

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11537

COMMONWEALTH OF MASSACHUSETTS, *Plaintiff-Appellee*,

v.

JEREMY D. GOMES, *Defendant-Appellant*.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT FOR BERKSHIRE COUNTY

No. SJC-11567

COMMONWEALTH OF MASSACHUSETTS, *Plaintiff-Appellee*,

v.

KENNETH JOHNSON, *Defendant-Appellant*.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT FOR SUFFOLK COUNTY

BRIEF OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION AND
THE CENTER FOR LAW, BRAIN & BEHAVIOR AS AMICI CURIAE
IN SUPPORT OF DEFENDANTS-APPELLANTS

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The American Psychological Association and the Center for Law, Brain & Behavior respectfully submit this brief pursuant to: (a) the Court's solicitations of amicus briefs in Commonwealth v. Gomes, SJC-11537 (Oct. 8, 2013), and Commonwealth v. Johnson, SJC-11567 (Nov. 12, 2013), and (b) amici's accompanying motion under Rule of Appellate Procedure 17 for leave to file an amicus brief.

INTEREST OF AMICI CURIAE

The American Psychological Association (APA) is the leading association of psychologists in the United States. A nonprofit scientific and professional organization, APA has approximately 135,000 members and affiliates. Among APA's purposes are to increase and disseminate knowledge regarding human behavior; to advance psychology as a science and profession; and to foster the application of psychological learning to important human concerns, thereby promoting health, education, and welfare.

APA has filed more than 155 amicus briefs in state and federal courts nationwide. These briefs have been cited frequently by courts, including the U.S. Supreme Court. See, e.g., Hall v. Florida, 134 S. Ct. 1986, 1994-1995, 2000-2001 (2014); Graham v.

Florida, 560 U.S. 48, 68 (2010); Panetti v. Quarterman, 551 U.S. 930, 962 (2007); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002). APA has recently filed amicus briefs in cases addressing eyewitness-identification issues. See, e.g., Perry v. New Hampshire, 132 S. Ct. 716 (2012); Commonwealth v. Walker, 92 A.3d 766 (Pa. 2014); State v. Artis, S.C. 19035 (Conn. Oct. 29, 2013) (pending).

APA has a rigorous approval process for amicus briefs, the touchstone of which is an assessment of whether a case is one in which there is sufficient scientific research, data, and literature relevant to one or more questions before the court so that APA can usefully contribute to the court's understanding and resolution of that question. APA regards these cases as presenting such questions.

The Center for Law, Brain and Behavior (CLBB) is a nonprofit academic center based at Massachusetts General Hospital. CLBB's mission is to promote the responsible, ethical, and scientifically sound translation of neuroscientific research into the legal arena. CLBB has a distinguished faculty of neuroscientists and legal scholars, and it pursues translational research, cross-disciplinary fellowship

training, and the dissemination of sound science through public symposia and scholarly writings. A central part of CLBB's mission is to be of service to the bar and the judiciary with respect to promoting a useful understanding of rapidly emerging neuroscientific data. CLBB's participation in this amicus submission is emblematic of this central purpose.¹

STATEMENT OF THE ISSUES

Amici will address the issues on which this Court solicited amicus briefs in Commonwealth v. Gomes, SJC-11537, and Commonwealth v. Johnson, SJC-11567.

In Gomes, the Court requested amicus input on whether the trial judge erred in refusing the defendant's request to instruct the jury that:

- (1) human memory is not like a video recording;
- (2) witnesses who are highly confident of their identifications are not therefore necessarily reliable; and
- (3) a witness's prior viewing of a suspect in an identification procedure reduces the

¹ No counsel for a party authored this brief in whole or in part, and no one other than amici, their members, and their counsel funded the preparation or submission of this brief. Undersigned counsel state that Wilmer Cutler Pickering Hale and Dorr LLP has not previously represented either defendant-appellant in these or any related proceedings.

reliability of the witness's later identification of the same suspect.

In Johnson, the Court invited amicus briefs on the following issue: Where a victim of a crime has failed to identify the defendant in an identification procedure such as a police lineup, whether the defendant is entitled to a modified identification instruction that informs the jury that they may consider the fact that the victim failed to identify the defendant as the perpetrator.

STATEMENT OF THE CASE

Amici do not have independent knowledge of the facts in these cases. For purposes of this brief, amici adopt the statements set forth in the defendants' briefs in this Court.

ARGUMENT

Eyewitness testimony is often a critical part of the truth-seeking process. Accurate eyewitness identifications can provide powerful evidence of guilt or innocence. As this Court has "long recognized," however, "'eyewitness identification[s] ... present[] a substantial risk of misidentification'" and thus "'increase[] the chance of a conviction of an innocent defendant.'" Commonwealth v. Silva-Santiago, 453 Mass. 782, 796 (2009) (quoting Commonwealth v. Jones,

423 Mass. 99, 109 (1996)); see also, e.g., United States v. Wade, 388 U.S. 218, 228 (1967) (“The vagaries of eyewitness identification are well-known[.]”).

To mitigate the threat of erroneous convictions caused by mistaken identifications, this Court has “recognized that, where the reliability of a positive eyewitness identification is an important issue at trial, a judge should instruct the jury regarding the evaluation of eyewitness identification testimony.” Commonwealth v. Franklin, 465 Mass. 895, 910 (2013) (citing Commonwealth v. Pressley, 390 Mass. 617, 619 (1983)). Over the last thirty years the Court has periodically revised those instructions to ensure their fairness and continued scientific accuracy. For example, in Commonwealth v. Pressley, 390 Mass. 617 (1983), the Court held that the addition of an instruction that identifications can be “honest but mistaken” was compelled by “[f]airness to [the] defendant,” id. at 620. And in Commonwealth v. Santoli, 424 Mass. 837 (1997), the Court eliminated from the approved instruction the suggestion of a correlation between witness confidence and accuracy, in light of “significant doubt” about such a correlation, id. at 845-846; see also Commonwealth v. Rodriguez, 378 Mass. 296, 310-311 (1979) (adopting

identification instruction from United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972) (per curiam)).

The cases now before the Court concern whether trial courts should instruct juries on four principles relating to eyewitness identifications: (1) that human memory is not like a video recording; (2) that witnesses who are highly confident of their identifications are not therefore necessarily reliable; (3) that a witness's prior viewing of a suspect in an identification procedure, without making a positive identification, reduces the reliability of the witness's later identification of the same suspect; and (4) that the jury may consider the fact that an eyewitness to the crime has failed to identify a suspect in a police lineup.²

In considering these issues, amici submit that this Court should take into account the extensive body of psychological research dedicated to eyewitness identifications--research that, as will be discussed at the outset, is highly reliable. That research supports a number of conclusions relevant here: First, each of the four scientific principles raised by the defendants in these cases has ample support in

² As noted in amici's statement of the issues, the first three of these questions arise in Gomes; the fourth arises in Johnson.

the psychological research. Second, despite the advent of DNA testing and a number of high-profile exonerations, jurors still lack an adequate understanding of human memory and of the factors that make identifications more or less susceptible to error. Third, while jury instructions alone will not solve the problem of false identifications, neither can other traditional safeguards of the adversary system--cross-examination and expert testimony--by themselves counter in most cases the prejudicial effect of false identifications. Instructions, including those of the type requested here, are also needed.

I. EYEWITNESS-IDENTIFICATION RESEARCH IS RELIABLE

As discussed in Part II, the jury instructions that the defendants sought in Gomes and Johnson are well supported by psychological research on eyewitness identification. A threshold point to explain, then, is that that body of research is highly reliable. This reliability stems principally from three factors.

First, the methods used by researchers reflect best practices in scientific psychological research. "[L]ike all scien[tists] ... , psychologists rely upon basic principles of scientific inquiry that ensure reliability and validity of their findings." Malpass

et al., The Need for Expert Psychological Testimony on Eyewitness Identification, in Expert Testimony on the Psychology of Eyewitness Identification 3, 11 (Cutler ed. 2009). In particular, psychologists form hypotheses based on prevailing theories and available data, and then test those hypotheses through experiments or review of archival sources. See id. at 11-14. The testing process typically involves experiments in which researchers expose a controlled set of subjects to different videotaped or staged crimes and then test the accuracy of the subjects' identification skills. See, e.g., Wells et al., Eyewitness Evidence: Improving Its Probative Value, 7 Psychol. Sci. in Pub. Int. 45, 49-50 (2006). This approach is widely considered to yield "the most robust findings." Malpass et al., supra, at 13; see also Wells et al., supra, at 49. The next step-- analysis of the results produced by the experiments-- is equally sound: It normally involves inferential statistical methods, which have been "developed and accepted by researchers over a period of more than a century." Malpass et al., supra, at 14.

Second, studies in this field are typically subject to two layers of peer review, first at the

funding stage and then at the publication stage. See Cutler & Penrod, *Mistaken Identification* 66 (1995). The high standards and low acceptance rates that apply at both stages provide an additional check on the methodological soundness of the research. See id. at 66-67; Malpass et al., supra, at 14.

Third, most psychological researchers are members of APA, which requires them to abide by its Ethical Principles and Code of Conduct. The code forbids psychologists from fabricating data or making false or deceptive statements. See APA Standard 8.10(a). It also imposes more affirmative duties, including the obligation to share the data they use with any competent professional seeking to validate their work. See APA Standard 8.14(a). Nor is the code the only source of an ethical check on research. Universities at which much psychological research is conducted typically require that it be reviewed in advance by internal ethics boards. See, e.g., Meyer, *Regulating the Production of Knowledge: Research Risk-Benefit Analysis and the Heterogeneity Problem*, 65 Admin. L. Rev. 237, 243-250 (2013). And many journals that publish the research require statements of compliance with ethical standards. See, e.g., APA Certification

of Compliance with APA Ethical Principles (available at <http://www.apa.org/pubs/authors/ethics02.pdf>) (requirement applies to APA journals).

Further evidence regarding the reliability of psychological research on eyewitness identifications is the fact that there is overwhelming consensus as to the core findings of that research. In a 1989 study, for example, researchers surveyed psychologists who had published in the field. See Kassir et al., The "General Acceptance" of Psychological Research on Eyewitness Testimony, A Survey of the Experts, 44 Am. Psychologist 1089, 1090 (1989). This survey showed general agreement among experts that at least nine variables had been reliably shown to influence eyewitness accuracy. See id. at 1093, 1094 & tbl. 4. A follow-up survey conducted in 2001 confirmed the 1989 results as to each of those nine variables. See Kassir et al., On the "General Acceptance" of Eyewitness Testimony Research, A New Survey of the Experts, 56 Am. Psychologist 405, 410, 413 tbl. 5 (2001). More recent results confirm this near-universal acceptance. See Hosch et al., Expert Psychology Testimony on Eyewitness Identification: Consensus Among Experts?, in Expert Testimony on the

Psychology of Eyewitness Identification 143, 152 (Cutler ed. 2009) (according to a 2008 study cited therein, "the level of general acceptance in the field is higher than it was in 2001"). Simply put, "relative to other scientific research that enters courtrooms, the lack of controversy in the field of eyewitness identification is remarkable." Schmechel et al., Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence, 46 Jurimetrics 177, 179 (2006).

In short, psychological research on eyewitness identifications is highly reliable. In addressing the questions here, this Court should thus give great weight to the relevant findings of that research, which are discussed in the following sections.

II. PSYCHOLOGICAL RESEARCH SUPPORTS EACH OF THE PROPOSITIONS AT ISSUE IN THESE TWO CASES

In Commonwealth v. Hyatt, 419 Mass. 815 (1995), this Court held that "the published results of studies" can suffice to make "some new principle concerning the process of eyewitness identification ... sufficiently reliable so as to justify formulating a jury instruction that should be given in particular circumstances on request," id. at 818. That holding

is relevant here because, as explained below, “the published results of studies” provide substantial support for each of the four propositions at issue in these two cases.³

A. HUMAN MEMORY IS NOT LIKE A VIDEO RECORDING

1. The first instruction sought by the defendant in Gomes was as follows:

Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex. The process of remembering consists of three stages: acquisition--the perception of the original event; retention--the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval--the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.

³ The holding of Hyatt quoted in the text disposes of the Commonwealth’s contention in Gomes that expert testimony is required before a modified jury instruction on principles of eyewitness identification may be given. Brief of Plaintiff-Appellee Commonwealth of Massachusetts, No. SJC-11537 (“Commonwealth Gomes Br.”) 10. The Commonwealth’s reliance on Commonwealth v. Cook, 419 Mass. 192 (1994), to support its argument is misplaced. The trial court’s refusal in that case to give a “withdrawal from joint venture” instruction was upheld because “the evidence was insufficient to suggest that the defendant withdrew from the joint venture.” Id. at 201-202. In other words, the proffered instruction had no relevance to the evidence adduced at trial. Here, by contrast, there is no doubt that each of the proposed jury instructions would have been relevant given the facts presented at the trials.

Brief of Defendant-Appellant Jeremy Gomes ("Gomes Br.") 23. That instruction is fully supported by psychological research.

There is near unanimity among experts in the field that human memory is highly malleable. In particular, cognitive psychologists have long "established that when we experience an important event, we do not simply record it in our memory as a videotape recorder would." Loftus et al., *Eyewitness Testimony* § 2-2, at 12 (4th ed. 2007). This finding traces its origin to the 1930s work of Frederic Charles Bartlett. Through a series of experiments, Bartlett debunked the notion that "[r]emembering is ... the reexcitation of innumerable fixed, lifeless and fragmentary traces." Bartlett, *Remembering: A Study in Experimental and Social Psychology* 213 (1932). Instead, the process of remembering "is an imaginative reconstruction or construction It is thus hardly ever really exact, even in the most rudimentary cases of rote recapitulation[.]" Id.

Inaccuracies in memory are common because the process of remembering necessitates the active

processing of sensory inputs through the individual's preexisting cognitive patterns--patterns that are not infallible. As one commentary explained, "human perception does not work like a camera or video recorder. Rather, what is perceived and stored in memory is often incomplete or distorted as a result of the individual's state of mind or the nature of the event observed." Brigham et al., *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, 36 Ct. Rev. 12, 13 (1999). Due to this susceptibility to contamination, researchers have recommended that memory be regarded as comparable not to a videotape but to a fingerprint, hair sample, or other trace evidence from a crime scene. See, e.g., Wells, *Eyewitness Identification: Systemic Reforms*, 2006 Wis. L. Rev. 615, 622-623.

2. Bartlett's "reconstructive" model not only accounts for why memory is fallible, but also provides a framework for mapping when and how inaccuracies are introduced into the memory process. Psychologists analyzing the nature of memory have partitioned the memory cycle into three discrete steps: (1) the acquisition or encoding stage, when a witness perceives an event and information is thereby entered

into the memory system; (2) the retention or storage stage, the period between acquisition and the witness's attempt to recall the information; and (3) the retrieval stage, when the witness attempts to recall the stored information. See, e.g., Loftus et al., supra, at 13.

This three-stage analysis is "central to the concept of human memory," and "[p]sychologists who conduct research in this area try to identify and study the important factors that play a role in each of the three stages." Loftus et al., supra, at 13. Those psychologists have identified numerous factors that may adversely affect an eyewitness's memory at each stage. At the acquisition stage, memory is subject to both event-specific variables (such as duration of the event) and witness-specific variables (such as age). Id. At the retention stage, additional factors such as the passage of time or post-event information may contaminate the witness's memory. Id. Finally, at the retrieval stage, the witness's memory may be negatively affected by the method of questioning. Id.

In sum, the principles embodied in the first jury instruction that Mr. Gomes requested--including that

memory is malleable and unlike a video recorder--are not merely generally accepted (though they assuredly are that, see, e.g., Castelli et al., Evaluating Eyewitness Testimony in Adults and Children in The Handbook of Forensic Psychology 243, 244 (Weiner & Hess eds., 3d ed. 2006)). They are the foundation of the contemporary understanding of human memory across the psychological community. They easily satisfy the standard for inclusion in a jury instruction.

B. WITNESSES WHO ARE HIGHLY CONFIDENT OF THEIR IDENTIFICATIONS ARE NOT NECESSARILY THEREFORE RELIABLE

Psychological research similarly supports the proposition that witnesses who are highly confident about their identifications are not necessarily more reliable, which was the essence of a second instruction that Mr. Gomes sought:

Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.

Gomes Br. 25-26.

"The certainty that an eyewitness expresses in his or her identification is one of the most

researched variables in the eyewitness identification literature.” Wells & Quinlivan, Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 Law & Hum. Behav. 1, 11 (2009). And as one study explained, “[t]he outcomes of empirical studies, reviews, and meta-analyses have converged on the conclusion that the confidence-accuracy relationship for eyewitness identification is weak, with average confidence-accuracy correlations generally estimated between little more than 0 and .29.” Brewer et al., The Confidence-Accuracy Relationship in Eyewitness Identification, 8 J. Experimental Psychol. Applied 44, 44-45 (2002) (citing studies). Another slightly older analysis that combined existing studies--known as a “meta-analysis” --has suggested a confidence-accuracy correlation of only 0.41 for certain types of identifications. Sporer, Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies, 118 Psychol. Bull. 315, 319 (1995).

Importantly, error rates can be high even among the most confident witnesses. Researchers have

performed studies that track, in addition to identification accuracy, the subjects' estimates of their confidence in their identifications. In one article reporting results from an empirical study, researchers found that among witnesses who made positive identifications, as many as 40 percent were mistaken, yet they declared themselves to be 90 percent to 100 percent confident in the accuracy of their identifications. Sauer et al., Is There a Magical Time Boundary for Diagnosing Eyewitness Identification Accuracy in Sequential Line-ups?, 13 Legal and Criminological Psychol. 123, 131 tbl. 3 (2008). This confirms that many witnesses are overconfident in their identification decisions, that mistaken identifications are made with very high confidence levels, and that highly confident witnesses are not necessarily accurate in their identifications.

The confidence-accuracy correlation, moreover, varies significantly with both the quality of the initial observation of the actual perpetrator and the subsequent identification conditions. Under suggestive conditions, confidence is uniformly considered a very poor predictor of accuracy. As one study put it, "suggestive interviewing procedures

before or after an identification is made[] can dramatically weaken the accuracy-confidence relationship." Lindsay et al., Accuracy and Confidence in Person Identification: The Relationship is Strong When Witnessing Conditions Vary Widely, 9 Psychol. Sci. 215, 219 (1998); accord Wells & Quinlivan, supra, at 12 (citing studies). This is critical because eyewitnesses are often exposed to various sources of post-exposure "suggestion." Of relevance here, these memory-corrupting influences include what researchers call "co-witness influence," i.e., the tendency of a witness to become more confident in her identification if she learns that another witness agrees with it. See Luus & Wells, The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects, 79 J. Applied Psychol. 714, 714 (1994) (finding a dramatic increase in eyewitness confidence in their false identifications when informed that a co-witness had identified the same person as the culprit); accord Bradfield et al., The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy, 87 J. Applied Psychol. 112, 115 (2002). Thus, to the extent that one or more of Zachary

Sevigny, Lindsay Holtzman, and Gerald Mortensen--all three identifying witnesses in Gomes--manifested confidence at trial in their identifications, that confidence may have flowed not solely from the reliability of their individual identifications but from their knowledge that the other witnesses likewise identified Mr. Gomes as the culprit on the night of the arrest.⁴

These various research findings are consistent with the general skepticism already expressed by this Court and others about over-reliance on eyewitness confidence. This Court has stated, for example, that “[t]here is doubt as to the soundness of ... [the] assumption” that “the confidence with which a person makes an identification is a valid indicator of the accuracy of the recollection.” Jones, 423 Mass. at 110 n.9. Other state high courts have made similar observations. See, e.g., State v. Henderson, 27 A.3d 872, 889 (N.J. 2011) (“Almost all of the eyewitnesses [in DNA-exoneration cases] testified at trial that they were positive they had identified the right

⁴ As discussed below, see Part II.C., Sevigny’s and Mortensen’s prior viewing of Mr. Gomes’s photograph further undermines the reliability of their joint identification of him on the night of the arrest.

person.”); State v. Guilbert, 49 A.3d 705, 732 (Conn. 2012) (endorsing “numerous scientifically valid studies” on the proposition that “there is at best a weak correlation between a witness’ confidence in his or her identification and the identification’s accuracy”).⁵

Finally, jurors’ misconceptions compound the danger posed by witness overconfidence. Research shows that jurors systemically “over-rely” on witness confidence as an indicator of accuracy; indeed, despite the limits of the confidence-accuracy relation discussed above, confidence remains the most important factor that juries consider in assessing eyewitness testimony. See, e.g., Leippe et al, Cueing Confidence in Eyewitness Identifications, 33 Law & Hum. Behav. 194, 194 (2009); Wells et al., Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification, 64

⁵ In Commonwealth v. Cruz, 445 Mass. 589 (2005), this Court held that it was not error for a trial judge to refuse an instruction that there is “no proven relationship” between witness confidence and the accuracy of his or her identification, id. at 595 n.4. The Court there emphasized, however, that the defendant had sought an instruction that there is “no” confidence-accuracy correlation, whereas the Court’s “own review of the research” revealed only that the correlation “may be weak or limited.” Id. at 598. Unlike the defendant in Cruz, Mr. Gomes requested an instruction that is supported by extant research.

J. Applied Psychol. 440, 446 (1979); accord State v. Clopten, 223 P.3d 1103, 1108 (Utah 2009) (“[J]uries seemed to be swayed the most by the confidence of an eyewitness, even though such confidence correlates only weakly with accuracy.”). An instruction like the one requested by Mr. Gomes can thus play an important role in correcting a common misunderstanding among jurors.

In short, although eyewitness confidence can be a sign of accuracy, that is not necessarily the case-- and that is all the proposed instruction said. It did not state that the confidence-accuracy correlation is in fact weak, or that the jury should not consider a witness’s confidence at all. Informing juries of the limitations of eyewitness confidence as a predictor of accuracy conforms to scientific findings and should lead to more accurate verdicts.

C. A WITNESS’S VIEWING OF THE SAME SUSPECT IN MULTIPLE IDENTIFICATION PROCEDURES LOWERS THE RELIABILITY OF THE WITNESS’S IDENTIFICATION OF THAT SUSPECT IN ANY OF THE LATER PROCEDURES

A third instruction requested by Mr. Gomes was the following:

Multiple Viewings: When a witness views the same person in more than one identification procedure, it can be difficult to know whether a later identification comes from the witness's memory of the actual, original event or of an earlier identification procedure. As a result, if a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased. You may consider whether the witness viewed the suspect multiple times during the identification process and, if so, whether that affected the reliability of the identification.

Gomes Br. 21. This instruction is also supported by psychological research on eyewitness identifications.

Courts have long recognized that exposing an eyewitness to a person's likeness increases the risk that the witness will misidentify that person as the culprit in the future, even if the witness did not do so the first time. Over forty years ago, for example, the U.S. Supreme Court observed that, after seeing a photograph of a suspect, a "witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." Simmons v. United States, 390 U.S. 377, 383-384 (1968) (citing Wall, Eye-Witness Identification in Criminal Cases 68-70 (1965)). This Court similarly recognized nearly a quarter-century

ago that "the danger of misidentification is increased if the photograph of the same individual is included in different arrays." Commonwealth v. Scott, 408 Mass. 811, 826 (1990). Other state high courts have reached the same conclusion in recent years. See, e.g., State v. Lawson, 291 P.3d 673, 687 (Or. 2012) ("Whether or not the witness selects the suspect in an initial identification procedure, the procedure increases the witness's familiarity with the suspect's face" in subsequent identification).

These courts' conclusions were well-founded. As researchers have shown, the presentation of a suspect in one identification procedure contaminates any selection of that suspect by the same witness in a subsequent identification procedure. In particular, there is no way to know whether the identification of the suspect in the later procedure is a product of the witness's original memory for the perpetrator or instead reflects the witness's familiarity with the suspect from the prior procedure. In psychological terms, the identification of a suspect from the subsequent procedure may represent a "source-monitoring error." Source monitoring refers to the process of making attributions about our memories, and source-

monitoring errors refer to mistaken attributions about our memories. Thus, in a subsequent identification test, a witness may incorrectly attribute the source of her memory to having viewed the actual perpetrator during the crime, rather than having seen the suspect in the prior identification test. See generally Johnson et al., Source Monitoring, 11 Psychol. Bulletin 1, 11-12 (1993).

Psychological research has documented this phenomenon. For example, one meta-analysis that synthesized 15 previous studies found that eye-witnesses to simulated crimes who were exposed to photographs of suspects before participating in a lineup were significantly more likely to mistakenly identify as the culprit someone whom they had seen in a photograph, as compared to those who participated in the lineup without first viewing the photographs (37 percent to 15 percent). See Deffenbacher et al., Mugshot Exposure Effects, 30 Law & Hum. Behav. 287, 299 (2006). Overall, moreover, the presentation of photographs prior to the lineups reduced the proportion of correct identifications from 50 percent to 43 percent. See id. at 296; see also Brown et al.,

Memory for Faces and the Circumstances of Encounter,
62 J. of Applied Psychol. 311, 313 (1977).⁶

Research thus supports the conclusion that participation in one identification procedure (typically exposure to a photograph) increases the likelihood that the witness will, in a later lineup, mistakenly identify as the culprit a person the witness saw in the first procedure. In other words, participation in multiple identification procedures in which a suspect is shown to a witness more than once reduces the reliability of any identification in one of the later procedures, and contaminates the interpretation of the subsequent identification test results. The requested instruction would have apprised the jury of these important points.⁷

⁶ Research shows that these effects tend to disappear when a witness is presented with a very large number of photographs. See Dysart et al., Mugshot Exposure Prior to Lineup Identification, 86 J. Applied Psychol. 1280, 1283 (2001) (no statistically significant "transference" where witnesses were exposed to an average of 534 photographs).

⁷ The drop in reliability could only be greater when, instead of a lineup, the subsequent identification occurred under more suggestive circumstances, as in the case of the uncontrolled, extemporaneous joint identification in Gomes. (Messrs. Mortensen and Sevigny each participated in a photo array prior to the night that they and Ms. Holtzman saw Mr. Gomes together, with neither man picking out Mr. Gomes's

**D. AN EYEWITNESS'S FAILURE TO IDENTIFY A
DEFENDANT DURING A PRE-TRIAL LINEUP CAN BE
PROBATIVE OF INNOCENCE AND IS A PROPER
SUBJECT FOR JURY INSTRUCTION**

The defendant in Johnson requested an instruction informing jurors that they could consider the fact that the victims in that case "had an opportunity to view the defendant during a lineup and failed to identify him at that time." Brief of Plaintiff-Appellee Commonwealth of Massachusetts, No. SJC-11567 ("Commonwealth Johnson Br.") 11.⁸ The trial court denied the request, reasoning that because the victims had failed to identify the defendant at the lineup, no instruction regarding identification was needed. That ruling--which evidently rested on the assumption that a pre-trial non-identification is not probative of innocence--runs contrary to the findings of psychologists' eyewitness research.

photograph. See Commonwealth Gomes Br. 6. Ms. Holtzman did not participate in such an array. See id.)

⁸ The six-paragraph instruction is reproduced in its entirety in Mr. Johnson's brief. Brief of Defendant-Appellee Kenneth Johnson ("Johnson Br.") 19-20 n.5. The paragraph most pertinent to amici's discussion reads: "You may take into account whether a witness ever participated in an identification procedure and failed to identify the defendant as the perpetrator." Id.

As early as 1980, research psychologists questioned the notion that a non-identification of a suspect by a witness was merely a "technical" failure that did not say much about the suspect's innocence. See Wells & Lindsay, On Estimating the Diagnosticity of Eyewitness Nonidentifications, 88 Psychol. Bull. 776, 776 (1980). In a leading study, researchers analyzed preexisting data from a series of lineups that were administered after a simulated crime. See id. at 780-781. Some of the lineups contained the "criminal" plus "fill-ins," while others contained an innocent suspect (a bystander during the "crime") plus fill-ins. Id. Based on a probabilistic analysis of the data, the researchers concluded that, in the sample considered, non-identifications were highly probative of innocence. Id. That was because when the actual "criminal" was in the lineup, the witnesses were quite likely to pick him. Id. Hence, a witness's failure to identify a suspect who is in a lineup as the perpetrator is important evidence--though obviously not conclusive--that the suspect was not in fact the perpetrator. Id. Later studies have reached a similar conclusion. As one study put it, "[n]on-identifications ... are diagnostic of the

suspect's innocence" and "not merely 'failures' to identify the suspect." Clark et al., Regularities in Eyewitness Identification, 32 Law & Hum. Behav. 187, 211 (2007). As such, they "carry important information whose value should not be overlooked."

Id. The trial judge's denial of the instruction requested by Mr. Johnson was inconsistent with that conclusion.

III. JURORS TYPICALLY DO NOT HAVE AN ADEQUATE UNDERSTANDING OF EYEWITNESS RELIABILITY

In declining to issue the jury instructions requested by Mr. Gomes, the trial judge remarked, "These things I don't know myself." [T. III/126.] The knowledge of any particular judge, however, is not pertinent to the propriety of proposed instructions; as discussed, it is the state of the relevant field of science--as shown by "the published results of studies," Hyatt, 419 Mass. at 818--that determines when an instruction is warranted. The judge's observation does highlight, however, why the types of instructions requested here are needed: Most jurors (like the judge) are unaware of many if not most of the widely accepted findings regarding the reliability of eyewitness identifications.

Over the last three decades, several studies have assessed jurors' understanding of the factors that adversely influence an eyewitness's accuracy. See Benton et al., Eyewitness Memory Is Still Not Common Sense, 20 Applied Cognitive Psychol. 115 (2006); Schmechel et al., supra, at 191-205 (2006).⁹ These studies have consistently concluded that jurors misunderstand the reliability of eyewitness identifications.

In a 1992 study, for example, researchers asked potential jurors whether they agreed with each of 21 propositions about eyewitness reliability, propositions that had also been posed to psychologists. See Kassin & Barndollar, The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors, 22 J. Applied Soc. Psychol. 1241, 1243-1244 (1992). On most of the topics (13 of 21), there was statistically significant disagreement between the jurors and the experts. See id. at 1246. Jurors, in

⁹ See also, e.g., Seltzer et al., Juror Ability To Recognize the Limitations of Eyewitness Identifications, 3 Forensic Reports 121, 124-133 (1990); Noon & Hollin, Lay Knowledge of Eyewitness Behaviour: A British Survey, 1 Applied Cognitive Psychol. 143, 143, 145-149 (1987); Deffenbacher & Loftus, Do Jurors Share a Common Understanding of Eyewitness Behavior?, 6 Law & Hum. Behav. 15, 24-26 (1982).

other words, did not know what the experts knew about the reliability of eyewitness identifications.

Jurors' misconceptions about eyewitness accuracy have proved resilient over time, even in the face of the recent wave of high-profile exonerations. See generally Lampinen et al., *The Psychology of Eyewitness Identification* 243-244 (2012). In a 2006 study, researchers found statistically significant discrepancies between jurors' and experts' responses regarding 26 out of 30 statements about eyewitness accuracy. See Benton et al., supra, at 119. If anything, jurors performed more poorly in the 2006 study than in the 1992 study, where potential jurors had agreed with the experts on 33 percent of the issues tested, as opposed to merely 13 percent in 2006. See id. at 119, 126.¹⁰

Jurors' misconceptions, moreover, extend to at least two of the three propositions at issue in Gomes.

¹⁰ In 1983, this Court noted that jurors at that time were "not without a general understanding" of then-established "general principles" of eyewitness research. Commonwealth v. Francis, 390 Mass. 89, 101 (1983). The Court did not identify the basis for this assertion, and amici respectfully submit that the studies discussed in the text demonstrate that whatever was true in 1983, jurors now do not have an adequate understanding about the factors that bear on the reliability of eyewitness identifications.

In a 2006 study that involved approximately 1,000 actual jurors, nearly half of respondents (46 percent) indicated that the witness on the stand is effectively narrating a video recording of events that she can see in her “‘mind’s eye’” for jurors. Schmechel et al., supra, at 196. And nearly 40 percent agreed that “‘an eyewitness’s level of confidence in his or her identification is an excellent indicator of that eyewitness’ reliability.’” Id. at 199. These findings cast significant doubt on the assertion that juries adequately understand the factors that can render an identification unreliable (including factors at issue in this case, such as source-monitoring errors or contamination of subsequent identification tests by prior ones), such that the requested instructions were unnecessary.

IV. OTHER TOOLS OF THE ADVERSARY SYSTEM ARE INSUFFICIENT TO ADDRESS THE PROBLEM OF FAULTY EYEWITNESS IDENTIFICATIONS

The Commonwealth argues in Gomes that reliability issues affecting the eyewitnesses’ identifications were sufficiently “highlighted” by defense counsel’s cross-examination, and that if more were needed it should have been accomplished by expert testimony rather than jury instructions. Commonwealth Gomes Br.

14-15. Scientific research and recent experience cast doubt on the assertion that these alternatives are adequate to address the danger of inaccurate eyewitness identification.

As an initial matter, research has long shown that jurors systematically “over-believe” eyewitness identifications. In a 1983 study, researchers presented individuals with a variety of crime scenarios derived from previous empirical studies and asked the individuals to predict the accuracy rate of eyewitness identifications observed in the studies. See Brigham & Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 *Law & Hum. Behav.* 19, 22-24 (1983). On average, nearly 84 percent of respondents over-estimated the accuracy rates. See id. at 28. The magnitude of the over-estimation, moreover, was significant. For example, the respondents estimated an average accuracy rate of 71 percent for a highly unreliable scenario in which only 12.5 percent of eyewitnesses had made a correct identification. See id. at 24. Other studies confirm that jurors routinely “over believe” eyewitness testimony. See, e.g., Sigler & Couch, *Eyewitness Testimony and the Jury Verdict*, 4 *N. Am. J. Psychol.* 143, 146 (2002) (conviction rate by mock juries increased from 49

percent to 68 percent when a single, vague eyewitness account was added to the circumstantial evidence described in a case summary). Even when unreliable eyewitness identification is admitted, therefore, juries are likely to believe it.

Contrary to the Commonwealth's suggestion, cross-examination--though an essential part of the truth-seeking process--is not sufficient to address this problem. Empirical data on cross-examination indicate that it is not an effective way to counter unreliable eyewitness testimony. See Lampinen et al., supra, at 249 (citing Leippe, The Case For Expert Testimony About Eyewitness Memory, Psychology, Public Policy, and Law 909 (1995)). This is in part because what most affects jurors' assessment of an eyewitness identification is the witness's confidence. See Cutler & Penrod, Juror Sensitivity to Eyewitness Identification Evidence, 14 Law & Hum. Behav. 185, 185 (1990); Lindsay et al., Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?, 66 J. Applied Psychol. 79, 83 (1981). And cross-examination is often ineffective with an honest but mistaken witness who is very confident. See, e.g., Lampinen, supra, at 250 ("[T]he goal of cross-examination is to attack the credibility of the witness[, which] leads to a focus on factors ... such

as witness demeanor and trivial inconsistencies."); Clopten, 223 P.3d at 1110 ("Cross-examination will often expose a lie or half-truth, but may be far less effective when witnesses, although mistaken, believe that what they say is true.").¹¹

Expert testimony is likewise insufficient, though for a different reason. It is true that expert testimony can help juries better understand eyewitness identifications (and its limits), and thus reduces the prejudice of inaccurate identifications. Indeed, a number of studies support the view that expert testimony can make jurors more sensitive to the factors that influence eyewitness accuracy. See Lampinen, supra, at 250; Cutler et al., Expert Testimony and Jury Decision Making: An Empirical Analysis, 7 Behav. Sci. & L. 215 (1989); Devenport et al., How Effective Are the Cross-Examination and Expert Testimony Safeguards? Jurors' Perceptions of the Suggestiveness and Fairness of Biased Lineup

¹¹ The fact that wrongful convictions identified in recent years have frequently involved a mistaken identification further indicates that cross-examination alone is insufficient to deal with the problem of mistaken identifications. See, e.g., Garrett, Convicting the Innocent 8-9, 48 (2011) (of 250 wrongful convictions, 190 involved mistaken eyewitness identifications); accord Gross et al., Exonerations in the United States, 1989-2012, Report by the National Registry of Exonerations 40 tbl.13 (2012) (mistaken witness identifications in 43 percent of exoneration cases).

Procedures, 87 J. Applied Psychol. 1042 (2002). APA has thus urged courts to allow such testimony. But as the Commonwealth recognizes in its brief in Gomes, the admission of expert testimony lies within the discretion of the trial court. Commonwealth Gomes Br. 12. And even when a judge permits such testimony, other practical considerations--most significantly, the cost of retaining an expert and the time needed to present such testimony to the jury--may prevent a criminal defendant from introducing it. Jury instructions, by contrast, are "concise" and "cost-free." Henderson, 27 A.3d at 925, quoted in Guilbert, 49 A.3d at 727 n.27. Thus, despite generally being desirable, expert testimony cannot be the only safeguard against the dangers of unreliable identifications.

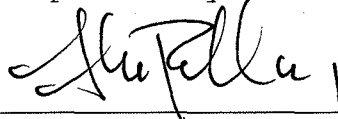
Furthermore, key portions of the instructions at issue in these cases would have told the jurors about particular factors that they were entitled--as a matter of law--to consider during their deliberations (the fact that a witness had failed to identify the defendant during a lineup, for example). Information about what the law permits jurors to consider is more appropriately conveyed in jury instructions than in expert testimony.

In sum, given the limitations of other tools of the adversary process at sensitizing jurors to the complexities and limitations of eyewitness evidence, the truth-seeking function of the criminal trial is best served by adopting an approach that allows vigorous cross-examination and admissible expert testimony alongside--but not in lieu of--thorough jury instructions.

CONCLUSION

Each of the instructions discussed above was supported by reliable and consistent psychological research, and each would have supplied information that would have assisted jurors in evaluating eyewitness testimony.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 14th day of August, 2014, I caused true and accurate copies of the foregoing brief to be filed conditionally herewith in the office of the Clerk of the Supreme Judicial Court and served upon the following counsel by first-class mail:

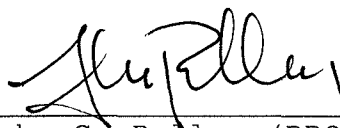
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**MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K)
CERTIFICATION**

I, John Polley, certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs, including Rules 16-20.



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