STATE OF CONNECTICUT *v.* JOHN DUPIGNEY
(SC 19026)

Rogers, C. J., and Norcott, Palmer, Zarella and Eveleigh, Js.

Argued January 11—officially released August 6, 2013

William T. Koch, Jr., and *W. Theodore Koch III*, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *David Clifton*, assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. The defendant, John Dupigney (petitioner), appeals from the dismissal of his petition for postconviction DNA testing, filed in accordance with General Statutes § 54-102kk,[1] which requires the court to "order DNA testing if it finds that . . . [a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing . . . ." General Statutes § 54-102kk (b) (1). In 2000, the petitioner was convicted of murder and related firearms offenses, and, in 2003, the Appellate Court affirmed his conviction. *State* v. *Dupigney*, 78 Conn. App. 111, 125, 826 A.2d 241, cert. denied, 266 Conn. 919, 837 A.2d 801 (2003). Thereafter, the petitioner filed a petition for postconviction DNA testing (first petition) pursuant to § 54-102kk. The court, *Damiani*, *J.*, denied the petition for failure to satisfy the requirements of § 54-102kk, and we affirmed that decision. *State* v. *Dupigney*, 295 Conn. 50, 74, 988 A.2d 851 (2010). In 2010, the petitioner filed a second petition for DNA testing (second petition), which the court, *Fasano*, *J.*, dismissed on the basis of principles of res judicata. The petitioner now appeals[2] from the dismissal of the second petition, claiming that the court, *Fasano*, *J.*, incorrectly concluded that that petition was barred by the doctrine of res judicata on the ground that all of the evidence on which the petitioner relied in support of the second petition was available both at the time of the petitioner's criminal trial and at the time the first petition was filed. We conclude that it is unnecessary to decide this claim because, even if we were to resolve it in favor of the petitioner, the second petition would still fail on its merits.[3] Accordingly, we affirm the decision of the court, *Fasano*, *J.*, on this alternative ground.

The opinion of this court in *State* v. *Dupigney*, supra, 295 Conn. 50, sets forth many of the facts that the jury reasonably could have found, as well as the relevant procedural history. "Morris Lewis, the victim, and Herbert Dupigney, the [petitioner's] brother, were partners in an illegal drug selling enterprise in [the city of] New Haven. The drug sales were conducted primarily at 304 Winthrop Avenue. Other members of the operation included Nick Padmore, [and] individuals known to the participants in the trial only as Ebony and Eric Raven. In December, 1994, following the victim's incarceration, the [petitioner] moved from Boston [Massachusetts] to New Haven to assist his brother in the drug operation. The [petitioner] also enlisted an acquaintance from Boston, Derrick D'Abreau, to help with the drug sales. D'Abreau moved to New Haven in the beginning of January, 1995.

"The victim was released from jail on January 23, 1995. That day, the victim telephoned Herbert Dupigney at the home of Carlotta Grinman. Grinman overheard

the [petitioner subsequently] tell his brother . . . that the victim was not going [to] get a . . . thing.

"On January 24, 1995, at about 9:30 p.m., the victim met with the [petitioner] . . . Herbert Dupigney, D'Abreau, Padmore, Raven and Ebony at 304 Winthrop Avenue. Upon his arrival at the building, the victim told everybody to leave because that was his location to sell drugs. As the argument escalated, the victim slapped the [petitioner] and threw a chair at him. The victim then broke a bottle and attempted to attack the [petitioner]. D'Abreau and Raven retreated to a turquoise Dodge Neon. The victim then started swiping the bottle at the occupants of the vehicle through one of its open windows. While Herbert Dupigney attempted to calm the victim and get him away from the car, the [petitioner] inquired if anybody had a gun. In response, D'Abreau gave the [petitioner] a .380 caliber pistol. The [petitioner] then pointed the gun at the victim and told him to back off.

"Herbert Dupigney and the [petitioner] then entered the turquoise Dodge Neon and left the scene. The group proceeded to [Raven's] apartment at 202 Sherman Avenue. The [petitioner] was visibly upset, and stated that the victim was getting on his nerves and that he was going to kill [the victim]. After a few minutes, the [petitioner] and [Herbert Dupigney] left.

"The [petitioner] and [Herbert Dupigney] rejoined [Raven] and D'Abreau at 202 Sherman Avenue approximately one hour later. Between 11:15 p.m. and 11:30 p.m., all four individuals proceeded to 300 Winthrop Avenue, where the drug operation had rented a fourth floor room facing Winthrop Avenue. At that time, the victim was playing dice with Padmore and Ebony in front of 304 Winthrop Avenue. Herbert Dupigney went down to the street to try to smooth things over with the victim. It was understood that if the attempt at reconciliation was unsuccessful . . . the victim would be shot. The [petitioner], [Raven] and D'Abreau observed the scene from the [apartment] window. After a few minutes of conversation between the parties and with no overt indication that an accord had been reached, the victim, Padmore and Ebony walked off in the direction of Edgewood Avenue. Herbert Dupigney called out to Ebony. After Ebony started to return, the [petitioner] and [Raven] abruptly left the apartment.

"As the victim and Padmore approached the corner of Winthrop Avenue and Edgewood Avenue, the turquoise Dodge Neon approached them. The [petitioner] exited the vehicle and fired several shots at the victim. A brief struggle ensued, after which the [petitioner] fired more shots at the victim. The victim died of his wounds shortly thereafter. . . .

"Shortly after the shooting, Padmore contacted the New Haven police . . . claiming to have information

regarding the crime. The police interviewed him on February 1, 1995. At that time, [Padmore] provided the police with a [tape-recorded] statement identifying the [petitioner] as the assailant. He also identified the [petitioner] as the shooter from a photographic array and signed the [petitioner's] photograph.[4] Both the [tape-recorded] statement and the photograph were admitted into evidence . . . .

"As a result, the state thereafter charged the petitioner with one count of murder in violation of General Statutes § 53a-54a (a), one count of carrying a pistol without a permit in violation of General Statutes [Rev. to 1995] § 29-35 and one count of criminal possession of a pistol or revolver in violation of General Statutes [Rev. to 1995] § 53a-217c. . . . At trial, the state offered into evidence a black knit hat, bloodied and with two holes, that the police had recovered from the driveway of 315 Winthrop Avenue on the night of the murder. Two witnesses for the state, D'Abreau and Aisha Wilson, testified that they had observed the shooting from the fourth floor of an apartment building across the street from 315 Winthrop Avenue. Both witnesses identified the petitioner as the shooter and testified that the petitioner had been wearing a black knit hat both just before the shooting and at the time of the shooting.

"The petitioner essentially presented a mistaken identity defense.[5] During the criminal trial, the petitioner's counsel made a motion to have the hat tested. The court, *Owens*, *J.*, denied the motion. Thereafter, the petitioner was found guilty on all three counts and was sentenced to a total effective term of seventy years incarceration. . . .

"After an unsuccessful direct appeal to the Appellate Court, in which the petitioner did not challenge the . . . court's denial of his motion for DNA testing, the petitioner filed a habeas corpus petition, claiming, inter alia, that his trial counsel had been ineffective for failing to [timely request] . . . DNA testing of the hat found at the murder scene. In furtherance of [his actual innocence claim in the habeas] petition, which [was subsequently withdrawn],[6] the petitioner also filed the [first] petition [under § 54-102kk] seeking DNA testing of the hat . . . . In 2007, the . . . court, *Damiani*, *J.*, conducted a hearing on the [first] petition, after which the court denied [that] petition on the ground that the petitioner had not shown that there was a reasonable probability that he would not have been prosecuted or convicted if the hat had been tested."[7] (Citations omitted; footnotes altered; internal quotation marks omitted.) Id., 54–57.

On appeal to this court, the petitioner claimed that the court, *Damiani*, *J.*, misapplied the reasonable probability standard of § 54-102kk (b) in concluding that there was no reasonable probability that the petitioner would not have been prosecuted or convicted if excul-

patory evidence had been obtained through DNA testing. See id., 53–54, 57–58. Specifically, the petitioner argued that, because the state had presented strong evidence linking the petitioner to the hat found at the murder scene, "testing of that hat revealing DNA matching neither the petitioner nor the victim would constitute exculpatory, material evidence under § 54-102kk (b)." Id., 71. The petitioner further argued "that acquittal due to a reasonable doubt would be particularly likely if the DNA were traced to a different known individual." Id., 68.

In addressing the petitioner's claim, we first considered the proper standard to apply in determining whether, under § 54-102kk, "[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing . . . ." General Statutes § 54-102kk (b) (1); see *State* v. *Dupigney*, supra, 295 Conn. 58–64. In doing so, we reviewed the reasonable probability standard applied in other postconviction contexts; see *State* v. *Dupigney*, supra, 295 Conn. 60–64; and concluded that "a 'reasonable probability' under § 54-102kk (b) (1) means a probability sufficient to undermine confidence in the outcome [of the trial]." Id., 64. Applying this standard, we concluded that the court, *Damiani*, *J.*, correctly determined that there was no reasonable probability that the petitioner would not have been prosecuted or convicted if exculpatory evidence had been obtained through DNA testing. See id., 67, 73; see also General Statutes § 54-102kk (b) (1).

In reaching that determination, we set forth the following additional facts that bore directly on the petitioner's claim. "D'Abreau testified at both the petitioner's probable cause hearing and at the trial that he had witnessed the shooting. At the probable cause hearing, D'Abreau testified that, just before the shooting, the petitioner had been wearing a three-quarter length leather coat that D'Abreau had loaned [to] the petitioner, jeans, a dark sweater, and a dark knit hat. He also testified that he had observed the petitioner, while still wearing the same clothing, shoot the victim multiple times in and around the driveway of 315 Winthrop Avenue. In addition, D'Abreau testified that, after the shooting, he had seen a black knit cap in a nearby alley. The alley was part of a route that the petitioner previously had shown D'Abreau to use to avoid the police.

"At trial, D'Abreau again testified that the petitioner had worn black boots, blue jeans, a dark sweater, a three-quarter length jacket and a dark cap on the night of the shooting. He testified that he had observed the shooting from the fourth floor of an apartment building across the street from 315 Winthrop Avenue. From this vantage point, he had recognized the petitioner as the shooter in part because the petitioner had been wearing

a coat that D'Abreau had loaned him. In addition, D'Abreau testified that the group including the petitioner had discussed the dispute over the drug dealing operation and had reached an understanding that, if the disagreement could not be resolved, the petitioner was going to shoot the victim. D'Abreau did not mention, nor was he asked about, seeing a black knit cap in the nearby alley.

"Wilson, who also had witnessed the shooting from a fourth floor apartment across the street from 315 Winthrop Avenue, [likewise] identified the petitioner as the shooter. Wilson testified that the shooter was wearing a black coat and a black wool knit hat, and that she had seen the petitioner wearing the same black coat and black hat earlier in the evening. Wilson also testified that she had recognized the petitioner as the shooter because she had seen the petitioner argue with the victim earlier in the evening and previously had observed him in the neighborhood.

"The state introduced the black hat into evidence through the testimony of Detective Robert Benson of the New Haven [P]olice [D]epartment, who had processed the crime scene. Benson testified that he had recovered a black knit cap with two holes in it from the driveway of 315 Winthrop Avenue along with a set of keys and shell casings. He also testified that he had taken photographs of a trail of blood droplets at the scene. The police incident report described the cap as a 'black ski-type hat (two holes in same and bloodied).' According to Benson, the hat was located in the driveway, approximately twenty-two feet away from the road." *State* v. *Dupigney*, supra, 295 Conn. 69–71.

In deciding whether the court, *Damiani*, *J.*, correctly had concluded that there was no reasonable probability that the petitioner would not have been prosecuted or convicted if exculpatory DNA test results had been obtained prior to trial, we explained, first, that the hat recovered from the crime was "a generic, black knit ski cap with no particular[ly] distinguishing features." Id., 72. We also observed that the petitioner had not provided this court with a record to support his contention that the state had argued to the jury that the hat recovered from the crime scene was the same hat worn by the shooter. See id. We emphasized that, as far as the record disclosed, the hat could have belonged to anyone, including the shooter, the victim or an unknown third party. Id. We then considered the evidence, unrelated to the hat, that the state had adduced at trial identifying the petitioner as the shooter. That evidence included not only three eyewitness identifications, two of which were by persons well acquainted with the petitioner, but also ample evidence of motive. Id., 72–73. We concluded that, "in light of the uncertain provenance of the black hat and the strong evidence, including the testimony of three eyewitnesses, that the

petitioner shot the victim, the absence from trial of even the most favorable result possible from a DNA test—that biological material from the hat belonged to neither the victim nor the petitioner—does not undermine our confidence in the fairness of the verdict." Id., 73.

Shortly after the release of our decision in *State* v. *Dupigney*, supra, 295 Conn. 50, the petitioner filed his second petition for DNA testing, the petition that is the subject of this appeaI. In support of his second petition, the petitioner alleged that he was in possession of new evidence sufficient to overcome our dual rationale for concluding that the trial court properly had denied his first petition, namely, that the petitioner had failed to establish a sufficient link between the hat and the shooter, and that the state's case against the petitioner was strong. See id., 72–73. In particular, the petitioner alleged that an individual named Kevin Moore would testify that he was robbed by the victim in 2004 and that a former friend and drug trafficking associate, Aubrey Rodney, had told Moore that he killed the victim in retaliation for that robbery.[8] The petitioner also alleged that Wilson would testify that the victim was not wearing a hat at the time of the shooting and that the black knit hat recovered from the crime scene appeared to be the hat worn by the shooter. The petitioner alleged that Moore's testimony "answer[ed] in main part [this] [c]ourt's concern [as expressed in *State* v. *Dupigney*, supra, 295 Conn. 72] that the evidence of [the petitioner's] guilt . . . was strong," and that Wilson's testimony "substantially answers [this] [c]ourt's concern" that the petitioner had not established an adequate connection between the hat and the shooter.

The state filed a motion to dismiss the second petition on the ground that it was barred by the doctrine of res judicata. In support of its motion, the state argued that the petitioner's claim that there was a reasonable probability that favorable DNA test results would undermine confidence in the jury verdict was fully and fairly litigated at the time of the first petition, and both the court, *Damiani*, *J.*, and this court rejected that claim because even the most favorable DNA results would not undermine confidence in the verdict. The state also maintained that the new evidence that the petitioner was seeking to introduce was available at the time of the first petition and, therefore, should have been presented at that time.

At a hearing on the state's motion to dismiss the second petition, the petitioner asserted that the petition was not barred by principles of res judicata because it was predicated on new evidence, some of which was unavailable at the time of the first petition. At that hearing, the court, *Fasano*, *J.*, questioned whether § 54-102kk permits a petitioner to introduce new evidence in support of a petition for DNA testing, positing instead

that the statute may require a petitioner to demonstrate, in light of the existing trial record, that favorable DNA testing would undermine confidence in the verdict. The court also questioned whether it had authority under § 54-102kk to consider new evidence in the context of a petition for postconviction DNA testing, noting that such evidence ordinarily is presented in connection with a petition for a new trial. Notwithstanding these concerns, the court permitted the petitioner to make a proffer of the new evidence and to argue why, in light of this evidence, there was a reasonable probability that favorable DNA testing would undermine confidence in the verdict.

Following the hearing, the court, *Fasano*, *J.*, granted the state's motion to dismiss the second petition on the ground that the petition was barred by principles of res judicata. In its memorandum of decision, the court characterized the second petition as materially identical to the first petition, with the only difference being that the petitioner was seeking to introduce new evidence to support the second petition. Although noting that the doctrine of res judicata is intended to promote judicial economy and repose, the court recognized that the doctrine is not inflexible and "must give way when [its] mechanical application would frustrate other social policies based on values equally or more important than the conveniences afforded by finality in legal controversies." (Internal quotation marks omitted.) In the spirit of flexibility, therefore, the court reviewed the petitioner's proffered evidence to determine whether it provided any reason not to apply the doctrine. Upon review of that evidence, the court concluded that it did not. Specifically, the court, *Fasano*, *J.*, concluded that Wilson's proffered testimony that the hat recovered from the crime scene " 'appears to be the same hat that she saw the shooter wearing' " was less than conclusive evidence linking the hat to the shooter, and, furthermore, that evidence was available at the time of trial. With respect to Moore's proffered testimony that a former drug trafficking associate had confessed to the killing, the court concluded, first, that it did not in any way strengthen the connection between the hat and the shooter and, second, that it did little to undermine confidence in the verdict in view of the fact that Moore was a " 'jailhouse informant' " who did not come forward until ten years after the petitioner's criminal trial. The court further observed that Moore's testimony also was available at the time of the first petition. This appeal followed.

On appeal, the petitioner claims that the court, *Fasano*, *J.*, incorrectly concluded that, for purposes of a petition under § 54-102kk, the doctrine of res judicata bars the use of evidence that could have been presented at trial or in connection with a prior petition under § 54-102kk. The petitioner further argues that the proposed testimony of Wilson establishes the nexus between the

hat and the shooter that this court found lacking in *State* v. *Dupigney*, supra, 295 Conn. 72, thereby entitling him to DNA testing of the hat. He also contends that the proposed testimony of Moore implicating Rodney as the shooter addresses our determination in *State* v. *Dupigney*, supra, 295 Conn. 72–73, that the state's case against the petitioner was strong. Specifically, the petitioner contends that the proffered testimony "cure[s] the factual defects" that this court "[hanged] its hat on" in upholding the denial of the first petition. According to the petitioner, to the extent that the court, *Fasano*, *J.*, considered the proffered testimony, it was solely for the purpose of determining whether the second petition was foreclosed by principles of res judicata, not to determine whether, in light of the proffered testimony, there was a reasonable probability that the result of the petitioner's criminal trial would have been different if favorable results had been obtained through DNA testing. We express no view as to whether the court, *Fasano*, *J.*, properly invoked the doctrine of res judicata in dismissing the second petition because we conclude that, even if the petitioner was entitled to a resolution of the merits of his second petition, he cannot prevail under § 54-102kk.

Before addressing that issue, however, we note that, at oral argument before this court, the petitioner's counsel informed us that Rodney is deceased and there is no reasonable possibility that DNA from the hat could ever be traced to him. The petitioner's counsel further explained, however, that Moore's testimony had been proffered solely to demonstrate that there are other people who could have killed the victim, not to support a claim that DNA testing would likely link Rodney to the shooting. The petitioner has acknowledged that, from his perspective, the most favorable outcome of DNA testing would be a " 'cold hit' " linking biological material from the hat to an identifiable individual. According to the petitioner, such a match would allow him to argue in the habeas court that the person whose DNA is on the hat is the real killer, not the petitioner. Finally, the petitioner has observed that, if DNA recovered from the hat cannot be traced to an identifiable third party, he can still argue that the person to whom the DNA belongs is Rodney.

We conclude that the petitioner is no more entitled to DNA testing now than he was when his first petition was denied. With respect to that first petition, we concluded that there was no reasonable probability that the petitioner would not have been prosecuted or convicted if exculpatory DNA test results had been obtained prior to trial, primarily because, even if we assumed the *most* favorable result from DNA testing—biological material belonging to someone other than the victim or the petitioner—it did not undermine confidence in the verdict given the strength of the state's case against the petitioner. See *State* v. *Dupigney*, supra, 295

Conn. 72–73. Nothing in the second petition changes that equation. That is, even if we credit Wilson's testimony that the hat in evidence appears to be the hat that the shooter wore,[9] and even if we assume the dubious value of Moore's testimony implicating Rodney as the real killer,[10] it does not alter what we already had assumed, for purposes of the first petition, to be the best case scenario for the petitioner, namely, that DNA testing reveals biological material belonging to someone other than the petitioner or the victim. See id., 73. The prospect of such a result is simply insufficient to warrant an order for DNA testing under § 54-102kk.

Indeed, what the second petition essentially boils down to is a request by the petitioner to undertake a fishing expedition on the off chance that it might yield evidence that allows him to point a finger at someone else. The reasonable probability standard of § 54-102kk was intended to prevent this type of open-ended excursion, however, by conditioning postconviction access to DNA evidence on a threshold showing that exculpatory test results would actually *undermine confidence* in the verdict. See *State* v. *Dupigney*, supra, 295 Conn. 66–67 ("Conditioning access to DNA evidence serves important state interests, including respect for the finality of court judgments and the efficient use of limited state resources. . . . Legislatures thus have faced the dilemma of how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice. . . . To reconcile these competing interests, legislatures have imposed various threshold showings, including materiality requirements such as the reasonable probability standard . . . . [That standard] serves these conflicting interests by requiring access to DNA testing only in those situations in which, if exculpatory results were discovered by DNA testing, these results would undermine confidence in the outcome of the trial." [Citations omitted; internal quotation marks omitted.]). That standard clearly is not met in the present case.

Although we described the state's evidence against the petitioner as "strong" in upholding the denial of his first petition; id., 72; in fact, that may have been an understatement. Indeed, the evidence against the petitioner included not only three seemingly reliable eyewitness identifications; see id., 69–73; cf. *State* v. *Marra*, 295 Conn. 74, 81, 90, 988 A.2d 865 (2010) (testimony of two eyewitnesses amply supported trial court's determination that no reasonable probability existed that "the petitioner would not have been prosecuted or convicted had exculpatory [DNA] evidence . . . been available at trial"); but also powerful evidence relating to motive. See *State* v. *Dupigney*, supra, 295 Conn. 73; see also *State* v. *Dupigney*, supra, 78 Conn. App. 113. There also was undisputed testimony that we did not rely on in *State* v. *Dupigney*, supra, 295 Conn. 50, but which bears emphasis now, namely, that the shooter was riding in

a turquoise Dodge Neon, the same vehicle that the petitioner was seen getting into shortly before the murder, following his altercation with the victim.[11] *State* v. *Dupigney*, supra, 78 Conn. App. 116. Although the petitioner claimed mistaken identity at trial, the chance that the petitioner was misidentified by three eyewitnesses—two of whom knew the petitioner well—is slim. The chance that the petitioner and the "real killer" were both driving a turquoise Dodge Neon, however, is truly remote. When the testimony regarding the turquoise Dodge Neon is considered along with the other evidence, the absence from trial of even the most favorable DNA test results—DNA evidence linking the hat to a third party—does not undermine our confidence in the verdict. Indeed, there are many reasons why someone else's DNA might be on the petitioner's hat that are in no way inconsistent with the petitioner's guilt. For example, the petitioner could have borrowed the hat just as he had borrowed the coat that he was wearing that night, or he could have found the hat. Among the endless possibilities, we are hard pressed to think of one, and the petitioner has identified none, that would undermine our confidence in the verdict.[12]

The decision is affirmed.

In this opinion the other justices concurred.

[1] General Statutes § 54-102kk provides in relevant part: "(a) Notwithstanding any other provision of law governing postconviction relief, any person who was convicted of a crime and sentenced to incarceration may, at any time during the term of such incarceration, file a petition with the sentencing court requesting the DNA testing of any evidence . . . .

"(b) After notice to the prosecutorial official and a hearing, the court shall order DNA testing if it finds that:

"(1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing;

"(2) The evidence is still in existence and is capable of being subjected to DNA testing;

"(3) The evidence, or a specific portion of the evidence identified by the petitioner, was never previously subjected to DNA testing, or the testing requested by the petitioner may resolve an issue that was never previously resolved by previous testing; and

"(4) The petition before the Superior Court was filed in order to demonstrate the petitioner's innocence and not to delay the administration of justice.

"(c) After notice to the prosecutorial official and a hearing, the court may order DNA testing if it finds that:

"(1) A reasonable probability exists that the requested testing will produce DNA results which would have altered the verdict or reduced the petitioner's sentence if the results had been available at the prior proceedings leading to the judgment of conviction;

"(2) The evidence is still in existence and is capable of being subjected to DNA testing;

"(3) The evidence, or a specific portion of the evidence identified by the petitioner, was never previously subjected to DNA testing, or the testing requested by the petitioner may resolve an issue that was never previously resolved by previous testing; and

"(4) The petition before the Superior Court was filed in order to demonstrate the petitioner's innocence and not to delay the administration of justice.

"(d) The costs of DNA testing ordered pursuant to this section shall be borne by the state or the petitioner, as the court may order in the interests of justice, except that DNA testing shall not be denied because of the inability of the petitioner to pay the costs of such testing.

"(e) In a proceeding under this section, the petitioner shall have the right to be represented by counsel and, if the petitioner is indigent, the court shall appoint counsel for the petitioner in accordance with section 51-296."

[2] The petitioner appealed to the Appellate Court from the decision of the court, *Fasano*, *J.*, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[3] For the same reason, we need not address the petitioner's additional claim that the court's refusal to consider new evidence in support of the second petition violated his right to equal protection under the fourteenth amendment to the United States constitution.

[4] "At trial, Padmore claimed to have been under the influence of illegal drugs while at the New Haven police station and denied any memory of either providing the statement to the police or choosing the [petitioner's] photograph from the array. The police detective who interviewed Padmore at the station testified that he appeared clearheaded and sober while at the station." *State* v. *Dupigney*, supra, 78 Conn. App. 121 n.3.

[5] The petitioner testified that he was with a female acquaintance and was a considerable distance away from the scene of the shooting when the victim was shot. See *State* v. *Dupigney*, supra, 78 Conn. App. 123.

[6] At oral argument before this court, the petitioner's counsel represented that the petitioner ultimately withdrew his claim alleging actual innocence. His withdrawal of that claim, however, had no effect on his petitions under § 54-102kk.

[7] Specifically, the court, *Damiani*, *J.*, concluded: "Looking at the statute, [§] 54-102kk, looking at the transcripts, the shooter had a black knit cap on. The shooting took place, the shooter left, [the victim] stumbled around and he ends up in the driveway or alley of 315 Winthrop [Avenue] and that's where he expired. A black knit cap is there. I mean, for me to assume that that is the same black knit cap that [the petitioner] had on is pure speculation. We have two people, [Wilson and D'Abreau], who identified [the petitioner] as the shooter. . . . [The petitioner has] not made [the] requisite showing that a reasonable probability exists that [he] would not have been prosecuted or convicted if that hat were tested." (Internal quotation marks omitted.) *State* v. *Dupigney*, supra, 295 Conn. 67 n.17.

[8] We note that, in his second petition, the petitioner alleges that the robbery that the victim allegedly committed took place in 2004, ten years after the victim's murder. For purposes of our analysis, we assume that this is a scrivener's error and that the alleged robbery occurred prior to the victim's murder.

[9] Significantly, the petitioner does not allege that Wilson is recanting her identification of the petitioner as the person whom she saw fight with the victim on the night of the murder and, later, shoot the victim in the street in front of her apartment. See *State* v. *Dupigney*, supra, 78 Conn. App. 115–17 (summarizing Wilson's trial testimony).

[10] But cf. *State* v. *Arroyo*, 292 Conn. 558, 567–69, 973 A.2d 1254 (2009) (recognizing inherent unreliability of jailhouse informant testimony), cert. denied, U.S. , 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010).

[11] Wilson, who observed the altercation from the window of her apartment, testified that, when it ended, "the [petitioner] and [Herbert Dupigney] entered a turquoise colored car . . . [and drove off]." *State* v. *Dupigney*, supra, 78 Conn. App. 116. "Later that same evening, at approximately 11:15 p.m., Wilson heard someone outside her apartment building yelling, 'Help, help. Fire, fire.' When she looked out of the window, she saw the victim bleeding and walking in the middle of the street. The same turquoise colored car in which the [petitioner] and [Herbert Dupigney] previously had departed then returned. The [petitioner] . . . exited the car and shot the victim." Id. "Wilson later testified on cross-examination that she could not see the shooter's face from the apartment. She stated, however, that the shooter was wearing the same clothing as she had seen [the petitioner] wearing [earlier in the evening] *and that he arrived in the same car in which the* [*petitioner*] *had departed earlier that evening*." (Emphasis added.) Id.

D'Abreau testified in a similar fashion. He stated that, shortly before the shooting, the victim "walked off in the direction of Edgewood Avenue [with Padmore and Ebony]." Id., 114. "As the victim and Padmore approached the corner of Winthrop Avenue and Edgewood Avenue, the turquoise Dodge Neon approached them. The [petitioner] exited the vehicle and fired several shots at the victim. A brief struggle ensued, after which the [petitioner] fired more shots at the victim." Id.

[12] The petitioner contends that, in jurisdictions with statutes similar to § 54-102kk, postconviction DNA testing has been ordered in cases in which

evidence of guilt was stronger than the evidence against the petitioner in the present case. We do not share the petitioner's view of the nature of the state's evidence in his case, which is reflected in the unsupported assertion that a " 'cold hit' " in the DNA databank to a known individual "would cause the state's case against [him] to evaporate." In any event, the cases on which he relies are inapposite either because they do not involve the application of a statute similar to § 54-102kk or because they involve materially different facts. Consequently, the petitioner's reliance on out-of-state precedent is misplaced.