
**SUPREME COURT
OF THE
STATE OF CONNECTICUT**

S.C. 17707

STATE OF CONNECTICUT

v.

JVEIL OUTING

**AMICUS BRIEF AND APPENDIX ,
NEW ENGLAND INNOCENCE PROJECT**

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STATEMENT OF INTEREST OF THE AMICUS

New England Innocence Project ("NEIP") is a charitable trust and a 501(c)(3) tax-exempt organization, whose membership includes Boston-area law professors, lawyers, and members of Goodwin Procter, LLP. NEIP provides pro bono legal services to identify, investigate, and exonerate through the use of DNA-testing persons who have been wrongly convicted and imprisoned in the New England states, and it studies the causes of such convictions.

ARGUMENT

I. EXPERT TESTIMONY ON FACTORS AFFECTING THE ACCURACY OF EYEWITNESS IDENTIFICATIONS SHOULD BE PERMITTED AND ENCOURAGED

A. The Reliability of Eyewitness Testimony Is Beyond the Common Knowledge of an Average Juror

Eyewitness identification expert testimony is essential because jurors are generally unfamiliar with the factors that affect its reliability. The trial court's conclusion that certain factors regarding eyewitness identifications are within the common knowledge of lay people (T. 2/21/06 at 60-63, see *id.* at 27-29) is baseless. The amicus asks this Court to conclude that the factors affecting eyewitness identifications are not within jurors' common knowledge and to more widely permit expert testimony.

There is broad scientific consensus among research psychologists about eyewitnesses of which the public is largely ignorant. See Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of Experts*, 56 AM. PSYCHOL. 405, 412 (2001); see also Kassin et al., *The "General Acceptance" of Psychological Research on Eyewitness Testimony: A Survey of the Experts*, 44 AM. PSYCHOL. 1089 (1989). In the most recent study, Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 195 (2006), researchers surveying about 1000 potential jurors found that jurors' understanding of perception and memory fails at "even the most basic levels." See also Benton et al., *Eyewitness Memory Is Still Not Common Knowledge*, 20 J. APPLIED COGNITIVE PSYCHOL. 115 (2006). No published study concludes jurors have accurate

common knowledge about memory, perception, and the accuracy of eyewitness identifications.

The *Kemp* and *McClendon* courts' reliance on cross-examination as a replacement for expert testimony has also been undermined. See *State v. McClendon*, 248 Conn. 572 (1999); *State v. Kemp*, 199 Conn. 473 (1986). Cross-examination "cannot be viewed as an absolute assurance of accuracy and reliability," *United States v. Wade*, 388 U.S. 218, 228-29 (1967). Cross-examination is a good tool to ferret out dishonesty; it is a poor tool to examine an honest-but-mistaken witness, particularly one unaware of the subconscious effects of post-event information on his or her memory. See *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1125 (10th Cir. 2006) ("while cross-examination is often effective, expert testimony, when directed at complex issues, may provide a more effective tool for rebutting an eyewitness's testimony"); *United States v. Mathis*, 264 F.3d 321, 342 (3d. Cir. 2001) ("it is difficult to comprehend how weapons' destructive effect on memory might be elucidated through cross-examination"); LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 289-349 (4th ed. 2007) (discussing the limitations of cross-examination and advising practitioners); see also Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STET. L. REV. 727 (2007).

B. There Is a Research Consensus Regarding Jurors' Understanding of the Factors Affecting Eyewitness Identifications

When this Court first considered the admissibility of eyewitness testimony in *Kemp*, 199 Conn. at 477, it was largely unaware of extant research on the public's understanding of eyewitness identification. *Kemp's* brief mentioned LOFTUS, EYEWITNESS IDENTIFICATION (1979), but neither party cited other, then-existing studies that revealed profound misunderstandings about perception, memory, and eyewitness identifications. Still, the field of eyewitness identification research was still largely in its infancy in 1986.

Thirteen years later, the *McClendon* Court relied on *Kemp's* earlier survey of state and federal decisions, 248 Conn. at 589-90, to conclude that the various principles should come as "no surprise" to a juror, *id.* at 586-87. The Court again suggested that cross-examination and

closing argument were sufficient to educate jurors about weak identifications. *Id.* at 588. *But see id.* at 601-02. (Berdon, J., dissenting). However, during that interval, additional studies of juror knowledge had been published, only three of which were cited McClendon's brief. Many others that unanimously concluded that jurors' common sense ideas did not accurately reflect the factors affecting eyewitness identifications were not brought to the *McClendon* court's attention.

Since 1999, there has been a virtual explosion of eyewitness identification research and increasing acceptance of that research by states and the federal government. See e.g., DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999); NEW JERSEY ATTORNEY GENERAL, ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (Apr. 18, 2001); Fisher, *Eyewitness Identification Reform in Massachusetts*, 91:2 MASS. L. REV. 52 (2008). The scientific landscape has changed dramatically and has reached a consensus on many aspects of eyewitness identification research. See Kassin et al., *On the "General Acceptance of Eyewitness Testimony Research," supra*, at 412; see also Kassin et al., *The "General Acceptance" of Psychological Research on Eyewitness Testimony, supra*.

C. There Is Considerable Consensus Among Researchers Regarding the Effects of Stress and the Presence of a Weapon, and the Relationship Between Confidence and Accuracy

The State primarily disputes research showing, at best, a weak correlation between a witness' confidence and the accuracy of his or her identification of the actual culprit. (SBr. 13-14.) The amicus disagrees. Studies cited by the State do not contradict this research; they support it. In one study relied upon by the State (SBr. 11, 13), the study's *authors* wrote:

"[L]et us emphasize that [our findings] should not be construed as offering any encouragement for the use of any expression of eyewitness confidence in the courtroom as an index of likely accuracy. Our confidence data were obtained at the time of the identification and without any possibility of interaction with the lineup administrator. . . . In sum, our data in no way challenge the previously stated view that identification confidence expressed in the courtroom (and not previously recorded at the time of the identification) should be ignored.

Brewer & Wells, *The Confidence-Accuracy Relationship in Eyewitness Identifications*, 12 J.

EXPERIMENTAL PSYCHOL. APPLIED 11, 25 (2006). The *authors* of another study cited for the same point wrote “it would be wrong to infer that our data indicate that confidence predicts accuracy.” Berhman & Davey, *Eyewitness Identifications in Actual Criminal Cases: An Archival Study*, 25 LAW & HUM. BEHAV. 475, 486 (2001).

Moreover, academic studies showing a weak correlation between confidence and accuracy are performed under carefully monitored conditions, i.e., in a double-blind manner, often using a sequential method, with appropriate cautionary instructions. Academic researchers know with absolute certainty whether the culprit is present or absent in the procedure and whether the culprit was viewed by the witness.

In practice, fact-finders must determine whether the witness’ confidence, typically not contemporaneously recorded, has been artificially inflated by an explicit or implicit belief that the culprit is in the array, by subconscious cues by an administrator who knows which image is the suspect and the strength of the reasons behind selecting that suspect, and by post-procedure feedback, such as an officer indicating to a witness that he or she selected the police suspect. Expert testimony is necessary for the fact-finder to meaningfully evaluate the witness’ identification.

The effect of a weapon’s presence on a witness’ perceptions and memory is no ivory tower concern. A 2006 Justice Department study of 800 assaults on police discussed perception and memory for violent encounters between officers and offenders, and mistaken assumptions about perception and memory including perception distortions as a result of stress. DEP’T OF JUSTICE, VIOLENT ENCOUNTERS (2006). It specifically examined the weapon focus, i.e., situations in which trained police officers could describe in great detail the weapon that they had faced, but had greater difficulty accurately describing their assailant, and concluded perception and memory problems are rooted in the body’s biological response to stress. *Id.* at 67-69. Moreover, if, as the report indicates, perception and memory issues are not within law enforcement’s common knowledge, how can they be within the public’s common knowledge?

The State argues that Dr. Dysart’s testimony regarding the effects of stress and the

presence of a weapon is not relevant to this case because Crimley and Caple first saw the culprit riding his bicycle *before* they heard gunshots or saw a gun and became afraid. (SBr. 10-11, Exs. 31, 32, 37, 40.) There is no scientific basis to break up a short incident this way; the eye is not a camera; the brain does not make a series of memory “snapshots.” The witnesses made observations, encoded those perceptions into memory, and reconstructed that memory when they gave police statements. The stress of the shooting affected the entire memory. See *generally* Valentine & Mesout, *Eyewitness Identification Under Stress*, 22:6 APPLIED COGNITIVE PSYCHOL. ___ (2008) (discussing recent studies on stress’ effect on memory); Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT’L J. L. & PSYCHOL. 264 (2004) (stress’ effects on ability of soldiers to recognize guard and interrogator in simulated interrogations held for 30 minutes under good viewing conditions); Loftus & Burns, *Mental Shock Can Produce Retrograde Amnesia*, 10 MEMORY & COGNITION 318 (1982) (noting that upsetting incident affects memory of preceding events).

II. A NON-BLIND IDENTIFICATION PROCEDURE IS INHERENTLY SUGGESTIVE

Outing unsuccessfully moved to suppress the identifications made in his case because, *inter alia*, they were not performed in a double-blind, sequential manner. (T. 3/7/06 at 15-25.) Amicus agrees that an identification that is not made in a double-blind manner is inherently and significantly suggestive. See *State v. Davis*, 61 Conn. App. 621, 629-30 (2001) (show-up is inherently and significantly suggestive).

The Chief State’s Attorney’s Law Enforcement Council sought the benefits of double-blind procedures without recommending them: “Avoid using words, gestures, or expressions which could influence the witness’ selection. If practical, especially during a photo array, take a position where the witness cannot see you. If the witness makes an ID, refrain from making any comment on the witness’ selection.” Letter from Chief State’s Att’y Morano to Comm’r Boyle, Connecticut State Police (Sept. 23, 2005) (reproduced in appendix). The Appellate Court found as much in *Nunez*:

There is no question that the limited research presented by the defense favors

double-blind, sequential identification procedures. There is also little question that the limited research presented by the defendant shows that double-blind sequential procedures are less suggestive than the traditional procedure. . . . Given the limited number of studies on the subject, we are not convinced that, at the present time, that our state constitution requires us to adopt double-blind, sequential identification procedures because the traditional procedures are unnecessarily suggestive.

93 Conn. App. at 831-32; see also State's Brief, *State v. Nunez*, AC 24752, at 35 n.17.

The amicus believes that the *Nunez* court was mistaken; scientific research and common sense support adopting double-blind identification procedures. While more research may be needed before constitutionally requiring sequential identification procedures as a matter of law, see e.g., Carlson et al., *Lineup Composition, Suspect Composition and the Sequential Lineup Advantage*, 14 J. EXPERIMENTAL PSYCHOL. APPLIED 118 (2008), double-blind procedures have already been adopted by law enforcement on its own, or pursuant to executive order or legislative action. But voluntary adoption by law enforcement is inconsistent and unreliable. Fisher, *supra*, at 65 (analysis in Boston and Middlesex County (MA) identification procedures showed only 50% of Boston photo identifications and only 18% of those in Middlesex were documented as blind, and no Boston identifications and only 54% of those in Middlesex were sequential despite policies requiring or urging blind sequential identification).

If this Court concluded that non-blind procedures are inherently suggestive, they would not be automatically inadmissible. Instead, like show-ups, they would be disfavored absent exigent circumstances. *State v. DeJesus*, 7 Conn. App. 309, 315 (1986). A defendant would still have to show the procedure was unnecessarily suggestive and that it was unreliable under the *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) factors. If the witness has been exposed to a suggestive procedure, the trial court, and this Court should be aware that the suggestion can affect the witness' memory of his or her confidence, attention to the suspect, and even the length of time he or she observed the suspect. Douglas & Steblay, *Memory Distortion in Eyewitness: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 857 (2006); Wright & Skagerberg, *Postidentification Feedback Affects Real Eyewitnesses*, 18 PSYCHOL. SCI. 172 (2007); see also Wells & Quinlivan, *Suggestive*

Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, 31 LAW & HUM. BEHAV. ___ (2007); O'Toole & Shay, *Manson v. Brathwaite Revised: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VALPARAISO L. REV. 109, 121-22 (2006).

If this Court concludes that the trial court was within its discretion to deny Outing's suppression motion, the amicus urges this Court to add to its *Ledbetter* instruction the language warning the jury about the risk that an administrator who knows who the witness is expected to identify may innocently and inadvertently influence the witness' answer without either he, or the witness being aware of said influence. See *State v. Ledbetter*, 275 Conn. 524, 579-80 (2005); see also *Commonwealth v. DiGiambattista*, 442 Mass. 423, 813 N.E.2d 516 (2004) (giving jury instruction intended to encourage law enforcement to record custodial interrogations). In addition, this Court should permit testimony by eyewitness identification experts to explain the science regarding identification procedures so that jurors can more fully evaluate a witness' testimony.

III. THE "ILLINOIS STUDY" DOES NOT PROVIDE A VALID SCIENTIFIC BASIS FOR QUESTIONING SEQUENTIAL DOUBLE-BLIND LINEUPS

The State refers this Court to a 2006 Illinois study that attempted to compare traditional simultaneous lineups administered by an officer who knows which person was the suspect, with the sequential, double-blind procedures advocated by researchers. (See SBr. 30-31.) The State ignores published criticisms of the study's methods and conclusions. The amicus urges this Court to disregard the Illinois study as fundamentally flawed and to consider instead the favorable experiences of states like New Jersey, some Massachusetts jurisdictions, and some Canadian police departments with double-blind sequential procedures. See Fisher, *supra*; *Regina v. Hibbert*, 2 S.C.R. 445 (2002); CORY, THE INQUIRY REGARDING THOMAS SOPHONOW (2001). British and French lineups have long been blind. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 58 (1960); WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 46 (1965). This method is not mere researcher theory—it is successfully used by many police departments.

Researchers have long advocated replacing traditional lineups and photo arrays, in

which the witness is simultaneously shown a suspect and a series of fillers by a police officer who knows which person is the suspect (simultaneous non-blind procedures), with a procedure in which an officer who does not know who the suspect is (or who cannot see which pictures the witness is viewing) shows a series of images or persons to the witness one at a time (double-blind sequential procedures). See generally Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998). This procedure guards against unconscious, non-verbal cues from the lineup or array administrator and against using relative judgment (picking the person in the lineup or array who looks most like the actual culprit). As a result of eyewitness identification studies, Illinois enacted explicit requirements that a witness be warned that a suspect may not be in a lineup or array, and the state now has specific requirements about how fillers must be chosen. 725 ILL. COMP. STAT. 5/107A. (Neither protection is required in Connecticut.)

A 2005 study in Hennepin County (MN) confirmed lab predictions regarding the advantages of sequential double-blind procedures over traditional procedures. See Klobuchar & Caligiuri, *Protecting the Innocent/Convicting the Guilty: Hennepin County's Pilot Project in Blind Sequential Eyewitness Identifications*, 32 WM. MITCHELL L. REV. 1 (2005); Klobuchar et al., *Symposium: Reforming Eyewitness Identification*, 4 CARDOZO PUB. L. POL'Y & ETHICS 381 (2006). Under sequential double-blind procedures, the number of filler identifications decreased significantly, while the number of suspect identifications was virtually identical to that predicted by labs. *Id.*

The 2006 Illinois Pilot Program ("the Illinois Study") reported that contrary to expectations, the traditional procedure resulted in a higher suspect identification rate and a lower non-suspect ("filler") selection rate than sequential double-blind procedures. MECKLENBURG, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES 38–46 (2006) ("the Illinois Report"). Thus, the Illinois Study concluded that sequential double-blind procedures were not superior to traditional procedures and in some ways were actually inferior. *Id.* at 47. Unfortunately, the Illinois Study was flawed in both its design and implementation, making its results scientifically unreliable.

A. The Blind/Non-Blind Confound Makes the Results Inherently Unreliable

The Illinois Study uses the identification of the police suspect to indicate that the witness has identified the actual culprit. It asserts that some of the suspects were independently corroborated as culprits, and none were refuted, but it does not describe its method for doing so. See Illinois Report, *supra*, at iii. Compare Behrman & Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 479-80 (2001). The Illinois Study does not measure accuracy; it simply measures the correlation between who the witness says committed the crime and who the police *think* committed the crime. An identification may be considered “correct” even if the suspect is actually innocent. See LOFTUS ET AL., *supra*, at 100-01; Wells, *Field Experiments on Eyewitness Identification: Towards a Better Understanding of Pitfalls and Prospects*, 32 LAW & HUM. BEHAV. 6, 7 (2008); STATE OF WISCONSIN OFFICE OF THE ATTORNEY GENERAL, RESPONSE TO CHICAGO REPORT ON EYEWITNESS IDENTIFICATION PROCEDURES 4 (2006); see also Ross & Malpass, *Moving Forward: Response to “Studying Eyewitness Investigations in the Field*, 32 LAW & HUM. BEHAV. 16, 19 (2008).

More significantly, the Illinois Study tried to test two variables simultaneously, comparing traditional, non-blind simultaneous procedures to double-blind sequential procedures. Illinois Report, *supra*, at iii. This approach created a confounding variable and made a valid comparison of the two lineup methods impossible. The “confound” was that sequential procedure administrators were blind, whereas simultaneous procedure administrators were not—those conducting the traditional tests knew the identity of the suspect and fillers in each photo array. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 LAW & HUM. BEHAV. 3, 4 (2008). This confound taints the results because identifications using simultaneous procedures might have resulted from administrator bias and influence, even inadvertent or unintentional, rather than to lineup method. *Id.*; see also Wells, *Field Experiments*, *supra*, at 7; Sullivan, *Efforts to Improve the Illinois Capital Punishment System: Worth the Cost?*, 41 U. RICH. L. REV. 935, 945 (2007). Interestingly, in two cities (Chicago and Evanston) *not a single* witness using the traditional method picked a filler instead of the police suspect. This astonishing result

compares with an average filler selection rate of 20.5% in other simultaneous procedure studies, Wells, *Field Experiments*, *supra*, at 8, and suggests subconscious administrator bias. *But see* MECKLENBURG, ADDENDUM TO THE REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES 7 n.3 (2006).

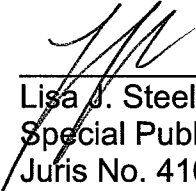
The confound precludes reliance on the results of the Illinois Study because there is no way to determine whether they are due to the differences between sequential and simultaneous procedures, differences between blind and non-blind administrators, or some combination thereof. See STATE OF WISCONSIN OFFICE OF THE ATTORNEY GENERAL, *supra*, at 4; Ross & Malpass, *supra*, at 17. It has “devastating consequences for assessing the real-world implications of this particular study.” Schacter et al., *supra*, at 4.

B. Field Testers Did Not Follow Protocol, and Possibly Skewed the Results

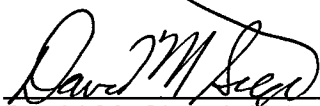
The results of the Illinois Study are also questionable because field testers diverged from its official protocol in significant ways. See Ross & Malpass, *supra*, at 18. Officers administering traditional procedures failed to report “tentative” filler identifications. This shows that (1) there actually *were* filler selections for simultaneous procedures, thus undermining the basis of the Study’s ultimate conclusion, and (2) non-blind officers may have actually *caused* the witnesses’ tentativeness by influencing their confidence levels after their selection through their feedback. Wells, *Field Experiments*, *supra*, at 8. Additionally, in Chicago, testing was not performed randomly. One testing site performed exclusively traditional procedures and the other performed exclusively double-blind sequential procedures. Results thus could have been due to differences in the testing sites and the administrators at each, rather than by differences in the lineup methods. *Id.* at 9. These deviations are not innocuous; they are actually quite harmful because “[w]ithout knowing that the protocol is implemented as directed, we cannot know whether the differences attributable to the protocol or some deviation from it.” *Id.* at 19.

This Court should not rely on the Illinois Study’s results in its analysis.

Respectfully submitted
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The Amicus
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CERTIFICATION

Pursuant to Practice Book § 62-7, the undersigned certifies that this brief complies with Practice Book § 67-2.



Lisa J. Steele, Esq.

S.C. 17707

STATE OF CONNECTICUT

v.

JVEIL OUTING

SUPREME COURT

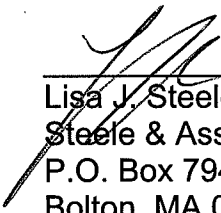
STATE OF CONNECTICUT

September 29, 2008

CERTIFICATE OF SERVICE

Pursuant to Practice Book § 62-7, this certifies that a copy of the Amicus Brief in the above-captioned case was mailed first class, postage prepaid this 29th day of September, 2008 to: The Honorable Joseph A. Licari, Jr., c/o trial court clerk, New Haven Superior Court, 235 Church St., New Haven, CT 06510; and to Attorney Nancy L. Chupak, Esq., Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067.

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