THE INNOCENCE NETWORK

Via e-mail (christine.burak@sjc.state.ma.us)
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Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Re: Comments on the Provisional Jury Instruction Regarding Eyewitness Identification

Dear Ms. Burak:

The Innocence Network, in cooperation with member organizations the Innocence Project, Inc. and the New England Innocence Project,[1] respectfully submits these comments in response to the Supreme Judicial Court Rules Committee's notice inviting comment on the provisional jury instruction regarding eyewitness identification evidence appended to the Supreme Judicial Court's opinion in *Commonwealth v. Gomes*, 470 Mass. 352 (2015).

The Supreme Judicial Court has long recognized the particular threat posed by eyewitness misidentification to the integrity of the criminal justice system and has undertaken unique efforts, from police practice reforms to changing the legal framework for evaluating this complex and powerful evidence, to address the many sources of error in cases involving eyewitness identifications.[2] The Innocence Network (the Network) commends the Court for its advances in this area, including the provisional jury instruction promulgated in *Gomes*. The Network's comments are intended to strengthen these comprehensive instructions so that innocent defendants in eyewitness cases in Massachusetts receive meaningful protection from the possibility of wrongful conviction.

The Innocence Network is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The sixty-eight current members[3] of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, France, Ireland, Italy, the Netherlands, New Zealand and

[1] Member organization Committee for Public Counsel Services Innocence Project abstains from this submission to avoid any potential conflict with the submission of Committee for Public Counsel Services to the Committee.
[2] *See Commonwealth v. Walker*, 460 Mass. 590 (2011) (recognizing that "eyewitness identification is the greatest source of wrongful convictions" and convening the Court's Study Group on Eyewitness Identification to examine all aspects of eyewitness identifications in the criminal justice system).
[3] A complete list of member organizations is attached hereto as Exhibit A.

Taiwan.[4] The Innocence Network and its members are committed to using the lessons gleaned from the wrongful conviction cases to improve the accuracy and reliability of the criminal justice system to ensure that future wrongful convictions are prevented. The Network member's work has a significant public safety component, insofar as wrongful convictions allow real perpetrators to remain free, often to commit additional crimes, while the innocent are imprisoned.[5]

The work of the Network organizations has helped to expose the problem of mistaken identification as the leading contributing cause of wrongful convictions, playing a role in 72 percent of the 329 DNA exonerations, including eight of the nine exoneration cases based on DNA evidence in Massachusetts.[6] The Network's extensive experience in mistaken eyewitness identification cases has led it to call on law enforcement, legislatures and the judiciary[7] to implement a variety of systemic reforms to minimize the risk of future wrongful convictions based on eyewitness misidentification.

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[4] The member organizations who are signatories to this submission are: the Alaska Innocence Project, Arizona Innocence Project, Association in Defense of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, France Innocence Project, Georgia Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Illinois Innocence Project , Indiana University Robert H. McKinney School of Law, Wrongful Conviction Component, Innocence & Justice Project at University of New Mexico School of Law, Innocence Project, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of Texas, Irish Innocence Project at Griffith College, Italy Innocence Project, The Justice Project, Kentucky Innocence Project, Knoops and Partners Innocence Project (the Netherlands), Life After Innocence, Loyola Law School Project for the Innocent, Michigan Innocence Clinic, Michigan State Appellate Defenders Office, Wrongful Conviction Units, Mid-Atlantic Innocence Project, Midwest Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, North Carolina Center on Actual Innocence, Northern California Innocence Project, Office of the Public Defender, State of Delaware, Office of the Ohio Public Defender, Ohio Innocence Project, Oklahoma Innocence Project, Osgoode Hall Innocence Project (Canada), Pennsylvania Innocence Project, Proyecto Justicada Reinvindicado, Reinvestigation Project (Office of the Appellate Defender), Resurrection After Exoneration, Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Taiwan Project for the Innocent, Texas Center for Actual Innocence, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of Baltimore Innocence Clinic, University of British Columbia Law Innocence Project (Canada), University of Miami School of Law Innocence Clinic, Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, West Virginia Innocence Project, Wisconsin Innocence Project and Witness to Innocence.

[5] In 49 percent of the wrongful convictions proven by post-conviction DNA testing, our work also helped identify the real perpetrators of those crimes. These true offenders are known to have committed a total of 144 additional violent crimes, including 77 rapes and 34 murders, following the arrest of the actually innocent person who was then erroneously prosecuted and convicted.

[6] *See* The Innocence Project, The Cases: DNA Profile Exonerees available at http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA&c5=MA&c6=d53d92d3a951429daafffdf4366f520a (last visited May 28, 2015).

[7] The Innocence Network and its members have appeared as *amicus curiae* in cases involving questions relating to the evaluation and use of eyewitness identification evidence in Massachusetts and around the country. *See, e.g., Young v. Conway*, 715 F.3d 79 (2d Cir. 2011); *Commonwealth v. Bastaldo*, No. SJC-11763 (Mass. Sup. Jud. Ct. argued Feb. 5, 2015); *Commonwealth v. Crayton*, 470 Mass. 228 (2014); *Commonwealth v. Gomes*, 470 Mass. 352 (2014); *Commonwealth v. Johnson*, 470 Mass. 389 (2014); *Commonwealth v. Walker*, 460 Mass. 590 (2011); *State v. Henderson*, 208 N.J. 208 (2011); *State v. Lawson*, 352 Or. 724 (2012).

One of the most important judicial reforms sought by the Network members is the type of expansive, science-based jury instructions embraced by the Supreme Judicial Court in *Gomes*. Instructions of this type provide critical protection to innocent defendants and help to ensure reliability in the outcomes of criminal cases by giving jurors necessary information and context about empirically-proven factors affecting the reliability of eyewitness identifications. The value of enhanced, eyewitness identification-specific jury instructions has been recognized by the United States Supreme Court and courts throughout the country.[8] The New Jersey Supreme Court, explaining its landmark decision to call for an extensive set of new, science-based instructions, posited, "[I]f even only a small number of jurors do not appreciate an important, relevant concept, why not help them understand it better with an appropriate jury charge?"[9]

The comments we submit herein identify those areas we believe can be improved and offer suggested language for incorporation into the final jury instruction on eyewitness identification to be promulgated by the Committee.

Overview

As the *Gomes* Court recognized, to provide a jury with "sufficient guidance on how to assess critical [identification] testimony,"[10] an eyewitness identification jury instruction should:

- Be scientifically accurate;[11]
- Reflect those principles that have attained a near consensus in the relevant scientific community;[12]
- Evolve with scientific understanding;[13]
- Be clear and balanced;[14] and
- Not be overly long.[15]

In addition, an effective, modern jury instruction should go beyond the traditional listing of factors that may affect eyewitness memory found in *Telfaire*-based instructions and instead explain to the jury *how* those factors may affect the accuracy of the identification.[16]

Despite the *Gomes* Court's recognition of the importance of this last feature, many of the provisional instructions do not fully explain how identified factors can affect identification accuracy. Without more detailed explanation, the instructions fail to give jurors the guidance

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[8] *See, e.g., Perry v. New Hampshire*, 132 S.Ct. 716, 721 (2012); *State v. Ledbetter*, 275 Conn. 534 (2005); *State v. Cabagbag*, 127 Hawai'i 302 (2012); *State v. Warren*, 230 Kan. 385 (1981); *Commonwealth v. Rodriguez*, 378 Mass. 296 (1979); *Henderson*, 208 N.J. 208, 272-73 (2011); *State v. Long*, 721 P.2d 483 (Utah 1986).

[9] *State v. Henderson*, 208 N.J. at 272.

[10] *See Gomes*, 470 Mass. at 364, *quoting Cabagbag*, 127 Hawai'i at 313.

[11] *Id.* at 363, 364.

[12] *Id.* at 367.

[13] *Id.* at 368.

[14] *Id.* at 377.

[15] *Id.* at 377, *Quoting* National Research Council of the National Academies, Identifying the Culprit: Assessing Eyewitness Identification 43 *(National Academies Press 2014).*

[16] *Id.* at 363; *See also* Sup. Jud. Ct. Study Group on Eyewitness Evidence: Report and Recommendations to the Justices, July 25, 2013 at 54; Devenport et al., Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising from Mistaken Eyewitness Identification, in Expert Testimony on the Psychology of Eyewitness Identification 51, 62 (Brian L. Cutler ed., 2009) (critiquing *Telfaire*-based instructions).

they need to critically evaluate identification evidence. This problem is particularly acute in cases involving system and estimator variables whose effects are not well understood by, or run counter to common misperceptions held by lay persons.[17]

While the Network is sensitive to the Court's concern about the length of an eyewitness identification instruction, we do not believe that the scientific research supports this concern. Further, it is concerning that in shortening the Study Group's comprehensive recommended instruction, the Court eliminated much of the critical language designed to provide jurors with "sufficient guidance on how to assess critical [identification] testimony,"[18] particularly in explaining the effects of system and estimator variables. Because the more robust language contained in the Study Group Report provides important protections to innocent defendants, the Network urges the Committee to revert to the Study Group's recommended language as described *infra*.

Further, the efficacy of the identification instruction is compromised by the absence of a preliminary charge, as recommended by the Study Group, or a directive that relevant instructions be read prior to eyewitness identification testimony (as opposed to at the close of evidence).[19] Research has shown that providing jurors with identification-specific instructions before they hear identification testimony sensitizes them to identification evidence strength. Indeed, research suggests that this may be the most effective way to increase juror sensitivity to identification evidence.[20] Research has also demonstrated that preliminary instructions can improve how jurors process testimony and can delay juror decision making until the close of evidence.[21]

Next, the Network urges the Committee to promulgate a range of cautionary instructions, including in cases involving in-court identifications, which the Court recently recognized are especially suggestive and prejudicial and pose unique risks for misidentification.[22] These instructions will enable courts to ensure that jurors are sensitized to evidence that possesses indicia of unreliability.

Finally, there are a number of substantive areas that should be either included or made more robust, so that jurors are fully informed about the factors that have the most significant potential effect on eyewitness reliability. The Network has also identified language that should be eliminated because it presents a risk of confusion or mistake that could increase the risk that innocent defendants will be erroneously convicted.

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[17] *See, e.g.,* Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, in The Handbook of Eyewitness Psychology: Memory for People 501 (R.C.L. Lindsay et al. eds., 2007); Elizabeth F. Loftus et al., Eyewitness Testimony: Civil and Criminal (4th ed. 2007); John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19 (1983).

[18] *See Gomes*, 470 Mass. 352, 364 (2014), *quoting State v. Cabagbag*, 127 Hawai'i 302, 313 (2012).

[19] *See State v. Henderson*, 208 N.J. 208, 296 (2011).

[20] National Academies at 43 and n.63 (citing research).

[21] *See* Vicki L. Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making*, 76 J. App. Psych. 220, 226 (1991).

[22] *See Crayton*, 470 Mass. 228; *Commonwealth v. Collins*, 470 Mass. 255 (2014).

Comments

Concerns About Overall Length Must Not Reduce Accuracy and Comprehensiveness of Instruction.

The Court's conclusion that "the longer the jury instruction, the greater the risk that it will implicitly communicate the message that all eyewitness identifications should be viewed as unreliable rather than simply evaluated with caution and care" is not supported by the research.[23] The National Academies report on which the Court relied for this point did not identify a causal relationship between increased length of instructions and increased juror skepticism, and we are aware of no research on identification instructions that has shown such a relationship. Moreover, the research relied upon by the National Academies predates New Jersey's landmark science-based instructions, and all of the cited studies involved *Telfaire* instructions or simplified *Telfaire* instructions.[24]

Nor has there yet been any peer reviewed research[25] into the efficacy of the New Jersey instruction or similar modern, science-based instructions like that proposed in *Gomes*. The paper cited in *Gomes*, "The Novel New Jersey Eyewitness Instruction Induces Skepticism But Not Sensitivity,"[26] which reports increased across-the-board skepticism among mock jurors has not yet been peer reviewed and so should not be relied upon.[27] But even the authors of that study could reach no conclusion about the role of instruction length in driving the outcome, and so recommended that "future experiments should tease apart the role of length versus ability to apply the guidelines." Finally, the study's methodology raises significant concerns. The researchers used a 30-40 minute videotape of a mock criminal trial that "contain[s] the basic elements of a trial: opening statements from both the prosecution and defense; direct and cross-examination of three witnesses; closing arguments; and jury instructions read aloud by the judge."[28] The limitations of this approach should be obvious to any experienced practitioner: in order for jury instructions to be effective, they must be incorporated meaningfully into every aspect of a trial, including *voir dire*, opening statements, witness questioning and closing argument.

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[23] *Gomes*, 470 Mass. 352, 377, *citing* National Academies at 28.

[24] *See, e.g.,* Jennifer L. Devenport et. al, *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising from Mistaken Witness Identification, in* Expert Testimony on the Psychology of Eyewitness Identification 310 (B. L. Cutler ed., 2009) ("[P]sychological research suggests that the cautionary instructions currently relied on by the courts (i.e., Telfaire instructions) either have no effect or enhance juror skepticism rather than juror sensitization to eyewitnessing and identification conditions. Thus, the courts may benefit from a set of cautionary instructions that more closely resemble expert psychological testimony, such as those set forth by the California Supreme Court in *People v. Wright* (1987).").

[25] National Commission on Forensic Science, *Views on Scientific Literature in Support of Forensic Science and Practice* at 2 (adopted Jan. 30, 2015).

[26] Athan Papailiou et al., "The Novel New Jersey Eyewitness Instruction Induces Skepticism But Not Sensitivity," Arizona Legal Studies Discussion Paper No. 14–17 (Aug. 2014).

[27] As the Court recognized in *Gomes*, it is science that has achieved general acceptance that should govern judicial practice. *Gomes*, 470 Mass. at 368.

[28] Papailiou et al. *supra* at 7.

Finally, it is worth noting that the New Jersey instruction has been in use for nearly three years without revision, and there is no evidence that jurors in New Jersey have become overly skeptical of eyewitness identification evidence.

For all of these reasons, the Network urges the Committee to ensure that concerns about the overall length[29] of the instruction do not result in a diminishment of the efficacy of the instructions' ability to guide juror decision making. The Committee should instead focus on whether the content of the identification instruction transmits what jurors need to know to effectively analyze the identification testimony before them.

In Order to Meaningfully Affect Juror Comprehension of Identification Evidence, the Instructions Should Include a Pre-Charge.

The Network urges the Committee to adopt the pre-charge set forth in the Study Group Report, with three changes. First, the Committee should adopt a strong presumption in favor of reading the pre-charge prior to opening statements and prior to the identification testimony in cases involving eyewitness identification. This would allow trial courts to limit or eliminate one or both of the readings in the minority of cases where the party could establish "good reason" for the instruction not to be given.[30] Second, the Committee should add language that informs jurors that they will later be instructed about various factors that research has shown can affect the accuracy of an identification. Finally, the pre-charge should include language that addresses stress[31] and witness certainty[32], as these (like retention interval and memory contamination, which the Study Group included in its pre-charge) are among the most common factors in eyewitness identification cases and two of the most commonly misunderstood factors.[33] The Network urges the adoption of the following pre-charge language, supported by the reasoning set forth below:

> **One of the most important issues in this case is the identification of the defendant as the person who committed the crime.**
>
> **I am now going to talk to you about the general nature of memory. Some of this information may surprise you and may contradict what we once thought of as common sense about memory. Later on I will discuss with you specific factors that can affect memory. I am not expressing any opinion about the accuracy of any specific memory of any particular witness.**
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> **Memory does not function like a videotape or DVR, permanently and accurately capturing a person, a scene, or an event. Memory is far more complex. We do have the ability to recognize other people from past experiences and to identify**

[29] As the Court and Study Group both note, most cases will involve only a subset of the instruction.
[30] *Commonwealth v. Crayton*, 470 Mass. 228, 235 (2014).
[31] *See Gomes*, 470 Mass. at 372-73 (citing cases and research).
[32] *Id.* at 369-72 (citing cases and research).
[33] *Id.*

them at a later time. Generally, memory is most accurate right after the event and begins to fade quickly thereafter. Although moderate levels of stress may improve focus in some circumstances, high levels of stress or fear can reduce an eyewitness's ability to process information. Also, a person's memory may change due to information the person gets between the time of the incident and whenever the witness recalls it. A person may not realize that his memory has changed because of the information he gets. This is especially true for a witness's confidence, which can be significantly increased by information the witness receives. Under most circumstances, a witness's certainty in an identification is not a reliable indicator of identification accuracy.

As has been established by substantial social science research and recognized in *Gomes*, the problem of juror knowledge of eyewitness identification issues is twofold: jurors lack important information and possess many misconceptions concerning how memory works and the effects of specific system and estimator variables on witness memory and perception.[34] The pre-charge recommended by the Network (or, in the alternative that recommended by the Study Group) is an important first step in addressing both of these problems. Both the Network and the Study Group's pre-charges provide an accurate framework through which jurors can process the identification evidence they will hear.[35] Without such a framework, jurors will "impose [their own] preexisting framework upon the information" they receive – regardless of whether that preexisting framework is correct.[36] Second, and relatedly, the pre-charge will help jurors focus on and recall relevant evidence rather than irrelevant evidence.[37] This is particularly important given that unaided jurors tend to overvalue factors like witness certainty while discounting factors like retention interval.[38]

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[34] *Id.* at 365-66 (collecting cases and referencing research).

[35] *See, e.g.,* Sara Gordon, *Through the Eyes of Jurors: The Use of Schemas in the Application of "Plain-Language" Jury Instructions*, 64 Hastings L.J. 643, 674 (2013) (recommending that "courts use principles of cognitive and educational psychology" including providing preliminary instructions and repeating instructions "to develop jurors' schemas for the relevant legal concepts to make those schemas more flexible and better organized, and therefore allow for more accurate and more efficient decisionmaking."); *Accord* Elizabeth Ingriselli, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 Yale L.J. 1690, 1715-17 (2015) (Research has shown that individuals are more able to recognize primed information when they have an organizational schema that provides them with context to evaluate the evidence. Pre-evidence instructions would provide the jury with an organizational framework for evaluating evidence. If the instructions are also debiasing, they will prime jurors to organize the evidence according to legal principles rather than personal biases.).

[36] Janice C. Goldberg, Comment, *Memory, Magic, and Myth: The Timing of Jury Instructions*, 59 Or. L. Rev. 451, 454 (1981); *Accord* E. Barrett Prettyman, *Jury Instructions – First or Last?* 46 A.B.A. J. 1066 (1960) ("What manner of mind can go back over a stream of conflicting statements of alleged facts . . . and retrospectively fit all these recollections into a pattern of evaluation and judgment given him for the first time after the events? The *human* mind cannot do so. It is not a magnetized tape from which recorded speech can be repeated at chosen speed and volume.").

[37] *See, e.g.,* Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 Law & Hum. Behav. 163, 177 (1977) (jury instructions at the beginning of a trial help jurors to distinguish relevant evidence and to remember that evidence).

[38] *See* Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185-191(1990).

While empirical research about the "precise impact" of preliminary instructions has not been "resolved conclusively,"[39] the findings are generally neutral or positive.[40] One study found that pretrial instruction improved juror performance in two distinct ways.[41] First, jurors who heard the instructions *before and after* trial were better able to apply the law to the facts than any other subjects (which included before-only and after-only conditions).[42] Second, jurors who received pretrial instruction were "more likely to defer their verdict decisions until after the trial."[43] Finally, the study found that preliminary instructions were not harmful in any way: "[p]reinstruction did not impair jurors' performance on any measure. There were no decrements in their abilities to recall the evidence, understand the law, or make verdict decisions. It appears, then, that these benefits of preinstruction may be realized without cost to jurors' information processing or decision making."[44]

In light of this research, the Network strongly urges the Committee to adopt its proposed pre-charge (or, in the alternative, that recommended by the Study Group) and, further, to adopt a strong presumption in favor of reading the pre-charge both before opening argument and before identification testimony. A party opposing the pre-charge should be required to demonstrate "good reason" why it should not be given.

To Be Effective, the System and Estimator Variable Language Must Explain How the Variables Can Affect Memory.

In *Gomes*, the Court replaced much of the Study Group's proposed language addressing how various system and estimator variables can affect eyewitness memory and perception with language "list[ing]" factors that the jury "should consider."[45] The result of this change is that the provisional instructions are the functional equivalent of *Telfaire/Rodriguez* instructions, suffering from all of the same well-known problems. For the following reasons, we urge the Committee to adopt the Study Group's recommended instructions for the system and estimator variables identified below because these instructions will "at the very least . . . contribute to the Court's goal of reducing the number of wrongful convictions while obtaining accurate convictions."[46]

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[39] Neil P. Cohen, *The Timing of Jury Instructions*, 67 Tenn. L. Rev. 681, 690 (2000).
[40] *See id.* at 690-691 (collecting research); *see also* Ingriselli *supra* at 1715-16 (positing that timing should have a stronger effect where the instruction involves easily understood instructions designed to "unbias" jurors as compared with instructions that involve complex legal principles).
[41] *See* Vicki L. Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making*, 76 J. App. Psych. 220, 226 (1991).
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Should the Committee agree with the Network's suggested changes, we would further suggest that the word "list" be changed to "explain" in the sentence, "Relying on some of the research that has been done in this area, I am going to **list** some specific factors you should consider in determining whether the identification testimony is accurate." *Gomes*, 470 Mass. 352, 380 (emphasis added).
[46] Study Group Report at 4.

Eyewitness-specific jury instructions have been a feature in most jurisdictions[47] since the late 1970s and historically followed the model set forth in *United States v. Telfaire*.[48] *Telfaire* instructions highlight factors that influence the reliability and accuracy of an identification, but do not provide specific guidance about how the presence of a given factor might affect the reliability or accuracy of an identification or how the jury should weigh the presence of a factor in evaluating the identification evidence.[49] Scientific research suggests that these traditional instructions have not been effective at combating juror misconceptions or assisting jurors with the complex task of weighing and evaluating identification evidence. They have been specifically criticized for being difficult to comprehend; incomplete (in that they list only a few of the factors shown by scientific research to affect reliability); and insufficiently proscriptive (in that they do not provide juries with meaningful guidance about how to critically analyze or weigh the evidence). Indeed, scientists have concluded that *Telfaire* instructions do not substantially improve juror understanding of eyewitness identification evidence.[50]

In the eyewitness context, this is particularly true because jurors possess many misconceptions about memory and the factors that affect the reliability of an identification. For this reason, and as discussed *supra*, timing and repetition are also important. Instructions provided prior to the witness's testimony and at the close of evidence can increase jurors' real-time understanding of the identification evidence, particularly regarding previously unfamiliar concepts, as well as during deliberations.[51]

Thus, in order to provide jurors with a better understanding of eyewitness factors, the Committee should adopt system and estimator variable language (like that contained in the Study Group Report) that is clearly worded and explains how various factors affect the reliability of an identification.[52] The final instruction should address the effect of estimator variables on memory and should also include explicit references to, and explain the effect of, the presence or absence of those police practices shown by scientific research to affect the reliability of identifications.[53] Explicit references to system variables (as can be seen in the Study Group's recommended instructions) are particularly important in Massachusetts where, although there has been a unique history of collaborative reform efforts involving all stakeholders in the criminal justice system, there has been no mandatory statewide reform. Incorporating best police practices into jury instructions thus not only serves to educate jurors but also ensures that litigants are treated

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[47] *See Perry v. New Hampshire*, 132 S.Ct. 716, 728 n.7, 729 (2012) (Noting that "many federal and state courts have adopted" eyewitness-specific jury instructions and citing examples of these instructions.).

[48] *United States v. Telfaire*, 469 F. 2d 552, 558–559 (D.C. Cir. 1972).

[49] *Accord Commonwealth v. Gomes*, 470 Mass. 352, 363 (2014).

[50] *See, e.g.,* Brian L. Cutler et al., *Nonadversarial Methods for Improving Juror Sensitivity to Eyewitness Evidence*, 20 J. Appl. Soc. Psychol. 1197, 1198-1200, 1202-06 (1990); Edith Greene, *Judges' Instruction on Eyewitness Testimony*, 18 J. Appl. Soc. Psychol. 252, 260 (1988).

[51] *See* Donna Cruse & Beverly A. Browne, *Reasoning in a Jury Trial: The Influence of Instructions*, 114 J. Gen. Psychol. 129, 133 (1986) ("Multiple exposures to clear legal definitions serve to equate rules among jurors and eliminate the necessity of relying on naïve assumptions to evaluate testimony."). *See also State v. Henderson,* 208 N.J. 208, 296 (2011).

[52] Gabriella Ramirez et al., *Judges Cautionary Instructions on Eyewitness Testimony*, 14 Am. J. Forensic Psychol. 31, 56 (1996) ("The revised instructions . . . led to a significant effect on the subjects' expert knowledge of eyewitness factors. In contrast, no educational effect was found with *Telfaire* [instructions]."). *See also* Nancy K. Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis,* 30(4) Law & Hum. Behav. 469 (2006).

[53] Study Group Report at 122-28; 129.

uniformly regardless of the jurisdiction of the investigation. In addition, as the Court has previously recognized, judicial notice of best police practices has a salutary effect on law enforcement and can also deter unscientific police practices.[54]

Finally, the instruction the Committee adopts should address more fully one of the most potent misconceptions possessed by jurors regarding eyewitness testimony: the relationship between certainty and accuracy, by clarifying that, at best, there exists only a weak correlation between confidence and accuracy, and that such correlation exists *only* among a small segment of identifying witnesses.[55] To underscore just how important this finding is, consider the research findings of Professor Brandon Garrett, who studied the first 250 DNA exonerations (of which 190 or 76 percent involved eyewitness misidentification).[56] Professor Garrett found that among the misidentification cases that went to trial, 57 percent (91 of 161) involved eyewitnesses who had not been certain of their identification pre-trial. Yet only 21 percent of these eyewitnesses (34) admitted to the earlier uncertainty.[57] These statistics confirm what the research shows: certain and uncertain witnesses can both be wrong; certainty is malleable; and people often do not realize when their level of certainty has changed.

To ensure that jurors receive the context and direction necessary to properly evaluate eyewitness identification evidence, the Network urges the Committee to reconsider the system and estimator variable instructions proposed by the Study Group. Specifically, the Network urges the Committee to adopt the language recommended by the Study Group for the following factors, where there is general consensus in the scientific community:

- General opportunity to view instruction[58];

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[54] *Commonwealth v. Silva-Santiago*, 452 Mass. 782, 797 (2009) (urging that police officers follow reform practices in conducting eyewitness identification procedures); *Commonwealth v. Watson*, 455 Mass. 246, 252 (2009) (same). *Compare Perry v. New Hampshire,* 132 S.Ct. 716, 719 (2012) ("A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place.") *with Commonwealth v. Johnson*, 420 Mass. 458, 468 (1995) ("the reliability test does little or nothing to discourage police from using suggestive identification procedures . . . [o]nly a rule of per se exclusion can ensure the continued protection against the danger of mistaken identification and wrongful convictions.").

[55] *See, e.g., State v. Lawson*, 352 Or. 724, 777 (2012) ("Despite widespread reliance by judges and juries on the certainty of an eyewitness's identification, studies show that, under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy. . . . *[R]etrospective* certainty—witness confidence in the accuracy of their identification *after* it has occurred—may have a weak correlation with accuracy. *See* Gary L. Wells & Elizabeth A. Olsen, *Eyewitness Testimony,* 54 Ann Rev Psychol 277, 283 (2003) (describing studies). The effect, however appears only within the small percentage of extremely confident witnesses who rated their certainty at 90 percent or higher, and even those individuals were wrong 10 percent of the time. *Id.*") In light of this research, courts have cautioned against overreliance on the relationship between certainty and accuracy. *See, e.g., State v. Almaraz*, 154 Idaho 584, 595 (2013) ("Courts should be cautious in the amount of weight they give to a witness's degree of certainty in their identification when police have used overly suggestive procedures, particularly when confirmation feedback has been given."); *State v. Henderson*, 208 N.J. 208, 254 (2011) ("eyewitness confidence is generally an unreliable indicator of accuracy"); *Brodes v. States*, 279 Ga. 435, 614 (2005) (in light of scientific research, trial courts should not consider certainty in evaluating identification evidence); *Commonwealth v. Santoli*, 424 Mass. 837 (1997) (same).

[56] Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 48 (2011).

[57] *Id.* at 64.

[58] "One factor to consider is the witness's opportunity to observe an event or a person. Just as in this courtroom, our ability to see what is going on depends on our individual ability to see, and the opportunity we are given to use our

- Stress[59];
- Duration[60];
- Weapon focus[61];
- Hidden or altered features[62];
- Distinctive face or feature[63];
- Witness saw defendant on prior occasion[64];
- General system variable instruction[65];
- Conduct of lineup/photo array procedure.[66]

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eyesight. For example, the information we acquire about this courtroom depends on our individual eyesight, our physical and mental condition, such as illness, injury, or fatigue, where we are, and what we are looking at. If we are talking about the back row of seats to my right, what we see is affected by distance, lighting, angle of vision, and things blocking our view. But keep in mind that the level of activity in this courtroom may differ from the conditions at the time of the crime." Study Group Report at 119 (citations omitted).

[59] "Another factor to consider about the acquisition of information is stress. Although moderate levels of stress may improve focus in some circumstances, high levels of stress or fear can have a negative effect on a witness's ability to acquire information and make an accurate identification." Study Group Report at 120 (citations omitted).

[60] "Another factor to consider about the acquisition of information is the amount of time a witness had to observe a person or an event. There is no minimum time required to make an accurate identification, but a brief or fleeting contact is less likely to produce an accurate identification than a longer exposure to the person who committed the crime. In addition, a witness's time estimate may not be accurate because witnesses tend to think events last longer than they actually did." Study Group Report at 119-20 (citations omitted).

[61] "Another factor to consider about the acquisition of information is whether the witness saw a weapon during the incident. A weapon can distract the witness and take the witness's attention away from the perpetrator's face, particularly if the weapon is directed at the witness. As a result, if the crime is of short duration, the presence of a visible weapon may reduce the accuracy of an identification. In longer events, this distraction may decrease as the witness adapts to the presence of the weapon and focuses on other details." Study Group Report at 130.

[62] "Another factor to consider about the acquisition of information is whether the perpetrator's features were visible or hidden. For example, hats, sunglasses, and masks can affect a witness's ability to both remember and identify the perpetrator and can reduce the accuracy of an identification." Study Group Report at 132.

[63] "Another factor to consider about the acquisition of information is whether the perpetrator had a distinctive face or feature. A witness may be more likely to remember a distinctive face or feature and to accurately identify it." Study Group Report at 133.

[64] "Another factor to consider is whether the witness knew the defendant or had seen the defendant before the incident or before the identification. If the witness had seen the defendant before the incident, you should consider how many times the witness had seen the defendant and under what circumstances. Prior exposure to a person can help a witness recognize that person. But it can also lead to a mistaken identification if the witness confuses people he saw at a different times or places. For example, if the witness got off a bus before witnessing the crime, he might mistakenly remember another passenger on the bus when asked to identify the perpetrator of the crime. It is for you to decide whether the prior contact between the witness and the defendant makes the witness identification more accurate, less accurate, or had no effect." Study Group Report at 135.

[65] "Other outside factors that may affect storing information and forming a memory are the identification procedure(s) used in this case. The way that an identification procedure is conducted can affect the accuracy of an identification. Therefore, in evaluating the accuracy of each identification made in this case, you should consider the manner in which the procedure was conducted, including anything said to the witness before, during, or after the identification procedure(s). There are general factors that apply to every type of identification procedure the police conducted in this case. First, before conducting an identification procedure, the police should obtain from the witness a detailed description of the offender. Second, witnesses should not be interviewed or participate in identification procedures together. For example, witnesses should not view a lineup at the same time or within earshot of each other. Third, the police should not provide witnesses with any feedback about the offender or the identification procedure(s). I will now instruct you on the specific identification procedure(s) used in this case. ..." Study Group Report at 122-28 (citations omitted).

[66] "Feedback occurs when the police or other witnesses to an event convey to a witness that he or she correctly identified the suspect. That confirmation poses a risk of creating a false sense of confidence in a witness. Feedback

In addition to adopting the Study Group language for these factors, the Network submits the following comments regarding system or estimator variables, for which there is a general consensus in the scientific community:

Confidence-Accuracy Language

The Court has long recognized the substantial body of research finding witness confidence or certainty not to be a good indicator of identification accuracy.[67] Yet the provisional instruction on the certainty-accuracy relationship provides the jury with very little information or guidance about these findings. The Network urges the Committee to adopt a stronger instruction that more accurately reflects the research consensus and can mitigate against jurors' tendency to rely unduly on witness confidence as a proxy for accuracy. The Network suggests the following to replace the existing provisional confidence-accuracy language:

> **A witness's confidence can be significantly increased by information the witness receives before or after an identification procedure. A witness may not be aware that his/her confidence has been inflated. Research has shown that, under most circumstances, a witness's certainty in an identification is not a reliable indicator of identification accuracy. This is especially true where the witness did not describe that level of certainty when s/he first made the identification.**

Cross-Race/Cross-Ethnicity Instruction

As discussed in the brief of *amicus curiae* the Innocence Project, Inc., in *Commonwealth v. Bastaldo*, No. SJC-11763 (Mass. Sup. Jud. Ct. argued Feb. 5, 2015) cross-race identifications are very common among the DNA exonerations involving eyewitness misidentification, occurring in at least 41 percent of the cases (a number that rises to 44 percent when looking only at victim identification). For the reasons set forth in the Innocence Project's brief, the Network proposes that the following cross-race instruction be presumptively given unless the parties agree that the witness and the defendant are of the same race or ethnicity.

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can also present a risk of falsely enhancing a witness's memory of the quality of his or her view of an event. It is for you to determine whether or not the memory of the witness was affected by feedback or whether the memory instead reflects the accurate perceptions of the witness during the event. Identification is a question of fact for you, the jury, to decide. If, after your consideration of all the evidence, you determine that the Commonwealth has not proven beyond a reasonable doubt that the defendant was the person who committed this offense(s), then you must find him not guilty. If, on the other hand, after your consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant was correctly identified, you then must consider whether the Commonwealth has proven each and every element of the offense[s] charged beyond a reasonable doubt." Study Group Report at 129. The Network is particularly concerned that the provisional instructions do not specify those practices that have been "designed to diminish the risk of suggestiveness." *Commonwealth v. Gomes,* 470 Mass. 352, 385 (2014).

[67] *See Gomes*, 470 Mass. at 370 (citing cases). *Accord* National Academies at 4 (recognizing that confidence judgments may vary over time and can be powerfully swayed by many factors).

> **Research has shown that people may have greater difficulty in accurately identifying members of a different race or ethnicity who look different from them. You should consider whether the witness and the defendant's difference in race or ethnicity, if any, may have influenced the accuracy of the witness's identification. [WHERE RELEVANT, ADD THE FOLLOWING:] Research has also shown that this difficulty in accurately identifying members of a different race or ethnicity is greater when the witness only viewed the person for a short time and/or when there was a long period of time between the original viewing and the identification.**

Showups

The language concerning showups in the provisional instruction[68] suffers from the same shortcomings as the system variable language discussed *supra*. In addition, this language is inaccurate and misleading, and inconsistent with the Court's jurisprudence in this area in two respects. First, it incorrectly describes showups as "to some degree" inherently suggestive[69] and second it incorrectly informs jurors that the risks associated with showups can be "reduce[d]" by a witness's fresh memory.[70] In both cases, the objected-to language creates a serious risk of wrongful conviction for innocent defendants.

In its many cases addressing showups,[71] the Court has not moderated its description of showups as "inherently suggestive" in any way. That is because, as the science shows and courts around the country have recognized, showups are inherently suggestive. The moderating language ("to some degree") included in the provisional instruction should be deleted as it incorrectly minimizes the suggestion inherent in the showup and will likely cause jurors to improperly discount that suggestion and its effect on witnesses. It is the presence and effect of suggestion, as the Committee knows, that creates the risk of misidentification with which we are so concerned.

In *Crayton*, the Court explained the particular risk of misidentification associated with showups but not lineups or photographic arrays:

> [U]nlike lineups, showups have no mechanism to distinguish witnesses who are guessing from those who actually recognize the suspect. In an unbiased lineup, an unreliable witness will often be exposed by a 'false positive' response identifying a known

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[68] *Gomes*, 470 Mass. at 386-87.

[69] *Gomes*, 470 Mass. at 387.

[70] *Gomes*, 470 Mass. at 387 ("[y]ou should consider how long after the initial event the showup took place, as a fresh memory of an event that occurred only a few hours earlier may **reduce** the risks arising from the inherently suggestive nature of a showup,") (emphasis added).

[71] See, e.g., *Commonwealth v. Phillips,* 452 Mass. 617, 628–29 (2008); *Commonwealth v. Martin,* 447 Mass. 274, 279–81 (2006); *Commonwealth v. Figueroa,* 468 Mass. 204, 217 (2014); *Commonwealth v. Austin,* 421 Mass. 357, 361 (1995). *See Commonwealth v. Meas,* 467 Mass. 434, 441 (2014); *Commonwealth v. Crayton*, 470 Mass. 228, 235 (2014).

> innocent subject. By contrast, because showups involve a lone suspect, every witness who guesses will positively identify the suspect, and every positive identification is regarded as a 'hit.' For that reason, misidentifications that occur in showups are less likely to be discovered as mistakes.[72]

This risk is present whether or not the witness has a fresh memory. The temporal proximity of the showup to the crime does not *reduce* the risk presented by the absence of known innocent fillers. Likewise, showups present a unique risk of suggestion because "the eyewitness likely knows that the police suspect the individual" being presented.[73] Again, a witness's fresh memory does not diminish this risk. Instead, it is more accurate to say – as the Court did in *Austin* and *Crayton* – that the benefits of a prompt showup, such as "concerns for public safety; the need for efficient police investigation in the immediate aftermath of a crime; and the usefulness of prompt confirmation of the accuracy of investigatory information" **justify**[74] the associated risks. The language used by New Jersey in its jury instruction ("Although the benefits of a fresh memory may **balance** the risks of undue suggestion, showups conducted more than two hours after an event present a heightened risk of misidentification")[75] and the Oregon Supreme Court in *Lawson* ("A showup is most likely to be reliable when it occurs immediately after the witness has observed a criminal perpetrator in action because the benefit of a fresh memory **outweighs** the inherent suggestiveness of the procedure)[76] also accurately convey the scientific research findings and the Court's jurisprudence. Should the Committee decline to adopt the Study Group's language about showups, it should at a minimum replace the word "reduce" with either "justify," "balance," or "outweigh."

The risk of wrongful conviction where a showup is used is not theoretical; showups have played a significant role in the DNA exonerations involving eyewitness misidentification. Physical showups were used in 15 percent (35) and photographic showups were used in 4 percent (10) of the 235 DNA exonerations that involved eyewitness misidentifications. In order to protect innocent defendants identified in showups from the threat of wrongful convictions, and for all of the reasons set forth *supra*, the Network strongly urges the Committee to adopt the jury instruction relating to showups recommended by the Study Group[77] rather than the provisional

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[72] *Crayton,* 470 Mass. at 235 (2014), *quoting* Study Group Report at 76 and citing research.
[73] *Crayton*, 470 Mass. at 237.
[74] *Austin*, 421 Mass. at 362 (1995); *Crayton*, 470 Mass. at 242.
[75] New Jersey Model Jury Charge (Criminal) "Identification: Out-of-Court Identification Only" (Sept. 2012) (emphasis added).
[76] *State v. Lawson,* 352 Or. 724, 743 (2012) (emphasis added).
[77] "In this case, a witness identified the defendant during a 'showup,' that is, the defendant was the only person shown to the witness when the identification was made. In evaluating the identification that was made, one factor to consider is when the showup was conducted. Showups conducted more than two hours after an incident tend to be less accurate than showups conducted within two hours of the incident. Another factor to consider is how the showup was conducted. An appropriate showup procedure conducted by the police should include the following: 1. When transporting a witness to a showup, officers should attempt to prevent the witness from hearing radio transmissions or other officer-to officer conversations related to the suspect or their investigation. 2. The police should minimize suggestiveness. For example, showups should not be conducted if the suspect is seated in the rear of a police cruiser, in a cell, or in any other enclosure associated with custody. If the suspect is handcuffed, he should not be put into a position where the witness can see the handcuffs. 3. The police should not tell the witness anything about the suspect, including whether he was arrested or where he was caught. In addition, the police should

instruction. Should the Committee elect not to do this, however, it is imperative that the Committee eliminate the language of the provisional instruction, which is at odds with the scientific research, is misleading to jurors and increases the risk that an innocent suspect will be wrongly convicted based on mistaken eyewitness identification testimony.

In-Court Identifications

In-court identifications were present in 54 percent of the DNA exonerations where eyewitness misidentification was a contributing factor in the wrongful conviction. In *Crayton* and *Collins*, *supra*, the Supreme Judicial Court once again distinguished itself as a nationwide leader by identifying and addressing one of the most suggestive procedures and most dangerous sources of unreliability in eyewitness identifications: the in-court identification. In so doing, the Court recognized the unique risks associated with in-court identifications and the great difficulty involved in mitigating those risks. Given these problems, the Court limited the availability of in-court identifications in cases involving no prior out-of-court identification[78] or a prior-out-of-court identification that resulted in "something less than an unequivocal positive identification."[79] The Court has not yet addressed "whether State constitutional principles would also require 'good reason' before in-court identifications are admitted in evidence [or] the admissibility of in-court identifications in civil cases."[80]

The new rules articulated in *Crayton* and *Collins* provide meaningful protection for innocent defendants in cases where in-court identifications are prohibited. The Network commends the Court for incorporating the research findings into judicial practice.

The Committee should include language concerning in-court identification procedures in the final instruction. This language will help address the recognized dangers associated with in-court identifications. This is particularly important as jurors are often unaware of the very factors that make in-court identification procedures so suggestive and the resulting identification so potentially unreliable. Further, cross-examination and argument provide insufficient means to mitigate these dangers[81]. The Network proposes the following instruction which should be given both before and after the in-court identification is made, and at the close of evidence:

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not tell the witness whether the suspect was found with anything. Another factor to consider is what the police told the witness about the showup procedure. Before conducting a showup, the police should tell the witness the following: 1. You are going to be asked to view some people. 2. The person you saw earlier may or may not be one of the people you are about to view. 3. It is just as important to clear innocent persons from suspicion as it is to identify the guilty. 4. Regardless of whether you identify someone, we will continue to investigate the incident. 5. If you do identify someone, our procedures require me to ask you to state, in your own words, how certain you are. 6. If you do identify someone, please do not ask us questions about the person because we cannot share any information with you. 7. Regardless of whether you identify a person, please do not discuss the procedure with any other witnesses in the case or the media." Study Group Report at 123-24 (citations omitted).

[78] *Crayton,* 470 Mass. at 242.

[79] *Commonwealth v. Collins*, 470 Mass. 255, 262 (2014).

[80] *Crayton*, 470 Mass. at 242, n.16.

[81] National Academies at 75 ("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."). *See also Commonwealth v. Crayton*, 470 Mass. 228, 169 (2014) ("we have previously recognized how difficult it is for a defense attorney to convince a jury that an eyewitness's confident identification might be attributable to the suggestive influence of the circumstances surrounding the identification") (citing cases). *Accord* Jules Epstein, *The*

The witness [name] may be asked to identify the perpetrator from among the people in the court room. This is called an in-court identification procedure and is regarded as especially suggestive for a few reasons.

First, there are no alternative lineup members who the witness might pick if presented with more than one person. Thus, an in-court identification procedure does not really "test" the witness's memory and there are no "wrong answers" as there would be with a lineup.

Second, it is often obvious who the defendant is within the court room. Thus, it is difficult to know if the witness is making an identification based on his/her independent memory of the event or is instead simply selecting the person s/he knows to be, or believes to be, the defendant. The witness may not recognize that s/he is affected by the circumstances of the in-court identification and may even strongly believe that s/he is making an identification based on his/her memory. That belief, no matter how strongly held, may be incorrect.

Third, you have already heard that memory fades over time. It is important for you to consider the effect of the passage of [amount of time] on the witness's memory.

You should consider these factors in evaluating any in-court identification, but it is ultimately for you, the jury, to decide whether the witness's identification is accurate.

Cautionary Instructions Provide An Important Protection Against Wrongful Conviction Based on Mistaken Eyewitness Identification Testimony.

As the Court and the Study Group have recognized, the scientific research establishes that the risk of misidentification decreases when law enforcement uses certain best practices in the administration of identification procedures, whether showups, live lineups or photo arrays.[82] These practices include (but are not limited to) blind administration, non-suggestive lineup/array composition, prophylactic pre-lineup instructions, the avoidance of feedback, recording, the verbatim recording of a witness's confidence statement, and sequential presentation.

Great Engine That Couldn't: Science, Mistaken Identifications and the Limits of Cross-Examination, 36 Stetson L. Rev. 727 (2007).

[82] *Commonwealth v. Silva-Santiago*, 452 Mass. 782, 797 (2009); *Commonwealth v. Watson*, 455 Mass. 246, 252 (2009); *Perry v. New Hampshire,* 132 S.Ct. 716, 719 (2012); Study Group Report at 22-27.

As discussed *supra* and recognized by the Court in the false confession context[83], courts have an important role to play in both encouraging voluntary and uniform compliance with these practices and in deterring practices that research has shown increase the likelihood of misidentification, which creates a risk of wrongful conviction for innocent defendants.[84] The Network urges the Committee to follow the Study Group's recommendation and adopt "cautionary instructions to deal with variances from best practices in eyewitness identification procedures."[85] The instruction should be triggered by the state's failure to comply with any of the seven practices identified above. The Network urges that the Committee adopt the following language, modified from the Court's holding in *DiGiambattista,* the Study Group's recommendations and model jury instructions, the New Jersey eyewitness identification instructions and the cautionary instructions mandated in identification cases in other states[86]:

> **Scientific research has shown that the risk of eyewitness misidentification can be reduced when law enforcement follows certain best practices. Research has also shown that the risk of misidentification can likewise be increased if these practices are not used.**
>
> **In this case, law enforcement failed to follow [some/all] of these practices.**
>
> **[GIVE AS APPROPRIATE:]**
>
> - **A lineup administrator who knows which person or photo in the lineup is the suspect may intentionally or unintentionally convey that knowledge to the witness. That increases the chance that the witness will select the suspect, even if the suspect is innocent. It is for this reason that the recommended practice is for the lineup administrator not to know who the suspect is, or to take steps to make sure s/he**

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[83] *Commonwealth v. DiGiambattista*, 442 Mass. 423, 447 (2004) ("Where police fail to, at a minimum, audiotape the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recordered whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt.").

[84] *See supra* n.54.

[85] Study Group Report at 112.

[86] Study Group Report at 113; New Jersey Model Jury Charge (Criminal) "Identification: Out-of-Court Identification Only" (Sept. 2012); *State v. Ledbetter*, 275 Conn. 534 (2005) (trial court should instruct jury regarding risk of misidentification resulting from a failure to instruct the witness that the suspect may not be present in the lineup); *State v. Long*, 721 P.2d 483 (Utah 1986) (general cautionary instruction on fallibility of eyewitness identifications); *State v. Delgado*, 188 N.J. 48 (2006) (cautionary instruction where police failed to contemporaneously document identification procedure in writing); State *v. King*, 2007 WL 325507 (N.J. Super. A.D. Feb. 6, 2007) (where police told witness the suspect was present in the lineup, trial court required to instruct the jury that such practices increase the risk of misidentification).

does not know which lineup member is being viewed by the suspect.

- **A suspect should not stand out from other members of the lineup. The reason is simple: an array of look-alikes forces witnesses to examine their memory. The risk of misidentification increases when the suspect stands out, because the witness may choose the suspect because he is the obvious choice, not because he matches the witness's independent memory. In addition, a biased lineup may inflate a witness's confidence in the identification because the selection process seemed so easy to the witness. Lineups should also include a number of possible choices for the witness, commonly referred to as "fillers." A minimum of six persons or photos should be included in the lineup. When fewer than six persons or photos are included in the lineup/photo array, the chance that the suspect will be selected increases – whether or not he is in fact the person who committed the crime.**
- **What is or is not said to the witness prior to viewing an identification procedure can affect how the witness behaves, including whether or not s/he makes an identification and how certain s/he is of that identification. For this reason, identification procedures should begin with instructions to the witness that the perpetrator may or may not be in the array and that the witness should not feel compelled to make an identification. The failure to give this instruction can increase the risk of misidentification.**
- **Feedback occurs when police officers signal to eyewitnesses that they correctly identified the suspect. That confirmation may reduce doubt and engender or produce a false sense of confidence in a witness. Feedback may also falsely enhance a witness's recollection of the quality of his or her view of an event.**
- **A witness's confidence statement should be documented in the witness's own words at the time s/he makes an identification. You have been previously instructed that a witness's certainty in an identification is not a reliable indicator of identification accuracy. It is also true that a witness's certainty can be inflated as a result of biased procedures or suggestive feedback. When police fail to document a witness's level of certainty at the time of the identification, we have no way of knowing whether the witness's certainty has increased between the time of the identification and the time of the witness's testimony.**
- **It is important that you, the jury, have as much information as possible about the identification procedure to help you evaluate of the reliability of the identification**

evidence. It is for this reason that police should record the entire identification procedure. The absence of a recording permits (but does not compel) you to conclude that the Commonwealth has failed to establish that the identification procedure was proper beyond a reasonable doubt.

When you consider the reliability of the identification made by [witness], you must do so bearing in mind the procedures used to elicit that identification and the known risks associated with those procedures, if any. Given the failure to follow those practice[s] that research has shown can reduce the risk of misidentification, you should weigh evidence of the witness's alleged identification with great caution and care.

The Committee Should Make All Changes Necessary to Prevent Misleading or Confusing Jurors And to Ensure That The Final Instruction Is Scientifically Valid.

"Free from doubt" Language

The provisional *Gomes* instruction includes the following language:

> In evaluating eyewitness identification testimony, it is not essential that a witness be free from doubt as to the correctness of his or her identification of the defendant.[87]

This language presents a risk of improperly bolstering the testimony of uncertain witnesses and causing confusion when considered with the confidence-accuracy language.[88] As a result, the Network urges the Committee to delete the above sentence in its entirety.

Honest Mistake Language

The existing honest mistake instruction language[89] (the *Pressley* instruction) should not be replaced by the substantially more limited language of the provisional instruction.[90] The existing language provides jurors with an appropriate level of detail to illustrate the ways honest mistakes can occur. This is particularly important given the limitation of traditional adversarial tools in

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[87] *Commonwealth v. Gomes*, 470 Mass. 352, 379 (2014).

[88] "Research shows that a witness's expressed certainty in an identification, standing alone, may not be a reliable indicator of the accuracy of the identification, especially where the witness did not describe that level of certainty when the witness first made the identification." *Gomes*, 470 Mass at 383 (citations omitted).

[89] "In deciding whether or not to believe a witness who identifies the defendant as the perpetrator, remember that you must consider not only whether the witness is trying to tell you the truth or is lying. You must also decide whether that witness's identification is accurate or instead is an honest mistake. Sometimes people perceive an event erroneously, or forget things, or get confused. Deciding whether a witness is trying to tell you the truth is only the first step. You must then go on to decide whether the witness's identification is accurate in fact." Mass. Crim. Model Jury Instructions, No. 9.160 (Identification) (2009).

[90] "If you conclude that the witness intended to tell the truth, you must also consider the possibility that the witness made a good faith error in identification. That is, you should consider whether the witness could be honestly mistaken in his or her identification of the defendant." *Gomes*, 470 Mass. at 379.

uncovering witnesses who are honestly mistaken[91] and the research showing that jurors have great difficulty distinguishing between accurate and inaccurate eyewitnesses.

"People sometimes make mistakes" Language

The word "sometimes" in the phrase "research has shown that people **sometimes** make mistakes in identification" in the provisional instruction,[92] without more, fails to provide meaningful guidance to jurors about the frequency of error among eyewitnesses and may instead mislead jurors by suggesting that eyewitness errors are rare. We know, for example, that among the 329 DNA exonerations (which represent a very small fraction of all criminal convictions) eyewitness errors occurred in 72 percent of cases.[93] Among the 1606 erroneous convictions identified by the National Registry of Exonerations (including DNA and non-DNA exonerations), eyewitness errors contributed to 33 percent or 537 convictions. Research consistently shows that witnesses – both real witnesses and study participants – select fillers between 20 and 25 percent of the time.[94] These significant error rates are not captured by the word "sometimes," rendering the language misleading to jurors and creating a risk that jurors will discount the frequency of eyewitness errors when evaluating the accuracy of identification evidence.

Moreover, this language fails to focus jurors on the causes of many of these errors – the system and estimator variables that have been shown to negatively affect memory – leaving jurors with the incorrect impression that mistakes can just happen and potentially undermining their attention to the very factors that have been shown to cause eyewitness errors. To correct these issues and to adequately protect innocent suspects, the word "sometimes" should be deleted from this sentence, or replaced by the words "often" or "frequently."

Totality of the Evidence Language

Given the experience of Network members with wrongful conviction cases involving evidence that appeared, at the time of conviction, to convincingly corroborate what turned out to be mistaken eyewitnesses, we strenuously object to the following language, and urge the Committee to delete it:

> You should consider all the relevant factors that I have discussed, viewed in the context of the totality of the evidence in this case, in evaluating the accuracy of a witness's identification testimony. Specifically, you should consider whether there was other evidence in the case, direct or circumstantial, that tends to support or not to support the accuracy of an identification.

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[91] *See supra* n.81.

[92] *Gomes*, 470 Mass. at 379.

[93] *See* The Innocence Project, The Cases: DNA Profile Exonerees, Eyewitness Misidentification, available at http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA&c6=d53d92d3a951429daafffdf4366f520a (last visited May 28, 2015).

[94] Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. Public Interest 45 (2006); Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 Law & Hum. Behav. 523 (2003).

Among the 236 DNA exonerations involving eyewitness misidentification, 54 percent involved multiple contributing causes of wrongful conviction. A full 33 percent (or 77 cases) involved multiple witnesses misidentifying the same innocent person. Recent research has demonstrated that false confessions and eyewitness misidentification have contaminated other types of evidence used to wrongly convict innocent people (e.g., faulty forensics, incentivized informants, etc.).[95] While the relationship between eyewitness misidentification and other evidentiary errors has not yet been fully explored, it is clear from the DNA exonerations and from this research that despite the mere presence of other evidence that appears to corroborate the identification (whether in the form of other eyewitnesses or evidence that appears entirely separate), there is a real possibility that that evidence could be wrong (as the identification could be wrong). Professor Garrett's research into how reviewing courts handled the cases of the first 200 people ultimately exonerated by DNA supports the conclusion that the cases against many of these individuals appeared to be very strong. Garrett found that, among the cases of those later exonerated by DNA where a written appellate opinion was given, 32 percent had their claims denied on harmless error grounds while 16 percent had a court find that the claim had merit but nevertheless deny relief based on harmless error. While the courts often failed to fully explain their harmless error conclusion, it is safe to assume that they so ruled in light of the perceived strength of the prosecution's case.[96]

The provisional instruction ignores the lessons of the exonerations – that the case against innocent defendants can appear strong and involve multiple types of seemingly unrelated but ultimately erroneous evidence – and instead reinforces the jury's tendency to evaluate pieces of evidence together, rather than independently. In light of what the DNA exonerations teach about the frequency with which multiple evidentiary errors occur, the proposed language should, at a minimum, be deleted. The Committee could and should go further and instead caution jurors to evaluate the accuracy of each identification on its own, without reference to other evidence, including other eyewitness identifications, and in light of the instruction provided. The Network suggests the following language:

> **You should consider all the relevant factors that I have discussed in evaluating the accuracy of each witness's identification testimony standing on its own.**

Conclusion

The Network commends the Supreme Judicial Court, the Study Group and the Rules Committee for its commitment to promoting a fair and reliable criminal justice system in the Commonwealth. We are heartened by the thorough consideration of the scientific research concerning eyewitness memory and perception and the incorporation of that research into judicial practice in ways that will result in meaningful protection from wrongful conviction for innocent defendants. These comments to the provisional jury instructions are intended to ensure

[95] Saul Kassin et al., *Confessions That Corrupt: Evidence From the DNA Exoneration Case Files*, 23 *Psychol. Sci.* 41 (2012).
[96] Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 161-162 (2008).

that they wholly reflect scientific consensus and provide jurors with "sufficient guidance on how to assess critical [identification] testimony."[97]

Respectfully submitted,

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[97] *See Gomes*, 470 Mass. 352, 364 (2014), *quoting Cabagbag*, 127 Hawai'i 302, 313 (2012).

Appendix A

Innocence Network Member Organizations

May 2015

1. Alaska Innocence Project
2. Arizona Innocence Project
3. Arizona Justice Project
4. Association in Defense of the Wrongly Convicted (Canada)
5. California Innocence Project
6. Center on Wrongful Convictions (National)
7. Committee for Public Counsel Services Innocence Program (MA)
8. Connecticut Innocence Project
9. Cooley Innocence Project (MI)
10. Duke Center for Criminal Justice and Professional Responsibility (NC)
11. France Innocence Project
12. Georgia Innocence Project
13. Griffith University Innocence Project (Australia)
14. Hawaii Innocence Project
15. Idaho Innocence Project
16. Illinois Innocence Project
17. Innocence and Justice Project at the University of New Mexico School of Law
18. Innocence Project (National)
19. Innocence Project Argentina
20. Innocence Project at the University of Virginia
21. Innocence Project New Orleans
22. Innocence Project New Zealand
23. Innocence Project Northwest Clinic (WA)
24. Innocence Project of Florida
25. Innocence Project of Iowa
26. Innocence Project of Minnesota
27. Innocence Project of Texas
28. Irish Innocence Project at Griffith College
29. Israel Public Defender
30. Italy Innocence Project
31. Justicia Reinvindicada – Puerto Rico Innocence Project
32. Kentucky Innocence Project
33. Knoops and Partners Innocence Project (The Netherlands)
34. Life After Innocence (National, exoneree support)
35. Loyola Law School Project for the Innocent
36. Michigan Innocence Clinic
37. Michigan State Appellate Defender Office, Wrongful Conviction Units
38. Mid-Atlantic Innocence Project (MD, VA, District of Columbia)

39. Midwest Innocence Project (AR, KS, MO, IA, NB)
40. Mississippi Innocence Project
41. Montana Innocence Project
42. Nebraska Innocence Project
43. New England Innocence Project
44. New York Law School Post Conviction Innocence Clinic
45. North Carolina Center on Actual Innocence
46. Northern California Innocence Project
47. Office of the Ohio Public Defender, Wrongful Conviction Project
48. Office of the Public Defender, State of Delaware
49. Ohio Innocence Project
50. Oklahoma Innocence Project
51. Osgoode Hall Innocence Project (Canada)
52. Pennsylvania Innocence Project
53. Reinvestigation Project (NY)
54. Resurrection After Exoneration (National, exoneree support)
55. Rocky Mountain Innocence Center (UT, NV, WY)
56. Taiwan Association for the Innocent
57. Texas Center for Actual Innocence
58. The Exoneration Initiative (NY)
59. The Sellenger Centre Criminal Justice Review Project (Australia)
60. Thurgood Marshall School of Law Innocence Project (TX)
61. University of Baltimore Innocence Project Clinic
62. University of British Columbia Law School Innocence Project
63. University of Miami Law Innocence Clinic (FL)
64. Wake Forest University Law School Innocence and Justice Clinic (NC)
65. West Virginia Innocence Project
66. Wisconsin Innocence Project
67. Witness to Innocence (National, exoneree support)
68. Wrongful Conviction Clinic (IN)