No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

J'VEIL OUTING, *Petitioner*

v.

CONNECTICUT COMMISSIONER OF CORRECTIONS, *Respondent*

ON WRIT OF CERTIORARI TO THE
CONNECTICUT APPELLATE COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER ASSIGNED COUNSEL VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS RIGHT TO DUE PROCESS BY FAILING TO PRESERVE FOR APPEAL AN ISSUE REGARDING THE ADMISSIBILITY OF AN EYEWITNESS EXPERT'S TESTIMONY AT TRIAL WHERE THE PRECEDENTS RELIED UPON BY THE TRIAL COURT WERE FORSEEABLY LIKELY TO BE MODIFIED OR OVERRULED ON APPEAL?

2. WHETHER THE DEFENDANT'S DUE PROCESS AND FAIR TRIAL RIGHTS ARE VIOLATED WHEN EXPERT TESTIMONY ABOUT EYEWITNESS IDENTIFICATION IS EXCLUDED OR UNDULY LIMITED?

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PETITION FOR WRIT OF CERTIORARI

Petitioner J'Veil Outing (Outing) respectfully requests that the Court grant a writ of certiorari to review the decision of the Connecticut Appellate Court affirming the denial of his petition for writ of habeas corpus.

The petitioner is the petitioner and petitioner-appellant in the courts below. The Respondent is the Connecticut Commissioner of Correction, the defendant and defendant-appellee in the courts below.

OPINIONS BELOW

The opinion of the Connecticut Superior Court, Judicial District of Tolland, denying Outing's state petition for habeas corpus is reprinted in the Appendix at App. A. The opinion of the Connecticut Appellate Court affirming the denial of Outing's state petition for habeas corpus is at *Outing v. Commissioner*, 190 Conn. App. 510, 211 A.3d 1053 (2019), and is reprinted in the Appendix at App. B. The opinion of the Connecticut Supreme Court denying certification is at *Outing v. Commissioner*, 333 Conn. 903, 214 A.3d 382 (2019), and is reprinted in the Appendix at App. C.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Connecticut Appellate Court on the basis of 28 U.S.C. § 1257. The Connecticut Supreme Court denied Outing's timely-filed petition for certification on September 11, 2019. Petitioner's timely-filed Application for Extension of Time to

file this petition was granted on December 3, 2019, extending the deadline to January 31, 2020.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The questions presented implicate the following provisions of the United States Constitution.

The Constitution of the United States, amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

The Constitution of the United States, amendment XIV, section 1, provides:

> No State shall ... deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The states are divided about whether a trial attorney can be found ineffective for failing to make an objection and preserve an issue for appeal when it is reasonably foreseeable that the governing precedent is ripe for appellate modification or reversal. Federal courts have largely held that an attorney is not required to preserve challenges to then-existing law. This Court's holdings imply that counsel has a duty to preserve appellate issues. This Court should grant certiorari to resolve whether an attorney is ineffective when he or she fails to preserve an issue for appeal when that issue is foreseeably ripe for a favorable appellate decision.

The federal courts and states are also divided about whether, and to what extent, expert testimony about eyewitness identification is admissible at trial. In

Perry v. New Hampshire, 565 U.S. 228, 245-47 (2012), this Court enumerated various safeguards that protect a defendant from juries placing undue weight on eyewitness testimony. The Court noted that "[i]n appropriate cases, some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence." *Id.* at 247. This Court has not addressed the admissibility of such expert testimony under the federal constitution. This Court should grant certiorari to resolve the split among jurisdictions in whether a defendant's due process rights are violated when the trial court precludes or unduly limits the testimony of an eyewitness identification expert.

A. Introduction

On June 23, 2005, two bystanders saw a black man on a bicycle shoot another man on a street in New Haven, Connecticut. Four days later, both witnesses identified Outing as the culprit in a non-blind[1], simultaneously[2]

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[1]A double-blind or blinded procedure is conducted in such a way that the person(s) conducting the procedure either do not know which person in the photo array is suspected as the perpetrator of the offense; or cannot see which images the witness is looking at during the procedure, by means such as putting the images in folders or using a computer program where the witness' screen is not visible to the person(s) conducting the array.

[2]A simultaneous photographic array displays multiple photographs together on a single page to be shown to a witness. The witness can compare images in a process called "relative judgment".

In a sequential identification procedure, individual photographs are displayed to a witness one at a time. The witness makes a yes or no decision on each image before turning to the next. If the witness chooses an image, then he or she may be asked to continue to look at each of the remaining images. Some jurisdictions permit the witness to ask to see all of the images again, others only permit one viewing to avoid the witness using relative judgment.

presented photographic array. Outing was arrested and charged with the murder. He was convicted by a jury after six days of deliberations and was sentenced to 50 years incarceration.

In 2010, his conviction was affirmed by the Connecticut Supreme Court. *State v. Outing*, 298 Conn. 34, 3 A.3d 1 (2010), cert. denied 562 U.S. 1225 (2011) (*Outing I*). The Supreme Court declined to determine whether Outing was unconstitutionally deprived of an eyewitness expert's testimony at trial because it held that trial counsel had failed to properly preserve the issue by not renewing an objection to limitations put on the expert's testimony in a suppression hearing.

Outing I was argued on March 25, 2009, and decided fifteen months later, on August 31, 2010. A contemporaneous appeal raising virtually the same issue, *State v. Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012) (*Guilbert*), completed its initial briefing a few months after *Outing I* was argued. The Connecticut Supreme Court delayed argument in *Guilbert* until approximately six months after *Outing I* was decided, and gave both parties the opportunity to address *Outing I* in supplemental briefs.

Guilbert, decided nineteen months after argument, was a landmark decision in Connecticut, upending decades-old precedent which had discouraged the admission of eyewitness identification expert testimony, and holding that several factors affecting eyewitness accuracy were not within the jury's common knowledge and were so well-established by research that expert testimony would be admissible

without the necessity for a *Daubert* hearing. However, the exclusion of Guilbert's expert was found to be harmless error, and his conviction was affirmed.

Outing filed a state petition for habeas corpus asserting, inter alia, that trial counsel had provided ineffective assistance of counsel by not preserving the issue that prevailed in *Guilbert* and by not adequately investigating Outing's alibi witnesses. See *Strickland v. Washington*, 466 U.S. 668, 684-686 (1984). The habeas court found that trial counsel made reasonable tactical decisions and denied Outing's habeas petition. The Connecticut Appellate Court affirmed. *Outing v. Commissioner*, 190 Conn. App. 510, 211 A.3d 1053 (2019) (*Outing II*). The Connecticut Supreme Court denied certification.

Mr. Outing now petitions this Court for a writ of certiorari to the Connecticut Appellate Court to reverse the denial of his state habeas petition as his conviction violates his Sixth and Fourteenth Amendment rights.

B. Factual Background: Failure to Preserve Appellate Record

On the evening of June 23, 2005, Nadine Crimley (Crimley) and her brother Ray Caple (Caple) were on Canal Street in New Haven with their children. They saw a young African-American man on a bicycle shoot Kevin Wright (Wright). The culprit fled on foot, leaving the bicycle behind. There were no other witnesses. No physical evidence linked Outing to the crime – the fingerprints on the abandoned bicycle were not Outing's.

Police interviewed Crimley on the night of the shooting. Crimley told the

investigating officer that she'd never seen the culprit before in her life. She gave a very general description of the culprit, including that he was wearing a hat. She did think she could identify the culprit. Police later developed Outing as a suspect because of an anonymous tip.

Four days after the shooting, a detective interviewed Caple. Caple gave a general description of the culprit's clothing and of the bicycle. He said he recognized the culprit as a former high school classmate. Police presented Outing's photograph as part of a non-blind, simultaniously presented photographic array. The array used photographs taken from the defendant's high school year book. Caple picked Outing. Police recorded a summary statement, but not their entire interaction with Caple.

A few hours later, a detective re-interviewed Crimley. He asked her whether she recognized the culprit from the neighborhood among other suggestive and leading questions. The detective showed the same array in the same manner to Crimley, who also chose Outing. Police recorded a summary statement, but not their entire interaction with Crimley.

After his arrest and arraignment, Outing was represented by appointed counsel, an experienced solo practitioner. His attorney was later assisted by assigned co-counsel for trial.

Outing moved to suppress the out-of-court identifications. At the time, Connecticut used the familiar *Neil/Manson* test, created by this Court in the 1970s. See *Manson v. Brathwaite*, 432 U.S. 98, 107, 109 (1977), and *Neil v. Biggers*, 409

U.S. 188, 198 (1972). Caple testified at the motion hearing that police forced him to give a statement. He was not in the area at the time of the shooting and did not see Wright get shot. Crimley testified that she saw the shooting, but had never gotten a good look at the culprit and did not know what he looked like. She said police had pressured her into making a statement and choosing Outing's picture. She said police had focused her on his picture, and that she recognized all of the other people in the array.

Outing offered an eyewitness identification expert's testimony at the hearing. The trial court, applying decades-old Connecticut precedent disfavoring eyewitness identification expert testimony, ruled that several areas that the expert proposed to testify about were common knowledge and thus would be excluded. The excluded factors included: the effect of a disguise such as a hat on accuracy; the effect of the presence of a visible weapon; the lack of correlation between a witness' confidence and the accuracy of an identification; the negative effects of high-level stress; and that collaboration between witnesses may taint an identification. The expert was allowed to testify about the effects of cautionary instructions prior to an identification procedure; the differences between a non-blind and double-blind presentation of an array; the differences between presenting images simultaneously or sequentially; and unconscious transference (when a person mis-recognizes a stranger as a familiar person). The trial court denied the suppression motion.

Three weeks later, Outing's attorney orally renewed a request to offer his expert's testimony about the four factors that she testified to in the hearing, but did

not renew her request as to the five excluded factors.

At trial, both Caple and Crimley again testified that police had pressured them to give statements. Both repudiated their identification of Outing as the culprit. Their statements and identifications were introduced under Connecticut's prior inconsistent statement rule. Defense counsel did not offer the identification expert's testimony. The jury deliberated for six days, asking repeatedly for Caple and Crimley's testimony to be replayed, repeatedly requesting re-instruction on reasonable doubt and speculation, and reporting more than once that they were hopelessly deadlocked.

The Connecticut Supreme Court affirmed Outing's conviction. As to the expert's testimony, the Court "decline[d] to review this claim because it was not preserved." *Outing I, supra* at 22. It noted that:

> The trial court emphasized that it was limiting its ruling to the testimony at the hearing on the motion to suppress, "where the court is both the finder of fact and the . . . ruler on the legal issues," and left the issue open should the defendant seek to introduce [its expert's] testimony at trial.

Outing I, supra at 11.

In a footnote, it continued:

> The trial court stated that it wanted "to make it clear for the record, whatever [the court is] ruling here with respect to topics or admissibility is . . . only with respect to the motion . . . to suppress where the court is both the finder of fact and the . . . ruler on the legal issues." The court further stated: "Obviously, there may be . . . some arguments that need not be repeated, if and when that testimony is offered at trial. But [the court] just want[s] the record to be clear that at this point [it is] only ruling on admissibility, as to the hearing before [it]."

Outing I, supra, 22 n. 11. Two years later, the Connecticut Supreme Court overturned Connecticut's decades-old case law discouraging eyewitness expert testimony that Outing's trial judge had relied upon. The Connecticut Supreme Court concluded that its prior decisions were "out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror". *Guilbert, supra*, at 720.

It further concluded that eight concepts were not common knowledge, and so well supported by research that a *Daubert* hearing was not needed to offer expert testimony about them. Those factors were:

> (1) there is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy; (2) the reliability of an identification can be diminished by a witness' focus on a weapon; (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events; (4) cross-racial identifications are considerably less accurate than identifications involving the same race; (5) memory diminishes most rapidly in the hours immediately following an event and less dramatically in the days and weeks thereafter; (6) an identification may be less reliable in the absence of a double-blind, sequential identification procedure; (7) witnesses may develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification; and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another.

Guilbert, supra at 732. These factors include three of the five topics that Outing's expert was not allowed to discuss at the suppression hearing.

Outing timely filed a state habeas petition challenging, inter alia, his trial counsel's failure to renew a request to let the expert testify about the five excluded

topics.

In an evidentiary hearing held eleven years after Outing's attorney was appointed in this case, trial counsel acknowledged that she did not recall with certainty many of the events and decisions she made in his trial. Trial counsel testified that she did not call the identification expert because the expert's testimony concerned good-faith mistakes. When the witnesses recanted in the suppression hearing, counsel thought it was no longer a mistaken identification case, it was a coerced testimony case. Counsel had followed-through with her expert's testimony in the hearing because she was already in the midst of it, but decided that the expert's testimony would not be necessary at trial.

Trial counsel testified that she could not recall why she orally renewed her request to let the expert testify to the four factors heard in the suppression hearing. She recalled that she did not renew her motion about the five excluded factors because she felt that the expert's testimony would not be relevant to her coerced identification theory. She did not want to have to "go into the whole thing all over again and present additional proof", and did not want to commit herself to offering the expert at trial. She agreed that there was no harm in renewing the motion to preserve the record, but "[t]hat wasn't my strategy."

Outing offered an experienced defense attorney to testify as an expert in habeas that reasonably competent counsel would have renewed the offer in order to preserve the appellate record, especially in a murder case; renewing the motion would let counsel make an informed decision about whether to offer the expert at

trial; and that there was no tactical reason not to do so.[3] The habeas court found that trial counsel had made a reasonable strategic decision not to renew the offer and denied his habeas petition.

Outing timely filed an appeal of the denial of his state habeas petition. The Connecticut Appellate Court concluded that because trial counsel "reasonably determined not to present [the expert's] testimony at the petitioner's criminal trial, she would have had no strategic reason to preserve the court's exclusion of evidence on a matter that she reasonably believed had been rendered moot by her tactical decision not to pursue a theory of mistaken identification." *Outing II, supra*, at 534.

REASONS FOR GRANTING THE PETITION

Outing was indigent and relied upon his Sixth Amendment right to assigned counsel under *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The right to counsel includes "the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

> Under *Strickland*, a defendant who claims ineffective assistance of counsel must prove (1) "that counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 687-688, 104 S.Ct. 2052, and (2) that any such deficiency was "prejudicial to the defense," *id.*, at 692, 104 S.Ct. 2052.

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[3]The expert's testimony might, in fact, have bolstered her defense that the witnesses had been pressured to identify Outing. If the witnesses did not have a good opportunity to view the culprit, then they may have been more willing to accept the police theory of who shot the victim. See also *Commonwealth v. Pressley*, 390 Mass. 617, 620, 457 N.E.2d 1119 (1983) (jury "might very well have declined to conclude that the [witness] lied, but may have been more inclined to believe that [the witness] was honestly mistaken".)

> To prevail on a Sixth Amendment ineffective-assistance-of-counsel claim, a defendant must show both that his counsel's performance was deficient and that his counsel's errors caused him prejudice. In assessing deficiency, a court asks whether defense "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694, 104 S.Ct. 2052.
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> "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." [*Strickland*] *Id.*, at 688, 104 S.Ct. 2052. "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at 689, 104 S.Ct. 2052. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.*, at 690, 104 S.Ct. 2052.

Knowles v. Mirzayance, 556 U.S. 111, 124 (2009).

A. Failure to Preserve Appellate Record

"Effective trial counsel preserves claims to be considered on appeal". *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). Trial counsel's decision not to renew her objection to the limitation on her expert's testimony at trial failed to preserve the issue for appellate review. There was no tactical reason not to preserve this issue. Renewing her request would not have committed her to making another offer of proof[4], or to offering the expert at trial. In addition to preserving this issue for appeal, doing so

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[4]The trial court held, during the suppression hearing, that the five excluded factors were within the realm of common knowledge and experience. It seems unlikely that the trial court would have changed its mind on the eve of trial, three weeks later, when trial counsel renewed her motion as to only the four allowed factors.

would have confirmed the scope of her expert's trial testimony in case she decided to offer the expert. For example, the witnesses could have recanted their recantation and claimed at trial to recognize Outing as the culprit, making good-faith mistake once again clearly relevant to the defense.

In denying Outing's appeal, the Connecticut Appellate Court relied on a Connecticut decision that *Strickland* does not require counsel to challenge then-existing law, *Outing II* at 535-36 citing *Ledbetter v. Commissioner*, 275 Conn. 451, 461-62, 880 A.2d 160 (2005), no matter how ripe the existing law may be for change on appeal.

At least three federal circuit courts and some states have come to similar conclusions. See *Green v. Johnson*, 116 F.3d 1115 (5th Cir. 1997); *Bullock v. Carver*, 297 F.3d 1036 (10th Cir. 2002); *Smith v. Singletary*, 170 F.3d 1051 (11th Cir. 1999); *Bailey v. State*, 472 N.E.2d 1260, 1265 (Ind. 1985); *Commonwealth v. Baumhammers*, 625 Pa. 354, 92 A.3d 708 (Pa. 2014); *Snell v. State*, 126 A.3d 463, 468 (RI 2015). See generally, Moyer, *Counsel as "Crystal Gazer": Determining the Extent to which the Sixth Amendment Requires that Defense Attorneys Predict Changes in the Law*, 26:2 CIV. R. L. J. 183 (2016).

Florida takes the most extreme position. As a matter of state law, ineffective assistance of trial counsel claims deal with the possibility of prejudice at trial, not on appeal. Where counsel failed to object to a per se reversible error, it was not a violation of *Strickland*. *Romero v. State*, 276 So. 3d 514, 519-20 (Fla. 5th Dist.

2019).

Conversely, two federal circuits and some states leave open the possibility that a trial court's failure to preserve a foreseeable appellate issue could be ineffective assistance of counsel. See *Virgin Islands v. Forte*, 865 F.2d 59, 60-61 (3rd Cir. 1989) (trial counsel found ineffective where, inter alia, objection would have required "little effort" and would not have been a "reprehensible or unprofessional act"); *Lucas v. O'Dea*, 179 F.3d 412, 420 (6th Cir. 1999) ("[C]ounsel's failure to raise an issue whose resolution is clearly foreshadowed by existing decisions might constitute ineffective assistance of counsel."). Oregon holds that an attorney may be constitutionally inadequate if he or she fails to anticipate a foreseeable change in precedent. See *Miller v. Lampert*, 340 Or. 1, 14, 125 P.3d 1260 (2006) ("we look to the [United States Supreme Court] decisions that preceded petitioner's sentencing hearing and ask whether, in the exercise of reasonable skill and judgment, petitioner's counsel should have foreseen" that the Court would overrule its existing precedent). Kansas noted that counsel's "failure to foresee a change in the law may lead to [state habeas relief under statute] if the failure was not objectively reasonable." (citation omitted) *Laymon v. State*, 280 Kan. 430, 439-40, 122 P.3d 326 (2005).

To provide effective assistance of counsel, trial counsel should not only be aware of existing law and precedent, but be alert to developments suggesting that existing precedent is ripe for modification or reversal. In the days of Lexis, Westlaw, and Google Scholar, it is easy for counsel to research issues across neighboring

states. CLEs, listservs, and discussion groups make it easy for counsel to be aware of national trends. Trial counsel should make motions[5] and objections to preserve the record for appellate challenges.

This is not a case like *Maryland v. Kulbicki*, 136 S.Ct. 2 (2015) where counsel had no reason to anticipate a change in the law regarding eyewitness expert testimony in Connecticut. Trial counsel testified that she was familiar with eyewitness identification science. She had retained a nationally regarded expert. The Connecticut Supreme Court was (and is) in the forefront of adopting eyewitness identification research. A few months after police administered a non-blind simultaneous array to Caple and Crimley with only a few cautionary instructions, *State v. Ledbetter*, 275 Conn. 534, 881 A.2d 290 (2005) cert. denied 547 U.S. 1082 (2006), created a cautionary jury instruction to be given when police did not give certain admonishments prior to an identification procedure.

Not only were changes in how the Connecticut Court regarded eyewitness identification evidence and research foreseeable – changes came about in a series of subsequent cases. *Outing I* was followed by *Guilbert* (reversing prior cases discouraging use of identification expert testimony); *State v. Williams*, 317 Conn. 691, 707-08, 119 A.3d 1194 (2015) (clarifying how different levels of familiarity

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[5]This Court has held that an attorney's decision not to pursue a motion to suppress is virtually unchallengeable under *Strickland* because this Court concluded that such motions have no chance of success. *Sexton v. Beaudreaux*, 138 S.Ct. 2555 (2018). Sexton's counsel did not appear to argue that among the purposes of a motion to suppress is to preserve for appeal arguments to change the law in light of scientific research and appellate decisions from other jurisdictions.

affect an identification's reliability); and *State v. Dickson*, 322 Conn. 410, 436-37, 141 A.3d 810 (2016), cert. denied 137 S.Ct. 2263 (2017) (limiting in-court identification testimony).

Recently, Connecticut has joined a growing number of states that no longer use this Court's venerable *Neil/Manson* test for suppression on state constitutional grounds. *State v. Harris*, 330 Conn 91, 191 A.3d 119 (2018). See e.g. *Young v. State*, 374 P.3d 395 (Alaska 2016); *State v. Kaneaiakala*, 145 Haw. 231, 450 P.3d 761 (2019); *State v. Lawson*, 352 Or. 724, 291 P.3d 673 (2012); and *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011). The sea change in Connecticut's state law had begun at the time of Outing's trial and was gathering strength. It is no coincidence that Outing and Guilbert's cases were briefed nearly contemporaneously; that in both *Outing* and *Guilbert*, the Connecticut Supreme Court wrestled with its decision for about 18 months from each case's oral argument; or that Justice Palmer's concurring opinion in *Outing I* lays out a roadmap for the *Guilbert* majority opinion.

Counsel should also be generally aware of legislative developments. Not long after *Outing I*, the Connecticut legislature enacted procedural requirements for police-administered identification procedures, including that they be double-blind or blinded; the images be sequentially administered; that certain pre-procedure admonitions be given; and that the witness' confidence be contemporaneously recorded before any feedback. See Connecticut General Statues § 54-1p.

Trial counsel should have recognized that the Connecticut Supreme Court was interested in, and receptive to, arguments about eyewitness identification research in *Ledbetter*. She should have recognized that Connecticut's then-governing cases discouraging the use of identification experts were ripe for appellate challenge and that this case was a good vehicle for that challenge.

Trial counsel did not need to make a significant effort to preserve this issue for review. Trial counsel had been warned by the trial court that its rulings as to the admissibility of some of the identification expert's testimony, and the exclusion of other parts of it, applied only to that hearing. Counsel could have asked the trial court about the excluded points when she made her pre-trial oral motion renewing her request as to the admitted points. Counsel was ineffective for not doing so.

In *Engle v. Isaac*, 456 U.S. 107, 130 (1982), this Court wrote that

> We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.

The *Engle* court "hesitate[d] to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim." *Id.* at 131.

"[E]ven the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding". When considering whether counsel has been ineffective, "every effort be made to eliminate the distorting effects of

hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (internal citation, quotation marks omitted) *Smith v. Murray*, 477 U.S. 527, 536 (1986). A habeas court should consider the foreseeability of an appellate court's willingness to reconsider its prior holdings, and whether trial counsel should have preserved the issue for appellate review.

Here, trial counsel did not need extraordinary vision to be aware of the sea changes in the Connecticut appellate courts' interest in eyewitness identification issues, or the vulnerability of the case law relied upon by the trial court to appellate reversal in light of new developments in identification research. In *Guilbert*, arising contemporaneously, trial counsel made a similar proffer of an expert and properly preserved the issue for appeal. Appellate counsel made very similar arguments to those made in *Outing I*. The exclusion of Guilbert's expert was found to be error, albeit harmless in his case. The limitation on the expert was not harmless in Outing's case, which rested on two shaky eyewitnesses.

Although the Sixth Amendment guarantees criminal defendants only a fair trial and a competent attorney and does not insure that defense counsel will recognize and raise every conceivable constitutional claim, *Engle* at 134, this is an instance where counsel was ineffective for preserving her claim for appeal.

B. The Admissibility of Expert Testimony on Eyewitness Identification.

This Court has not addressed the admissibility of eyewitness identification expert testimony as a matter of federal due process. As noted above, in *Perry v. New*

Hampshire, 565 U.S. 228, 245-47 (2012), this Court enumerated various safeguards that protect a defendant from juries placing undue weight on eyewitness testimony. The Court noted that "[i]n appropriate cases, some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence." *Id.* at 247.

There is a split among the Federal Circuits on this issue. Only the Third and Sixth circuits actively favor admission of eyewitness expert testimony. See *United States v. Brownlee*, 454 F.3d 131 (3rd Cir. 2006); *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000); *United States v. Downing*, 753 F.2d 1224 (6th Cir. 1985). One, the Eleventh Circuit, retains a per se exclusionary rule. See *United States v. Holloway*, 971 F.2d 675 (11th Cir. 1992). The remaining eight Circuits favor exclusion in most situations. See *United States v. Rodriguez-Berrios*, 573 F.3d 55 (1st Cir. 2006); *United States v. Serna*, 799 F.2d 842 (2nd Cir. 1986); *United States v. Harris*, 995 F.2d 532 (4th Cir. 1993); *United States v. Alexander*, 816 F.2d 164 (5th Cir. 1987); *United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999); *United States v. Kime*, 99 F.3d 870 (8th Cir. 1996); *United States v. Rincon*, 28 F.3d 921 (9th Cir. 1994); *United States v. Smith*, 156 F.3d 1046 (10th Cir. 1998). See generally Tallent, *Through the Lens of Federal Evidence Rule 403: An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts*, 68:2 WASHINGTON & LEE L. REV. 765 (2011).

Most of the federal cases in this area predate a more widespread acceptance

of eyewitness expert testimony in state courts. Even Pennsylvania, long a hold-out against eyewitness identification expert testimony, now permits it. *Commmonwealth v. Walker*, 92 A.3d 766 (Pa. 2014).

This Court should grant this petition to resolve the split among federal and state courts about the admissibility of expert testimony on eyewitness identification in general, and the limitations that may be put on it in the name of common sense or common knowledge.

C. The Defendant was Harmed by his Attorney's Inaction.

Outing was harmed by his trial attorney's failure to renew her objection to the limitation on the identification expert's testimony. Had counsel merely renewed her objection, and assuming that the trial court would not conclude that what was common knowledge had changed in the intervening weeks, then Outing's case, not Guilbert's, would have changed Connecticut's law. Given the centrality of the two eyewitnesses to the State's case and the jury's deliberations, the omission of an expert's testimony would not have been held harmless.

Here, Outing's conviction rested on two shaky eyewitnesses, who each said they had been pressured by police into selecting Outing's image from a non-blind, simultaneous photo array. The non-blind, simultaneous procedure used was then-accepted in Connecticut, but the tape recordings of their statements show the use of leading questions and raise a question about suggestiveness that could have corrupted the reliability of their identifications. As to reliability, this was a sudden, violent crime. In *Guilbert*, Connecticut recognized that testimony about the adverse

effects of high-level stress and viewing a weapon and the weak link between confidence and accuracy in a suggestive procedure would be appropriate expert testimony and was not within the jurors' common knowledge. Caple's acquaintance with Outing from high school and Crimley's assertion that she had seen him in the neighborhood, while potentially positive factors[6], also support the expert's testimony about unconscious transference.

The jury deliberated for six days, asking to rehear Caple and Crimley's testimony several times. The Connecticut Supreme Court deliberated it for seventeen months. The exclusion of the expert's testimony was not harmless beyond a reasonable doubt. Had trial counsel preserved the limitations on the expert's testimony at trial, Outing stood an excellent chance of reversing his conviction and obtaining a new trial on appeal. Failing to preserve the appellate issue was ineffective assistance of trial counsel.

If Outing were tried today in a Connecticut Superior Court, the case would look quite different. Setting aside Connecticut's rejection of the *Neil/Manson* test and changes to how a suppression motion would be resolved, an identification expert's testimony would be admissible. The jury could be made aware of the Legislature's stated preference for double-blind or blinded sequential procedures,

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[6]Familiarity is a complicated topic worthy of an expert's testimony. See Vallano, et al., *Familiar Eyewitness Identifications: The Current State of Affairs*, 25 PSYCHOL. PUB. POL'Y & L. 128, 131-34 (2019); Pezdek & Stolzenberg, *Are Individuals' Familiarity Judgments Diagnostic of Prior Contact?*, 20 PSYCHOL. CRIME & L. 302 (2014). Neither Capel nor Crimley were so well-acquainted with Outing that the restriction on expert testimony was harmless.

which include specifically includes requirements that "the eyewitness should not feel compelled to make an identification" and that "nothing shall be said that might influence the eyewitness's selection of the person suspected as the perpetrator". Connecticut General Statutes § 54-1p. Outing was harmed by his attorney's decision not to preserve the expert issue for appeal.

This Court should grant this petition to review the Connecticut Appellate Court's conclusion that trial counsel was not ineffective in not preserving a strong appellate issue and in not investigating and presenting an alibi defense against her client's wishes.

CONCLUSION

Outing was convicted as a result of eyewitness identification procedures criticized by Connecticut's Supreme Court months after they were used in this case, and prohibited by the Connecticut Legislature a few years later. The trial court limited his identification expert's testimony based on precedents overruled by the Connecticut Supreme Court not long after Outing's conviction was affirmed, on arguments similar to those made in Outing's case – the arguments were not reached for Outing because of his trial counsel's decision not to preserve the issue. As noted above, this Court should grant certioari to clarify counsel's duty to preserve appellate issues.

Had the issue been preserved, Outing's case, not Guilbert's would have changed Connecticut law. This Court has not yet addressed the admissibility of eyewitness identification experts and should do so to resolve a split among the

federal circuit courts and the states.

This Court should grant certiorari to review Outing's claims.

Respectfully Submitted,
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