protected free speech and did not constitute "fighting words."

TYREESE BOWENS *v.* COMMISSIONER OF CORRECTION, SC 20204
Judicial District of Tolland

Habeas Corpus; Actual Innocence; Ineffective Assistance of Counsel; Whether Newly Discovered Evidence Required to Support Actual Innocence Claim; Whether Change in Law Allowing Expert Testimony as to Fallibility of Eyewitness Identification Constitutes Newly Discovered Evidence; Whether Habeas Court Properly Rejected Claim of Actual Innocence. The

petitioner was convicted of murder in connection with the death of a man who was shot while he sat in the front seat of a parked car. A witness who was sitting next to the victim at the time of the shooting identified the petitioner as the shooter. The petitioner brought this habeas action claiming that he was actually innocent and that the attorney who represented him in connection with a previous habeas petition rendered ineffective assistance of counsel. In support of his actual innocence claim, the petitioner presented (1) witnesses who testified that a third party had confessed to the murder, and (2) expert testimony regarding the fallibility of eyewitness identification. The petitioner argued that the expert testimony constituted newly discovered evidence because, at the time of his criminal trial in 1998, expert testimony regarding the fallibility of eyewitness identification was inadmissible. Subsequently, in *State v. Guilbert*, 306 Conn. 218 (2012), the Supreme Court overruled prior law and determined that testimony from a qualified expert on the fallibility of eyewitness identification is admissible at trial. The habeas court, following Appellate Court precedent holding that newly discovered evidence is required to support a claim of actual innocence, determined that expert testimony regarding the fallibility of eyewitness identification did not amount to newly discovered evidence and that, even if it did, the expert testimony merely cast doubt on the reliability of the state's witness and did not amount to affirmative proof of actual innocence. The habeas court also rejected the petitioner's actual innocence claim insofar as it was based on the third-party confession, finding that the claim was barred by res judicata because it had been raised and adjudicated in a previous habeas petition brought by the petitioner. In the alternative, the habeas court concluded that evidence of the alleged third-party confession did not establish by clear and convincing evidence that the petitioner was factually innocent of the murder and that, in light of that evidence, no reasonable fact finder could find him guilty of that crime. Finally, the habeas court rejected the petitioner's claims that his prior habeas counsel had rendered ineffective assistance in failing to adequately present a claim of actual innocence and in failing to adequately present a claim of ineffective assistance of trial counsel. The petitioner appeals, claiming that the habeas court erred in rejecting his actual innocence claim and urging the Supreme Court to overrule Appellate Court precedent that requires that a claim of actual innocence be supported by newly discovered evidence. The petitioner also claims that the habeas court erred in concluding that a conviction based on an eyewitness identification that is admitted without the benefit of expert testimony as to the fallibility of eyewitness identification does not violate due

process. Finally, the petitioner argues that the habeas court erred in rejecting his claims that his prior habeas counsel rendered ineffective assistance.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

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