LAVERY, J., concurring in part and dissenting in part. I agree with part I of the majority's opinion and respectfully disagree with part II. I dissent because I conclude that the trial court improperly granted the motion to dismiss filed by the respondent, the commissioner of correction.

The following facts are relevant to this discussion. In May, 1993, the petitioner, Bruce Zollo, was convicted, following a jury trial, of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A), sexual assault in a spousal relationship in violation of General Statutes § 53a-70b, and attempt to commit sexual assault in a spousal relationship in violation of General Statutes §§ 53a-49 (a) and 53a-70b, and sentenced to a total effective term of fifty years incarceration. *Zollo* v. *Commissioner of Correction*, 93 Conn. App. 755, 755–56, 890 A.2d 120, cert. denied, 278 Conn. 904, 896 A.2d 108 (2006). The petitioner then filed a petition for a writ of habeas corpus, "alleging, inter alia, ineffective assistance of counsel at trial because his counsel had failed (1) to investigate the case, (2) to cross-examine the state's witnesses adequately, (3) to conduct an adequate defense, (4) to challenge the admissibility of the state's DNA evidence and (5) to preserve for appeal issues regarding the DNA evidence." Id., 756. The habeas court held a trial on the petition on September 23, 2003. At that trial, the assistant state's attorney asked the petitioner about an eighteen year midtrial plea bargain offer from the trial court, *Hartmere*, *J.* The petitioner answered that there was no such midtrial offer. Both parties agree that it was then, during the trial on the first habeas petition, that the petitioner first learned that the trial court may have made a midtrial plea bargain offer.[1] The first habeas petition was denied on July 8, 2004. On January 12, 2005, the petitioner filed a motion for rectification. That motion was denied.

Based on the information learned at the first habeas trial, the petitioner filed a second petition for a writ of habeas corpus, alleging that his trial counsel was ineffective because he failed to convey the midtrial plea bargain offer to him. The respondent filed a motion to dismiss the amended second habeas petition, pursuant to Practice Book § 23-29 (2) and (3). Following a hearing on the motion to dismiss, the second habeas court, *Nazzaro*, *J.*, concluded that the second habeas petition constituted a successive petition and granted the respondent's motion to dismiss. The petitioner appeals from that judgment to this court. Presently, the petitioner purports that the factual predicate on which the assistant state's attorney based her question constitutes "new evidence not reasonably available at the time of the prior petition" (new evidence) under Practice Book

§ 23-29 (3). If the offer in fact was made, that means that the petitioner's trial counsel failed to communicate to his client a plea bargain offer, which certainly would support the petitioner's claim of ineffective assistance of counsel. *Sanders* v. *Commissioner of Correction*, 83 Conn. App. 543, 549–53, 851 A.2d 313, cert. denied, 271 Conn. 914, 859 A.2d 569 (2004); see also *H. P. T.* v. *Commissioner of Correction*, 127 Conn. App. 480, 488, 14 A.3d 1047 (2011).

In *Sanders*, the petitioner, Thomas Sanders, was charged in the underlying criminal matter with robbery in the first degree, conspiracy to commit robbery in the first degree, carrying a pistol without a permit and assault in the first degree. *Sanders* v. *Commissioner of Correction*, supra, 83 Conn. App. 544. The state made an initial plea bargain offer for fifteen years incarceration in exchange for guilty pleas in that case and another in which the petitioner also had been charged. Id., 544–45. Sanders did not accept that offer. After a trial by jury, Sanders was convicted and received a sentence of fourteen years incarceration. Id., 545. Sanders then brought a petition for a writ of habeas corpus, alleging ineffective assistance of trial counsel for (1) failing to engage meaningfully in plea bargaining and to advise him in a timely manner of the state's position regarding plea negotiations prior to trial, and (2) failing to advise him of his rights to sentence review and appeal. Id., 546. At the habeas trial, the assistant state's attorney who prosecuted Sanders in the underlying criminal matter testified that the state had extended to Sanders a second plea offer of eighteen years incarceration. Id., 545. The second offer included two new pending sexual assault and failure to appear charges in exchange for guilty pleas. Id. The second offer was conveyed during a pretrial conference to Sanders' attorney, who, according to the prosecutor's testimony, left the room and returned shortly and informed him that his client had rejected the offer. Id. Following a trial, Sanders was convicted and sentenced to twenty years incarceration to run consecutively to his prior sentence. Id., 545–46. In his habeas petition, however, Sanders alleged that he was never informed of the state's second offer and that he would have accepted it if he had been informed of such an offer. Id., 546. Evidence presented at the habeas hearing demonstrated that the petitioner was not in court when the offer was made. Id. Sanders also testified that he had not been informed of the offer. Id. The habeas court concluded that Sanders had been informed of the second offer but determined that the offer had not been meaningfully explained, and, therefore, that the petitioner's attorney had rendered ineffective assistance. Id. The court also concluded that Sanders was prejudiced by this failure and granted the petition for a writ of habeas corpus. This court agreed with the habeas court and, accordingly, affirmed its judgment. Id., 549–53.

The *Sanders* court held that a plea bargain offer must be conveyed *and* meaningfully explained to the defendant and that failure to do so constitutes ineffective assistance of counsel. Similar to *Sanders*, the petitioner here is claiming that his trial counsel failed to communicate a plea bargain offer to him that, if conveyed, he would have accepted. If the fact finder believes that the petitioner would have accepted the offer, and is therefore prejudiced, then the facts presented here clearly fit within those of *Sanders*. The petitioner should have an opportunity to research and investigate the issue.

The proper construction of Practice Book § 23-29 (3) is an issue of first impression for the appellate courts of this state. Practice Book § 23-29 provides in pertinent part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition . . . ."

"Initially, we set forth the appropriate standard of review for a challenge to the dismissal of a petition for a writ of habeas corpus when certification to appeal is granted.[2] The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . .

"[T]wo petitions may be brought on the same legal grounds if the two petitions seek different relief. . . . Successive petitions based on the same legal grounds and seeking the same relief are susceptible to a motion to dismiss. . . . *An exception is drawn to this rule if newly discovered facts are the ground of the second petition*. . . . [A] ground is a sufficient legal basis for granting the relief sought . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) *Smith* v. *Commissioner of Correction*, 122 Conn. App. 637, 640–41, 999 A.2d 840 (2010), cert. denied, 300 Conn. 901, 12 A.3d 574 (2011). A claim of ineffective assistance of trial counsel in two habeas petitions, for example, constitutes the same ground. See, e.g., id., 642.

"[I]f a previous application brought on the same grounds was denied, the pending application may be dismissed without hearing, unless it states new facts or proffers new evidence not reasonably available at the previous hearing. We emphasized the narrowness of our construction of Practice Book § 531 [now § 23-29] by holding that dismissal of a second habeas petition without an evidentiary hearing is improper if the peti-

tioner either raises new claims or offers new facts or evidence. . . . *Negron* [v. *Warden*, 180 Conn. 153, 158, 429 A.2d 841 (1980)] therefore strengthens the presumption that, absent an explicit exception, *an evidentiary hearing is always required before a habeas petition may be dismissed.*" (Emphasis added; internal quotation marks omitted.) *Carter* v. *Commissioner of Correction*, 109 Conn. App. 300, 305–306, 950 A.2d 619 (2008), quoting *Mejia* v. *Commissioner of Correction*, 98 Conn. App. 180, 188–89, 908 A.2d 581 (2006), appeal dismissed after remand, 112 Conn. App. 137, 962 A.2d 148, cert. denied, 291 Conn. 910, 969 A.2d 171 (2009).

Here, I agree with the majority that the second habeas petition is founded upon the same legal ground as the first, namely, ineffective assistance of trial counsel; and that it seeks the same relief as the first, reversal of his conviction. However, the majority ceases its inquiry at this point. The majority ignores the fact that the petitioner still is entitled to file a second habeas petition if he has new evidence that was not reasonably available at the time of the prior habeas petition. The majority is bound by the plain language of the Practice Book, Supreme Court precedent and this court's precedent to proceed to the second step and inquire into whether the facts underlying the question posed by the assistant state's attorney constitutes new evidence that would save the petitioner's second petition. See *Negron* v. *Warden*, supra, 180 Conn. 158; *Smith* v. *Commissioner of Correction*, supra, 122 Conn. App. 641; *Carter* v. *Commissioner of Correction*, supra, 109 Conn. App. 306 ("[A] petitioner may bring successive petitions on the same legal grounds if the petitions seek different relief. . . . But where successive petitions are premised on the same legal grounds and seek the same relief, the second petition will not survive a motion to dismiss unless the petition is supported by allegations and facts not reasonably available to the petitioner at the time of the original petition." [Internal quotation marks omitted.]); see also *Anderson* v. *Commissioner of Correction*, 114 Conn. App. 778, 794, 971 A.2d 766, cert. denied, 293 Conn. 915, 979 A.2d 488 (2009) (same); *Mejia* v. *Commissioner of Correction*, supra, 98 Conn. App. 189.

Had the majority proceeded to the second step as it should have, it would have discovered that the issue presented by this case—whether a fact that first comes to light during the first habeas hearing could constitute "new evidence" to support a second petition—has not been decided by our courts. This is the essential issue presented by this case. The majority's opinion follows the proper line of cases for most of the opinion but then suddenly, and without explanation, switches to its conclusion that the petitioner should have amended the petition or taken advantage of other remedies. The majority's conclusion does not follow its discussion of the law. Although the majority concludes that the petitioner was required to amend his petition or "take

advantage of [other] remedies available under such circumstances," it does not cite to any case that has held that such a requirement exists.

The majority relies on *Abdullah* v. *Commissioner of Correction*, 123 Conn. App. 197, 202, 1 A.3d 1102, cert. denied, 298 Conn. 930, 5 A.3d 488 (2010), for the proposition that "[i]t is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading, and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations in his complaint." (Citation omitted; internal quotation marks omitted.) I take no issue with this court's holding in *Abdullah*; however, the majority's reliance on it here is misplaced. In *Abdullah*, this court held that recovery on a petition for a writ of habeas corpus, like a complaint in a civil action, is limited to the allegations made in the complaint. *Abdullah* v. *Commissioner of Correction*, supra, 202. As this court stated in *Abdullah*, this is a basic principle of civil cases. However, the *Abdullah* holding does not apply to this case. The petitioner here is not trying to recover on an allegation that he did not make in his petition. Indeed, the claim on which the petitioner is attempting to recover is explicitly stated in his petition.[3] This court did not hold in *Abdullah* that failure to amend a complaint when new evidence is discovered precludes a habeas petitioner from filing a second petition. The majority does not cite, nor could I find, a case that supports the majority's holding. Simply put, there is no precedent in this state to support the principle that if a petitioner does not amend his petition immediately after becoming aware of new evidence during the habeas trial, he forfeits his ability to file a second petition based on that new evidence.

Furthermore, whether the petitioner should have moved to file an amended petition is immaterial. Although habeas corpus proceedings are civil in nature, they are unique in that they involve the petitioner's liberty and the amount of time the petitioner will be incarcerated. Although habeas proceedings follow most of the same procedures for ordinary civil matters in our Superior Courts, the Practice Book supplies a number of separate procedures specific to habeas matters.[4] This includes Practice Book § 23-29 (3), the section that controls the issue in the appeal before us.

This court has never held that evidence that is first discovered by a petitioner during a habeas hearing preempts a second habeas petition brought on the basis of that newly discovered evidence. Although this is an issue of first impression in this jurisdiction, there are two cases that this court has decided that present facts that are comparable, albeit not identical, to those in this case, *Tirado* v. *Commissioner of Correction*, 24

Conn. App. 152, 153–54, 586 A.2d 625 (1991), and *Carter* v. *Commissioner of Correction*, supra, 109 Conn. App. 303–304; both of which cut against the majority's decision. First, in *Tirado*, the petitioner's trial counsel decided not to subpoena an out-of-state alibi witness to testify on behalf of the petitioner, Emisael Tirado. *Tirado* v. *Commissioner of Correction*, supra, 153. Tirado was convicted following a jury trial. Id. The conviction was affirmed by our Supreme Court. Id. Soon thereafter, Tirado filed his first petition for a writ of habeas corpus, alleging ineffective assistance of trial counsel. Id. During a full trial on the matter, the court heard testimony from the petitioner's trial counsel and the witness who was not called to testify at the criminal trial. Id., 153–54. Their testimony indicated that although the witness had been willing to testify at the trial, the trial counsel made a tactical decision not to subpoena him because he did not find him to be a credible witness. The habeas court denied Tirado's petition. Id., 154. Tirado then filed a second petition for a writ of habeas corpus based on a claim of new evidence. Id. Tirado claimed that the new evidence was from the testimony of the alibi witness that was initially elicited during the first habeas trial. Id. The habeas court dismissed the petition. Id. On appeal, this court held that "[t]he potentially exculpatory testimony was known to this defendant prior to his trial, at the time of his appeal, at the time of the first habeas hearing and during the statutory period allowed for bringing a petition for a new trial." Id., 157.

The present case is clearly distinguishable from *Tirado*, primarily because Tirado knew about the evidence before his criminal trial began; here, however, the new evidence was not known to the petitioner until the assistant state's attorney asked the question during the first habeas trial. Therefore, unlike *Tirado*, the petitioner's new evidence was not reasonably available at the time of the first habeas petition.

What is more important, however, is that this court did not do in *Tirado* what the majority does today. In *Tirado*, this court did not hold that since the testimony came up during the initial habeas hearing, the petitioner must have known about it during the hearing and did not amend his petition or take advantage of other remedies, and therefore his petition was properly denied—as the majority does here. Instead, this court fully examined the time line of the case and pinpointed when Tirado became aware of the "new evidence"; this court determined that he was aware of it before his criminal trial started; and since his criminal trial was before his "prior petition," this court appropriately agreed with the habeas court that the habeas petition properly was denied.

The second case is *Carter* v. *Commissioner of Correction*, supra, 109 Conn. App. 300. It is important to

note that in some of this court's past decisions, we have been cavalier in our terminology regarding when, in the time line of a habeas corpus proceeding, the Practice Book's phrase "at the time of the prior petition" refers. Our decision in *Carter* is particularly illustrative. In that decision, this court stated at two separate points that the phrase was: "at the time of the first habeas *trial*" and " 'reasonably available at the previous *hearing*.' " (Emphasis added.) Id., 305. In truth, neither is correct. Section 23-29 of our Practice Book simply states: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer *new evidence not reasonably available at the time of the prior petition* . . . ." (Emphasis added.) It does not define *when* during the prior petition the evidence must not have been available. If the majority means, by repeating these passages from *Carter*, that the *Carter* court meant to make a rule that Practice Book § 23-29 (3) is defined from the time of the habeas hearing or the habeas trial, it is mistaken. Although *Carter* stated it twice, this court unmistakably did not mean it to be taken literally, as even the *Carter* court did not follow it.

In *Carter*, the petitioner, Anthony Carter, raised fourteen claims in his first petition for a writ of habeas corpus, including a claim that the prosecution elicited perjured testimony during his criminal trial. *Carter* v. *Commissioner of Correction*, supra, 109 Conn. App. 302 n.3. After a two day hearing, the habeas court noted that Carter had provided no testimony or exhibits in support of the perjured testimony claim, which precluded meaningful review. Id., 303. The petition, therefore, was denied. Id. Carter then filed a second petition for a writ of habeas corpus. Id., 304. In support of his claim that the prosecution elicited perjured testimony, Carter offered evidence from his first habeas hearing, including transcribed excerpts of the testimony of two Hartford police detectives and supporting police reports Carter obtained from the Hartford police, allegedly after he had heard the detectives' testimony at his first habeas trial. Id. The habeas court dismissed the petition on its own motion on the ground of res judicata. Id.

On appeal, this court considered whether the petition was supported by newly discovered evidence. Id., 305. It determined that the grounds for relief were the same in both petitions, prosecutorial impropriety and ineffective assistance of counsel. Id., 306. Unfortunately, it found the record to be too inadequate to permit appellate review and did not reach the merits of whether the evidence could have been considered "newly discovered." Id., 307. Specifically, this court stated that, although Carter had claimed that the testimony was

new, he did not offer any supporting facts as to why, with the exercise of due diligence, the evidence was not discoverable at the time of the original petition, and he did not provide this court with a transcript of the relevant portions of his first habeas trial. Id. However, in so finding, the court implicitly held that evidence first discovered during a habeas trial—the testimony from the police officers—*could* have met the requirements under Practice Book § 23-29 for "new facts or . . . new evidence not reasonably available at the time of the prior petition . . . ." Importantly, the *Carter* court did not hold that because the evidence came out during the first habeas trial, it was "discovered" by Carter "in the prior petition." In other words, this court implicitly held that just because the evidence came up during the first habeas trial does not preclude a second habeas petition based on that newly discovered evidence. This court implied that had Carter persuasively explained why the testimony was not reasonably available at the time of his prior petition and provided us with transcripts, it could have found in his favor.

Here, we have a complete record. We have the supporting facts that explain why the petitioner did not include in his first habeas petition the question from the assistant state's attorney concerning the midtrial offer by the court of eighteen years incarceration. We also have the relevant portions of the transcript from the first habeas trial. Therefore, we can get to the merits of whether the facts underlying the question from the assistant state's attorney constitutes new evidence under Practice Book § 23-29. As I mentioned above, this is an issue of first impression in Connecticut.

Where Connecticut courts have not addressed a particular issue, we look to other jurisdictions for guidance. *Monti* v. *Wenkert*, 287 Conn. 101, 122, 947 A.2d 261, (2008); *Westchester Fire Ins. Co*. v. *Allstate Ins. Co*., 236 Conn. 362, 368, 672 A.2d 939 (1996); *Coregis Ins. Co*. v. *Fleet National Bank*, 68 Conn. App. 716, 724, 793 A.2d 254 (2002). I propose that we adopt the standard that many of the United States Circuit Courts of Appeal have set.

Many of the federal Circuit Courts of Appeals that have ruled on this issue have looked to when the petition for habeas corpus was *filed* to determine whether the evidence could have been discovered previously. The Eleventh Circuit Court of Appeals has explicitly held, "What matters under [the federal habeas law][5] is whether [the petitioner], with the exercise of due diligence, could have discovered those facts at the time he *filed* his first federal habeas petition." (Emphasis added.) *Jordan* v. *Secretary, Dept. of Corrections*, 485 F.3d 1351, 1359 (11th Cir.), cert. denied sub nom. *Jordan* v. *McDonough*, 552 U.S. 979, 128 S. Ct. 450, 169 L. Ed. 2d 315 (2007). The Eleventh Circuit wholly reaffirmed this standard two years later in *In re Davis*, 565 F.3d

810, 819 (11th Cir. 2009) ("[w]hat matters under [28 U.S.C.] § 2244 [b] [2] [B] [i] is whether [the petitioner, Troy Anthony Davis], with the exercise of due diligence, could have discovered [the facts he now presents to us] at the time he filed his first federal habeas petition" [internal quotation marks omitted.]). Other Circuit Courts of Appeals that similarly have looked to when the prior habeas petition was filed to determine whether evidence could have been discovered previously include the First, Fourth, Fifth, Seventh, and Eighth. See *Rodriguez* v. *Superintendent, Bay State Correctional Center*, 139 F.3d 270, 274 (1st Cir. 1998) (Hector Santiago "Rodriguez filed his last habeas petition some six years prior to the Court's opinion in *Cage* [v. *Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990)]"); *In re Williams*, 364 F.3d 235, 239 (4th Cir.) ("Significantly, the cause inquiry focused on whether the applicant was prevented from including a particular claim in his *most recent* application. *See* [*Noble* v. *Barnett*, 24 F.3d 582, 585 (4th Cir. 1994)] (holding that the claims presented in the applicant's third habeas petition were barred by the abuse of the writ doctrine because the applicant 'had full knowledge of the facts central to each of these claims at the time that he filed his *second* petition for a writ of habeas corpus' . . . ." [emphasis in original])), cert. denied, 543 U.S. 999, 125 S. Ct. 618, 160 L. Ed. 2d 457 (2004); *Bennett* v. *United States*, 119 F.3d 470, 472 (7th Cir. 1997) ("*Riggins* [v. *Nevada*, 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992)] was decided long before [the petitioner Donald R.] Bennett filed his previous application for leave to file a [motion under 28 U.S.C. § 2255] attacking his conviction on the basis of the administration of the psychotropic drug to him"); *McDonald* v. *Bowersox*, 125 F.3d 1183, 1186 (8th Cir. 1997) ("To support his claim of a constitutional error, [the petitioner Samuel Lee] McDonald points only to psychiatric evidence that was available in 1986. McDonald filed his initial federal habeas petition in 1989."); cf. *Kutzner* v. *Cockrell*, 303 F.3d 333, 336 (5th Cir.) (noting that because essentially all of the evidence in question was discussed at trial, it therefore could have been discovered at the time of the petitioner's first habeas petition), cert. denied, 536 U.S. 978, 123 S. Ct. 14, 153 L. Ed. 2d 877 (2002).[6]

We should adopt this fair and reasonable rule. "The time of the prior petition" clearly means at the time the prior petition was filed. This is the clear and unambiguous reading of the language in the Practice Book. See *State* v. *Strickland*, 243 Conn. 339, 347, 703 A.2d 109 (1997) ("our Practice Book provisions are interpreted in accordance with the same principles that guide interpretation of our General Statutes"); see also *Roberto* v. *Honeywell, Inc.*, 33 Conn. App. 619, 637 A.2d 405 ("The rules of statutory construction apply with equal force to Practice Book rules. . . . A basic tenet of statutory construction is that when a statute [or rule of practice]

is clear and unambiguous, there is no room for construction." [Internal quotation marks omitted.]), cert. denied, 229 Conn. 909, 642 A.2d 1205 (1994). Under this definition, the petitioner clearly has new evidence that would save the petition from dismissal under Practice Book § 23-29 (3).[7] The petitioner filed the first petition for a writ of habeas corpus on or about September 4, 2002. The respondent does not dispute that the petitioner did not become aware of the possible midtrial plea bargain offer until September 23, 2003. Therefore, the petitioner learned of the potential new evidence more than one year after he had filed his petition for a writ of habeas corpus.

The question from the assistant state's attorney raises a concern that deserves to be investigated to determine whether it actually was based on fact. The petitioner learned that the new evidence might exist toward the end of the habeas trial, which undoubtedly is after the time period intended by the Practice Book's phrase, "the time of the prior petition." The word "petition" clearly refers to a time before the habeas trial. A petition in a habeas case is similar to a complaint in a civil case. We have held that "[t]he petition is in the nature of a pleading . . . . A petition generally conforms to a complaint in a civil action." (Citation omitted.) *Martinez* v. *Commissioner of Correction*, 105 Conn. App. 65, 70, 936 A.2d 665 (2007), cert. denied, 285 Conn. 917, 943 A.2d 475 (2008). The petition is the basis on which the trial exists.[8] The trial exists so that the petitioner may prove the allegations of his petition. Consequently, the petitioner could not have included the claim based on the newly discovered evidence in his first habeas petition when it was filed.

For the reasons stated previously, I would reverse the judgment of the habeas court, and, therefore, respectfully dissent.

[1] Whether the offer was in fact made is disputed by the respondent. The majority does "not accept the petitioner's assumption in the absence of evidence that the purported offer was, in fact, made." I believe that the absence of independent evidence is a reason for, not against, a second hearing; the petitioner should be given an opportunity to investigate this claim.

[2] This standard is used because the majority and I agree that certification should have been granted.

[3] "In his second habeas petition, as amended on August 5, 2009, the petitioner alleges, among other things, that '[t]he claim in this petition was not raised at trial, direct appeal or [in first habeas petition] as the facts and circumstances necessary to the claim were unknown and unavailable to petitioner until the [first] habeas trial was heard. Petitioner did not deliberately bypass the issue set out in this petition. . . . In the conduct of petitioner's case at the trial level [trial counsel] rendered to petitioner representation that was ineffective and deficient in that he failed to communicate and effectively explain to petitioner a plea agreement proffered and discussed with [trial counsel] prior to petitioner's conviction. The prosecuting authority provided [trial counsel] a specific term offer at eighteen (18) years incarceration as agreeable to the [s]tate in the petitioner's case. The representation of [trial counsel] as to this plea offer was deficient per the ruling in *Sanders* v. [*Commissioner of Correction*, supra, 83 Conn. App. 543], in that [trial counsel] never communicated the offer to petitioner or did so in such an ineffective and insufficient way or manner so as to effectively be no communication at all.' "

[4] Practice Book § 23-21 provides in relevant part: "Except as otherwise provided herein, the procedures set forth in Sections 23-22 through 23-42 shall apply to any petition for a writ of habeas corpus which sets forth a claim of illegal confinement. . . ."

[5] For our purposes, the phrase used in the federal habeas law, "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," is essentially equivalent to the phrase that is used in our Practice Book, "new facts or . . . new evidence not reasonably available at the time of the prior petition." Compare 28 U.S.C. § 2244 (b) (2) (B) with Practice Book § 23-29 (3).

[6] The majority considers this case at length, and interprets it to support its "conclusion that the petitioner's failure to take advantage of the remedies available to him at the time of the habeas trial renders his second petition successive." The majority's interpretation is flawed for three reasons. First, the evidence in question in *Kutzner* was available to the petitioner, Richard William Kutzner, before he filed his petition for a writ of habeas corpus, unlike the facts of this case. In this case, the purported new evidence was discovered during the habeas trial. Second, the evidence in question in *Kutzner* was available to Kutzner *before his criminal trial*, also unlike the facts of this case. *Kutzner* v. *Cockrell*, supra, 303 F.3d 336 ("[t]he fingernail scrapings and one of the hairs were disclosed to Kutzner before [the criminal] trial"). Therefore, *Kutzner* does not support the majority's conclusion that evidence first discovered during a trial cannot be used as the basis for a second habeas petition. Third, the passages of *Kutzner* that the majority quotes are from the court's analysis of Kutzner's claim under *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The standard for establishing a *Brady* claim and the standard for establishing a new evidence claim to support a successive habeas petition are entirely distinct. Furthermore, Kutzner's claim would have failed under my proposed rule as well because the evidence was discoverable by him before he filed his prior habeas petition.

[7] The majority points to Practice Book § 10-62: "In all cases of any material variance between allegation and proof, an amendment may be permitted at any stage of the trial. . . ." Here, however, it should be noted that there was no proof of a midtrial eighteen year offer. The purported eighteen year offer was mentioned as a question put to the petitioner during cross-examination at the end of the first habeas trial, and the petitioner denied ever hearing of such an offer. There was no sworn testimony of the offer or admission by the state that such an offer was ever actually made.

[8] The majority's analysis of this dissent states that the rule that I propose would foster the filing of successive petitions. However, the majority fails to give plain meaning to Practice Book § 23-29 (3). Practice Book § 23-29 specifically covers habeas proceedings. In addition, if there were ten amended petitions filed in the first habeas hearing, any evidence of the midtrial offer of eighteen years would not reasonably have been available at the time of the tenth amended petition because it came out during the trial.