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The "officially released" date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the "officially released" date appearing in the opinion.

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ESPINOSA, J., concurring in the judgment. The majority agrees with the claim of the petitioner, Melvin Jones, that, under the circumstances of this case, the trial court's decision denying his petition for a new trial is subject to de novo review. Applying this standard of review, the majority concludes that the trial court properly determined that the petitioner failed to establish that, if the new evidence were presented to a jury, it would probably lead to a finding that the defendant was not guilty. I disagree that the trial court's ruling is subject to de novo review. Instead, I would apply the same standard of review in the present case that this court has applied to rulings on petitions for a new trial for two centuries—whether the trial court abused its discretion. I agree with the majority, however, that, regardless of whether we apply the abuse of discretion standard or de novo review, the petitioner cannot prevail on his claim. Accordingly, I concur in the judgment.

As this court observed in 1903, "[w]hen . . . a judgment has been rendered upon the verdict of a jury, and that verdict is based upon evidence sufficient to support it, and no error in law has intervened in the trial and no mistake in pleading has occurred, or other mistake or accident to prevent the party from having a fair trial upon the merits, and the proceedings in the cause have been regular and lawful from its commencement to its close, any legal inference of injustice is excluded. The policy of the law treats it as final for all purposes, and forbids the court which rendered it from entertaining any further proceedings. It is possible that a losing party by some mistake or misfortune, and without fault of his own, may have been unable to produce on the trial evidence now attainable, which, if produced and believed, would demonstrate the injustice of the judgment, and so a new trial may be granted for the discovery of new evidence of this character.

"*The application is addressed to the discretion of the court* . . . and must allege and set forth the evidence produced on the former trial, together with the newly-discovered evidence, in order that the court may see whether injustice has probably been done, and whether the newly-discovered evidence is likely to reverse the result. If the adverse party desires to controvert the accuracy of the statement of the former testimony, or of the new testimony set forth, or to produce other testimony to be considered with that alleged, he may do so, and for this purpose no pleadings are essential. . . . Or he may admit the accuracy of the statement of the testimony, both old and new, and for this purpose a demurrer is used. In either case, whether upon the testimony old and new—as found by the court after hearing witnesses—or upon such testimony as set

forth in the application and admitted, *the court decides in the exercise of a sound discretion whether a new trial should be granted or denied.* . . . This discretion is a legal one; it is controlled by the well-established rules defining the requisites essential to granting a new trial. It may be abused by refusing a new trial where all essential requisites exist and the injustice of the judgment is apparent, and error may be affirmed where the trial court has erroneously held it had no power to exercise discretion. . . . But within these limits the power is discretionary, and its exercise in the denial of a new trial on the ground of newly-discovered evidence cannot be reviewed upon proceedings in error. This principle is firmly settled by many decisions of this court, extending from its organization to the present time." (Citations omitted; emphasis added.) *Gannon* v. *State*, 75 Conn. 576, 577–79, 54 A. 199 (1903); see also *Shabazz* v. *State*, 259 Conn. 811, 821–22, 792 A.2d 797 (2002) ("it is solely within the discretion of the trial court to determine, upon examination of both the newly discovered evidence and that previously produced at trial, whether the petitioner has established substantial grounds for a new trial").

In the present case, the majority does not dispute the general validity of the principle that a trial court's ruling on a petition for a new trial pursuant to General Statutes § 52-270 is subject to review for an abuse of discretion. It concludes, however, that "our deference to the trial court appears to arise historically and primarily from two considerations: (1) the trial judge's superior opportunity to assess the strength of the original trial evidence; and (2) the trial court's role as the arbiter of credibility." Accordingly, the majority concludes that, when, as here, the judge who ruled on the petition for a new trial was not the judge who presided over the criminal trial and neither party contests the credibility of the new evidence, this court is in as good a position as the trial court to determine whether a jury confronted with the new evidence would probably reach a different result, and, therefore, this court's review is de novo. Thus, the majority is persuaded by the petitioner's argument that there is no reason, under these circumstances, to treat petitions for a new trial based on newly discovered evidence differently from petitions for a writ of habeas corpus seeking a new trial on the ground that newly discovered evidence that the state failed to disclose before trial or that the defendant's attorney failed to discover could make a difference in the result. See, e.g., *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 309 n.63, 112 A.3d 1 (2015) ("Under *Brady* [v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] and *Strickland* [v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], it must be determined whether the evidence at issue, when considered in the context of the original trial, is of sufficient import relative to that

original trial evidence to undermine confidence in the verdict. As in all such cases, our review of that determination is de novo because we are as well situated as the habeas court to make that decision.").

I disagree. It is well settled that the substance, format and timing of a defendant's request for a new trial on the basis of newly discovered evidence can significantly affect the various legal standards that apply to the claim. For example, if a petitioner files a petition for a writ of habeas corpus claiming that he has discovered new evidence that casts doubt on his criminal conviction, but he makes no claim pursuant to *Brady* or *Strickland* that he did not receive a fair trial, the petitioner must prove by clear and convincing evidence that he "is actually innocent of the crime of which he stands convicted," and that "after considering all of that evidence and the inferences drawn therefrom . . . no reasonable fact finder would find the petitioner guilty." *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 791–92, 700 A.2d 1108 (1997). In contrast, if a habeas petitioner raises a claim under *Brady* or *Strickland*, he is required to prove only that that "the withheld evidence is of sufficient import or significance in relation to the original trial evidence that it reasonably might give rise to a reasonable doubt about the petitioner's guilt." *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 263. The reason for this much lower standard in cases involving *Brady* and *Strickland* claims is that the petitioner's right to a fair trial may have been violated. See *Summerville* v. *Warden*, 229 Conn. 397, 430–31, 641 A.2d 1356 (1994) (explaining why habeas petitioner who has not raised claim that his right to fair trial was violated has higher burden of proof).

The timing of the postconviction relief sought by a convicted defendant also matters. If a convicted defendant files a petition for a new trial on the basis of newly discovered evidence, he need not meet the extremely high level of proof required of a habeas petitioner raising a similar claim, but must prove only that the evidence would probably cause the jury to find him not guilty. See *Asherman* v. *State*, 202 Conn. 429, 434, 521 A.2d 578 (1987) (petitioner must demonstrate that newly discovered evidence "is likely to produce a different result in a new trial"). This lower standard applies to petitions for a new trial because the state's interest in finality increases as time passes. See *Summerville* v. *Warden*, supra, 229 Conn. 427 ("[F]or a petition for a new trial, within the three year limitations period, the petitioner's interests trump those of the public and the state. Beyond that period, however, the interests of the public and the state [in preserving the finality of judgments, in not degrading the properly prominent place given to the original trial as the forum for deciding the question of guilt or innocence within the limits of human fallibility, and in the fact that in many cases an order for a new trial may in reality reward the accused

with complete freedom from prosecution because of the debilitating effect of the passage of time on the state's evidence] trump those of the petitioner.").

It is clear to me, therefore, that, when considering what standard of review should apply to a petition for a new trial on the basis of newly discovered evidence, the primary factors that this court should consider are whether the defendant received a fair trial and the concomitant presumption of finality, *not* whether the trial court was in a better position to weigh the new evidence against the evidence that was presented at trial or to judge the credibility of the new evidence. This court has recognized for two centuries that, in light of these factors, the trial court has broader discretion to deny relief when a petitioner has filed a petition for a new trial on the basis of newly discovered evidence than it does when a petitioner has claimed that his constitutional right to a fair trial was violated. See *Gannon* v. *State*, supra, 75 Conn. 578 (since this court was created, trial court's ruling on petition for new trial has been subject to review for abuse of discretion because "[t]he policy of law treats . . . as final for all purposes" any conviction that has been obtained in proceedings that "have been regular and lawful from . . . commencement to . . . close," unless "the injustice of the judgment is *apparent*" [emphasis added]); see also *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 308 n.62 ("Of course, a defendant seeking a new trial on the basis of newly discovered evidence bears a significantly higher burden of establishing the materiality of the evidence at issue than a defendant raising a claim under *Brady* or *Strickland*. This is . . . because *Brady* and *Strickland* seek to vindicate the defendant's fair trial rights, whereas a new trial petition based on newly discovered evidence does not."); *Skakel* v. *State*, 295 Conn. 447, 522, 991 A.2d 414 (2010) ("[t]his strict standard [applicable to petitions for a new trial brought pursuant to § 52-270] is meant to effectuate the underlying equitable principle that once a judgment is rendered it is to be considered final, and should not be disturbed by posttrial motions except for a compelling reason" [internal quotation marks omitted]), quoting *Asherman* v. *State*, supra, 202 Conn. 434.

In my view, the statement in *Gannon* that finality is presumed when a petitioner has received a fair trial is not inconsistent with the court's statement in *Summerville* that "the petitioner's interests trump those of the public and the state [in the finality of the conviction]." *Summerville* v. *Warden*, supra, 229 Conn. 427. As I have indicated, in *Summerville*, this court focused on the *timing* of petitions for a new trial on the ground of newly discovered evidence and petitions for a writ of habeas corpus raising the same claim to explain why a lower *standard of proof* applies to a petition for a new trial. It does not follow from the fact that a lower burden of proof applies to petitions for a new trial that

the trial court has no more discretion to rule on a petition for a new trial that follows a fair trial than it does to rule on a habeas petition raising a claim that the petitioner's right to a fair trial was violated. I also recognize, of course, that a higher burden of proof is not the same thing as a more deferential standard of review. What *Lapointe*, *Skakel* and *Asherman* make clear, however, is that the fact that the defendant has received a fair trial is a critical factor in determining what legal standards apply to the defendant's postconviction claims. Accordingly, I would conclude that, as long as the trial court's ruling on a petition for a new trial on the basis of newly discovered evidence was reasonable, it should stand, even if the reviewing court might disagree with it. See *State* v. *Annulli*, 309 Conn. 482, 491, 71 A.3d 530 (2013) ("[u]nder the abuse of discretion standard, [an appellate court] makes every reasonable presumption in favor of upholding the trial court's rulings, considering only whether the court reasonably could have concluded as it did"); *State* v. *Deleon*, 230 Conn. 351, 363, 645 A.2d 518 (1994) ("[t]he issue . . . is not whether we would reach the same conclusion in the exercise of our own judgment, but only whether the trial court acted reasonably").

The majority points out that the fact that "judges often disagree on the correct outcome under the governing legal standard . . . does not, itself, convert a question of law into an exercise of discretion." Conversely, however, this court's adoption of guidelines, like those set forth in the four part test in *Asherman* v. *State*, supra, 202 Conn. 434, for determining whether a petition for a new trial should be granted, does not convert a discretionary judgment into a question of law. There clearly are circumstances under which reasonable people might disagree as to whether certain undisputed evidence would be likely to produce a different result in a new trial under the fourth prong of that test. In my view, when that is the case, the trial court's judgment should prevail.

Under the majority's decision, however, a petitioner may prevail on appeal from the denial of a petition for a new trial on the basis of newly discovered evidence even though the petitioner received a fair trial and *even though the trial court's decision was reasonable*. Of course, it is *only* when reasonable minds might disagree as to the proper result that application of the de novo standard of review could make a difference in the outcome on appeal. If no reasonable person could disagree with the trial court's ruling on a petition for a new trial, it would survive under both the abuse of discretion and de novo standards of review, while, if no reasonable person could agree with the ruling, the ruling would be reversed under both standards. The majority's decision clearly undermines the state's strong interest in finality in cases in which the defendant received a fair trial by encouraging the filing of appeals in cases where

reasonable minds could disagree regarding the proper result. For these reasons, I disagree with the majority's determination that rulings on petitions for a new trial based on newly discovered evidence are subject to de novo review under the specific circumstances of the present case. Instead, I would conclude that such petitions are subject to review for an abuse of discretion.

I therefore respectfully concur in the judgment.