SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19385

STATE OF CONNECTICUT

V.

ANDREW DICKSON

BRIEF FOR AMICUS CURIAE THE INNOCENCE PROJECT SUPPPORTING DEFENDANT-APPELLANT AND URGING REVERSAL

CHARLES D. RAY

McCARTER & ENGLISH, LLP
CITYPLACE I
185 ASYLUM STREET
HARTFORD, CT 06103
JURIS NO. 419091
TEL. (860) 275-6700
FAX (860) 724-3397
cray@mccarter.com

OF COUNSEL:

JAMES L. BROCHIN
MARQUES S. TRACY
LAURA E. SEDLAK

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 AVENUE OF THE AMERICAS
NEW YORK, NY 10019-6064
TEL. (212) 373-3000
FAX (212) 757-3990
jbrochin@paulweiss.com
mtracy@paulweiss.com
lsedlak@paulweiss.com

ATTORNEYS FOR AMICUS CURIAE THE INNOCENCE PROJECT

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Innocence Project is an organization dedicated to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction DNA evidence. To date, the work of the Innocence Project and affiliated organizations has led to the exoneration of 325 individuals who post-conviction DNA testing has shown were wrongly convicted. The Innocence Project has a compelling interest in ensuring that criminal trials reach accurate determinations of guilt and promote justice. Because wrongful convictions destroy lives and allow the actual perpetrators to remain free, the Innocence Project's objectives help to ensure a safer and more just society. Indeed, in 48 percent of the wrongful convictions proven by post-conviction DNA testing, the work of the Innocence Project and affiliated organizations has also helped identify the real perpetrators of those crimes.

In addition to its work on individual cases, the Innocence Project also seeks to prevent future wrongful convictions by researching the causes of wrongful convictions and pursuing reform initiatives designed to enhance the truth-seeking functions of the criminal justice system. Nearly 75 percent of individuals exonerated by DNA testing were originally convicted based, at least in part, on the testimony of eyewitnesses who turned out to be mistaken. The majority (54 percent) of these mistaken eyewitness identification cases involved in-court identifications. Thus, inasmuch as mistaken eyewitness identifications are a principal cause of wrongful convictions and in-court identifications are a common feature of these cases, the Innocence Project has a compelling interest in the adoption of a legal framework that reduces the risk of a finding of guilt based on an in-court misidentification.

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[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, its members or its counsel, contributed money that was intended to fund preparation or submission of this brief.

PRELIMINARY STATEMENT

The Innocence Project respectfully submits this amicus curiae brief in support of the defendant-appellant, urges reversal, and requests that the Court take this opportunity to overrule *State* v. *Smith*, because the assumptions on which it was based have been undermined by developments in social science research that the Court has previously recognized and relied upon. Amicus also respectfully submits that this Court should adopt a new framework—one that reflects current scientific research—for approaching the admissibility of in-court identifications.

STATEMENT OF FACTS AND PROCEEDINGS

Amicus incorporates by reference the facts in the defendant-appellant's brief ("Def. Brief").

ARGUMENT

I. In-Court Identifications of the Type Approved in *State* v. *Smith* Are Inherently Suggestive

There is no dispute that in-court identifications are inherently suggestive. This Court acknowledged this fact in *State* v. *Smith*, noting that "[a]ny one-on-one in-court identification of an accused conveys the message that the state has arrested and placed on trial a person it believes has committed the crime," and "[t]hat is the factor that creates the element of suggestiveness." 200 Conn. 465, 468–69 (1986); *Commonwealth* v. *Crayton*, 470 Mass. 228, 237–38 (2014) ("The presence of the defendant in the court room is likely to be understood by the eyewitness as confirmation that the prosecutor, as a result of the criminal investigation, believes that the defendant is the person whom the eyewitness saw commit the crime.").[2]

[2] This Court in *State* v. *Smith* relied in part on a Massachusetts opinion noting that there is "no constitutional requirement that an in-court identification confrontation . . . be otherwise free of suggestion." 200 Conn. 465, 469–70 (1986) (citing *Commonwealth* v. *Wheeler*, 3 Mass. App. 387, 391 (1975)). However, this proposition from *Wheeler* can no longer stand in light of the Supreme Judicial Court's decision in *Crayton*, 470 Mass. 228.

In this way, an in-court identification is "comparable in its suggestiveness to a showup identification." *Crayton*, 470 Mass. at 236–37. Both involve a witness asked to identify a suspect under circumstances that suggest that the state—in the form of the police or the prosecutor—believes the suspect is guilty. This Court has repeatedly recognized this inherently suggestive nature of show-up identifications. *See, e.g.*, *State* v. *Ledbetter*, 275 Conn. 534, 549 (2005) (recognizing that show-ups are "inherently and significantly suggestive because [they] convey[ ] the message to the [witness] that the police believe the suspect is guilty"); *State* v. *Guertin*, 190 Conn. 440, 456 (1983) (same). Precisely because of the inherent suggestiveness of show-ups, this Court requires a "two-pronged due process inquiry" before a court may admit evidence of a show-up. *Guertin*, 190 Conn. at 459. Other courts also have established strict guidelines for when identifications made during show-ups can be used. *See, e.g.*, *Crayton*, 470 Mass. at 235–36 & n.13 (requiring a showing of "good reason" before allowing show-up identifications and further stating that with show-ups there is no way to "distinguish witnesses who are guessing from those who actually recognize the suspect")[3]; *State* v. *Dubose*, 285 Wis.2d 143, 165–66 (2005) (holding that show-ups are "inherently suggestive and will not be admissible unless . . . the procedure was necessary"). The flaws that led this Court to caution against the use of show-ups also plague in-court identifications. Indeed, although there are similarities between the two, in-court identifications are actually much worse than show-ups, especially in cases such as this where the in-court identification is the witness's first identification of the defendant.

First, an in-court identification is much *more* suggestive than a one-on-one show-up. *See Crayton*, 470 Mass. at 237. In a show-up, the witness is not always aware that the

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[3] As with show-ups, there are no "wrong answers" to in-court identifications. A witness who is asked to identify the defendant as the perpetrator will most likely know exactly who the defendant is and be able to identify him or her. *See, e.g.*, *United States* v. *Archibald*, 734 F.2d 938, 941 (2d Cir. 1984) ("Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant . . . .").

person they are being shown is the only suspect, nor are they aware of how confident the police are that the suspect is, in fact, the perpetrator. With an in-court identification, the witness knows that the defendant is the only suspect and that he or she has been charged with the crime. That fact conveys to the witness that the "prosecutor, as a result of the criminal investigation, believes that the defendant is the person whom the eyewitness saw commit the crime." *Id.* at 237–38. Faced with the pressures of testifying in court, a witness may identify the defendant out of reliance on the prosecutor's conclusion rather than his or her own memory, or simply to conform his or her behavior to perceived expectations of what a witness should do. *See, e.g.*, *id.* at 237.

Second, unlike a show-up, which must take place relatively soon after the crime occurs,[4] in-court identifications can occur months, if not years, after the crime. In fact, many courts will require that a show-up occur within a couple of hours of when the witness first viewed the perpetrator or will otherwise recognize the decreasing reliability of a show-up that occurs much later. *See, e.g.*, *State* v. *Henderson*, 208 N.J. 208, 261 (2011) ("Thus, the record casts doubt on the reliability of showups conducted more than two hours after an event . . . ."); *State* v. *Brown*, 36 So.3d 974, 979–80 (La. App. 4 Cir. 2010) (noting that the "show up identification" must occur "within a short time after the offense" which is "generally satisfied when the identification occurs within an hour of the crime"). The passage of time greatly increases the risk of misidentification for in-court identifications, as opposed to show-ups, because memory degrades over time. *See, e.g.*, *Henderson*, 208 N.J. at 267.

Third, although this Court has found that circumstances such as whether "the defendant was in custody, the availability of the victim, the practicality of alternate procedures and the need of police to determine quickly if they are on the wrong trail,"

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[4] *See* State of Connecticut, Dep't of Emergency Services & Public Protection, *Police Officer Standards and Training Council: Mandatory Uniform Policy – Eyewitness Identification Procedures*, at 6 (2012), *available at* http://www.ct.gov/post/lib/post/publications/eyewitness_idmandpolicy10-11-12.pdf.

Ledbetter, 275 Conn. at 549, might justify a show-up, none of these factors support admission of in-court identifications. Because show-ups are so suggestive, courts allow their admission only when compelling circumstances outweigh the risks. In-court identifications are more suggestive than show-ups, are less reliable than show-ups, and are never justified by exigent or compelling circumstances.

II. This Court Should Overrule *Smith* and Adopt a Rule that Reflects, and Is Not Undermined by, Applicable Scientific Research

A. Recent Advances in Social Science Research Have Substantially Undermined the Primary Assumptions upon which *Smith* Was Based

Courts and commentators have recognized the inherent suggestiveness of in-court identifications for decades. *See* John H. Wigmore, *Evidence – Corroboration by Witness' Identification of an Accused on Arrest*, 25 Ill. L. Rev. 550, 550–51 (1931) ("[T]he conditions of the courtroom are too violently suggestive to give any value at all to the witness' assertion of recognition then made."); *see also Basoff* v. *State*, 208 Md. 643, 651 (1956) ("[A]n identification of an accused made by a witness for the first time in the courtroom may often be of little testimonial force, as the witness may have had opportunities to see the accused and to have heard him referred to by a certain name . . . .").

This Court's decision in *Smith* approved of the use of in-court identifications, notwithstanding the suggestive nature of the procedure, based on certain assumptions about eyewitness testimony. Scientific research has since shown those assumptions to be incorrect. For instance, the Court pointed out that the "defendant's protection against the obvious suggestiveness [of in-court identifications] . . . is his right to cross-examination." 200 Conn. at 470. Research has shown, however, that cross-examination is inadequate to expose mistaken identifications and to counteract the significant impact live eyewitness testimony has on jurors.[5] Cross-examination is ineffective, in part, because it works best as

[5] See Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 735–47 (2007); Jennifer N. Sigler & James V. Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N. Am. J. Psychol. 143,

a tool to expose witnesses who are lying; misidentification evidence is often offered by witnesses who are genuinely and honestly mistaken, not lying. *See United States* v. *Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009) ("[W]itnesses who think they are identifying the wrongdoer—who are credible because they believe every word they utter on the stand—may be mistaken."). Absent the "protection" that the *Smith* Court believed cross-examination could offer, in-court identifications amount to a highly prejudicial presentation of unreliable evidence.[6]

In addition, *Smith* drew a distinction between in-court identifications that are "tainted by an out-of-court identification procedure which is unnecessarily suggestive and conducive to irreparable misidentification," 200 Conn. at 469, and other "untainted" identifications. Yet, this distinction is flawed. In-court identifications are inherently less reliable than out-of-court identifications for the simple reason that memories decay rapidly, even over very short periods of time. *See, e.g.*, *Henderson*, 208 N.J. at 267 (citing studies). The passage of time also increases the likelihood that memories will be contaminated by post-event information, such as suggestive circumstances and information from third parties. In-court identifications are thus more likely to suffer from both incomplete and distorted recollection.

Social science has also shown that out-of-court identifications can irreparably taint the reliability of an in-court identification, even where (1) the out-of-court identifications are admissible under *Neil* v. *Biggers*; and (2) the out-of-court identifications resulted in no identification or a misidentification of a filler. These findings are based on research

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146 (2002) (noting that the conviction rate by mock juries increased from 49% to 68% with the incorporation of a single, vague eyewitness account).

[6] Recently, the National Academy of Sciences reaffirmed this research. National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification*, at 110 (2014), *available at* http://www.nap.edu/openbook.php?record_id=18891 ("hereinafter NAS Report") ("The accepted practice of in-court eyewitness identifications can influence juries in ways that cross-examination, expert testimony, or jury instructions are unable to counter effectively. Moreover, as research suggests . . . the passage of time since the initial identification may mean that a courtroom identification is a less accurate reflection of an eyewitness' memory.").

demonstrating that "false identification rates increase, and accuracy on the whole decreases, when there are multiple identification procedures."[7] This phenomenon, known as the "mugshot exposure effect," occurs when a witness misidentifies an innocent filler to whom the witness has been "exposed" at least once before. *See Young* v. *Conway*, 698 F.3d 69, 82–84 (2d Cir. 2012) (citing research, other cases).[8] Similarly, once a witness identifies a suspect, research has shown that she may become subconsciously attached to that prior identification, and thus, more likely to identify the same person again, even if the person is innocent. *See* Charles A. Goodsell et al., *Effects of Mugshot Commitment on Lineup Performance in Young and Older Adults*, 23 Applied Cognitive Psychol. 788, 789 (2009). This phenomenon occurs even when the actual culprit is present in the second identification procedure and the previously selected innocent person is absent. *Id.* at 798.

B. This Court Should Overrule *Smith* and Adopt a New Framework for Approaching the Admissibility of In-Court Identifications

Given that peer reviewed scientific research published since *Smith* has undermined the foundations of the decision, amicus respectfully submits that this Court should adopt a framework that bars all in-court identifications, except in the rare instance where the state can establish "good reason" for allowing the in-court procedure. The burden of the "good reason" standard should fall on the state as the proponent of the evidence.[9] It has control

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[7] Ryan D. Godfrey & Steven E. Clark, *Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value*, 34 Law & Hum. Behav. 241, 241, 256 (2010) (attributing this effect to "misplaced familiarity due to the memory of the suspect," as opposed to the memory of the perpetrator, or due to "heightened expectations and suggestiveness").

[8] *See also State* v. *Guilbert*, 306 Conn. 218, 234–36 & n.9 (2012); *Commonwealth* v. *Gomes*, 470 Mass. 352, 375–76 (2015); *State* v. *Lawson*, 352 Or. 724, 784–85 (2012); *Henderson*, 208 N.J. at 255–56.

[9] Amicus respectfully submits that such a showing should be made by clear and convincing evidence, a standard this Court has previously applied in the context of in-court identifications. *See, e.g.*, *State v. Oliver*, 160 Conn. 85, 90 (1970) (government must establish "by clear and convincing evidence that the in-court identifications were based

over the very facts that would support a finding of "good reason."[10] The precise contours of a "good reason" standard should be allowed to develop over time and would obviously include the unusual situation where a defendant opened the door to admission of an in-court identification by challenging the witness's very ability to make an in-court identification. Amicus respectfully submits, however, that simply challenging the accuracy of a prior identification would not suffice; to do otherwise would defeat the purpose of the proposed rule.

This approach is consistent with decades of established social science research regarding eyewitness identification and with the manner in which courts around the country have attempted to realign the law regarding eyewitness identifications with this body of research. For example, the Massachusetts Supreme Judicial Court recently overhauled its approach to in-court identifications in two decisions issued just this past September. In *Crayton*, 470 Mass. 228, and *Commonwealth* v. *Collins*, 470 Mass. 255 (2014), the court adopted a new framework that bars in-court identifications where no out-of-court identification occurred and where the eyewitness "made something less than an unequivocal positive identification of the defendant during a nonsuggestive identification procedure." *Collins*, 470 Mass. at 261–62; *see also Crayton*, 470 Mass. at 241–42. Massachusetts courts will now treat in-court identifications as in-court show-ups and will admit them in evidence only where there is "good reason" for their admission. Amicus respectfully urges this Court to do the same.

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upon observations of the suspect other than the [constitutionally proscribed] lineup identification").

[10] This approach is consistent with the way this State handles the admissibility of trace evidence: the proponent of the trace evidence must establish chain of custody. *State* v. *Coccomo*, 302 Conn. 664, 685 (2011) (citing *State* v. *Greene*, 209 Conn. 458, 479 (1998)); *accord State* v. *Johnson*, 162 Conn. 215, 232–33 (1972).

III. This Case Is an Appropriate Vehicle for Reexamining the Admissibility of In-Court Identifications, Especially in Light of Recent Developments in Similar Cases

This case arises at a time when courts across the country, including this one, have been closely scrutinizing all forms of eyewitness identification in an effort to align the law with the body of scientific research addressing the issue. The time is thus right for this Court to revisit the issue of the admissibility of in-court identifications, as the Appellate Court recognized. *See State* v. *Dickson*, 150 Conn. App. 637, 645 n.7 (2014). The importance of reexamining the law regarding in-court identifications in light of the relevant "scientific advances" in that area since *Smith* and the problematic facts and circumstances of this case make this an appropriate vehicle for taking a fresh look at the issue.

Three years ago, this Court recognized the "near perfect scientific consensus" that demonstrates that an "array" of variables—not reflected in the leading admissibility tests—are likely to cause mistaken identifications. *See Guilbert*, 306 Conn. at 234–36. Over the last five years, the state supreme courts of New Jersey and Oregon, and a study group appointed by the Massachusetts Supreme Judicial Court, each concluded that their state's versions of the controlling tests regarding the admissibility of out-of-court identifications do not comport with the findings of this scientific research and therefore cannot ensure the reliability of eyewitness identification evidence. *See, e.g.*, *Henderson*, 208 N.J. at 285–87; *Lawson*, 352 Or. at 746; Massachusetts Supreme Judicial Court Study Group on Eyewitness Evidence, *Report & Recommendations to the Justices*, at 8–9 (July 25, 2013), *available at* http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf.[11]

[11] *See also* NAS Report, *supra* note 6, at 18 (noting that the controlling test regarding out-of-court identifications "was not based on much of the research conducted by scientists on visual perception, memory, and eyewitness identification, and it fails to include important advances").

Adopting a new rule regarding in-court identifications is consistent with this widespread recognition that the legal standards governing eyewitness identifications are outdated and contrary to social science literature.

IV. Failing to Preclude the In-Court Identification in this Case Did Not Constitute Harmless Error

The error in this case was anything but harmless. The only eyewitnesses were unable to identify the defendant in non-suggestive, out-of-court identification procedures shortly after the crime. *See* Def. Brief at 2, 6.[12] Thus, the only positive identification of the defendant-appellant was that made by one of these witnesses, a stranger, in court, thirty-two months after the crime. *Id.* at 6. Aside from this highly suggestive and suspect in-court identification, the only other evidence against defendant-appellant was the incentivized testimony of his co-defendant, who admitted that he alone planned the crime, that he had successfully committed three other similar armed robberies (none of which involved the defendant-appellant), and that he had lied or been untruthful over a dozen times in his sworn testimony. *See id.* at 3, 38. This Court has previously noted "the inherent unreliability of accomplice testimony" and held that similar circumstances counsel against a finding of harmless error. *See State* v. *Patterson*, 276 Conn. 452, 468, 472–73 (2005) (failure to provide special credibility instruction regarding jailhouse informant harmful where informant's "testimony was the only evidence adduced by the state that directly implicated the defendant in a conspiracy to kill the victim").[13]

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[12] Scientific research has shown that non-identifications can be more probative of innocence than suspect identifications are of guilt. *See* Gary L. Wells & Elizabeth A. Olson, *Eyewitness Identification: Information Gain from Incriminating and Exonerating Behaviors*, 8 J. of Experimental Psychol.: Applied 155 (2002); Gary L. Wells & R.C. Lindsay, *On Estimating the Diagnosticity of Eyewitness Nonidentifications*, 88 Psych. Bull. 776 (1980).

[13] A study conducted by the Innocence Project concluded that, in "15% of wrongful conviction cases overruled through DNA testing, statements from people with incentives to testify . . . were critical evidence used to convict an innocent person." *See Informants*, The Innocence Project, http://www.innocenceproject.org/causes-wrongful-conviction/informants (last visited Mar. 10, 2015). Similarly, a 2005 survey conducted by Northwestern University

The absence of credible evidence is further exacerbated by the abundant scientific research that shows a tendency for jurors to over believe eyewitness identification evidence, even when it is undermined by other facts, such as the witness's prior inability to identify the defendant. *See* Sigler & Couch, *supra* note 5 (conviction rate by mock juries increased from 49% to 68% with the addition of a single, vague eyewitness account). Jurors also tend to overestimate "the likely accuracy of eyewitness evidence." John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19, 28 (1983).

CONCLUSION

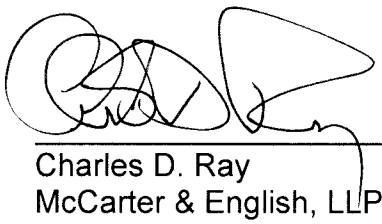
We respectfully urge this Court to reverse the judgment of the Appellate Court, overrule *State* v. *Smith*, and develop a rule that treats in-court identifications in a manner that reflects applicable scientific research.

School of Law found that, of the 111 death row exonerations that had occurred since capital punishment was reinstated, snitch cases account for 45.9% of those exonerations. *See* Northwestern University School of Law, Center on Wrongful Convictions, *The Snitch System*, at 3 (Winter 2004–2005), *available at* http://www.innocenceproject.org/causes-wrongful-conviction/SnitchSystemBooklet.pdf.

Dated: March 11, 2015

RESPECTFULLY SUBMITTED,

AMICUS CURIAE
THE INNOCENCE PROJECT



Charles D. Ray
McCarter & English, LLP
CityPlace I
185 Asylum St.
Hartford, CT 06103
Juris No. 419091
Tel. (860) 275-6700
Fax (860) 724-3397
cray@mccarter.com

Attorneys for Amicus Curiae
The Innocence Project

Of Counsel:

James L. Brochin
Marques S. Tracy
Laura E. Sedlak
Paul, Weiss, Rifkind, Wharton & Garrison
LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel. (212) 373-3000
Fax (212) 757-3990
jbrochin@paulweiss.com
mtracy@paulweiss.com
lsedlak@paulweiss.com

CERTIFICATION OF SERVICE AND COMPLIANCE

I hereby certify the following:

1. Copies of the foregoing brief were mailed (first class, postage prepaid) to the trial court (Thim, J.) and to counsel of record as listed below on March 11, 2015;

2. The foregoing brief is a true copy of the brief that was previously submitted electronically;

3. The foregoing brief does not contain any names or personally identifiable information that is prohibited from disclosure;

4. The foregoing brief complies with the formatting requirements and other provisions set forth in Practice Book § 67-2; and

5. The electronically submitted brief was emailed to counsel of record as listed below.

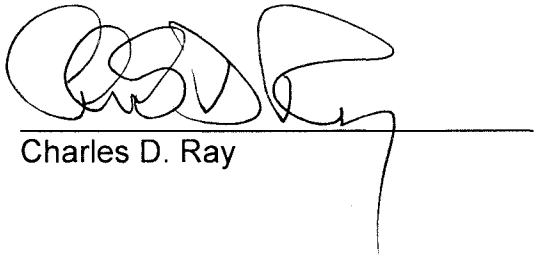
Hon. George N. Thim (J.T.R.)
Superior Court
Judicial District of Fairfield
1061 Main Street
Bridgeport, CT 06604
203-579-7250
203-579-6928 (facsimile)

Andrew S. Liskov
33 Merrimac Drive
Trumbull, CT 06611
203-816-7177
203-880-9072 (facsimile)
mal261@charter.net

Susann E. Gill
Office of the State's Attorney
(Appellate Counsel)
Judicial District of Fairfield
1061 Main Street
Bridgeport, CT 06604
203-579-6506
203-382-8401 (facsimile)
Susann.Gill@ct.gov

Susan C. Marks
Supervisory Assistant State's Attorney
Chief State's Attorney Appellate Bureau
300 Corporate Place
Rocky Hill, CT 06067
860-258-5800
860-258-5858 (facsimile)
Susan.Marks@ct.gov

Andrew Dickson
#379661
Cheshire Correctional Institution
900 Highland Avenue
Cheshire, CT 06604



Charles D. Ray