BERDON, J., concurring. I agree with the majority opinion that because the trial court made no factual findings, we are unable to review whether the police arrested the defendant, Davon Hicks, without probable cause and whether the "show-up" identification was suggestive in contravention of the defendant's constitutional rights. I also agree with the majority opinion that *on the basis of the present record*, there was sufficient evidence to convict the defendant.

I write this concurring opinion because I would not stop there. Rather, I would remand the case to the trial court, pursuant to our rules of appellate procedure, to find the facts necessary for this court to determine whether the police had probable cause to arrest the defendant and whether the "show-up" procedure was unduly suggestive.

Section 60-2 of the rules of practice provides in relevant part that the court "on its own motion or upon motion of any party . . . [may] (9) remand any pending matter to the trial court for the resolution of factual issues where necessary . . . ." I am aware that our Supreme Court has held that these "supervisory powers are not a last bastion of hope for every untenable appeal. They are an *extraordinary* remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Emphasis in original; internal quotation marks omitted.) *State* v. *Hines*, 243 Conn. 796, 815, 709 A.2d 522 (1998).

This is one of those cases that requires that we invoke our supervisory power under subdivision (9) of § 60-2 of the rules of practice. This appeal involves the defendant's conviction, which dates back to May 17, 2001, for an incident that occurred on August 4, 2000. He is a black man who was convicted by an all white jury and was represented by a trial attorney who was eventually suspended from the practice of law. After the defendant's conviction, and before being sentenced to twenty years imprisonment, suspended after eight years, an attorney, other than the defendant's trial attorney, moved for a new trial, alleging that the victim's wife, Keisha Alseph, had given him an oral statement, recorded on tape, that she "now knows it was not the defendant who was one of her three assailants, but another party who clearly resembles the defendant." The motion was summarily denied by the trial court. The defendant took this appeal to this court, which was dismissed on January 4, 2002, because counsel did not pursue it in a timely manner. The habeas court restored the defendant's appellate rights on August 9, 2005,

resulting in the present appeal.

I recognize, as referenced in footnote 3 of the majority opinion, that the defendant can seek review of claims as to his warrantless arrest and the "show-up" identification procedure through a new or reinstated petition for habeas corpus, on the basis of ineffective assistance of counsel. Under these circumstances, such review is insufficient. This defendant has now been incarcerated for more than six years and, with credit for good time, likely will have served his entire sentence before he can get an effective review of his conviction through the habeas route. The exercise of our supervisory powers to remand the case for further factual findings would accomplish the same result in a more expeditious manner.