1. STATEMENT OF ISSUES

Pursuant to Practice Book §67-7, the Innocence Project, 100 Fifth Avenue, 3rd Floor, New York, NY 10011, and other similar organizations listed below, hereby submit the following consolidated amicus curiae brief to the Supreme Court of the State of Connecticut in support of the defendant-appellant addressing the following issue:

Should the court overrule State v. Reid, 254 Conn. 540 (2000), and find that failure to caution a witness that the culprit might not be present at an identification procedure renders that procedure unnecessarily suggestive, requiring, at the very least, a curative jury instruction?

2. NATURE OF PROCEEDING AND STATEMENT OF FACTS OF THE CASE

On December 19, 2002, Ledbetter was convicted of two counts of robbery, in violation of General Statutes §53a-134(a)(3), and of conspiracy to commit robbery, in violation of General Statutes § 53a-134(a)(3), 53a-48. Ledbetter argued at trial that the showup procedure in which complaining witness Brian Leonard identified him was unnecessarily suggestive in violation of his due process rights under the 14th Amendment of the United States Constitution and article first, §8 of the Connecticut Constitution. Just prior to the showup procedure at which he identified defendant, Mr. Leonard heard a police radio transmission describing the apprehension of a car and suspects fitting the description he had given of his assailants. This was tantamount to a declaration that the people he was to view at the showup were likely culprits. The officer who brought Leonard to the showup knew he was taking Leonard to see suspects in the crime, but failed to warn Leonard that the people at the showup might not be the perpetrators. Leonard identified Ledbetter and another person at the showup as his assailants. At trial, Leonard failed to identify Ledbetter again as his assailant, and the flawed showup procedure remains the

only means by which anyone identified Ledbetter as one of the assailants. Ledbetter was sentenced to 20 years for each of the four counts, execution suspended after 12 years, all to be served concurrently, with five years probation. Amici otherwise adopt the procedural history and facts set forth in appellant's brief.

3. INTEREST OF AMICI

In rejecting appellant's contention that the showup procedure was unnecessarily suggestive, the trial court relied in part on this court's flawed reasoning in State v. Reid, 254 Conn. 540 (2000) -- which we believe runs counter to the weight of contemporary scientific evidence, the best practices of police departments, and the dictates of due process under the United States and Connecticut constitutions. As a non-profit dedicated to the exoneration of the wrongfully convicted throughout the United States for the last decade, the Innocence Project, Inc. ("the IP") has a particular interest in this case and any other case involving identification procedures likely to lead to wrongful convictions. The IP's fellow amici – the Center on Wrongful Convictions at Northwestern University in Chicago; the Wisconsin Innocence Project at the University of Wisconsin at Madison; the North Carolina Center on Actual Innocence; and the Northern California Innocence Project at Santa Clara University – share that interest.

4. ARGUMENT

This Court's decision in Reid that telling witnesses a culprit or suspect will be present at an identification procedure (and, implicitly, that police failure to warn witnesses the perpetrator might not be present) does not render that procedure "unnecessarily suggestive" contradicts well established scientific evidence, based on a series of studies conducted over nearly three decades, that such suggestive comments increase the chance

that witnesses will identify innocent people as criminals. Indeed, those same studies demonstrate that simply warning a witness the real perpetrator might not be present at a photo array or lineup significantly decreases wrong identifications without decreasing correct identifications. Because it appears that this Court was not adequately briefed on this substantial and persuasive scientific evidence when it decided Reid, amici propose that this Court revisit Reid and adopt the following rule:

> When police fail to give an affirmative warning that the real perpetrator may not be present in a photo array, lineup, or showup, or when police make suggestive comments indicating that the perpetrator is present, or fail to give an affirmative warning about the perpetrator's possible absence, a court may suppress the resulting identification on the ground that it is suggestive and/or unreliable. If the identification is not suppressed, however, the jury should be instructed about the potential harm resulting from the procedure and the increased likelihood of mistaken identification.

The ample evidence in support of the proposed rule is well known within the relevant scientific community. Psychological studies have proven repeatedly that statements leading witnesses to believe a culprit is present at an identification procedure result in high rates of mistaken identifications of "perpetrators" from lineups or photo arrays that include no actual suspects.[1] Witnesses who believe the culprit is present at an identification procedure are likely to pick the person who most resembles the perpetrator when the actually guilty party is absent.[2] However, even without a suggestive comment that leads the witness to believe the culprit is present, failure specifically to warn a witness

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[1] *See*, e.g., R.S. Malpass & P.G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*. JOURNAL OF APPLIED PSYCHOLOGY, Vol. 66, 482-89 (1981); Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, LAW AND HUMAN BEHAVIOR, Vol. 21, 283-298 (1997); Gary Wells, et. al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, LAW AND HUMAN BEHAVIOR, vol. 22, 603-47 (1998).

[2] *Id.;* Malpass and Devine, *supra.*

the perpetrator might not be present at an identification procedure makes the witness far more likely to identify an innocent party.[3] In one study, 78% percent of witnesses who did not receive warnings about possible perpetrator absence mistakenly identified "criminals" from lineups composed entirely of innocents.[4] Significantly, giving such a warning causes far fewer mistaken identifications without appreciably affecting the accurate identification of actual perpetrators.[5] Despite the consistency and the unchallenged credibility of peer-reviewed scientific studies establishing not only the importance of refraining from suggestive comments that could lead a witness to believe a culprit is present, but also the necessity of affirmatively warning witnesses the perpetrator may not be present, this court has, without fail, allowed admission of evidence tainted by such suggestiveness without requiring even a warning to the jury.

After holding that police comments about the presence of a suspect do not make an identification procedure unnecessarily suggestive, the Reid court claimed that "'little harm is likely to arise where the [victim], even without the police comment, would have inferred that the occasion for his being requested to identify someone is that the police have a particular person in mind who has been included among those to be viewed.'" Reid, 254 Conn. 540, 557 (quoting State v. Austin, 195 Conn. 496, 500 (1985)). The Court expanded on this logic by noting that "When presented with a photographic array by the police, crime victims reasonably can surmise that the police may consider one of the persons in the array to be a

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[3] *Id.*; Wells, *supra*; J. F. Parker & L.E. Caranza, *Eyewitness Testimony of Children in Target Present and Target-Absent Lineups,* LAW AND HUMAN BEHAVIOR, Vol. 13, 133-149 (1989); J. F. Parker, et. al., *Eyewitness Testimony of Children*, JOURNAL OF APPLIED PSYCHOLOGY, Vol. 16, 287-302 (1986); J.F. Parker & V. Ryan, *An Attempt to Reduce Guessing Behavior in Children's and Adults' Eyewitness Identifications,* LAW AND HUMAN BEHAVIOR*,* vol. 17, 11-26 (1993).

[4] Wells, et. al., *supra* (*citing* Malpass & Devine, *supra*).

[5] Steblay, *supra*; Wells, et. al., *supra*.

suspect in the case." Reid, 254 Conn. 540, 557 (Citing State v. White, 229 Conn. 125, 163 (1994); State v. Williams, 203 Conn. 159, 177 (1987); State v. Fullwood, 193 Conn. 238, 245 (1984)).

Yet this reasoning turns the scientific evidence on its head. It is precisely because witnesses are likely to believe a suspect or culprit is present in a lineup, photo array, or showup that they tend to mistakenly identify innocent people as perpetrators, and precisely why, from a psychological point of view, it is necessary to provide an affirmative warning about the possible absence of a perpetrator. As the Indiana Supreme Court stated in 1973, when police tell a witness a suspect is present in a lineup, the witness may "feel that he has an obligation to choose one of the participants in the display since the police evidently are satisfied that they have apprehended the criminal. The result may be that the witness strains to pick someone with familiar characteristics or someone who most resembles the actual criminal or the result may be that the witness will choose the one least dissimilar by the process of elimination." Sawyer v. State, 228 N.E. 2d 440, 443 (1973). This is exactly the conclusion of all of the social science available on the subject, and it applies with as much force to situations where the witness comes to his own conclusions about the presence of a culprit or suspect as when an improper police comment leads a witness to believe a culprit is present.

For this reason, the Department of Justice has recommended in its law enforcement guidelines that police offer affirmative warnings to witnesses telling them the perpetrator "may or may not be present" at lineups, in photo arrays, and at showup procedures. In fact, this Court has acknowledged the suggestiveness of police remarks that lead witnesses to believe a suspect is present at an identification procedure. Reid, 254 Conn. 540, 556.

Nonetheless, the Court concluded that such statements do not make the procedure "unduly suggestive." Reid, 254 Conn. 540, 556.

Herein lies the essence of the problem. First, even if this Court had deemed such remarks or failure to warn sufficient to make an identification "unnecessarily suggestive," evidence would rarely be excluded under the reliability tests of Manson v. Brathwaite, 432 U.S. 98 (1977) and State v. Figueroa, 235 Conn. 145 (1995). These reliability factors are, unfortunately, far less predictive of actual reliability when there has been any kind of suggestive identification because the suggestiveness of the procedure tends, after the fact, to falsely enhance the witness's certainty and memory of how good his view of the perpetrator was at the time of the crime.[6] Moreover, the reliability factors tend to overshadow the court's analysis of the suggestiveness inquiry, and even when the procedure was clearly unnecessarily suggestive, juries rarely have any inkling of the increased likelihood of mistaken identification resulting from the corrupted procedure. For this reason, we also recommend that juries receive a curative instruction whenever any identification is unnecessarily suggestive, regardless of whether the suggestiveness arose in the context of improper commentary or failure to warn about the possible absence of a culprit, and regardless of the outcome of the reliability analysis.

However, even disregarding the reliability prongs of Manson and Figueroa, the amici are aware of not one case in Connecticut history in which a police comment about the presence of a suspect in an identification procedure led, or even contributed, to a finding that the procedure was unnecessarily suggestive in the first place. It is imperative that we

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[6] Gary Wells, et. al., *supra*; G. Wells & A.L. Bradfield, "*Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts their Reports of the Witnessing Experience*. JOURNAL OF APPLIED PSYCHOLOGY, vol. 83, 360-76 (1998).

clearly identify cases in which suggestive identification procedures were used, even when evidence of those procedures will be admitted at trial. The heart of the United States Supreme Court's due process jurisprudence in this area is to prohibit systemic practices that unnecessarily increase error. In light of what we now know, this court should adapt its approach to deter such practices.

Currently, despite scientific demonstrations of the increase in mistaken identifications when police fail to warn witnesses about the potential absence of suspects, and despite this Court's acknowledgment of the suggestiveness of police comments telling witnesses a suspect is present, police in Connecticut have no incentive to avoid making such suggestive comments, let alone to give the affirmative warning. This leads to regular infringement of defendants' federal and state constitutional rights to due process, and this is what makes suppression or, at least, adoption of a curative instruction imperative when police suggest a suspect is present or fail to warn the culprit might not be present. An effective instruction might read:

> In this case, police failed to warn the identifying witness(es) that the actual culprit might not be present at the lineup (showup, photo array) at which defendant was identified as the alleged perpetrator of this crime. This is a suggestive identification procedure that can increase the chances of error. You should consider this evidence in making your determination about the defendant's guilt or innocence.

Such an instruction would provide an incentive for Connecticut law enforcement to conform to best police practices and would help safeguard the constitutional rights of Connecticut defendants to due process of law.[7] It would also help juries to make better

[7] In *Manson*, the Supreme Court recognized the importance of deterrence against police abuse but felt that a per se exclusion rule for suggestive identification evidence went too far in keeping relevant evidence from the jury. *Manson*, 432 U.S. at 112. A jury instruction would balance these concerns by providing a greater deterrent effect than the totality test alone, while still allowing the jury to consider potentially relevant evidence.

assessments of the potential problems with identifications that are tainted by suggestiveness. Most importantly, the effective implementation of future warnings that would likely result from the deterrent effect of a mandatory jury instruction in case of abuse would lead to apprehension of more criminals and to fewer convictions of innocent people.

That 85% of wrongful convictions are based on mistaken identifications further highlights the necessity of overruling Reid and of adopting a curative instruction as general policy for future cases like Reid.[8] The case of Mr. Reid himself poignantly emphasizes the need for reform in this area of eyewitness identification. In 2003, after DNA testing excluded Reid as the donor of hairs crucial to his conviction, he was exonerated after serving six years for first degree sexual assault and first degree kidnapping.[9] After the police officer in that case told the victim a suspect was in the photo array, she picked Reid out and said it was "a face I would not forget. It was imprinted on my mind." Reid, 254 Conn. 540, 558. She was wrong. Reid was innocent, and every bit of available relevant science suggests the police failure to warn her that the actual culprit might not be in the photo array she used to identify Reid likely contributed to an innocent man spending six years behind bars in a Connecticut prison.

As noted earlier in this brief, neither party in Reid addressed the relevant scientific evidence on suggestive identification procedures, and, consequently, the Reid court did not consider that evidence. If this court had considered the weight of the available science, it might have decided Reid differently, and Mr. Reid might not have been convicted of a crime

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[8] Scheck, Neufeld, & Dwyer, ACTUAL INNOCENCE (2000); Connors, Lundregan, Miller, & McEwan, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (Department of Justice, 1996).

[9] *Conviction Obtains a New Trial*, Hartford Courant, May 17, 2003. *Rape Case Dismissed*, Hartford Courant, July 19, 2003.

he did not commit. This court's reliance on scientific evidence about suggestive identification procedures would lead to more accurate results at every level the justice process, from police practices up through appellate decision-making. Without the benefits of modern science, however, lower courts will continue to rely on the intuitive but incorrect logic of the Reid decision.

In fact, the trial court in this case specifically relied on the Reid court's flawed reasoning for the proposition that a witness's knowledge that he or she is viewing a suspect may not render an identification procedure unnecessarily suggestive.[10] However, as in Reid, the identification procedure used to identify Ledbetter was unnecessarily suggestive. The absence of an adequate pre-showup warning about possible culprit absence corrupted the procedure and made it more likely that Leonard incorrectly identified Ledbetter. Leonard's failure to identify Ledbetter in court leaves the flawed showup procedure as the only means by which anyone identified appellant as a perpetrator. As such, we believe this Court should vacate Mr. Ledbetter's conviction and remand his case for a new trial with the tainted identification evidence excluded or, at least, with a jury instruction on the failure of police to include an appropriate warning for Mr. Leonard before the showup procedure.

Respectfully submitted,

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[10] Trial Record, 12/23/2002 at 25.

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CERTIFICATION

Pursuant to Practice Book §62-7, the undersigned certifies that a copy of this application has been today mailed, first class to Lisa Steele, Esq., P.O. Box 794, Bolton, MA 01740 counsel for defendant-appellant and to Nancy L. Chupak, Assistant State's Attorney, Appellate Bureau, Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067.

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