
SUPREME COURT
OF THE
STATE OF CONNECTICUT

SC 19649

STATE OF CONNECTICUT
v.
ERNEST HARRIS

BRIEF OF THE AMICUS CURIAE
CONNECTICUT INNOCENCE PROJECT & THE INNOCENCE PROJECT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

STATEMENT OF INTEREST OF *AMICI CURIAE*.....1

PRELIMINARY STATEMENT1

STATEMENT OF FACTS AND PROCEEDINGS.....2

ARGUMENT2

I. IN LIGHT OF THIS COURT’S RECENT DECISION IN DICKSON,
THE IDENTIFICATION IN THIS CASE SHOULD BE EXCLUDED
AND THE CONVICITON REVERSED2

II. THE MANSON/LEDBETTER TEST DOES NOT ACHIEVE ITS GOAL
OF USING RELIABILITY AS A “LINCHPIN” TO PROTECT
DUE PROCESS AND FAIR TRIAL INTERESTS4

III. THIS COURT SHOULD ADOPT A LEGAL FRAMEWORK THAT
ACCOMMODATES CURRENT SCIENTIFIC FINDINGS AND GUIDES
THE LOWER COURTS ON THE USE OF THE EVOLVING
BODY OF SCIENTIFIC RESEARCH8

TABLE OF AUTHORITIES

CASES

<u>Commonwealth v. DiGiambattista</u> , 442 Mass. 423, 813 N.E.2d 516 (2004)	10
<u>Manson v. Brathwaite</u> , 432 U.S. 98 (1977)	2, 4, 5, 6, 7, 8
<u>State v. Dickson</u> , 322 Conn. 410, 141 A.3d 810 (2016)	Passim
<u>State v. Guilbert</u> , 306 Conn. 218, 49 A.3d 705 (2012)	Passim
<u>State v. Henderson</u> , 208 N.J. 208, 27 A.3d 872 (N.J. 2011)	6, 8, 9
<u>State v. Lawson</u> , 352 Or. 724, 291 P.3d 673 (Or. 2012)	6, 8, 9, 10
<u>State v. Ledbetter</u> , 275 Conn. 534, 881 A.2d 290 (2005)	2, 4, 5, 6, 7, 8, 10
<u>State v. Outing</u> , 298 Conn. 34, 3 A.3d 1 (2010)	5
<u>Young v. State</u> , 374 P.3d 395 (Alaska 2016)	6

CONNECTICUT GENERAL STATUTE AND PUBLIC ACT PROVISIONS

Conn. Gen. Stats. Sec. 54-1p	4
Public Act No. 12-111	10

OTHER AUTHORITIES

Belief of Eyewitness Identification Evidence <i>in</i> Handbook of Eyewitness Psychology: Memory for People 501(R.C.L. Lindsay et al. eds., 2007)	7
Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions, 33 Law & Hum. Behav. 194 (2009)	3
How Variations in Distance Affect Eyewitness Reports and Identification Accuracy, 32 Law & Hum. Behav. 526 (2008)	7
Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 Law & Hum. Behav. 287 (2006)	2

National Academy of Sciences, Identifying the Culprit: Assessing Eyewitness Identification (2014)	6, 9
The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications 20 Psychol., Pub. Pol. and L. 1 (2014).....	3
Time Went by So Slowly: Overestimation of Event Duration by Males and Females, 1 APPLIED COGNITIVE PSYCHOL. 3 (1987)	7
West & Meterko, DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years (forthcoming 2016).....	1

STATEMENT OF INTEREST OF AMICI CURIAE¹

The Innocence Project is dedicated to providing legal and related services to indigent prisoners whose actual innocence may be established through post-conviction DNA evidence. The work of the Innocence Project and similar organizations has led to the exoneration, through post-conviction DNA testing, of 344 individuals who were wrongly convicted for crimes they did not commit. The Connecticut Innocence Project (CTIP) is a specialized unit of the State of Connecticut Division of Public Defender Services. Like the Innocence Project, the mission of the CTIP is to identify, review, and investigate cases of wrongly convicted individuals within Connecticut, and to seek their release from prison.

Eyewitness misidentification is the leading contributing cause of wrongful convictions established through post-conviction DNA testing, playing a role in 71% of 344 cases.² An analysis of the first 250 wrongful conviction cases established through post-conviction DNA testing revealed that the vast majority of cases involving misidentification (88%) involved law enforcement suggestion or other indicia of unreliability.³ Since mistaken eyewitness identifications are the principal contributing cause of wrongful convictions, Amici have a compelling interest in the adoption of a legal framework, together with improved law enforcement procedures, that reduce the risk of a finding of guilt based on misidentification.

PRELIMINARY STATEMENT

The Innocence Project and CTIP submit this amicus curiae brief in support of Defendant Ernest Harris. Amici urge reversal and further respectfully request that this Court

¹ This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the Amicus Curiae, contributed money that was intended to fund preparation or submission of this brief.

² <http://www.innocenceproject.org/causes/eyewitness-misidentification/>

³ Brandon Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong. Data available at: http://www.law.virginia.edu/html/librarysite/garrett_eyewitness.htm. A recent analysis of the first 325 DNA exonerations reveals the frequency of photo arrays (53%); in-person lineups (54%); composites (28%); and non-identification by a witness (19%) within the cases involving mistaken eyewitnesses. West & Meterko, DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years (forthcoming 2016).

replace the Manson/Ledbetter test with a new framework for evaluating the admissibility of eyewitness identification testimony that is consistent with decades of peer-reviewed social science research.

STATEMENT OF FACTS AND PROCEEDINGS

Amici incorporate by reference the facts in the Defendant's brief.

ARGUMENT

I. IN LIGHT OF THIS COURT'S RECENT DECISION IN DICKSON, THE CONVICTION IN THIS CASE SHOULD BE REVERSED

The first-time, in-court identification of Mr. Harris at an arraignment on an unrelated matter was inherently suggestive. Thus, the resulting identification was so unreliable that it should have been excluded, and should have precluded a subsequent, in-court trial identification of Mr. Harris. The admission of this unreliable evidence violated Mr. Harris's due process rights because it offends the principles of fundamental fairness. State v. Dickson, 322 Conn. 410, 423-30, 442-44 (2016). His conviction should be reversed.

Indeed, the arraignment ID here was as suggestive as those in-court IDs criticized by this Court in Dickson: Mr. Harris was handcuffed and being presented for arraignment, which state's witness Jose Rivera knew from his own experience meant that he was being charged with a crime. Trans. 9/17/12 at 137, 143. Mr. Harris was arraigned immediately before co-def. Emmett Scott, whom Rivera had previously seen in a photographic array but failed to identify, suggesting that Harris and Scott were being arraigned together, an important detail given that the crime was committed by two assailants together.⁴

In fact, this identification procedure was worse than a traditional, in-court trial identification. Rivera was in the company of law enforcement agents who knew the identities of the police suspects—effectively non-blind administrators—at all relevant times.

⁴ This is particularly troubling in light of the research on "mugshot exposure" which describes how a witness familiar with an individual from a prior identification procedure can confuse the source of that familiarity and believe that person to be the perpetrator. K. A. Deffenbacher et al., Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 LAW & HUM. BEHAV. 287 (2006).

Prior to entering the arraignment court, Rivera was told that the police may have “suspects in court” and believed he was there to make an identification.⁵ Such biasing information serves the opposite purpose as the prophylactic pre-lineup instructions used by Detective Natale during the three prior photographic arrays and now mandated by Connecticut law. At the arraignment, Rivera was accompanied by state’s attorney’s Inspector Lawlor, who knew the names of the police suspects. Immediately after Scott’s arraignment and prior to the next arraignment, Lawlor got up and walked towards Rivera; Rivera and Lawlor then left the courtroom.⁶ While Lawlor denied telling Rivera the suspects’ names prior to the arraignment, he testified that when Rivera informed Lawlor that he recognized the two as the perpetrators, he referred to each by name⁷ and stated that he was “100 percent positive” and would “never forget it.” The totality of the circumstances strongly suggest that Rivera’s choice and his certainty were influenced by the suggestive circumstances (including the prior procedure featuring Scott) orchestrated by law enforcement.⁸

As this Court wrote in Dickson about the in-court identification in that case:

“[W]e are hard-pressed to imagine how there could be a *more* suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime. *If this procedure is not suggestive, then no procedure is suggestive.* Indeed, the present case starkly demonstrates the problem, in that [the witness] was unable to identify the defendant in a photographic array, but had absolutely no difficulty doing so when the defendant was sitting... in court . . . Second, because the extreme suggestiveness and unfairness of a one-on-one in-court confrontation is so obvious, we find it likely that ... *a first time in-court identification procedure amounts to a form of improper vouching.*

⁵ This information is the kind of suggestive pre-procedure information that can alter a witness’s memory, his inclination to make an identification, and his certainty in his identification, creating a serious risk of misidentification for an innocent suspect. See, e.g., M. R. Leippe et al., Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions, 33 LAW & HUM. BEHAV. 194 (2009). Accord State v. Guilbert, 306 Conn. 218, 239 & n.18 (2012).

⁶ Lawlor’s rising and walking towards Scott immediately following Scott’s arraignment is a form of post-procedure confirmatory feedback that can have the same effects as described supra fn. 4. See also Steblay et al., The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications 20 Psychol., Pub. Pol. and L. 1 (2014).

⁷ Rivera’s identification of the individuals by name supports the inference that he knew their names prior to the arraignment.

⁸ See supra fns. 4 & 5.

(Emphasis altered.) Dickson, *supra*, 322 Conn. 423-25.

Rivera's memory for Harris had never been tested in a non-suggestive out-of-court identification procedure. This failure is critical, since Detective Natale, who had a photograph that could have been used in an array, believed Harris was a suspect prior to the arraignment. Detective Natale nonetheless elected *not* to generate a non-suggestive, out-of-court identification procedure for Mr. Harris. Instead, she subjected him to a highly suggestive, first-time, in-court identification procedure.⁹ Both because of the circumstances surrounding the viewing of Scott and Harris, and the "vouching" factor as described by this Court in Dickson, it is no wonder that Rivera identified the two men at the arraignment. Since no pretrial, non-suggestive identification procedure had taken place, the trial court erred in admitting the first-time, in-court identification of Mr. Harris. *Id.*, 444-47. Nor did the State request permission to conduct a non-suggestive identification procedure, as required by Dickson. It was further error, under Dickson, for the trial court to permit a second in-court identification at trial after applying the Manson/Ledbetter factors to determine the reliability of the arraignment identification. This is precisely what this Court considered and rejected in Dickson.¹⁰

For all of the reasons set forth in the Defendant's Brief and herein, the arraignment and trial identifications should have been excluded. As a result, it is respectfully submitted that Mr. Harris's conviction be reversed.

II. THE MANSON/LEDBETTER TEST DOES NOT ACHIEVE ITS GOAL OF USING RELIABILITY AS A "LINCHPIN" TO PROTECT DUE PROCESS AND FAIR TRIAL INTERESTS

This case dramatically illustrates the abject failure of the Manson/Ledbetter test in preventing the admission of unreliable identifications and presents this Court with an

⁹ This indefensible choice is made worse: during the only array that contained Scott's photograph, the witness did not identify Scott, but identified another lineup member as the "driver's side (non-shooter) assailant," the same role he later assigned Harris.

¹⁰ Additionally, although the arrest of the defendant occurred after the effective date of Connecticut's eyewitness identification procedure statute, Conn. Gen. Stats. Sec. 54-1p, the fact that Detective Natale and the state's attorney's inspector ignored its practices is especially serious.

opportunity to re-examine the legal framework for assessing eyewitness identification evidence.¹¹ Amici respectfully urge this Court to join the supreme courts of Alaska, Oregon and New Jersey and establish a new framework aligned with the social science research.¹²

This Court has been at the forefront of evaluating the robust body of peer-reviewed research in the area of eyewitness memory and perception that has significantly advanced our understanding of how memory works and what factfinders know about it:

We now conclude that *Kemp* and *McClendon* are out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror. This broad based judicial recognition tracks a near perfect scientific consensus. The extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification

State v. Guilbert, 306 Conn. 218, 234-36 (2012).

In Guilbert, the Court took the commendable and necessary step of reversing decades of precedent in light of social science research that undermined those decisions. That same body of research has also undermined confidence in the Manson/Ledbetter test's ability to ensure that "reliability is the linchpin" in evaluating challenged identification evidence. Manson v. Brathwaite, 432 U.S. 98, 114 (1977). As the 2014 report of the National Academy of Sciences concluded:

The *Manson v. Brathwaite* test . . . evaluates the "reliability" of eyewitness identifications using factors derived from prior rulings and not from empirically validated sources. It includes factors that are not diagnostic of reliability and treats factors such as the confidence of a witness as independent markers of reliability when, in fact, it is now well

¹¹ See Manson v. Brathwaite, 432 U.S. 98 (1977); State v. Ledbetter, 275 Conn. 534 (2005).

¹² This Court's concerns over the scientific validity of the Manson/Ledbetter test predate Guilbert. See State v. Outing, 298 Conn. 34, 61-62 (2010) (noting that use of expert testimony on the reliability of eyewitness identifications "calls into question the soundness of the test . . . [and] [a]s is self-evident, several of these considerations relate to the assumptions that the studies have called into question."). Indeed, even in Ledbetter this Court had already begun to acknowledge the "weak correlation, at most" between the Manson factors and the "uncontradicted scientific literature." 275 Conn. 566-67.

established that confidence judgments may vary over time and can be powerfully swayed by many factors. The best guidance for legal regulation of eyewitness identification evidence comes not, however, from constitutional rulings, but from the careful use and understanding of scientific evidence to guide fact-finders and decision makers.

National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* at 44 (2014), available at <https://www.nap.edu/read/18891/chapter/5#44> (“NAS Report”).

The three state supreme courts to have directly considered the ongoing validity of Manson have each concluded, after evaluating the research, that the test can no longer stand. See State v. Henderson, 27 A.3d 872, 918 (N.J. 2011) (Manson “does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury’s innate ability to evaluate eyewitness testimony.”); State v. Lawson, 291 P.3d 673, 688 (Or. 2012) (Manson “does not accomplish its goal of ensuring that only sufficiently reliable identifications are admitted into evidence. Not only are the reliability factors . . . both incomplete and, at times, inconsistent with modern scientific findings, but the [Manson] inquiry itself is somewhat at odds with its own goals”); Young v. State, 374 P.3d 395, 405 (Alaska 2016) (“a *Brathwaite*-based test fails to take into account the myriad factors now generally known to affect the reliability of eyewitness evidence, and that such a test can no longer be viewed as consistent with Alaska’s constitutional guarantee of due process.”).

The Manson/Ledbetter test is fundamentally flawed in four ways. First, and most critically, research has shown that suggestive circumstances have a corrupting effect on several of the reliability factors. As a result, suggestion and reliability simply cannot be “balanced” against each other in any meaningful way; the very premise of the Manson/Ledbetter test is false. This fundamental flaw leads to the paradoxical outcome that a more suggestive identification appears more reliable (under the Ledbetter reliability factors) when, in fact, it is clear that suggestive circumstances render identifications *less* reliable. See Henderson, supra, 27 A.3d 918 (“The irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and

report better viewing conditions. Courts in turn are encouraged to admit identifications based on criteria that have been tainted by the very suggestive practices the test aims to deter.”). Because jurors are likely to “over-believe” eyewitnesses, the admission of such testimony can be unduly prejudicial. See M. Boyce et al., Belief of Eyewitness Identification Evidence *in* Handbook of Eyewitness Psychology: Memory for People 501, 508-09 (R.C.L. Lindsay et al. eds., 2007) (“Research indicates that people overestimate the abilities of eyewitnesses.”).

Second, the test erroneously assumes that a witness’s honest testimony about three of the five reliability factors serves as probative evidence. In actuality, research demonstrates that people, even when they believe they are being honest, are not likely to provide accurate self-reports about their opportunity to view, degree of attention paid, or certainty in the identification, even in the absence of suggestion. See, e.g., R.C.L. Lindsay et al., How Variations in Distance Affect Eyewitness Reports and Identification Accuracy, 32 LAW & HUM. BEHAV. 526, 526-35 (2008) (poor ability of eyewitnesses to estimate distances); E. Loftus et al., Time Went by So Slowly: Overestimation of Event Duration by Males and Females, 1 APPLIED COGNITIVE PSYCHOL. 3, 3 (1987) (eyewitnesses tend to overestimate duration).

Third, the Manson/Ledbetter test is premised on the assumption that two factors—a witness’s confidence in his/her identification and a witness’s ability to describe the perpetrator—are good indicators of the witness’s accuracy, even though decades of scientific research have disproven the strength of these correlations under a number of conditions. Current scientific literature consistently demonstrates that a moderate correlation between confidence and accuracy occurs in limited circumstances.¹³ Guilbert,

¹³ The State argues that research on the lack of a confidence-accuracy correlation is not convincing. The Innocence Project disagrees. This Court has held that “numerous scientifically valid studies” support the proposition that “witnesses may develop unwarranted confidence in their identifications if they are privy to post event or post identification information about the event or the identification.” Guilbert, supra, 306 Conn. 253. Accord Dickson, supra, 322 Conn. 410, n.32. Even assuming that scientists have not arrived at consensus on this factor, that itself is reason to eliminate this variable from the

supra, 306 Conn. 237 n.12. See also Lawson, supra, 291 P.3d 704-05 (summarizing scientific findings on this factor); NAS Report at 6 (“it is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors.”). Research has also demonstrated that there is “little correlation between a witness’s ability to describe a person and the witness’s ability to later identify that person.” Lawson, supra, 687-88.

Fourth, although the test directs courts to consider the “totality of the circumstances,” in practice, courts typically analyze only five enumerated factors, and not other circumstances. See Henderson, supra, 27 A.3d 915. Scientific literature has indisputably shown that many other system and estimator variables not considered by the test significantly affect the reliability of eyewitness identifications.¹⁴

These problems warrant a reevaluation and reformation of the Manson/Ledbetter test in order to ensure the suppression of the most unreliable and prejudicial identifications and to ensure the availability of meaningful intermediate remedies.

III. THIS COURT SHOULD ADOPT A LEGAL FRAMEWORK THAT ACCOMMODATES CURRENT SCIENTIFIC FINDINGS AND GUIDES THE LOWER COURTS ON THE USE OF THE EVOLVING BODY OF SCIENTIFIC RESEARCH

Amici respectfully submit that this Court should adopt a new framework for assessing the admissibility of eyewitness identifications. Specifically, the new framework should: (1) take all relevant variables into account and respond appropriately to shifts in scientific consensus on these variables; (2) employ a burden-shifting regime at pretrial screenings; (3) incorporate intermediate remedies; and (4) adopt an exclusionary rule for violations of Connecticut’s identification procedure rules.

The new framework, like those adopted by New Jersey, Oregon and Alaska courts,

Manson/Ledbetter test. If the studies are, in fact, so inconsistent that there is a genuine question as to whether confidence is correlated with accuracy, then courts should not rely on confidence as an indicator of reliability.

¹⁴ This Court has recognized these variables in Guilbert, supra, 306 Conn. 218, 253-54, n.11. Estimator variables present in this case – weapon focus; high levels of stress; poor lighting conditions – would likely have negatively affected the witness’s memory.

and endorsed by the Massachusetts Supreme Judicial Court's Study Group on Eyewitness Identification, would explore all relevant variables and facts, rather than relying solely on the five enumerated factors.¹⁵ This approach is consistent with this Court's approval of a broad consensus of "scientifically valid studies" on eight such variables, Guilbert, supra, 306 Conn. 253-54, as well as the approval of several more by the National Academy of Sciences and the supreme courts of New Jersey, Oregon, Massachusetts, and Alaska. See NAS Report at 91-101; Mass. Study Group Report at 59-84; Lawson, supra, 291 P.3d 700-11; Henderson, supra, 27 A.3d. 896-910, 920-21. The framework would also be flexible and take into account the fact that scientific research is "dynamic"; as this Court has instructed, "[t]rial courts [should not be limited] from reviewing evolving, substantial, and generally accepted scientific research." Guilbert, supra, 258. Accordingly, Amici propose that this Court should provide guidance to the lower courts that they may "rely on reliable scientific evidence that is generally accepted by experts in the community" to "either consider variables differently or entertain new ones." Id.

Second, like trace evidence, eyewitness identification testimony under the new framework would be presented and vetted in pretrial reliability hearings, where the initial burden to demonstrate reliability and admissibility is on the proponent of the evidence. See NAS Report at 109-110 (recommending pretrial judicial inquiry); Dickson, supra, 322 Conn. 444-47 (prescreening for in-court identifications). Expert testimony would be admissible during these hearings, in order to provide the trial court with a complete picture of the variables that affect reliability in each case.

Third, the new framework would emphasize the importance of science-based jury instructions, as well as the availability of limiting testimony where eyewitness identifications are admissible despite some elements of suggestiveness. See generally, Guilbert, supra.

¹⁵ Massachusetts Supreme Judicial Court Study Group on Eyewitness Identification, Report and Recommendations to the Justices at 16 (July 24, 2013), available at <http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf> ("Mass. Study Group Report").

In addition, the Court should take this opportunity to create, pursuant to its supervisory power,¹⁶ robust, carefully written jury instructions that are grounded in science,¹⁷ and to encourage trial judges to limit testimony to exclude material that is unduly prejudicial. See, e.g., Lawson, supra, 291 P.3d 695 (instructing lower courts to exclude “particularly prejudicial aspects of a witness’s testimony” and illustrating how science can inform the court on which aspects are, in fact, particularly prejudicial).

Finally, the new framework should require suppression of evidence obtained in material violation of the identification procedures that the Connecticut legislature has adopted in Public Act No. 12-111, An Act Concerning Eyewitness Identification Procedures. Where law enforcement fails to comply with these rules to a lesser degree, the jury should receive a modified Ledbetter instruction keyed to the particular failure to follow the law. The Court should also adopt instructions to be given in the event of failures to comply that jurors should “evaluate with particular care” any failure to follow recommended identification protocols.¹⁸ Jurors should also be advised that the failure to follow best practices “permits (but does not compel) them to conclude that the [state] has failed to prove [identity] beyond a reasonable doubt.”¹⁹

In light of the social science research and this Court’s established commitment to preventing wrongful convictions based on eyewitness misidentification, the Court should now also overrule Ledbetter in favor of a new legal framework that ensures that only reliable eyewitness identification evidence is admitted and that defendants have available a range of meaningful intermediate remedies that will prevent future wrongful convictions based on eyewitness misidentification.

¹⁶ Accord Dickson, 322 Conn. 410, 448-450 (2016).

¹⁷ Massachusetts and New Jersey’s revised jury instructions are illustrative. See Massachusetts Model Eyewitness Identification Instruction (November 2015), available at <http://www.mass.gov/courts/docs/courts-and-judges/courts/district-court/jury-instructions-criminal/6000-9999/9160-defenses-identification.pdf> and New Jersey Identification Jury Instruction (July 19, 2012), available at http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf.

¹⁸ See Massachusetts Model Eyewitness Identification Instruction, supra.

¹⁹ See Commonwealth v. DiGiambattista, 442 Mass. 423, 448 (2004).

Respectfully submitted,

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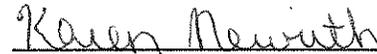
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CERTIFICATION

Pursuant to Conn. Prac. Bk. §§ 62-7 and 67-2 the undersigned certifies that the attached Amicus Curiae brief is the true copy of the electronically submitted Amicus Curiae brief, and that true copies were mailed first class postage prepaid this 3rd day of October 2016, to: The Honorable Brian T. Fischer, Superior Court, New Haven Superior Court, 235 Church Street, New Haven, CT 06510; Nancy Chupak, Assistant State's Attorney, Juris No. 415137, and Laurie N. Feldman, Assistant State's Attorney, Juris No. 434331, Office of Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Tel. (860) 258-5807, Fax: (860) 258-2828, DCJ.OCSA.Appellate@ct.gov; Karen A. Newirth, Senior Staff Attorney, NY Registration No. 4115903, The Innocence Project, Inc., 40 Worth Street, Suite 701, New York, NY 10013, Tel. (212) 364-5349, Fax: (212) 364-5363, knewirth@innocenceproject.org and to the defendant-appellant, Ernest Harris, #286874, Cheshire CI, 900 Highland Avenue, Cheshire, CT 06410

It also is certified that the brief complies with all the provisions of Conn. Prac. Bk. §67-2 including electronic delivery to all counsel of record.

The undersigned attorney hereby certifies that this brief does not contain any name or other identifying information that is prohibited from disclosure by rule, statute, court order or case law; and that the brief complies with all provisions of this rule pursuant to Conn. Prac. Bk. §67-2.



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