COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

PLYMOUTH, ss. **NO. SJC-13548**

COMMONWEALTH

v.

THOMAS MERCADO

BRIEF OF AMICI CURIAE COMMITTEE FOR PUBLIC COUNSEL SERVICES, MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NEW ENGLAND INNOCENCE PROJECT, AND THE INNOCENCE PROJECT IN SUPPORT OF APPELLANT

ON APPEAL OF A JUDGMENT OF THE SUPERIOR COURT DENYING A MOTION FOR NEW TRIAL

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STATEMENT OF INTEREST OF AMICI CURIAE

The Committee for Public Counsel Services (CPCS), Massachusetts' public defender agency, represents indigent individuals in criminal, juvenile, mental health, and care and protection proceedings throughout the Commonwealth. G.L. c. 211D, §§ 5–6. CPCS's primary mission is to protect and zealously advocate for the constitutional rights of its clients. Eyewitness misidentification is the leading cause of wrongful convictions, including in cases where multiple witnesses mistakenly or falsely identified a defendant as the perpetrator. Eyewitness evidence can also have an outsized influence on the way a jury views other evidence in a case. This brief addresses the impact of advancements in eyewitness identification science and expert testimony as newly available evidence in motions for new trial. This Court's decision will thus affect the interests of CPCS's present and future clients.

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated association of lawyers of the Massachusetts Bar whose practice substantially focuses on criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth and devotes much of its energy to identifying, and seeking to avoid or correct, problems in the criminal legal system.

The New England Innocence Project (NEIP) is a nonprofit organization dedicated to correcting and preventing wrongful convictions in the six New England states. In addition to providing pro bono legal representation to individuals with

claims of innocence, NEIP advocates for legal and policy reforms that will reduce the risk of wrongful convictions. This includes advocating for the increased use of reliable scientific evidence and the exclusion of "common sense" misconceptions and assumptions to guide judicial decision-making. NEIP is committed to raising public awareness of the prevalence, causes, and costs of wrongful convictions, including bringing to light the racial disparities that exist within the criminal legal system and that have led to a disproportionate number of people of color being wrongfully convicted. Through its participation in the Supreme Judicial Court's Study Group on Eyewitness Identification and the Standing Committee on Eyewitness Identification, NEIP has supported the Commonwealth's interest in ensuring that the law reflects current, reliable, scientific principles.

The Innocence Project is a nonprofit organization that works to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone. Since its founding in 1992, the Innocence Project has used DNA and other scientific advances to prove innocence. Beginning with Glen Woodall, it has helped free or exonerate more than 250 people. The advent of DNA testing has provided scientific proof that wrongful convictions are not isolated or rare events. The Innocence Project has long studied the causes of these injustices and has found that eyewitness misidentifications are a leading cause of wrongful convictions. This extensive experience with mistaken identification cases has led the

Innocence Project to advocate for a variety of systemic reforms, including improving police procedures, proposing model legislation, and revisiting convictions resting on what science shows to be unreliable identifications.

DECLARATION OF AUTHORSHIP AND ANY CONFLICTS

Amici are the sole authors of this brief. Neither party nor their attorneys authored this brief in whole or in part. Neither party nor their attorneys, nor any other person or entity, contributed money intended to fund the preparation or submission of this brief. None of the amici is a party to this appeal. The amici do not represent and have not previously represented either party in any proceeding at issue in this appeal, or another proceeding involving similar issues.

QUESTION PRESENTED

This Court has solicited amicus briefs on the following question:

Whether the defendant is entitled to a new trial for murder in the first degree due to newly developed scientific evidence on the issue of eyewitness identification.

ARGUMENT

I. ADVANCES IN THE STUDY OF EYEWITNESS IDENTIFICATION AND MEMORY SINCE MR. MERCADO'S TRIAL, AS WELL AS ITS ACCEPTANCE BY MASSACHUSETTS COURTS, CONSTITUTE NEWLY DISCOVERED AND NEWLY AVAILABLE EVIDENCE.

To obtain a new trial based on a claim of new evidence, a defendant must show both that (1) the evidence is newly discovered or newly available; and (2) it probably would have been a real factor in the jury's deliberations. Commonwealth

v. Cowels, 470 Mass. 607, 616 (2015). As the motion judge correctly found, Mr. Mercado satisfied the first prong (R456). The "significant expansion" in eyewitness identification science since Mr. Mercado's 2009 trial constitutes new evidence (R456). In addition, there is no question that Commonwealth v. Gomes, 470 Mass. 352 (2015), with its recognition and adoption of principles that had reached a near consensus in the scientific community, and its acknowledgment of the important role expert testimony could play in educating juries about such principles, see 470 Mass. at 378, constituted a sea change that made the scientific advancements newly available to litigants in the Commonwealth.

A. Advances in social science can constitute newly discovered or newly available evidence.

Like the pending case of Commonwealth vs. Gaines,[1] Mr. Mercado's appeal presents the question of how courts considering new trial motions should view developments in the science of eyewitness identification. As in Gaines, amici urge this Court to provide clear guidance that advances in the social and behavioral sciences—including research findings about eyewitness identification and memory—should be

[1] See Commonwealth vs. Raymond Gaines, No. SJC-13446, https://www.ma-appellatecourts.org/docket/SJC-13446.

evaluated under the same standard applied to all advances in scientific understanding.[2] When advances in social scientific research give rise to real doubt whether a conviction—particularly a murder conviction—is consonant with justice, courts should not turn a blind eye to the possibility of a wrongful conviction based on unreliable evidence. See Commonwealth v. Rosario, 477 Mass. 69, 80–81 (2017) (considering developments in fire science and new social science "data on coercive interrogation tactics" in affirming the grant of a new trial). Cf. Commonwealth v. Alcide, 472 Mass. 150, 167 n.23 (2015) (noting that, though "the rules announced in our recent decisions concerning certain eyewitness testimony are prospective only," the Court "need not blind [itself] to the unfairness that may be created by in-court show-up identifications").

This is especially important for scientific evidence undermining eyewitness identifications. Indeed, as this Court has recognized, misidentifications are "the primary cause of erroneous convictions." Gomes, 470 Mass. at 362. Analysis of the first 375 DNA exonerations has shown that eyewitness misidentifications contributed to 69% of the wrongful convictions, far outpacing all other causes.[3] Of the cases involving misidentifications, nearly a third (32%) involved misidentification by

[2] Amici NEIP and the Innocence Project submitted an amicus brief addressing this issue in Gaines.

[3] See Innocence Project, *DNA Exonerations in the United States (1989–2020)*, https://innocenceproject.org/dna-exonerations-in-the-united-states/.

more than one eyewitness.[4] When considering both DNA- and non-DNA based murder exonerations, nearly half of the misidentification cases involved multiple mistaken eyewitnesses. Gross & Shaffer, Exonerations in the United States, 1989–2012: Report by the National Registry of Exonerations 46 (2012). And in Massachusetts, over 40 percent of all exonerations have involved wrongful convictions that were due, at least in part, to mistaken eyewitnesses.[5]

Making clear that advances in the science of eyewitness identification and memory can constitute newly discovered or newly available evidence preserves a motion judge's ability to weigh the evidence before her, and—if she determines that the "game-changing advances" in eyewitness identification science are new, as the judge did here (R456)—move on to analyzing whether the expert testimony would have been a real factor in the jury's deliberations. Such a case-by-case analysis ensures that courts carefully consider whether finality must yield to "our system's reluctance to countenance significant individual injustices." Commonwealth v. Brescia, 471 Mass. 381, 388 (2015). And like other scientific developments—in DNA testing, fingerprint analysis, toolmark examination, or other disciplines—there is little reason to expect a deluge of motions for new trial.

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[4] Id.

[5] See The National Registry of Exonerations, https://shorturl.at/9FkdI.

B. Research findings on eyewitness memory are both newly discovered and newly available to Mr. Mercado.

As noted, the motion judge found that the "game-changing advances in the underlying science" of eyewitness identification since Mr. Mercado's 2009 trial showed that his proffered expert testimony was "newly discovered" (R456). During the litigation of the gatekeeper petition, the Single Justice agreed. The Court found that "there is no doubt that [this] scientific testimony … was not available to [Mr. Mercado] at the time of his trial or direct appeal" (R497).

As an initial matter, amici note that the Commonwealth disputes these conclusions for the first time in this full-bench appeal. In the trial court and Single Justice proceedings, the Commonwealth did not deny that this evidence was "new." Rather, it argued only that Dr. Franklin's testimony would have been irrelevant or otherwise inadmissible had it been available in 2009 (R318–319), and that it would not in any event "have been a real factor in the jury's deliberations" (R321–322).[6] In its brief to this Court, however, the Commonwealth parses the publication dates of the studies cited by Dr. Franklin and argues for the first time that because some of those individual studies predated Mr. Mercado's trial, Dr. Franklin's testimony as a whole cannot be considered "new" (CB22–28). As such, the Commonwealth's arguments in this regard are waived. See Cowels, 470 Mass. at 615 n.3, 616–617

[6] See also Commonwealth's Opposition to Gatekeeper Petition (Paper #4), Commonwealth vs. Thomas Mercado, No. SJ-2023-330, at 26–28.

("Commonwealth's recent contention" that scientific evidence was not newly discovered "was waived below, and cannot be raised on appeal").

The Commonwealth is also wrong. Although research on eyewitness memory began before Mr. Mercado's trial in June 2009, since that date there have been both significant scientific advances in the field, as well as a complete overhaul of the way eyewitness evidence is treated in Massachusetts courts. As to the former, the Commonwealth's newfound argument ignores the reality of scientific advancement. As in any complex scientific area, eyewitness memory researchers continuously test and re-test the multitude of factors that can affect the reliability of an eyewitness identification. Even where individual studies reach conclusions about some factors that affect eyewitness memory, scientists may continue to perform studies and form conclusions until there is a convergence of research, a meta-analysis, or other support establishing a consensus or near consensus.[7] This Court fully appreciated this dynamic in Gomes when it found that the scientific community had reached a near

[7] Consider, for instance, the scientific consensus that has emerged that high stress impairs eyewitness accuracy. Psychologists have studied the effects of stress on memory since the 1970s. But as late as 2001, only 60% of experts surveyed agreed that "[v]ery high levels of stress impair the accuracy of eyewitness testimony." See Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 American Psychologist 405, 408, 412 (2001). Then, in 2004, both a meta-analysis and an important field study on the effects of high stress on eyewitness memory were published. See Deffenbacher, *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687 (2004); Morgan, *Accuracy of Eyewitness Memory for Persons Encountered*

consensus on certain principles affecting eyewitness memory. At the same time, the Court established a Standing Committee on Eyewitness Identification because it recognized that research would continue in this area and there could be new factors in the future for which the research findings would form a consensus or near consensus.

As to the latter, although some research findings about eyewitness memory had been scientifically established prior to 2009, they were not truly available to litigants in Massachusetts at the time of Mr. Mercado's trial. Prior to this Court's 2015 decision in Gomes, it was rare for defense counsel to obtain the services of an eyewitness identification expert and for courts to allow eyewitness expert testimony. As the motion judge explained, "such species of expert opinion was still being developed and was not commonly introduced into contested judicial proceedings" (R448). This Court, too, has observed that "at the time of trial, expert evidence on eyewitness identification was still being developed and was not commonly introduced at trial; defense counsel did not have the benefit of our opinion in [Gomes], which recognized evolving research on eyewitness testimony and incorporated it into our jurisprudence." Commonwealth v. Kirkland, 491 Mass. 339, 356–357 (2023) (discussing a 2013 trial).

During Exposure to Highly Intense Stress, 27 Int'l J. of Law & Psychiatry 265 (2004). By 2021, more than 80% of surveyed experts agreed that "[v]ery high levels of stress impair the accuracy of eyewitness testimony." Marr et al., *The Effects of Stress on Eyewitness Memory: A Survey of Memory Experts and Laypeople*, 49 Memory & Cognition 401, 405 (2021).

Indeed, prior to Gomes, this Court had regularly held that judges properly excluded eyewitness expert testimony in cases (like this one) where there was more than one eyewitness and some evidence that could be characterized as "corroborating." See, e.g., Commonwealth v. Watson, 455 Mass. 246, 258 (2009); Commonwealth v. DiBenedetto, 427 Mass. 414, 420 (1998). Thus, this Court's decision in Gomes rendered the science on eyewitness identification newly available to defendants like Mr. Mercado. Cf. Cowels, 470 Mass. at 616 (deeming DNA analysis "newly discovered" where the particular type of DNA testing at issue existed at an "experimental stage" prior to defendant's trial but had not yet been definitively ruled admissible by this Court). Courts in other states have taken the same approach. See People v. Martinez, 187 N.E.3d 1218, 1242–1244 (Ill. App. Ct. 2016) (holding that because Illinois caselaw had previously disfavored the admission of expert evidence on eyewitness memory, it had not been truly available at the time of trial and was newly discovered evidence even if the research had previously existed); and Revels v. State, KNL-CV22-6056733-S, 2024 WL 163367, at *3–7 (Conn. Super. Ct. Jan. 9, 2024) (agreeing with the petitioner that eyewitness expert "evidence that was excluded from the Petitioner's trial as a matter of law is deemed newly discovered upon judicial recognition of its admissibility").

Regardless of the theoretical availability in 2009 of expert testimony about the factors affecting the reliability of eyewitness identification, this Court should

take the same flexible, justice-oriented approach it has taken in other cases involving evolution of scientific knowledge and judicial acceptance of that knowledge. The fact that science and law do not develop at the same time or pace can result in an interregnum when evidence is not scientifically "new," and yet is not sufficiently understood in the legal community that failure to call an expert would be viewed as ineffective assistance of counsel.[8] Social science, in particular, is a complex, iterative process, where one study builds on another, it takes time for a consensus or near-consensus to evolve, and there is not always a clear date when a particular finding—or a field as a whole—was "discovered," much less "available" in a legal proceeding.

This Court, however, has cut through this Gordian knot, concluding that its "touchstone must be to do justice." Commonwealth v. Epps, 474 Mass. 743, 767 (2016). In Epps, there had been some medical research questioning the reliability of a diagnosis of shaken-baby syndrome at the time of trial. Id. at 764–767. But there was not yet widespread recognition in the scientific community of the potential unreliability of that diagnosis. Id. at 755, 762. Rather than trying to parse out what parts of this evolving scientific debate were "new" since the time of the trial, this Court simply analyzed whether the petitioner "was deprived of a substantial defense, regardless whether the source of the deprivation is counsel's performance alone, or the

[8] For a thoughtful discussion of the issue, see Plummer & Syed, *Criminal Procedure v. Scientific Progress: The Challenging Path to Post-Conviction Relief in Cases that Arise During Periods of Shifts in Science*, 41 Vt. L. Rev. 279 (2016).

inability to make use of relevant new research findings alone, or the confluence of the two." Id. at 767.

The flexible, justice-first approach exemplified by Epps (and also utilized in cases like Brescia and Rosario) is an indispensable cornerstone of this Court's post-conviction jurisprudence, under which "[a]ll claims, waived or not, must be considered," and no "substantial risk of a miscarriage of justice" may be countenanced. See Commonwealth v. Randolph, 438 Mass. 290, 293–296 (2002). Thus, if this Court has reservations about the conclusions of the motion judge and the single justice that Dr. Franklin's testimony is "newly available" to Mr. Mercado, it should take that same approach here. Where someone was convicted of a crime based on eyewitness evidence and was deprived of a substantial defense because the jurors were not presented with relevant scientific research that was either not firmly established or not commonly admitted at the time of trial (or both), the conviction should not be permitted to stand if the deprivation of that substantial defense means that "justice may not have been done." Mass. R. Crim. P. 30(b). See Epps, 474 Mass. at 768 & n.28.

II. WHEN ASSESSING WHETHER DEVELOPMENTS IN EYEWITNESS IDENTIFICATION SCIENCE WOULD HAVE BEEN A REAL FACTOR IN A JURY'S DELIBERATIONS, COURTS MUST CONSIDER THE IMPACT EYEWITNESS EVIDENCE HAS ON A JURY, INCLUDING THE WAY IT AFFECTS THEIR EVALUATION OF OTHER EVIDENCE.

Although the motion judge correctly found that the developments in eyewitness identification science since 2009 constituted new evidence, he erred in his analysis of whether those advancements would have been a real factor for the jury (R456–457). Specifically, he compartmentalized his analysis of these "game-changing advances" (R456), such that he did not consider how the jury's potential overvaluation of eyewitness evidence—as a result of not having access to the research findings showing the unreliability of such evidence—may have affected its interpretation of the other evidence in the case. Because, in the judge's view, the newly available expert testimony did not "caus[e] the prosecution's case to implode like a Jenga tower" (R458), he concluded that its absence did not warrant a new trial at which the jury would be able to assess it alongside the Commonwealth's case.

The "real factor" test does not contemplate such blinkered analysis. Under that test, the "inquiry is not whether the verdict may have been different, but whether the evidence in question probably [would have] served as a real factor in the jury's deliberations." Cowels, 470 Mass. at 623, quoting Commonwealth v. Sullivan, 469

Mass. 340, 353 (2014).[9] Where "newly discovered evidence likely would have functioned as a real factor in the jury's deliberations," a motion judge "may not then assess whether the jury still would have reached the same conclusion. Instead, the determination that the evidence likely [would have been] a real factor in the jury's deliberations demands a new trial." Id.

This "common law standard of review … places particular emphasis on the role of the jury." Commonwealth v. Hampton, 88 Mass. App. Ct. 162, 170 (2015), citing Commonwealth v. Tucceri, 412 Mass. 401, 412–413 (1992). It is designed to preserve "'the defendant's right to the judgment of his peers,' since it ensures that the court's analysis turns on 'what effect the omission might have had on the jury,' rather than on 'what … impact [it] has on the judge's personal assessment of the trial record.'" Cowels, 470 Mass. at 623, quoting Tucceri, 412 Mass. at 411.

The motion judge thus erred by resting on his own view of the overall strength of the Commonwealth's case (R456–463). A proper analysis must account for the way the eyewitnesses' identifications likely impacted the jury's consideration of the

[9] This is the test applied to evaluate evidence that should have been presented at trial, but that the jury did not hear due either to its unavailability at the time of trial; defense counsel's ineffective failure to present it; or the prosecution's failure to disclose it (in the absence of a specific defense request for disclosure). See Cowels, 470 Mass. at 622–623 (newly available scientific evidence), citing Commonwealth v. Tucceri, 412 Mass. 401, 411–414 (1992) (equating non-disclosure standard with ineffective assistance standard in this context).

Commonwealth's *other* evidence and, in the absence of an explanation of their potential unreliability, may have eliminated any reasonable doubts the jury had about Mr. Mercado's presence, involvement, or subsequent flight.

A. Eyewitness identification evidence is extremely persuasive to jurors.

Just as experimental psychologists have studied eyewitness identification and memory, they have also studied juror knowledge and decision-making. These studies have repeatedly demonstrated that "[f]ew categories of evidence are as compelling to members of a jury as eyewitness evidence." Semmler et al., *Jurors Believe Eyewitnesses*, in Conviction of the Innocent: Lessons from Psychological Research 185, 185 (B. Cutler ed., 2012). See also Loftus et al., Eyewitness Testimony: Civil and Criminal § 8-4 (6th ed. 2019). Eyewitness testimony "has been shown to be comparable to or more impactive than physical evidence . . . and even sometimes confession evidence." Boyce et al., *Belief of Eyewitness Identification Evidence*, in 2 Handbook of Eyewitness Psychology: Memory for People 501, 505 (2007).

In addition to placing inordinate weight on eyewitness identification evidence, jurors tend to be "unable to discriminate between accurate and inaccurate witnesses." Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 Psych. Pub. Pol'y & Law 909, 925 (1995). In one classic study, mock jurors who watched the videotaped cross-examination of an eyewitness believed the eyewitness 80% of the time when the witness correctly identified the culprit *and* 80% of the time when the

witness was mistaken. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. Applied Psychol. 440, 444, 447 (1979).

Research suggests that this inability to distinguish between accurate and mistaken testimony stems from jurors' tendency to focus on eyewitness confidence while ignoring the risk factors that research has shown to adversely affect the accuracy of identifications. See Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185, 190 (1990) (concluding that "jurors are insensitive to the factors that influence eyewitness memory" but "gave disproportionate weight to the confidence of the witness"). This focus on courtroom confidence is particularly problematic when, as in Mr. Mercado's case, witnesses have been exposed to suggestiveness by the police. See Commonwealth v. Collins, 470 Mass. 255, 264 n.13 (2014) (discussing study finding that where witnesses were given confirmatory post-identification feedback, thereby inflating their confidence when they testified, jurors' "ability to discriminate between accurate and mistaken testimony was 'totally eliminated,' because mistaken eyewitnesses delivered testimony that was just as credible as accurate eyewitness testimony"), citing Smalarz & Wells, *Post-Identification Feedback to Eyewitnesses Impairs Evaluators' Abilities to Discriminate Between Accurate and Mistaken Testimony*, 38 Law & Hum. Behav. 194, 199–200 (2014). When jurors lack access to the relevant scientific findings in cases where eyewitness identification is a central part of the Commonwealth's case,

there is a real concern that they may base their verdict on unreliable, albeit persuasive, evidence.

B. Unreliable, yet persuasive, eyewitness identification evidence can lead to an over-valuation of other evidence in the case.

A jury does not hear each piece of evidence in isolation; thus, when assessing whether newly discovered or available evidence would have been a real factor for the jury, courts must consider its impact on other evidence. See, e.g., Rosario, 477 Mass. at 81 (considering how new evidence might have affected jury's evaluation of defendant's confession); Cowels, 470 Mass. at 620–621 (considering how new evidence might have affected jury's evaluation of credibility of key Commonwealth witness). Studies have shown that eyewitness testimony can have an unwarranted compounding effect, improperly bolstering other evidence: "The existence of eyewitness identification evidence increases the perceived strength of the other evidence presented," regardless of that other evidence's independent probative value. Boyce, supra at 505. Empirical research has also "shown that eyewitness confidence can distort jurors' perceptions of other aspects of the testimony." Garrett et al., *Factoring the Role of Eyewitness Evidence in the Courtroom*, 17 J. Empirical Legal Stud. 556, 558 (2020).

It is particularly important to consider the potential contaminating impact of unreliable eyewitness identification evidence on the jury's evaluation of other evi-

dence where the other evidence is circumstantial, requiring the jury to draw contestable inferences to reach a finding of guilt. In this case, for instance, the court found that the newly available evidence could not overcome (1) "consciousness of guilt" evidence; (2) the defendant's presence at the scene of the crime; (3) testimony from one of the identification witnesses that the defendant made an inculpatory statement; and (4) the fact that there were three identifying witnesses (R458–460). However, the court never evaluated how the jury's consideration of each of these categories of evidence could have been influenced by the eyewitness identifications.

An inculpatory inference is not inevitable from so-called "consciousness of guilt" evidence. Judges now routinely advise jurors about the dangers of a one-sided view of such evidence.

> [T]here may be numerous reasons why an innocent person might do such things. Such conduct does not necessarily reflect feelings of guilt. Please also bear in mind that a person having feelings of guilt is not necessarily guilty in fact, for such feelings are sometimes found in innocent people.

See Instruction 3.580 of the Criminal Model Instructions for Use in the District Court (2024); and Commonwealth v. Morris, 465 Mass. 733, 739 (2013) (affirming language of model instruction). Indeed, innocent, exonerated people have also exhibited consciousness of guilt.[10] See, e.g., Commonwealth v. Marrero, 493

[10] One vivid example is Michael Anthony Williams, who was sentenced to life without parole in 1981 after being convicted of a brutal rape. The victim knew Mr. Williams well, and identified him as her attacker immediately after the crime. When

Mass. 338, 346–347 (2024) (reversing denial of motion for new trial based on new DNA evidence that would have been a real factor for the jury, despite consciousness of guilt evidence); and Cowels, 470 Mass. at 623 (same).

Importantly, model jury instruction 3.580 explicitly tells jurors never to convict based solely on consciousness of guilt evidence but to consider it with the rest of the evidence. In other words, the jurors here were told to consider the probative value of the consciousness of guilt evidence in light of the eyewitness evidence. Therefore, had the jurors been aware of the newly available evidence that undermines those eyewitness identifications, they would have been required to consider the impact of that expert evidence when examining the consciousness of guilt evidence. It was error for the motion judge to consider them separately, and to assume the jurors would have done so as well.

The defendant's presence at the scene of the crime is similarly not independent of the identification evidence. Here, there is no dispute that Mr. Mercado was at the scene *before* the crime. He admitted so in his testimony, while asserting that he left a couple hours prior to the shooting (TR5:20–30). But the Commonwealth's

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police drove him to the victim's house for a confirmatory show-up, he attempted to flee. At trial, the prosecutor insisted that this "was not the act of an innocent man." The jury deliberated for less than an hour before returning the conviction. Twenty-three years later, DNA testing definitively exonerated Mr. Williams. He was sixteen years old when he entered prison, and forty when he was released. See The National Registry of Exonerations, *Michael Anthony Williams*, https://shorturl.at/hpbMN.

eyewitnesses (who provided inconsistent timelines for when they saw Mr. Mercado) are the only evidence placing him at the scene at the time of the shooting (TR3:14–24, 44–45, 99–103, 116–119). No forensic evidence, such as GPS or text messages, links Mr. Mercado to the scene at that time.

Notably, in cases where eyewitnesses have been shown to be mistaken, one reason can be "memory-source error" (also known as "unconscious transference"), "which involves a dissociation between familiarity and an awareness of the source of that familiarity." Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 Law & Hum. Behav. 1, 25 (2020). This source confusion can cause an eyewitness to mistakenly identify a bystander "as the culprit due to a misattribution of familiarity"; in other words, the witness recognizes that they have seen the suspect before but misremembers the context of that prior viewing. Id.; see also Vallano et al., *Familiar Eyewitness Identifications: The Current State of Affairs*, 25 Psych., Pub. Pol'y & Law 128, 133 (2019). Therefore, a person can be misidentified *because* they were at the scene of the crime at a different time, not in spite of that. Expert testimony informing jurors of these counterintuitive findings surely could affect their view of the significance of a defendant's presence near the scene of a crime.

Because the reliability of the eyewitnesses is the issue most affected by the new evidence, expert testimony helping the jury assess that reliability could also

impact their evaluation of one witness's memory of an overheard statement attributed to the defendant. Indeed, that witness's perceptions (sight, hearing, and memory) on that night—and the jury's consideration of those perceptions—are all connected. See generally Loftus et al., supra, § 4-7 (collecting examples of contamination and distortion in people's memories, including memories of conversations). Further, the witness's own belief in their identification—itself potentially influenced by suggestive police conduct—could impact their memory of the surrounding circumstances and what they may (or may not) have heard.

Finally, as previously stated, multiple mistaken eyewitnesses are not unusual in wrongful conviction cases. Kirk Bloodsworth, for instance, was identified by *five* eyewitnesses before being exonerated by DNA.[11] Therefore, where the newly available evidence undermines the reliability of one or more of those eyewitnesses in ways the jury never understood, the sheer number of eyewitnesses should not be used to tip the scales in favor of upholding a potentially unjust conviction. Rather than finding that each problematic identification corroborated and strengthened the others, after hearing scientific evidence about their unreliability, the jurors may have instead treated each identification as weaker evidence because of the demonstrated unreliability of the other ones.

[11] The Innocence Project, *Kirk Bloodworth*, https://innocenceproject.org/cases/kirk-bloodsworth.

CONCLUSION

For the above reasons, amici urge this Court to hold that advances in the science of eyewitness identification were newly discovered or newly available, and that motion courts must consider the likely effect of eyewitness identification evidence on the jury (including how it would have affected their evaluation of other evidence) when analyzing whether expert evidence about the unreliability of eyewitness identifications would have been a real factor in the jury's deliberations.

Respectfully Submitted,

August, 2024

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CERTIFICATE OF COMPLIANCE

I, Ira L. Gant, counsel for the amicus Committee for Public Counsel Services, hereby certify, in accordance with Mass. R. App. P. 17(c)(9), that this brief complies with Mass. R. App. P. 20. Compliance with the length limit specified in Mass. R. App. 20(a)(3)(E) was ascertained by using the proportional Times New Roman font, size 14-point, and a word counting software tool. The brief contains 4,431 words in the parts covered by Mass. R. app. 16 and 20.

I also certify that this brief otherwise complies with the rules of court that pertain to the filing and content of briefs, including, but not limited to: Mass. R. App. P. 13, and 16-20.

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

PLYMOUTH, ss. **NO. SJC-13548**

COMMONWEALTH

v.

THOMAS MERCADO

CERTIFICATE OF SERVICE

I, Ira L. Gant, do certify that on August 19, 2024, and in compliance with Mass. R. App. P. 13(e) and 17(c)(10), I served copies of the foregoing Brief of Amici Curiae on the individuals listed below. Additionally, because the filings were made through the electronic filing system, as counsel of record in that system, the following individuals were duly served.

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