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CHRISTOPHER BROWN *v.* COMMISSIONER OF CORRECTION
(AC 45756)

Prescott, Clark and Bear, Js.*

Syllabus

The petitioner, who had been convicted of kidnapping in the second degree and conspiracy to commit kidnapping in the second degree, sought a writ of habeas corpus, claiming that his trial counsel, M, rendered ineffective assistance because he failed to call an eyewitness identification expert at the petitioner's criminal trial and that, but for M's deficient performance, there was a reasonable probability that the petitioner's trial would have had a more favorable outcome for the petitioner. The petitioner and two associates abducted the victim and brought him to the basement of an abandoned building, where they assaulted him, tied his wrists and ankles with rope and threatened him at gunpoint, demanding to know where he kept his supply of marijuana and cash. After the police found the victim and transported him to a hospital, a detective, S, visited the victim, at which time the victim informed S that the three assailants were Black Jamaican men, one of whom had a "milky-white" left eye. On the basis of the description provided by the victim and information obtained from the victim's niece, K, and a confidential informant, another detective, R, prepared a photographic array consisting of eight photographs, including one photograph of the petitioner and seven of Black men of similar age, appearance, and dress. R also blacked out the left eye of each individual in the photographic array. R and S visited the victim in the hospital, administered the standard witness identification instructions, and gave the victim a form containing the same instructions. R and S then presented the photographic array to the victim, who selected the photograph of the petitioner. The petitioner was subsequently arrested and charged. Prior to his criminal trial, the petitioner filed a motion to suppress the victim's identification of the petitioner as one of the kidnappers because the process used by the police to present the photographic array to the victim was unnecessarily suggestive and the identification was not reliable under the totality of the circumstances. After an evidentiary hearing at which the court heard the testimony of the victim and R, the court denied the petitioner's motion to suppress. During the petitioner's criminal jury trial, M's strategy was to focus on the fact that the victim was not consistent in his recollection of the details of the incident. M extensively cross-examined the victim as to the inconsistencies in his testimony on direct examination as compared to his prior statements to the police while he was at the hospital and his prior testimony at the pretrial motion to suppress hearing. M elicited testimony from the victim as to how the identification progressed from his initial statement to the police at the scene of the incident that he was unable to identify his kidnappers, to his identification of his kidnappers by their nicknames while he was at the hospital, and to his subsequent identification from the photographic array of the petitioner as one of his kidnappers. M also elicited testimony from the victim that he was inebriated at the time of the incident. In his closing argument, M repeatedly highlighted that the victim directly contradicted himself with respect to the details of the incident and, thus, the victim's entire testimony, including, but not limited to, his identification of the petitioner, should be disregarded as unreliable. The habeas court denied the petitioner's ineffective assistance of counsel claim and subsequently denied the petition for certification to appeal from the habeas court's judgment. On the petitioner's appeal to this court, *held*:

1. The habeas court abused its discretion in denying the petitioner's petition for certification to appeal: because M viewed the victim's identification of the petitioner as the main issue in the criminal case, as there was no forensic evidence connecting the petitioner to the offenses, there were no other eyewitnesses, and there was no evidence that tied the petitioner to his coconspirators, our Supreme Court's decision in *State* v. *Guilbert* (306 Conn. 216) that indicated that cross-examination and

closing argument are often less effective than expert testimony at identifying the weaknesses of eyewitness identification testimony supported the petitioner's position about the preference for expert testimony; accordingly, the possible application of *Guilbert* to the present case fell within the category of issues that are debatable among jurists of reason and that could have been resolved by a court in a different manner and presented an issue adequate to deserve encouragement to proceed further.

2. The petitioner could not prevail on his claim that the habeas court improperly concluded that M's failure to call an eyewitness identification expert at the petitioner's criminal trial did not constitute constitutionally deficient performance: M's decision not to present the testimony of an eyewitness identification expert at trial was supported by a legitimate strategic basis, as M, an experienced criminal trial attorney who was aware of the benefits that an eyewitness identification expert could provide in particular cases and who previously had consulted such experts, nevertheless determined, on the basis of his investigation of the facts, that the testimony of such an expert would not have been helpful to the defense, primarily because of the compelling nature of the victim's identification of the petitioner, and, therefore, M made the sound strategic decision to instead focus on the fact that the victim was not consistent in his recollection of the details of the incident and, thus, his entire testimony, including, but not limited to, his identification of the petitioner, was untrustworthy; moreover, the testimony of an eyewitness identification expert to challenge the identification procedures used by the police would not have supported the theory of defense that M pursued at trial, which was to focus on the alleged lack of recollection of the victim as to many of the details of the incident, not that the police, through the procedures that were used, improperly influenced the victim to identify the petitioner from the photographic array because, as the habeas court found, M had no evidence to support that contention; furthermore, although this court recognized the general viability of the language in *Guilbert* indicating that cross-examination and closing argument often are not as effective as expert testimony at identifying the weaknesses of eyewitness identification testimony, this general statement did not require a different outcome in the present appeal because *Guilbert* did not eliminate the well established principle that the decision to call an expert witness is a strategic decision by defense counsel, which will not be reversed unless it is unsupported by a legitimate reason.

Argued September 7—officially released November 7, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Klatt*, *J.*; judgment denying the petition; thereafter, the court, *Klatt*, *J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed*.

Julia K. Conlin, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (petitioner).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *David Carlucci*, former senior assistant state's attorney, for the appellee (respondent).

BEAR, J. The petitioner, Christopher Brown, appeals following the denial of his petition for certification to appeal from the habeas court's judgment denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal, and (2) improperly concluded that his trial counsel's failure to call an eyewitness identification expert at the petitioner's criminal trial did not constitute constitutionally deficient performance that prejudiced the petitioner. We agree with the petitioner that the habeas court abused its discretion in denying his petition for certification to appeal. We agree, however, with the respondent, the Commissioner of Correction, that the petitioner failed to establish that his trial counsel rendered ineffective assistance. Accordingly, we affirm the judgment of the habeas court.

This court's decision in the petitioner's direct appeal sets forth the following relevant facts, which the jury in the petitioner's criminal trial reasonably could have found. "In the early morning of August 4, 2012, the [petitioner] and two associates abducted the victim, Neville Bar, and brought him to an abandoned building located at 27 Glendale Avenue in Hartford. The [petitioner] and his two associates brought the victim to the basement of 27 Glendale Avenue, tied his wrists and ankles with rope, and threatened him at gunpoint, demanding to know where he kept his supply of marijuana and cash. During the incident, the [petitioner] and his associates stabbed the victim in the leg, hit him in the face with a gun several times, and tortured him by melting a plastic water bottle onto his arms. Before leaving the abandoned basement, the three men took the victim's wallet, which contained $700, tied him with a blanket and a string of Christmas lights, and left him in a bathtub.

"On the morning of August 5, 2012, Hartford police officers found the victim in the basement of 27 Glendale Avenue after a neighbor heard him screaming for help. When discovered, the victim was standing in the bathtub, covered in feces and urine, and bound by rope, the string of Christmas lights, and the blanket. He was confused and could only provide disjointed answers to police questioning about the incident and the identity of his assailants. He was then sent to Hartford Hospital for treatment of his wounds and dehydration.

"Later that day, Hartford police Detective Richard Salkeld visited the victim at the hospital at which time the victim informed Salkeld that the three assailants were black Jamaican men, one of whom had a 'milky-white' left eye.

"Following his conversation with the victim, Salkeld spoke to the victim's wife, Margaret Bar, and his niece,

Karina Reed. Reed informed Salkeld that she knew a Jamaican male who had recently been evicted from 27 Glendale Avenue, but still used that location as a place to party. She identified the Jamaican male as 'Banit' and described him as having only 'one eye.'

"On the basis of the descriptions provided by the victim and Reed, Salkeld searched the Hartford [p]olice database for black Jamaican men associated with 27 Glendale Avenue. That search revealed that the [petitioner] had recently been a resident of 27 Glendale Avenue. A physical description of the [petitioner] in the police booking system indicated that one of the [petitioner's] eyes was 'whited over.'

"In the morning of August 6, 2012, Hartford police Detective Renee LeMark-Muir received information from a registered confidential informant who, in the past, had provided the police with credible and reliable information that had led to the identification and location of suspects. The confidential informant told LeMark-Muir that on August 5, 2012, Reed had contacted the informant, asked whether the informant had information regarding the abduction of the victim, and asked whether a Jamaican male known as 'Banit' had been involved. The informant told the detective that the informant had then spoken to the [petitioner], whom the informant knew by his street name 'Banit.' The informant stated that the [petitioner] had confessed to kidnapping, tying up, beating, and melting a plastic bottle on the victim. The informant also stated that the [petitioner] did not believe that the victim would identify him or his two associates because the victim was afraid of them.

"On the basis of the results of the police database search, the descriptions of the assailants from the victim and Reed, and the information from the confidential informant, Hartford police Detective David [Richter] prepared a photographic array consisting of eight photographs, one photograph of the [petitioner] and seven of black men of similar age, appearance, and dress. To further make uniform the appearance of the individuals and eliminate the distinct characteristic of the [petitioner's] eye, [Richter] blacked out the left eye of each individual in the photographic array.

"At approximately noon, on August 6, 2012, [Richter] and Salkeld visited the victim in the hospital. They administered the standard witness identification instructions and also gave the victim a form containing the same instructions. The victim initialed each instruction and signed the form, indicating that he understood each instruction. The detectives then presented the photographic array to the victim, who selected the photograph of the [petitioner], whom he knew as 'Banit.' He then provided the police with a signed voluntary statement stating 'this is the guy who robbed me and kidnapped me.'

"The [petitioner] was subsequently arrested pursuant to a warrant and charged in a five count long form information with: kidnapping in the second degree in violation of [General Statutes] § 53a-94 (a); assault in the second degree in violation of General Statutes [(Rev. to 2011)] § 53a-60 (a) (2); robbery in the first degree in violation of General Statutes § 53a-134 (a) (4); conspiracy to commit kidnapping in the second degree in violation of [General Statutes] §§ 53a-48 (a) and 53a-94 (a); and conspiracy to commit assault in the second degree in violation of §§ 53a-48 (a) and 53a-60 (a) (2)." (Footnote omitted.) *State* v. *Brown*, 161 Conn. App. 483, 485–88, 128 A.3d 553 (2015). Attorney Dennis McMahon represented the petitioner in the underlying criminal proceedings.

Prior to the criminal trial, the petitioner filed a motion to suppress the victim's identification of the petitioner as one of the kidnappers because the process used by the police to present the photographic array to the victim was unnecessarily suggestive and the identification was not reliable under the totality of the circumstances. In particular, he contended that the eyewitness procedure was flawed because the photographs were not presented sequentially or in double-blind format, the victim was not told that he should not feel compelled to make an identification or that he should take as much time as he needed, and the victim could not read the instructions on the bottom corner of the photographic array. See General Statutes § 54-1p.[1] In opposition to the motion, the state contended that the identification procedure was not unnecessarily suggestive because the left eyes of all the individuals in the photographs were blacked out so that the petitioner's distinctive cloudy eye was not visible; the petitioner was provided with the witness identification form and clear verbal instructions, which included the information that he was not required to select any of the photographs and that the suspect may not be in the photographic array; and the victim was intimately familiar with the petitioner's face because he spent fifteen to twenty minutes in close proximity to the petitioner during the incident. After an evidentiary hearing at which the court heard the testimony of the victim and Richter, the court denied the petitioner's motion to suppress.[2]

During the petitioner's criminal jury trial, McMahon's strategy was to focus on the fact that the victim was not consistent in his recollection of the details of the incident. Particularly, McMahon extensively cross-examined the victim as to the inconsistencies in his testimony on direct examination, as compared to his prior statements to the police while he was at the hospital and his prior testimony at the pretrial motion to suppress hearing. Some of the contradictions included the victim's shifting testimony as to which of the kidnappers burned him; whether he identified the kidnappers

by name while he was at the hospital despite the fact that he did not know their names prior to the incident; why he did not initially mention the petitioner's cloudy eye to the police at the scene; and whether he was located on the grass, on the curb, or in his locked or unlocked car when he was kidnapped. With respect to the identification of the petitioner, McMahon elicited testimony from the victim as to how the identification progressed from his initial statement to the police at the scene of the incident that he was unable to identify his kidnappers, to his identification of his kidnappers by their nicknames while he was at the hospital, and to his subsequent identification from the photographic array of the petitioner as one of his kidnappers. McMahon also elicited testimony from the victim that he was inebriated at the time of the incident, as he had consumed at least eight alcoholic beverages and smoked three marijuana joints during a five hour period preceding his abduction. In his closing argument, McMahon repeatedly highlighted that the victim "directly contradict[ed] himself" with respect to the details of the incident and, thus, his entire testimony, including, but not limited to, his identification of the petitioner, should be disregarded as unreliable.

After the trial, the petitioner was convicted of kidnapping in the second degree in violation of § 53a-94 (a) and conspiracy to commit kidnapping in the second degree in violation of §§ 53a-48 (a) and 53a-94 (a). *State* v. *Brown*, supra, 161 Conn. App. 491. The court rendered judgment accordingly and sentenced the petitioner to a total effective term of forty years of incarceration, execution suspended after twenty-three years, followed by five years of conditional discharge. Id. In his direct appeal to this court, the petitioner raised a single claim that the court improperly denied his motion to compel the state to disclose the identity of a confidential informant. Id., 485. This court disagreed and affirmed the judgment of conviction. Id.

Subsequently, the petitioner filed the operative amended habeas petition on February 28, 2020.[3] The petitioner claimed, inter alia,[4] that McMahon rendered ineffective assistance of counsel because he failed to present the testimony of an eyewitness identification expert at the criminal trial. The petitioner claimed that, "[b]ut for McMahon's deficient performance, there [was] a reasonable probability that the petitioner's trial . . . would have had a more favorable outcome for the petitioner." On May 21, 2020, the respondent filed its operative amended return generally asserting a lack of sufficient information to admit or deny the petitioner's claims.

On November 19, 2021, the habeas court, *Klatt*, *J.*, held a one day trial on the habeas petition at which the petitioner presented the testimony of Robert Powers, a forensic toxicology expert; Reed;[5] Garrett Berman, a

memory and eyewitness identification expert; McMahon; Attorney Frank Riccio, a criminal defense expert; and Attorney Robin Krawczyk, the prosecutor who tried the petitioner's criminal trial. The petitioner attempted to subpoena the victim to testify at the habeas trial, but he subsequently learned that the victim had died seven months prior to the habeas trial. The petitioner submitted thirty-three exhibits, and the respondent submitted one exhibit, all of which the court admitted into evidence and considered in rendering its decision.

On July 11, 2022, the court issued a memorandum of decision in which it denied the petitioner's ineffective assistance of counsel claim. The court began by summarizing the petitioner's claim as follows: "The petitioner also faults [McMahon] for not calling an identification expert *at trial*. [The victim] was the only witness who identified the petitioner. The petitioner argues that the identification procedures used by the police were not procedures developed to minimize the likelihood of an unduly suggestive identification. . . . The petitioner asserts that the *jury* needed expert testimony to explain the importance of the new identification procedures and how the old procedures could have impacted [the victim's] identification." (Emphasis added.) The court reasoned that "McMahon viewed [the victim's] identification of the petitioner as the main issue in the criminal case. There was no forensic evidence connecting the petitioner to the offenses, and there were no other eyewitnesses. There was no evidence that tied the petitioner to the coconspirators. [McMahon] filed a motion to suppress [the victim's] identification on the ground that it was unnecessarily suggestive and not reliable. [McMahon] also argued that the photo[graphic] array did not comply with the eyewitness task force recommendations (e.g., sequential array and double-blind lineup), which were not yet in effect, but the motion was denied. As to the photo[graphic] array procedures, [McMahon] thought the police followed the correct procedures. [McMahon] did not allege that someone might have influenced [the victim's] identification because he had no evidence to support that contention." The court further held that "McMahon's trial strategy, like his strategy at the motion to suppress hearing, was to focus repeatedly on [the victim's] inconsistencies. [The victim] did not testify in the suppression hearing[6] but did testify at [the criminal] trial. The difficulty for [McMahon] was that [the victim] testified that he was in the basement with the petitioner for about fifteen minutes and had a very clear view of him, as well as the petitioner's highly distinguishing cloudy left eye. [The victim] never wavered from his identification of the petitioner. Although [McMahon] ha[d] consulted with identification experts in previous matters, he did not in the petitioner's case because of the strong and clear identification of the petitioner by [the victim]. [McMahon] did not think that an expert would have helped the defense

or undermined the [victim's] identification of the petitioner."(Footnote added.) The habeas court further held that "[t]he trial court concluded that, 'although [Richter] did not administer a double-blind, sequential photographic array, based on the totality of the circumstances the identification procedure employed in the [petitioner's] case is constitutionally sound.' . . . The trial court found that the procedure was not unnecessarily suggestive. Here, the petitioner also has not shown that the identification was unnecessarily suggestive. The evidence presented by the petitioner at the habeas trial does [not] demonstrate that [McMahon] rendered deficient performance by not using an eyewitness identification expert. The petitioner has neither shown that his motion to suppress would have been granted nor undermined this court's confidence in the outcome of the criminal trial. Consequently, this ground for ineffective assistance of counsel must fail because the petitioner has not proven deficient performance or how he was prejudiced."[7] (Citation omitted; emphasis omitted.)

On July 19, 2022, the petitioner filed a petition for certification to appeal from the habeas court's judgment, which the habeas court denied. This appeal followed. Additional facts will be set forth as necessary.

I

The petitioner first claims that the habeas court abused its discretion by denying his petition for certification to appeal. We agree.

We begin by setting forth the applicable standard of review. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the peti-

tioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Williams* v. *Commissioner of Correction*, 221 Conn. App. 294, 302–303, 301 A.3d 1136 (2023).

In the present case, "McMahon viewed [the victim's] identification of the petitioner as the main issue in the criminal case. There was no forensic evidence connecting the petitioner to the offenses, and there were no other eyewitnesses. There was no evidence that tied the petitioner to the coconspirators." Moreover, as discussed more fully in part II of this opinion, there is language supporting the petitioner's position about the preference for expert testimony as articulated by our Supreme Court in *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), as cross-examination and closing argument "often [are] not as effective as expert testimony at identifying the weaknesses of eyewitness identification testimony because cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs." Id., 243. The possible application of *Guilbert* to this case falls within the category of issues that are debatable among jurists of reason and that could have been resolved by a court in a different manner and presents an issue adequate to deserve encouragement to proceed further. We thus conclude that the habeas court abused its discretion in denying the petition for certification to appeal. See, e.g., *Doan* v. *Commissioner of Correction*, 193 Conn. App. 263, 272–73, 219 A.3d 462, cert. denied, 333 Conn. 944, 219 A.3d 374 (2019). Accordingly, we turn to the merits of the petitioner's ineffective assistance of counsel claim.

II

The petitioner next claims that the court improperly concluded that McMahon's failure to call an eyewitness identification expert at the petitioner's criminal trial did not constitute constitutionally deficient performance. Specifically, he argues that an eyewitness identification expert "could have explained the intricacies of eyewitness identification, leading the jurors to conclude that [the victim's] identification of the petitioner was not credible," and that there was no legitimate strategic reason for McMahon not to present the testimony of such an expert. The petitioner also argues that McMahon's attempt to undermine the victim's identification on cross-examination and closing argument was not a sufficient substitute for expert testimony. We disagree.

We first set forth our standard of review and general principles governing habeas matters and claims of ineffective assistance of counsel. "In reviewing ineffective assistance claims . . . [t]he habeas court is afforded

broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Maia* v. *Commissioner of Correction*, 347 Conn. 449, 460, 298 A.3d 588 (2023).

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may [deny] a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Godfrey-Hill* v. *Commissioner of Correction*, 221 Conn. App. 526, 535, A.3d (2023).

With respect to the first prong of *Strickland*, "[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess [trial] counsel's assistance after conviction . . . and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action *might be considered sound trial strategy.*" (Emphasis in original; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 341 Conn. 279, 288, 267 A.3d 120 (2021). "[T]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Internal quotation marks omitted.)

Meletrich v. *Commissioner of Correction*, 332 Conn. 615, 637, 212 A.3d 678 (2019).

The petitioner does not dispute that "there is no per se rule that requires a trial attorney to call an expert in a criminal case." *Doan* v. *Commissioner of Correction*, supra, 193 Conn. App. 276; see also *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 100–101, 52 A.3d 655 (2012) (recognizing that our Supreme Court "has never adopted a bright line rule that an expert witness for the defense is necessary in every . . . case"); *Antonio A.* v. *Commissioner of Correction*, 148 Conn. App. 825, 833, 87 A.3d 600 ("there is no per se rule that requires a trial attorney to seek out an expert witness" (internal quotation marks omitted)), cert. denied, 312 Conn. 901, 91 A.3d 907 (2014).

"[F]ailing to retain or utilize an expert witness is not deficient when part of a legitimate and reasonable defense strategy." (Internal quotation marks omitted.) *Inglis* v. *Commissioner of Correction*, 213 Conn. App. 496, 518, 278 A.3d 518, cert. denied, 345 Conn. 917, 284 A.3d 300 (2022). "[T]he selection of an expert witness is a paradigmatic example of the type of strategic choic[e] that, when made after thorough investigation of [the] law and facts, is *virtually unchallengeable*." (Emphasis added; internal quotation marks omitted.) *Nicholson* v. *Commissioner of Correction*, 186 Conn. App. 398, 414, 199 A.3d 573 (2018), cert. denied, 330 Conn. 961, 199 A.3d 19 (2019), cert. denied sub nom. *Nicholson* v. *Cook*, U.S. , 140 S. Ct. 70, 205 L. Ed. 2d 76 (2019).

Our appellate courts repeatedly have rejected a petitioner's claim that his trial counsel rendered deficient performance by failing to call an expert witness at trial on the ground that trial counsel's decision was supported by a legitimate strategic reason. For instance, in *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 194 A.3d 316, cert. denied, 330 Conn. 933, 194 A.3d 1196 (2018), this court rejected the petitioner's claim that trial counsel was deficient for his failure to retain, and present the testimony of, an expert forensic psychologist at trial to attack the credibility of the minor victim's statements made during a forensic interview. Id., 809–11, 820. This court concluded that trial counsel's decision not to retain such an expert was "based on a number of appropriate factors," including that he had "experience defending cases involving sexual assault of young children. He was aware that forensic psychologists were available and could be helpful in certain situations. He determined, however, that such a strategy was probably not worthwhile in this case. Here, the victim appeared comfortable throughout the forensic interview and offered information freely and at times in an unsolicited manner. He viewed the interview as having been conducted properly given his general understanding of the applicable procedures for conducting such interviews. From his experience, [trial

counsel] testified that these facts made the victim's statements less susceptible to impeachment by a forensic psychologist." Id., 820; see also *Ricardo R.* v. *Commissioner of Correction*, 185 Conn. App. 787, 799–801, 198 A.3d 630 (2018) (defense counsel's decision not to present testimony of forensic mental health expert was "sound and strategic" because he planned on emphasizing same points expert would have made during cross-examination of state's witnesses and during closing argument), cert. denied, 330 Conn. 959, 199 A.3d 560 (2019); *Kellman* v. *Commissioner of Correction*, 178 Conn. App. 63, 78–79, 174 A.3d 206 (2017) (rejecting claim that defense counsel was deficient for his decision not to consult and call extreme emotional disturbance expert because he determined it would be more prudent "to pursue the extreme emotional disturbance defense through the testimony of the petitioner and lay witnesses"); *Gregory* v. *Commissioner of Correction*, 111 Conn. App. 430, 434, 959 A.2d 633 (2008) (defense counsel's decision not to present testimony of dog handling expert was matter of trial strategy because he presented same evidence during cross-examination of police officer handling dog), cert. denied, 290 Conn. 906, 962 A.2d 794 (2009).

Applying the foregoing principles, we agree with the habeas court's conclusion that McMahon's decision not to present the testimony of an expert identification witness at trial was supported by a legitimate strategic basis. McMahon, an experienced criminal trial attorney, was aware of the benefits that an eyewitness identification expert could provide in particular cases because he previously had consulted such experts. McMahon nevertheless determined, on the basis of his investigation of the facts, that the testimony of an eyewitness identification expert in the present case would not have been helpful at trial primarily because of the compelling nature of the victim's identification of the petitioner. Particularly, the victim testified at trial that he was within arm's length of the petitioner for approximately fifteen minutes during the incident and that he had a very clear view of the petitioner and his highly distinguishing cloudy left eye. The victim never wavered from his identification of the petitioner, and the victim identified the petitioner as one of his kidnappers in the photographic array even though the police had eliminated the petitioner's most prominent identifiable characteristic by blacking out his left eye and the left eye of each other individual in the photographic array. At the habeas trial, McMahon testified that he thought the police followed the correct procedure when presenting the victim the photographic array and that he did not think the photographic array was suggestive at all.[8] Accordingly, in light of McMahon's experience, his previous consultation with eyewitness identification experts, and his investigation of the facts of the present case, the court determined that it was a sound strategic

decision for McMahon to determine that the testimony of an eyewitness identification expert would not have been helpful to the defense. See, e.g., *Grover* v. *Commissioner of Correction*, supra, 183 Conn. App. 820 (trial counsel had experience defending against similar charges and knew that forensic psychologist experts were available and could be helpful in some cases, but expert would not have been helpful in case at bar because victim's statements made her less susceptible to impeachment by expert).

Instead of presenting the testimony of an eyewitness identification expert, McMahon, therefore, made the strategic decision that he would focus on the fact that the victim was not consistent in his recollection of the details of the incident and, thus, his entire testimony, including but not limited to his identification of the petitioner, was untrustworthy. Specifically, McMahon testified at the habeas trial that his trial strategy was to show that the victim "was inconsistent across the board. I was trying to shake loose the fact that . . . one of his key comments was that he had a clear look at [the petitioner] for a very long time without a mask which . . . with a milky eye . . . you know, it was clear to him. But I was trying to show that the other things he got wrong, like the time, where he was picked up from, the locations, things like that, he didn't know [the kidnappers]. He knew [the kidnappers]. I was trying to show that he was so inconsistent that the [identification] had to be put into question, too." In fact, McMahon extensively cross-examined the victim at trial as to the inconsistencies arising from the victim's statements to the police, that the victim was inebriated at the time of the incident, and that he was unable clearly to observe what was happening and who was doing it. During his closing argument, McMahon repeatedly highlighted that the victim "directly contradict[ed] himself" with respect to the details of the incident. McMahon's strategic decision to undercut the victim's identification by way of cross-examination and closing argument, instead of expert testimony, was reasonable. See, e.g., *Ricardo R.* v. *Commissioner of Correction*, supra, 185 Conn. App. 799–801; *Kellman* v. *Commissioner of Correction*, supra, 178 Conn. App. 78–79; *Gregory* v. *Commissioner of Correction*, supra, 111 Conn. App. 434.

Moreover, the testimony of an eyewitness identification expert to challenge the identification procedures used by the police would not have supported the theory of defense that McMahon pursued at trial. Relying on the testimony of Berman at the habeas trial, the petitioner on appeal contends that an eyewitness identification expert would have "expose[d] to the jury via an expert witness the myriad of ways in which the identification procedures used in the present case rendered the key evidence lacking in trustworthiness . . . ." In contrast, McMahon's theory at trial was to focus on the alleged lack of recollection of the victim as to many of

the details of the incident, not that the police, through the procedures that were used, improperly influenced the victim to identify the petitioner from the photographic array because, as the habeas court found, McMahon "had no evidence to support that contention." In short, McMahon believed that the reason that the victim identified the petitioner as one of his kidnappers was not due to a defect in the photographic array, or police pressure, but instead was a result of the victim spending approximately fifteen minutes within arm's length of the petitioner during the incident. Therefore, at the time of trial, McMahon reasonably believed that the manner in which the police elicited the pretrial identification from the victim was proper and that his focus should instead be on the lack of veracity of the victim because of his lack of recollection, which is a strategic decision that we cannot second-guess. See, e.g., *Morales* v. *Commissioner of Correction*, 220 Conn. App. 285, 314, 298 A.3d 636 (appellate courts consistently have declined to "second guess" strategy or judgment calls made by trial counsel), cert. denied, 348 Conn. 915, A.3d (2023).

Finally, the petitioner argues that McMahon's attempt to undermine the victim's identification on cross-examination and during closing argument was not a sufficient substitute for expert testimony. To support this argument, the petitioner relies on a statement by our Supreme Court in *State* v. *Guilbert*, supra, 306 Conn. 243, that cross-examination and closing argument "often [are] not as effective as expert testimony at identifying the weaknesses of eyewitness identification testimony because cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs." Although we recognize the general viability of this statement and the need to consider it when a witness' identification is at issue, we conclude that this general statement does not require a different outcome in the present appeal. *Guilbert* was not a habeas case but, instead, was a direct appeal in which our Supreme Court reversed its precedent to conclude that testimony by a qualified expert on the fallibility of eyewitness identification is admissible when that testimony would aid the jury in evaluating the state's identification evidence. Id., 221.[9] Although cross-examination and closing argument may not always be as effective as expert testimony, that does not mean that the decision not to call an expert identification witness in a particular case necessarily constitutes deficient performance. See, e.g., *Michael T.* v. *Commissioner of Correction*, supra, 307 Conn. 100–101. *Guilbert* does not eliminate the well established principle that the decision of whether to call an expert witness is a strategic decision by defense counsel, which will not be reversed unless it is unsupported by a legitimate reason. See, e.g., *Inglis* v. *Commissioner of Correction*, supra, 213 Conn. App. 518. Although an eyewitness identification expert may have

provided some context with respect to the manner in which the police presented the photographic array to the petitioner, McMahon's decision not to present such testimony was reasonable in light of the strength of the victim's identification of the petitioner and McMahon's strategy to undermine that identification by challenging the victim's general lack of ability to recollect details of the incident, including but not limited to his identification of the petitioner, at trial.

In sum, we conclude that the petitioner has failed to meet his burden to overcome the presumption that McMahon's decision in this case not to call an eyewitness identification expert at trial was supported by a reasonable strategic reason. See, e.g., *Jordan* v. *Commissioner of Correction*, supra, 341 Conn. 288.

The judgment is affirmed.

In this opinion the other judges concurred.

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

[1] General Statutes § 54-1p governs eyewitness identification procedures. Section 54-1p was amended by No. 12-111, § 1, of the 2012 Public Acts, to take effect on July 1, 2012, to include a mandate, inter alia, that the Police Officer Standards and Training Council and the Division of State Police within the Department of Emergency Services and Public Protection "jointly develop and promulgate uniform mandatory policies and appropriate guidelines for the conducting of eyewitness identification procedures" no later than February 1, 2013, and that each municipal police department adopt procedures in accordance with those guidelines no later than May 1, 2013.

Here, the photographic array was presented to the victim on August 6, 2012, which was approximately one month after the amendments to § 54-1p became effective but approximately nine months before the May 1, 2013 final deadline in the amendments for the adoption of statewide uniform eyewitness identification procedures. During argument on the petitioner's motion to suppress, McMahon acknowledged that it was not yet mandatory for the police to comply with the eyewitness identification procedures that had not yet been developed, promulgated, and adopted as required by § 54-1p, but he said that was not an "excuse" for the police not to have complied with the double-blind format or given notice to the victim that he did not have to choose any of the photos and that a photo of the alleged perpetrator might not be included in the photos. The habeas court concluded that "any changes implemented by" Public Act 12-111 were "inapplicable" to the photographic array presented by the police to the victim, and the petitioner does not challenge that conclusion on appeal.

[2] We note that the court in the present case incorrectly stated that the victim did not testify at the pretrial hearing on the petitioner's motion to suppress the victim's identification of the petitioner.

[3] In December, 2017, the petitioner filed an amended petition for a new trial on the basis of alleged newly discovered evidence that he obtained from the subsequent June, 2015 trial of one of his coconspirators, consisting of testimony by Reed that, when she told detectives that a Jamaican man with one eye previously had resided at 27 Glendale Avenue, she was aware that assisting the police in a criminal matter would render her eligible for relief in a pending deportation case. The court denied the petition for a new trial on the ground that the newly discovered evidence was not likely to produce a different result at a new trial. This court affirmed the court's judgment in a per curiam decision. See *Brown* v. *State*, 201 Conn. App. 903, 241 A.3d 215 (2020), cert. denied, 336 Conn. 904, 242 A.3d 1009 (2021).

[4] The operative petition contained other claims, including that McMahon rendered ineffective assistance of counsel at the hearing on the motion to suppress the victim's identification, at the criminal trial, and during the proceedings on the petitioner's petition for a new trial. See footnote 3 of this opinion. The petitioner also raised a related due process claim in which he alleged that his conviction and incarceration were obtained in violation of his due process rights as a consequence of McMahon's deficient performance. On appeal, the petitioner pursues only his claim that McMahon

rendered ineffective assistance of counsel because he failed to present the testimony of an eyewitness identification expert at the criminal trial.

[5] There is an ostensible conflict with respect to the spelling of the name of the victim's niece between this court's opinion in the petitioner's direct appeal (Karina Reed) and the transcript of the habeas trial (Kerina Reid-O'Meally). Although it is not entirely clear from the record, it is apparent that both names refer to the same individual. For convenience, we refer to the victim's niece throughout this opinion as Reed.

[6] See footnote 2 of this opinion.

[7] We acknowledge that the court's analysis of the petitioner's claim was less than precise because the court appeared to simultaneously address McMahon's failure to present the testimony of an eyewitness identification expert *both* at the motion to suppress hearing and at the criminal trial. This incongruity may have stemmed from the fact that the petitioner did not specify in his petition or in his posttrial brief whether his claim was limited to McMahon's failure to call an eyewitness identification expert at the motion to suppress hearing, at the criminal trial, or both. On appeal, however, the petitioner narrowed his claim only to challenge McMahon's failure to present the testimony of an eyewitness identification expert at the criminal trial. See footnote 4 of this opinion. Neither party in their appellate briefs took issue with the court's use of a combined analysis to resolve the petitioner's eyewitness identification claim, and neither party filed a motion for articulation.

Accordingly, to the extent that there is an ambiguity in the court's decision, resulting from its combined analysis, as to whether it explicitly concluded that McMahon did not render ineffective assistance of counsel by failing to present an eyewitness identification expert at trial, it was the duty of the petitioner as the appellant to move for an articulation seeking an independent analysis as to each aspect of that claim. See *D2E Holdings, LLC* v. *Corp. for Urban Home Ownership of New Haven*, 212 Conn. App. 694, 712–13, 277 A.3d 261 (it is duty of appellant to seek articulation), cert. denied, 345 Conn. 904, 282 A.3d 981 (2022). In the absence of an articulation, we presume that the trial court acted properly. See *State* v. *Bruny*, 342 Conn. 169, 201 n.15, 269 A.3d 38 (2022) (" 'we read an ambiguous trial court record so as to support, rather than contradict, [the trial court's] judgment' "); *A Better Way Wholesale Autos, Inc.* v. *Better Business Bureau of Connecticut*, 221 Conn. App. 1, 15, 299 A.3d 1200 (2023) (in absence of articulation we presume trial court considered all allegations before it), petition for cert. filed (Conn. August 28, 2023) (No. 230149).

[8] This was the same view of the court when it denied the petitioner's pretrial motion to suppress the identification as unnecessarily suggestive and not reliable. We note, however, that the standards governing eyewitness identification procedures have evolved since the photographic array was presented to the petitioner in the present case, more than a decade ago. See footnotes 1 and 9 of this opinion.

[9] Our Supreme Court released its decision in *State* v. *Guilbert*, supra, 306 Conn. 218, on September 4, 2012, which was approximately sixteen months *prior* to the petitioner's criminal trial that began on January 16, 2014. McMahon was not asked specifically at the habeas trial whether he was aware of *Guilbert*. As we previously have stated, McMahon had consulted eyewitness identification experts in prior cases, so he was aware that, at the time of the petitioner's criminal trial, they were available to be consulted. The petitioner makes no claim that McMahon's failure to present an expert identification witness was due to a mistaken belief that such an expert's testimony would not have been admissible.