

No. 05-9500

**In the
Supreme Court of the United States**

LAQUAN LEDBETTER,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

**On Petition for Writ of Certiorari to the
Supreme Court of the State of Connecticut**

**BRIEF OF NEIL VIDMAR, BRIAN BORNSTEIN, JOHN
BRIGHAM, EDWARD J. BRONSON, BRIAN L. CUTLER,
KENNETH DEFFENBACHER, PHOEBE C. ELLSWORTH,
SOLOMON FULERO, VALERIE P. HANS, HARMON M.
HOSCH, SAUL KASSIN, ROD LINDSAY, ELIZABETH
LOFTUS, ROY S. MALPASS, CHRISTIAN MEISSNER,
STEVEN D. PENROD, J. DON READ, NANCY K.
MEHRKENS STEBLAY, JOHN TURTLE, GARY L.
WELLS, And RICHARD WIENER AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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**MOTION OF NEIL VIDMAR, ET AL. AS *AMICI CURIAE* FOR
LEAVE TO FILE THE ACCOMPANYING *AMICUS* BRIEF IN
SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI**

Pursuant to Rule 37(b) of the Rules of this Court, Neil Vidmar, Brian Bornstein, John Brigham, Edward J. Bronson, Brian L. Cutler, Kenneth Deffenbacher, Phoebe C. Ellsworth, Solomon Fulero, Valerie P. Hans, Harmon M. Hosch, Saul Kassin, Rod Lindsay, Elizabeth Loftus, Roy S. Malpass, Christian Meissner, Steven D. Penrod, J. Don Read, Nancy K. Mehrkens Steblay, John Turtle, Gary L. Wells, and Richard Wiener, as *amici curiae*, request leave to file the accompanying *amicus* brief in support of the petition for a writ of certiorari.¹ Consent to file this brief was requested from both parties. The Petitioner consented. The Respondent would take no position.

Amici curiae are university professors who have conducted research on eyewitness identification or who otherwise have had relevant experience with the problems of eyewitness identification. Their brief summarizes the findings from eyewitness identification research and highlights the considerable problems lower courts, law enforcement officials, and state legislatures have had with the application of the eyewitness admissibility criteria established in *Neil v. Biggers*, 409 U. S. 188 (1972) and *Manson v. Brathwaite*, 432 U. S. 98 (1976). The *amici curiae* believe that their brief presents relevant matters not already brought to the Court's attention by the parties.

¹ Brief biographies of the *amici curiae* are presented in Appendix A of the accompanying brief.

Therefore, the *amici curiae* respectfully request that this Court grant them leave to file the accompanying brief.

Respectfully submitted,

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INTEREST OF AMICI CURIAE¹

Amici Curiae are university professors who have conducted research on eyewitness identification or otherwise have had relevant experience with the problems of eyewitness identification. The interest of these amici is to provide the Court with an accurate summary of findings from this research and to highlight the struggle of lower courts, law enforcement officials, and state legislatures to deal with the serious problems associated with the level of certainty criterion established in *Neil v. Biggers*, 409 U.S. 188 (1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977). Short biographies of the amici are set out in Appendix A.

SUMMARY OF ARGUMENT

This Court is familiar with the substantial role that eyewitness testimony plays in wrongful convictions. *See United States v. Wade*, 388 U.S. 218, 228 (1967). In *Neil v. Biggers*, 409 U.S. 188 (1972), the Court noted that “[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification.” *Id.* at 198. Nevertheless, the Court refused to prohibit *per se* eyewitness identifications that are the product of unnecessarily suggestive procedures. *Id.* at 198–99. Rather, *Biggers* established a five-factor test to evaluate the reliability of such identifications: (1) opportunity to view the criminal at the time of the crime, (2) degree of attention, (3) accuracy of the prior description of the criminal, (4) level of certainty demonstrated

¹ Amici curiae have moved for leave to file this brief. No person or entity other than Amici or their counsel made a monetary contribution to this brief. Amici are grateful to Duke University School of Law students Amanda C. Brown, Michael P. Goodman, Ph.D, Brian D. Hurley, Michael T. Rosenberg, and Matthew W. Wolfe for their invaluable contributions to this brief.

at the confrontation, and (5) the length of time between the crime and the identification at issue. *Id.* at 199-200.

The *Biggers* certainty factor has no scientific basis. Rather, it was the product of the Court's "common sense" intuition about what factors likely enhanced the reliability of eyewitness identifications. Experience and science have shown that the Court's intuition was wrong. Scientific research has demonstrated conclusively that the eyewitness certainty, or confidence, criterion is misleading and unreliable, and often leads to mistaken identifications. The inadequacy of the *Biggers* standard affects both the pretrial and trial stages of a criminal case. The certainty factor misdirects law enforcement officials, bolsters the confidence of other witnesses, and contributes to the over-reliance of jurors and many judges on eyewitness testimony. States are struggling to reconcile the unbridgeable chasm between what is scientifically sound and what *Biggers* requires.

Several states have circumvented the flawed *Biggers* standard altogether by addressing the problem of eyewitness testimony through interpreting their own constitutions.

Some states whose constitutions could not be interpreted to avoid *Biggers* have sought to blunt the effect of eyewitness testimony admitted under that standard by permitting experts to testify about the scientifically demonstrated unreliability of such testimony.

Other jurisdictions are trying to address the problem of eyewitness identifications at the investigative stage of criminal cases. The United States Department of Justice and the states of Illinois, New Jersey, North Carolina, and Texas established commissions that recommended scientifically based procedures for conducting lineups to limit erroneous identifications. Wisconsin has adopted and others are

considering legislation that will mandate the use of such procedures by law enforcement officials.

A constitutional standard that “has proven to be intolerable simply in defying practicable workability” has outlived its usefulness. *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992). As the Petition argues, the highly suggestive “street show-up” used to identify Petitioner in this case and the Connecticut Supreme Court’s recognition of the inadequacy of the *Biggers* factors make this an especially appropriate case in which to reexamine those criteria. In the face of thirty years of scientific evidence that *Biggers* is wrong, the Court has a duty to act.

ARGUMENT

I. Mistaken Eyewitness Identification Is a Major Cause of Wrongful Convictions.

This Court has long recognized that the “vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identifications.” *United States v. Wade*, 388 U.S. 218, 228 (1967). But not even this Court imagined the prevalence of wrongful convictions or the full extent to which misidentifications contributed to them. The U.S. Department of Justice (“DOJ”) found ten years ago that eyewitness misidentifications were to blame for dozens of wrongful convictions. See U.S. Dep’t of Justice, National Institute of Justice, *Convicted By Juries, Exonerated By Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996). In its study of twenty-eight cases of defendants who were later exonerated by DNA evidence, the DOJ found that “eyewitness testimony was the most compelling evidence. Clearly, however, those eyewitness identifications were wrong.” *Id.* at 24. This troubling finding “points conclusively to the need in the legal system

for improved criteria for evaluating the reliability of eyewitness identification.” *Id.* Specifically, the report suggested that the *Biggers* test has outlived its utility and should be replaced with a standard that embodies the findings of contemporary science. *See id.* In a follow-up analysis of forty DNA exoneration cases, mistaken identifications were discovered in thirty-six of them (ninety percent). Gary L. Wells, Mark Small, Steven Penrod, Roy S. Malpass, Solomon M. Fulero & C. A. E. Brimacombe, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *Law & Hum. Behav.* 603 (1998). The fact that such an overwhelming majority of these cases involved mistaken identifications “lends support to the argument that eyewitness identification evidence is among the least reliable forms of evidence and yet is persuasive to juries.” *Id.* at 605.

A more recent study of 172 DNA exoneration cases found that seventy-five percent featured convictions that were at least partially supported by eyewitness testimony. Innocence Project, *Facts on DNA Exoneration Cases*, available at http://www.innocenceproject.org/docs/DNA_Exoneration_Facts_WEB.pdf (last visited March 31, 2006).

Because mistaken identifications contribute so frequently to wrongful convictions, the criteria for assessing the reliability of eyewitness identifications must be re-examined. The need to do so is urgent. The criteria for determining the reliability of eyewitness testimony should be based only upon scientifically valid factors. Unfortunately, the *Biggers* certainty factor is contraindicated by scientific research. It should be overturned.

II. The Standard Established in *Neil v. Biggers* For Determining the Reliability of Eyewitness Testimony Is Inconsistent With Thirty Years of Scientific Research

A. The *Biggers* certainty factor has no scientific basis.

1. The *Biggers* certainty factor is the product of widely held but erroneous assumptions about what makes eyewitness testimony reliable.

In 1967 three decisions came down regarding the admissibility of eyewitness identifications following a suggestive pre-trial identification. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967). The *Biggers* test was based upon these three cases. The foundation of the cases was the Court's acknowledgment of the "high incidence of miscarriage of justice" caused by mistaken eyewitness identifications. *Wade*, 388 U.S. at 228. The Court recognized that a suggestive pre-trial identification can taint later identifications. *Id.* at 229. Thus, it held that where there has been a suggestive pretrial identification, any subsequent in-trial identification must have an independent source to be admissible. *Id.* at 241. In applying this test, the Court suggested several factors to be considered:

for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

Id. Although the Court did not attribute this list of factors to any source, they represent six of the twelve "danger factors"

suggested by Patrick M. Wall, *Eye-Witness Identification in Criminal Cases*, 90–130 (Charles C Thomas 1965), a book referenced repeatedly throughout the *Wade* opinion, 388 U.S. 218 *passim*.

In *Biggers*, the Court established a *Wade*-like test for pre-trial identifications, based only in part upon the *Wade* factors:

As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

409 U.S. at 199–200. The certainty factor included in this test did not originate in *Wade*. Indeed, in the past, the Court had made only casual mention of an eyewitness's certainty about an identification: "Notwithstanding cross-examination, none of the witnesses displayed any doubt about their respective identifications of Simmons," *Simmons v. United States*, 390 U.S. 377, 385 (1968). None of the Court's previous cases concerning the reliability of eyewitness identifications had listed certainty as a factor. *Biggers* was the first case to do so.

Ironically, the introduction of certainty as a factor in *Biggers* conflicts with the very foundation of *Wade*: the recognition that an eyewitness was unlikely to "go back on his word" once he had identified the defendant. *Wade*, 388 U.S. at 229, (citing Glanville Williams & H. A. Hammelmann, *Identification Parades – I*, [1963] *Crim. L. Rev.* 479, 482). In fact, the scientific source of the *Wade* factors warns that an eyewitness "may be subjected to so many suggestive

influences by the police that at the trial he will make ‘a positive identification which no amount of subjective cross-examination will be able to shake.’” Patrick M. Wall, *Eye-Witness Identification in Criminal Cases*, 15–16 (citing *The Case Against Personal Identification*, 13 *Fortnightly L.J.* 87 (1943)).

2. Scientific research has established that the *Biggers* certainty factor is unsuitable for determining the reliability of eyewitness testimony.

In the more than three decades since *Biggers*, peer-reviewed journals have published hundreds of scientific studies on the accuracy of eyewitness identification. These studies show that the correlation between eyewitness confidence and accuracy is at best a weak relationship and contingent on any number of situational factors, some of which can be manipulated, even unintentionally, by police or other witnesses. The inescapable conclusion is that using eyewitness confidence as a criterion for reliability can result in: innocent persons being identified as perpetrators; police and prosecutors being thrown off the track of the actual culprit; and jurors being swayed by unreliable evidence.

Elizabeth Loftus, *Eyewitness Testimony* (Harvard Univ. Press 1979), summarized a series of studies conducted up to 1979 that in turn generated a whole field of scholarship devoted to the subject. A subsequent text, Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (Cambridge Univ. Press 1995), listed over 2000 articles and reports investigating the factors influencing eyewitness identification accuracy. Penrod and Cutler summarized the conclusions of those studies as follows:

[U]nder the conditions that typically prevail in short

criminal encounters between victim-witnesses and perpetrators, witness confidence in ability to identify a perpetrator (prelineup confidence) is largely unrelated to accuracy, and confidence in having made a correct identification is, at best, only modestly associated with identification accuracy.

Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing their Forensic Relation*, 1 Psychol. Pub. Pol'y. & L. 817, 825 (1995). A more recent review of the research findings leads to the same conclusion, namely that eyewitness confidence is a poor predictor of accuracy. See Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Annual Review of Psychology 277 (2003).

Meta-analysis is a scientific technique widely used to examine the consistency of findings across a collection of many experiments and studies. A number of meta-analytic review articles have examined factors affecting eyewitness unreliability.

One review analyzed thirty studies demonstrating a consistently low relationship between confidence and accuracy. Siegfried Ludwig Sporer, Steven Penrod, Don Read & Brian Cutler, *Choosing, Confidence, and Accuracy: A Meta-analysis of the Confidence-accuracy Relation in Eyewitness Identification Studies*, 118 Psychological Bulletin 315 (1995). For eyewitnesses who voluntarily choose a suspect, this relationship is stronger. Subsequent analyses are consistent with these conclusions. Another review concluded that biased instructions reduce accuracy when suspects are innocent without increasing the identification of guilty suspects. Amy Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-identification Feedback Effect*, Applied Cognitive Psychol.

(forthcoming 2006). One study suggested that biased instructions may slightly increase the chances of identifying guilty suspects, but it did not contradict the Steblay conclusion that biased lineup procedures are likely to result in innocent persons being misidentified as the perpetrator. Steven Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 *Law & Hum. Behav.* 575 (2005). A 2004 study examined a large number of studies bearing on stress and accuracy, leading those authors to conclude, “we have adduced considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details.” Kenneth A. Deffenbacher, Brian H. Bornstein, Steven D. Penrod & Kieran E. McGorty, *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 *Law & Hum. Behav.* 687, 699 (2004). Finally, the Douglass & Steblay review demonstrated the consistency of the finding that eyewitnesses’ confidence is affected by feedback that does not improve their accuracy. Nancy Mehrkens Steblay, *Social Influence on Eyewitness Recall: A Meta-analytic Review of Lineup Instruction Effects*, 21 *Law & Hum. Behav.* 283 (1997).

In short, there is a high degree of consistency across many studies demonstrating conclusively that there is only a weak relationship between confidence and accuracy. In the absence of other evidence, when eyewitnesses state they are confident in their identification of a suspect, there is a considerable likelihood that they are wrong.

Moreover, the relationship between confidence and accuracy is actually alterable in predictable ways by the investigation and trial process. A number of situational factors can adversely transform this relationship. Gary L. Wells, Elizabeth A. Olson & Steve D. Charman, *The Confidence of Eyewitnesses in Their Identifications From*

Lineups, 11 *Current Directions in Psychol. Sci.* 151 (2002). This makes sense when one considers the various reasons a person might have confidence in his or her testimony. For example, when an eyewitness has ample time to view a suspect, it might be expected that both accuracy and confidence would be high. Likewise, when an eyewitness glimpses a suspect for only a brief moment, one would expect both confidence and accuracy to be low. Research supports these hypotheses, finding a high relationship between confidence and accuracy when comparing across wide ranges of exposure to a suspect. Don J. Read, John R. Vokey & Richard Hammersley, *Changing Photos of Faces: Effects of Exposure Duration and Photo Similarity on Recognition and the Accuracy-Confidence Relationship*, 16 *J. of Experimental Psychol.: Learning Memory and Cognition* 870 (1990).

However, the relationship between confidence and accuracy deteriorates in situations analogous to real-world cases. When factors other than eyewitness testimony are known, an eyewitness's confidence very often does not provide additional valuable information. In contrast to the other *Biggers* factors, eyewitnesses' confidence in their identification is subject to dramatic alterations by influences other than the witnessed event. Indeed, there are many factors that can increase confidence without improving accuracy.

The first factor which, in practice, is likely to increase an eyewitness's confidence is police interrogation. Detectives commonly give eyewitnesses feedback (consciously or subconsciously) about whether an identification fits the theory of the case. When eyewitnesses are given confirmatory feedback about an identification, confidence in the identification goes up, but its accuracy does not. Carl Martin Allwood, Jens Knutsson & Pär Anders Granhag, *Eyewitnesses Under Influence: How Feedback Affects the Realism in*

Confidence Judgments, 12 Psychol. Crime & L. 25 (2006). Later discussions with prosecutors also can raise eyewitnesses' confidence in an identification. This is because repeated questioning alone leads to higher confidence over time. John S. Shaw III, *Increases in Eyewitness Confidence Resulting from Postevent Questioning*, 2 J. of Experimental Psychol.: Applied 126 (1996); John S. Shaw III & Kimberly A. McClure, *Repeated Postevent Questioning Can Lead to Elevated Levels of Eyewitness Confidence*, 20 Law & Hum. Behav. 629 (1996). Additionally, when eyewitnesses are placed in situations where social pressure or incentive to perform correctly is high, they try especially hard to "get it right"; the result is that their confidence in the identification is higher, without being more accurate. John S. Shaw III & Tana K. Zerr, *Extra Effort During Memory Retrieval May Be Associated With Increases in Eyewitness Confidence*, 27 Law & Hum. Behav. 315 (2003).

One meta-analysis demonstrates that giving eyewitnesses confirmatory feedback has reliable and robust effects on their assessment of the witnessed event, including their assessment of their confidence, attention to the suspect, and even the length of time they viewed the suspect. Amy Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-identification Feedback Effect*, Applied Cognitive Psychol. (forthcoming 2006).

Thus, as an eyewitness gets closer to making an identification, the relationship between confidence and accuracy is likely to get weaker, rather than stronger. Multiple studies have consistently failed to find ways to improve this relationship. See, e.g., Michael D. Robinson and Joel T. Johnson, *How Not to Enhance the Confidence-Accuracy Relation: The Detrimental Effects of Attention to the Identification Process*, 22 Law & Hum. Behav. 409 (1998). For example, though collaborating with another witness has

been found to be associated with both higher confidence as well as higher accuracy, Carl Martin Allwood, Pär Anders Granhag & Marcus Johansson, *Increased Realism in Eyewitness Confidence Judgments: The Effect of Dyadic Collaboration*, 17 *Applied Cognitive Psychol.* 545 (2003), this relationship was found to be lower when identifications were made in public, John S. Shaw III, Tana K. Zerr & Keith A. Woythaler, *Public Eyewitness Confidence Ratings Can Differ From Those Held Privately*, 25 *Law & Hum. Behav.* 141 (2001). The general finding of this research is that confidence is a poor predictor of accuracy, and it likely will become even less reliable under the conditions specific to a trial.

There is a high degree of scientific consensus regarding the foregoing research. In 2001, sixty-four scientists who had conducted research on eyewitness reliability were surveyed; a majority of the experts had testified in court about the reliability of eyewitness identifications. Eighty-seven percent of these experts believed it was proper to offer testimony that “an eyewitness’s confidence is not a good predictor of his or her identification accuracy.” Saul M. Kassin, Anne V. Tabb, Harmon M. Hosch & Amina Memon, *On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts*, 56 *Am. Psychologist* 406, 408 [table] (2001); *see also* Saul M. Kassin, Phoebe C. Ellsworth & Vicki L. Smith, *The “General Acceptance” of Psychological Research on Eyewitness Testimony: A Survey of the Experts*, 44 *Am. Psychologist* 1089 (1989).

To summarize, a large body of scientific research over the last thirty years has convincingly established that the “common sense” *Biggers* criterion of eyewitness certainty is unsuitable for determining the reliability of eyewitness testimony.

B. The continued use of the *Biggers* certainty factor adversely affects the pretrial, trial, and appellate stages of a criminal case.

Consideration of eyewitness certainty as a significant factor in determining the reliability of eyewitness testimony adversely affects all stages of a criminal case. Because the factor does not correlate with accuracy, as laypeople intuitively assume, its use likely contributes to false positive identifications as well as false negative identifications.

At the pretrial stage of the case, the *Biggers* certainty factor shapes decisions about what to investigate, what not to investigate, and whether to prosecute. Whenever an identification is made, police routinely are instructed to document the confidence level of the eyewitness. Michael S. Wogalter, Roy S. Malpass & Dawn E. McQuiston, *A National Survey of U. S. Police on Preparation and Conduct of Identification Lineups*, 10 *Psychol. Crime & L.* 69, 74 (March 2004). This may lead the police to abandon some avenues of investigation because an eyewitness candidly admits to some degree of uncertainty about what was witnessed. On the other hand, eyewitnesses who expresses a high degree of certainty may misdirect law enforcement officials who assume, contrary to scientific fact, that their certainty equates strongly with accuracy. Such misdirected investigations frequently lead to wrongful convictions. Because of the high stakes involved in documenting the level of eyewitnesses' certainty that their identification is accurate, some law enforcement officials have balked at the requirement that they record such information. *See, e. g.,* Andrea Weigl, *Lineup process rankles DAs; They say question unsettles witnesses*, *The News & Observer*, February 22, 2006, at A1.

In cases that depend heavily upon the testimony of an eyewitness, prosecutors may decide not to charge the actual perpetrator because an eyewitness cannot express a high degree of certainty. Conversely, a prosecutor may pursue a case primarily because of the eyewitness's certainty about an identification, and ignore other evidence that raises doubt.

At the trial stage of the case, a court often will preferentially admit the testimony of highly certain eyewitnesses. Such decisions exacerbate the intuitive over-reliance of judges and jurors on eyewitness testimony. Gary L. Wells, R.C. Lindsay & T.J. Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. of Applied Psychol. 440 (1979).

While laypersons' common sense intuitions sometimes are consistent with scientific research, often their intuitions are far off the mark. For example, laypersons do not give proper weight to eyewitness identifications in comparison to other evidence. John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identification*, 7 Law & Hum. Behav. 19 (1983). Instead, jurors are likely to give more weight to eyewitness testimony than is justified. See, e.g., C.A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. of Applied Psychol. 714 (1994); Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 Law & Contemp. Probs. 133,160-166 (1989); Kenneth A. Deffenbacher & Elizabeth F. Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?*, 6 Law & Hum. Behav. 15 (1982); A. Daniel Yarmey & Hazel P. Tressillian Jones, *Is the Psychology of Eyewitness Identification a Matter of Common Sense?*, in *Evaluating Eyewitness Evidence* 13 (Sally M.A. Lloyd-Bostock & Brian R. Clifford, eds., 1983).

In a series of experiments, Wells & Lindsay consistently found that jurors placed a great deal of weight specifically on the confidence with which the eyewitness identified the defendant, despite the unreliability of this factor. Gary L. Wells & R.C.L. Lindsay, *How do People Infer the Accuracy of Eyewitness Memory? Studies of Performance and a Metamemory Analysis*, in *Evaluating Eyewitness Evidence* 41 (Sally M.A. Lloyd-Bostock & Brian R. Clifford, eds., 1983); R.C.L. Lindsay, Gary L. Wells & Fergus J. O'Connor, *Mock-juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension*, 13 *Law & Hum. Behav.* 333 (1989).

Similarly, some judges, misguided by their common sense assumptions, deny motions to allow expert witnesses or refuse to issue cautionary jury instructions. *See, e.g., United States v. Thevis*, 665 F.2d 616, 641 (5th Cir. 1982) (concluding that “jury can adequately weigh these problems through common-sense evaluation”); *State v. Guzman*, 2006 UT 12. Finally, the presence of a highly confident eyewitness in the case may lead other witnesses to overstate their own confidence, believing the defendant identified by the eyewitness in fact must be the perpetrator. Luus & Wells, *supra*.

In reviewing convictions based largely upon eyewitness testimony, appellate judges long have expressed unease with the role the certainty factor plays in determining the reliability of eyewitness identifications. For example, the Arizona Supreme Court said:

The last variable in this case concerns the question of confidence and its relationship to accuracy. Dr. Loftus’ testimony and some experimental data indicate that there is no relationship between the confidence which a witness has in his or her identification and the actual accuracy of that identification.... We cannot

assume that the average juror would be aware of the variables concerning identification and memory about which Dr. Loftus was qualified to testify.

State v. Chapple, 660 P.2d 1208, 1221 (1983) (footnote omitted). *See also, United States v. Hall*, 165 F.3d 1095, 1118 (7th Cir. 1999) (“Jurors who *think* they understand how memory works may be mistaken, and if these mistakes influence their evaluation of testimony then they may convict innocent persons.”) (Easterbrook, Circuit Judge, concurring). Other appellate courts simply downplay the certainty factor in affirming a conviction because it is influenced by the suggestive procedure itself. *See United States v. Rogers*, 387 F.3d 925, 938 (7th Cir. 2004). Unlike the other four elements of the *Biggers* test, the eyewitness’s degree of certainty can be recorded only after the suggestive procedure has been used. Thus, the eyewitness’s degree of certainty can be “engendered by the suggestive element itself.” *Abdur Raheem v. Kelly*, 257 F.3d 122, 139 (2d Cir. 2001).

C. Some jurisdictions have taken extraordinary ad hoc measures to bridge the chasm between what is scientifically sound and what is required by *Biggers*.

Massachusetts, New York and Wisconsin have relied upon their state constitutions to adopt *per se* rules that exclude all eyewitness testimony obtained using unnecessarily suggestive procedures. *Commonwealth v. Johnson*, 650 N.E.2d 1257 (Mass. 1995); *People v. Adams*, 423 N.E.2d 379 (N.Y. 1981); *State v. Dubose*, 699 N.W.2d 582 (Wisc. 2005). Michigan and Utah have adopted *Biggers*-like tests under state constitutional standards that specifically exclude the consideration of the objectionable certainty factor. *People v. Gray*, 577 N.W.2d 92 (Mich. 1998); *State v. Long*, 721 P.2d 483 (Utah 1986).

Both federal and state courts have admitted expert testimony to counteract the erroneous assumptions underlying the *Biggers* certainty criterion. See *Commonwealth v. Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997) (citing the “significant doubt about whether there is any correlation between a witness’s confidence in his or her identification and the accuracy of her recollection”); see also *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000); *United States v. Moore*, 786 F.2d 1308 (5th Cir. 1986); *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973); *United States v. Hines*, 55 F. Supp. 2d 62 (D. Mass. 1999); *People v. McDonald*, 690 P.2d 709 (Cal. 1984); *Reed v. State*, 687 N.E.2d 209 (Ind. Ct. App. 1997); *Weatherred v. State*, 963 S.W.2d 115 (Tex. App. 1998).

A major obstacle to introducing expert testimony on the reliability of eyewitness identifications is the widely held assumption that such testimony encroaches upon the province of the jury as finders of fact. See, e.g., *Hinckston v. State*, 10 S.W.3d 906, 910 (Ark. 2000) (holding that “[e]xpert testimony on the credibility of witnesses is an invasion of the jury’s province”). A related obstacle is the view of many judges that such testimony concerns matters of common sense, with which jurors are adequately equipped. See *United States v. Langan*, 263 F.3d 613, 624 (6th Cir. 2001) (stating “the hazards of eyewitness identification are within the ordinary knowledge of most lay jurors”); *Currie v. Commonwealth*, 515 S.E.2d 335, 338 (Va. Ct. App. 1999) (stating that the “trustworthiness of eyewitness observations is not generally beyond the common knowledge and experience of the average juror”). Courts also fear the prejudicial impact of allowing expert witnesses to instruct the jury on how to evaluate the reliability of eyewitness testimony. See, e.g., *United States v. Fosher*, 590 F.2d 381,

383 (1st Cir. 1979) (the testimony would “create a substantial danger of undue prejudice and confusion because of its aura of special reliability and trustworthiness”).

Some states have tried to counteract the effects of erroneous assumptions about the reliability of eyewitness identifications by eliminating common suggestive techniques for obtaining such identifications. For example, the United States Department of Justice and the states of Illinois, New Jersey, North Carolina and Texas created commissions that recommended adoption of more scientific and less suggestive techniques for conducting lineups. See Department of Justice, National Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999); Illinois Commission on Capital Punishment, *Report of the Illinois Commission on Capital Punishment*, Chapter 2 (2002); New Jersey Attorney General, *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (2001); North Carolina Actual Innocence Commission, *Recommendations for Eyewitness Identification* (2006), available at http://www.innocenceproject.org/docs/NC_Innocenceproject.org/docs/NC_Innocence_Commission_Identification.html; Texas Criminal Justice Advisory Council, *Recommendations to Governor Rick Perry* (2006).

Another response to the problem with the *Biggers* test is to legislate eyewitness identification procedures. Wisconsin became the first state to codify an eyewitness identification practice bill into law. A.B. 648, 97th Leg. Sess., Reg. Sess. (Wis. 2005); Wis. Stat. § 175.50 (2006). Section 175.50 takes effect in December 2006. It standardizes scientifically validated police procedures for eyewitness lineups. Other

state legislatures are considering or have considered similar legislation.²

III. Reexamination Of The *Biggers* Standard In Light Of Relevant Scientific Evidence Is Consistent With The Principles Of *Stare Decisis*.

Justice Brandeis noted several decades ago that in “cases involving the Federal Constitution, . . . [t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407–08 (1932) (dissenting) (footnote omitted).

The certainty factor of the *Biggers* test was based upon widely shared “common sense” beliefs and understandings about a direct relationship between the confidence of an eyewitness and the accuracy of his or her identification. Without the benefit of scientific research, the Court in *Biggers* thus fashioned a constitutional standard that comported with

² S.B. 1544, 2005 Leg., Reg. Sess. (Cal. 2005); S.B. 595, 2006 Gen. Assem, Jan. Sess. (Conn. 2006); H.B. 1256, 148th Gen. Assem., Reg. Sess. (Ga. 2006); H.B. 1748, 23d State Leg., Reg. Sess. (Haw. 2005); S.B. 1707, 23d State Leg., Reg. Sess. (Haw. 2005); S.B. 2144, 23d State Leg., Reg. Sess. (Haw. 2006); H.B. 807, 421st Gen. Assem., Reg. Sess. (Md. 2006); S.B. 863, 421st Gen. Assem., Reg. Sess. (Md. 2006); H.B. 734, 184th Gen. Court, Reg. Sess. (Mass. 2005); S.B. 913, 184th Gen. Court, Reg. Sess. (Mass. 2005); S.B. 942, 184th Gen. Court, Reg. Sess. (Mass. 2005); H.B. 1105, 159th Gen. Court, 1st Sess. (N.H. 2005); A.J.R. 90, 212th Leg., Reg. Sess. (N.J. 2006); S.B. 946, 189th Gen. Assem., Reg. Sess. (Pa. 2005); S.B. 947, 189th Gen. Assem., Reg. Sess. (Pa. 2005); S.B. 948, 189th Gen. Assem., Reg. Sess. (Pa. 2005); H.B. 6060, 2005 Gen. Assem., Reg. Sess (R.I. 2005); H.B. 188, 2006 Sess., Reg. Sess. (Va. 2006); S.B. 293, 77th Leg., 2d Sess. (W.Va. 2006).

an intuitive understanding shared by judges, lawyers and the general public. The decision made sense at the time. But experience and scientific research have shown that this widely shared understanding was wrong. In that circumstance, *stare decisis* does not compel adherence to the incorrect understanding. *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). To the contrary, that is when it is most appropriate for the Court to revisit the old understanding. *See, e. g., Ring v. Arizona*, 536 U.S. 584, 608 (2002); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); *Payne v. Tennessee*, 501 U.S. 808, 829 (1991).

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Connecticut Supreme Court.

Respectfully submitted,

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