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February 19, 2014

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Re: Comments on the Report and Recommendations of the Supreme Judicial Court Study Group on Eyewitness Evidence

Dear Attorney Burak,

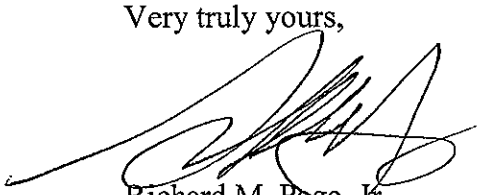
On behalf of the Boston Bar Association (BBA), I thank you for the opportunity to comment on the Report and Recommendations of the Supreme Judicial Court Study Group on Eyewitness Evidence (SJC Study Group), and for granting the BBA an extension in order for us to submit these comments. The BBA appreciates and recognizes the efforts put forth by the SJC Study Group to provide guidance on how Massachusetts courts can most effectively deter unnecessarily suggestive identification procedures and minimize the risk of a wrongful conviction.

The SJC Study Group Report was reviewed and discussed for several weeks by the Steering Committee of the BBA's Criminal Law Section, which drafted the attached comments. The Criminal Law Section was able to reach consensus on three of the five recommendations raised in the Report. The comments explain why the Criminal Law Section was unable to reach consensus on two of the recommendations. All of these comments were reviewed by the BBA Council, which approved the submission of a comment summary to the SJC Study Group.

Please note that the enclosed document does not constitute or reflect a position of the BBA as a whole, but rather summarizes the comments received from the Criminal Law Steering Committee. We offer these comments with the hope that they may be useful to the SJC as it considers the SJC Study Group's Report.

Thank you for providing members of the bar with an opportunity to weigh in on these important recommendations, and please feel free to contact me should you have any questions or concerns.

Very truly yours,



Richard M. Page, Jr.
Executive Director

Comments of the Boston Bar Association's Criminal Law Section on the Report of the Supreme Judicial Court Study Group on Eyewitness Evidence
(2/20/14)

In response to an invitation for comments from the Supreme Judicial Court's Study Group on Eyewitness Evidence, the Boston Bar Association's Criminal Law Section reviewed the Study Group's Report and offers the following specific comments on its recommendations:

1. Judicial Notice of Legislative Facts

    a. The Committee was unable to reach consensus on this issue. Dispute arose concerning the consistency and reliability of the science of memory, which precluded the group from reaching agreement on this issue.

2. Best Practices for Police Departments

    a. The Committee reached consensus that the police should be required at all times to comply with best practices. When questions arose regarding funding for the educational programs necessary to ensure police are trained in best practices, there was no agreement as to where the funds should come from. There was no agreement as to what, if any, sanction might be imposed on police not adhering to best practices.

3. Protocols for Pretrial Hearings

    a. On the issue of when, and under what circumstances, a defendant should be entitled to a pretrial hearing regarding the reliability of eyewitness evidence or the police protocols, the Committee was unable to reach a meaningful consensus.

4. Eyewitness Identification Jury Instructions

    a. The Committee agreed that there should exist uniform jury instructions regarding eyewitness identification – particularly as to police best practices and the reliability of eyewitness testimony (particularly that it should be an issue of fact). The committee did not consider individual jury instructions and did not consider specifically which issues should be covered by specific jury instructions.

5. Education and Continued Review

    a. The Committee reached consensus that continued education was paramount, as was an ongoing review of the standards applied to best practices, to maintain consistency with existing and developing scientific and experiential norms. The Committee did not define exactly what the continued education and review would consist of, nor was there agreement as to where the necessary funding would come from.

The Commonwealth of Massachusetts

Committee for Public Counsel Services
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November 26, 2013

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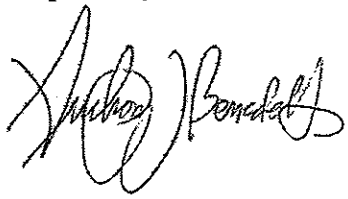
RE: CPCS Comments to the Report and Recommendations of the Supreme Judicial Court Study Group on Eyewitness Evidence

Dear Attorney Burak,

The Committee for Public Counsel Services is grateful for the opportunity to offer comments on the Report and Recommendations of the Supreme Judicial Court Study Group on Eyewitness Evidence. The Committee also salutes the Justices and the Study Group for the many hours of hard work that went into producing this comprehensive report on one of the most important issues facing our criminal justice system.

Attached please find our comments on the Report. Please let me know if you have any questions or need further information.

Respectfully Submitted,



Anthony J. Benedetti

The Committee for Public Counsel Services Comments to the Report and

Recommendations of the Supreme Judicial Court Study Group on Eyewitness Evidence

November 26, 2013

The Committee for Public Counsel Services (CPCS) deeply appreciates the substantial work done by the Supreme Judicial Court Study Group on Eyewitness Evidence and strongly endorses the great majority of the Study Group's recommendations contained in its Report and Recommendations to the Justices ("Study Group Report"). The Study Group Report's recommendations reflect a modern understanding, based on decades of sound, scientific research, of the workings of human memory and the frailty of eyewitness identification evidence. Adoption of these recommendations will thus bring police and jurisprudential practices much more in line with this modern understanding; as a consequence, these reforms will go a long way towards reducing the risk of wrongful convictions, injustices that are now well-documented and that occur all too frequently in identification cases.

As noted throughout the Study Group Report, other states, such as Oregon and New Jersey, have adopted such science-based reforms in their efforts to redress these serious problems. The Study Group has thoughtfully and carefully considered, built upon, and further refined the progressive approaches taken in these other states. As a result, the Study Group Report sets forth recommendations, which, if adopted, will constitute one of the most significant and positive reforms in the Massachusetts criminal justice system in decades. In an effort to further improve upon the Study Group's work, CPCS offers the following comments and suggestions.

(1) Judicial Notice of Legislative Facts

The recommendation that the Court take judicial notice of the science of memory as set out in the appendix to State v. Lawson, 352 Or. 724, 769-789 (2012), is, in CPCS's view, the single most important recommendation contained in the Study Group Report. Judicial notice of this science will enable the parties and the courts to incorporate these facts into all stages of pretrial litigation and trial, including motions to suppress, evidentiary claims, jury instructions,

arguments, and judicial rulings, without the significant expenditure of time and resources now required to establish a record of these scientifically-grounded facts.

CPCS recognizes that there may be some resistance to the adoption of this recommendation. But the taking of judicial notice of the modern psychological principles of eyewitness memory is preferable to, and far more affordable than, the alternative—requiring defense counsel to retain experts to establish a record, at pretrial hearings and at trial, of these well-established principles and mandating the admission of expert testimony at both stages of litigation in every identification case. Moreover, it is important to recognize that while the relevant science will undoubtedly continue to evolve, the only scientific principles that the Study Group Report has proposed as the subject of judicial notice are those that have garnered near consensus over decades of research, a point recognized by both the Oregon and New Jersey Supreme Courts. See Study Group Report at 17-18 (citing State v. Lawson, 352 Or. at 724, 740 and State v. Henderson, 208 N.J. 208, 247-272 (2011)).

CPCS notes that the judicially-noticed facts as articulated in Lawson are sometimes less specific, and thus less helpful, than the "Overview of the Science" set out in the Study Group Report itself at 15-33. Compare, e.g., Study Group Report at 64 ("In the case of distance . . . scientists have identified certain dispositive endpoints beyond which humans with normal, unaided vision are physically incapable of discerning facial features") (quoting Lawson at 773), with Study Group Report at 27 ("More recent studies specifically addressing the ability to identify faces at particular distances have demonstrated that, even with 20/20 vision and excellent lighting conditions, face perception begins to diminish at 25 feet, nears zero at about 110 feet, and faces are essentially unrecognizable at 134 feet") (citation omitted). For this reason, CPCS suggests that judicial notice of the principles of eyewitness memory as set out in the appendix in Lawson make clear that these principles constitute a baseline and not a ceiling for what can be drawn from the scientific literature. Regardless of the precise terms, CPCS strongly urges this Court to adopt this important recommendation.

(2) Police Practices

a. Distinction between "Best Practices" and "Specific Best Police Practices"

CPCS agrees with the Minority Statement of Attorney Natarajan and Judges Blitzman and Gertner that the Report's distinction between "Best Practices" and "Specific Best Police Practices" is unjustified. See Study Group Report at 158-159. Instead, as the Minority Statement urges, the Court should adopt the single, unified set of "Best Police Practices" set out at pages 86-88 of the Study Group Report.

a. Obtaining Description of Offender

The Study Group Report recommends that police be required to "obtain a detailed description of the offender" prior to attempting any identification (Number 4) while cautioning police to "avoid the use of leading questions" when interviewing witnesses (Number 3). Study Group Report at 86. These general directives, however, do not provide a sufficient safeguard against interviewing techniques that research has shown can negatively impact later identification reliability. Depending upon how the interview is conducted, asking a witness to provide a description of distinct features of a perpetrator's appearance can actually lead the witness to make guesses, sometimes incorrect, about those features, thereby distorting the witness's memory of the perpetrator and reducing the witness's ability to make an accurate identification. See Meissner, C. A., Brigham, J. C., & Kelley, C. M., *The influence of retrieval processes in verbal overshadowing*, 29 MEMORY & COGNITION 176 (2001); Wells, G.L. & Hasel, L.E., *Facial Composite Production by Eyewitnesses*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 6 (2007). This research suggests that a true "Best Police Practice" would require the police to explicitly advise the witness, prior to obtaining a description, not to guess at any particular features of the perpetrator and to describe only those features that the witness clearly remembers. See Meissner, supra at 180 ("[W]arning participants that they should generate only those aspects of the face that they accurately remember significantly enhanced identification accuracy"). CPCS thus suggests that the "Best Police Practices" include such an advisement.

b. Preservation of Identification Evidence

The Study Group Report recommends that police be required to preserve photographic arrays and to document in police reports "any steps taken to preserve the array." Study Group Report at 86. CPCS suggests that this preservation and documentation requirement should be expanded to encompass all forms of photographic identification procedures, including viewing of mug books and viewing of photographs on computer databases. CPCS is aware of identification cases in which the police have shown photographs in these non-array forms to witnesses and the witnesses did not select any photograph, but the police did not preserve or document whose photographs were displayed, thereby precluding the parties from later ascertaining whether a photograph of the defendant was among those viewed and leading to substantial litigation over that question. "Best Police Practices" should guard against this failure to preserve potentially exculpatory evidence.

CPCS further suggests that the police should be required, as a "best police practice," to preserve their contemporaneous notes of the original description taken from any witness,

regardless of whether those notes are later incorporated into a formal police report. In Commonwealth v. Henderson, 411 Mass. 309 (1991), this Court affirmed the dismissal of an indictment precisely because the police failed to retain a police officer's notes of the victim's description of her assailant. See id. at 310-311; see also Commonwealth v. Lee, 1993 Mass. Super. LEXIS 352, *8 (1993) ("Details of the photographic identification procedure and notes of the victim's description given immediately after the incident are critical to the defendant's defense.").

c. Best Practices for Showups

The Study Group Report recommends that showups "should not be conducted more than two hours after the witness's observation of the suspect." Study Group Report at 87. CPCS suggests adding the following language to the end of this sentence: "or where there exists probable cause to arrest the suspect independent of the crime under investigation." Showups, which this Court has recognized as "inherently suggestive," are nonetheless permissible when "good reason exists for the police to use a one-on-one identification procedure." Commonwealth v. Austin, 421 Mass. 357, 361 (1995). In a situation where the police detain an individual for whom there exists an independent, lawful basis to arrest (such as an outstanding arrest warrant for a separate offense), there is not a "good reason" to subject that individual to an "inherently suggestive" showup procedure. Instead, the police should take the individual into custody and then administer a less suggestive procedure, such as a lineup or photographic array.

(3) Pretrial Hearing Protocols

a. Showing Required for Pretrial Hearing

The Study Group Report recommends a standard under which a defendant who moves to exclude an out-of-court identification based on the presence of estimator variables that "cast[] doubt on the reliability of the identification" is only entitled to a hearing on that motion if the identification "is uncorroborated." Study Group Report at 110. This lack of corroboration requirement is troubling and unwarranted, in CPCS's view, for the following reasons. First, predicating the admission of a particular piece of evidence – or whether the defendant is even entitled to a hearing challenging the admission of such evidence – on the strength or weakness of the Commonwealth's other evidence raises significant due process concerns, as discussed in Holmes v. South Carolina, 547 U.S. 319, 331 (2006). Second, the Study Group Report does not say what type of "corroboration" would be sufficient to deny a defendant a hearing on such a

motion. Third, many DNA exonerations have occurred in cases (including Massachusetts cases) in which eyewitness identifications were in fact "corroborated" by other evidence, such as forensic evidence, "confessions," and additional eyewitness identifications. See, e.g., http://www.innocenceproject.org/Content/Stephan_Cowans.php (last visited on November 4, 2013); http://www.innocenceproject.org/Content/Kenny_Waters.php (last visited on November 4, 2013).

CPCS recognizes that the Study Group Report's inclusion of a lack of corroboration requirement was likely motivated by concerns that, absent such a limiting mechanism, the courts would be flooded with pretrial hearings in identification cases. However valid those concerns may be, they cannot blind us to the reality that innocent lives have been ruined by "corroborated" as well as "uncorroborated" identification testimony – as we have only recently again been reminded. See Commonwealth v. Schand, 440 Mass. 783, 795-796, 797 (1995) (affirming conviction and rejecting Schand's claim under G.L. c.278, §33E, where there was "considerable identification testimony establishing the defendant's guilt," including "[c]orroborative [i]dentification [t]estimony"); http://www.centurionministries.org/cases/mark-schand (describing Schand's exoneration, after 27 years of imprisonment, following his erroneous conviction "based on [the testimony of] six eyewitnesses") (last visited on November 13, 2013).

If the Court concludes that some limiting device is necessary, CPCS proposes the following alternative language in lieu of the language suggested by the Study Group Report at 110, subsection D:

> "when the defendant makes a showing of the presence of factors recognized in law or science ('estimator variables') casting doubt on the reliability of the identification. However, if the Commonwealth submits an affidavit demonstrating the existence of substantial independent evidence corroborating the reliability of a challenged identification, the trial court, in its discretion, may deny the defendant's request for a hearing on this particular ground."

b. Evidence at the Hearing

The Study Group Report recommends that evidence of system and estimator variables be considered "in making determinations described in II(B)(2) and (3) above." Study Group Report at 111. In addition, estimator variables are relevant and should be considered under II(B)(1) if the defendant has met his burden of proving an unnecessarily suggestive procedure, thereby triggering the court's duty to decide whether an adequate "independent source" for the identification exists, such that an in-court identification may be admitted. It should be clarified that estimator variables must be considered as part of this "independent source" determination.

c. Remedies

The Study Group Report recommends that certainty testimony only be admitted "(1) where the statement of certainty occurred immediately after the out-of-court identification" or "(2) within the judge's discretion, on redirect, rebuttal, or in other circumstances where the defendant challenges the witness's certainty." Study Group Report at 113. CPCS strongly urges this Court to reject the first of these recommended exceptions to the general rule of inadmissibility, for the reasons set forth in the Minority Statement of Attorney Natarajan and Judges Blitzman and Gertner. See Study Group Report at 160 (Minority Statement of Radha Natarajan, Esq.). On the other hand, the second exception is appropriate, because a defendant, possessing the right to present favorable evidence, must be allowed to adduce testimony regarding a witness's *lack* of certainty, and when that occurs, the trial judge should have discretion to allow the Commonwealth to introduce certainty testimony. See Commonwealth v. Santoli, 424 Mass. 837, 845 (1997) (noting significance of "the testimony of a witness who expressed doubt about the accuracy of her identification").

d. Admissibility Hearings Based on Rules of Evidence

A substantial portion of the Minority Statement of Attorney James Doyle appears to rest on the concern that adoption of the Study Group Report's recommendations would foreclose the possibility of excluding or limiting identification evidence based on traditional, common-law evidentiary grounds. See Study Group Report at 149 (Minority Statement of James M. Doyle, Esq.) ("The Study Group advocates *replacing* two complementary, long-standing, and familiar legal mechanisms for evaluating eyewitness evidence – a constitutionally required due process screen for evidence generated by police suggestion *and a common law evidentiary screen directed against unreliable evidence in general.*") (emphasis added). CPCS does not so read the Study Group Report. To the contrary, the Study Group Report explicitly recognizes that a defendant may pursue "a motion in limine to exclude eyewitness identification testimony as more prejudicial than probative." Study Group Report at 39. This statement accurately reflects current law. See Perry v. New Hampshire, 132 S.Ct. 716, 729 (2012) ("State and federal rules of evidence, moreover, permit trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury."); Commonwealth v. Simmons, 383 Mass. 46, 51-52 (1981) (holding that even if identification procedure does not amount to due process violation, identification evidence can still be excluded if the "the unfair, prejudicial, and unreliable quality of the identification would outweigh its probative value"); Commonwealth v. Jones, 423 Mass. 99 (1996) (concluding that identifications

can be excluded under common law notions of fairness, even absent state action in orchestrating suggestive procedure). To clarify any potential ambiguity regarding this issue, CPCS suggests that the Court make clear that trial judges continue to possess the authority to exclude identification evidence, or craft alternative remedies, based on the application of traditional evidentiary rules, even where such remedies may not be constitutionally required.

(4) Jury Instructions

a. Omission of Language Regarding Scientific Basis

The Study Group Report's recommended jury instructions seek to educate jurors about principles of eyewitness memory that have been well-established through scientific research. See Study Group Report at 51. But these concepts "may be met by skepticism on the part of some who are not familiar with the science," notwithstanding their general acceptance within the scientific community." Id. at 58; see also id. at 18 ("many of the findings are counterintuitive") (quoting State v. Guilbert, 306 Conn. 218, 239 (2012)). In order to increase the likelihood that these jury instructions will have their intended impact, particularly on those jurors who may enter the jury box reluctant to accept principles that run counter to their previously and perhaps deeply held beliefs, CPCS suggests that the following language be added after the fourth paragraph of the Study Group Report at 118:

> *In addition, some of the concepts that I am about to explain to you about how memory works may be different than or even the opposite of what you thought or believed to be true. It is therefore important for you to know that these concepts are based on scientific research and findings from that research that are well accepted within the scientific community. I will now explain these concepts.*[1]

b. Omission of Good Faith or Honest Mistake Instruction

The recommended instructions do not include the charge on good faith or honest mistake in identification, as set forth in Commonwealth v. Pressley, 390 Mass. 617, 620 (1983). CPCS assumes this is merely an oversight, and, in any event, strongly urges the Court to include such an instruction as part of any required charge, absent unique circumstances in which that instruction is irrelevant.

[1] For other examples of pattern jury instructions that explicitly mention that the relevant factors or principles are based on research, see http://www.dauphincounty.org/government/Court-Departments/Offices-and-Departments/Court-of-Common-Pleas/Documents/Turgeon/Model-Eyewitness-Identification-Jury-Instructions.pdf (last visited on November 13, 2013); http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf (last visited on November 13, 2013).

c. Instruction on Obtaining Detailed Description

As discussed in more detail above, a police interview of a witness aimed at obtaining a detailed description of the perpetrator, though well-intentioned, can actually distort the witness's memory and reduce the reliability of any later identification by that witness. The jury instructions, therefore, should not merely inform the jury that "police should obtain from the witness a detailed description of the offender," Study Group Report at 123, but should include the following additional, cautionary language after that sentence: *"However, police efforts to obtain a detailed description can sometimes lead witnesses to guess about features of the offender's appearance, thereby distorting the witness's memory and also decreasing the chances that a later identification will be accurate. That is why the police, when they interview a witness, should always warn him or her not to guess about the offender's features and to only describe those features that the witness clearly remembers."*

d. Failure to Follow Best Practices or Record Identification Procedures

As an alternative remedy to suppression, the Study Group Report recommends that "[w]here the Court finds the police have failed to follow the Best Police Practices or failed to record the identification procedures where it was feasible to do so, it shall give appropriate jury instructions." Study Group Report at 113. However, the recommended jury instructions do not include any language that addresses such situations. Thus, when there is evidence that the police failed to follow Best Police Practices, CPCS proposes the following language, derived from Commonwealth v. Bowden, 379 Mass. 472, 486 (1980), to follow the instructions on Identification Procedures set forth at 122-128:

> *In this case, evidence was presented that the police did not follow the Best Police Practices, as I have just described them to you. You may consider this evidence in deciding whether the Commonwealth has proven beyond a reasonable doubt that the defendant was, in fact, the person who committed the charged crime(s). This evidence of the failure of the police to follow these procedures could raise a reasonable doubt as to the defendant's guilt in your minds.*

When there is evidence that the police failed to record an identification procedure where it was feasible to do so, CPCS proposes the following language, derived from Commonwealth v. DiGiambattista, 442 Mass. 423, 447-448 (2004), also to follow the instructions on Identification Procedures set forth at 122-128:

In this case, you heard evidence that the police did not make a video or audio recording of the (photo array or lineup) procedure. The Supreme Judicial Court — this state's highest court — has expressed a preference that such procedures be recorded whenever practicable. Since there is no recording of the (photo array or lineup) procedure in this case, you should weigh evidence of the alleged identification of the defendant that supposedly resulted from that procedure with great caution and care. The reason is that the Commonwealth may have had the ability to record that procedure that led to the alleged identification of the Defendant, which the Commonwealth is now asking you to find beyond a reasonable doubt was accurate, but instead is asking you to rely on a summary of those circumstances drawn from the possibly fallible or selective memory of its witness(es). The absence of the recording of this procedure allows you, but does not require you, to find that the Commonwealth has failed to prove the reliability of this alleged identification beyond a reasonable doubt.

e. Typographical error in instructions regarding recommended procedures

The Study Group Report's recommended jury instructions state:

"If the suspect is handcuffed, the witness should not be put into a position where the witness cannot see the handcuffs." Study Group Report at 123. The word "not" in the second-to-last line should be omitted.

The Commonwealth of Massachusetts

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February 4, 2014

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Re: Notice Inviting Comment on the Supreme Judicial Court Study Group on Eyewitness Evidence's Report and Recommendations to the Justices

Dear Justices:

I am writing in response to this Honorable Court's Notice Inviting Comment on the Supreme Judicial Court Study Group on Eyewitness Evidence's Report and Recommendations to the Justices (the "Report"). Initially, I would like to thank the Court for addressing the issue of eyewitness identification and its role in the Commonwealth's criminal justice system and for soliciting comment on the Study Group's report.

I also would like to express my unequivocal support for the Study Group's recommendation that police agencies statewide be expected to adopt best practices for eyewitness identification procedures. It is an effort that, as the Court likely knows, my office has spearheaded for a decade. In 2004, in conjunction with then-Boston Police Commissioner Kathleen O'Toole, I convened a blue-ribbon panel on eyewitness identification. Comprised of my then-First Assistant District Attorney, police officials, prominent defense attorneys, and Gary Wells, one of the nation's leading academic experts on eyewitness identification, the panel made recommendations for revising police protocols on eyewitness identification. Adopted by the Boston Police Department and every other major law enforcement agency in Suffolk County, the panel's recommended protocol ultimately came to be referred to by Innocence Project founder Barry Scheck as the "gold standard" for the administration of identification procedures. *See* http://www.newenglandinnocence.org/wp-content/uploads/2011/07/Eyewitness-Identification-Reform-in-Massachusetts-by-Stanley-Z.-Fisher.pdf.

Likewise, I also agree fully with the Study Group's recommendation that a standing committee on eyewitness identification be formed to monitor developments in the field, propose legal updates, and implement training programs. As the Report establishes, the issue of eyewitness identifications is both complex and nuanced, and the criminal justice system will no

doubt benefit from the establishment of a committee representing all stakeholders responsible for making recommendations to the Court as the science evolves.

I must admit, however, that I am deeply troubled by some of the Study Group's recommendations that propose to take the Commonwealth down an unprecedented path, along which justices of the trial courts will substitute for experts in the science of eyewitness identification, will instruct juries on the state of research in the field, and will preclude juries from hearing some eyewitness identifications based on the individual justice's assessment of the identification's reliability. In no other area of the criminal law do we ask judges to assume the mantle of expert to educate juries on the applicability of scientific research to the facts of individual cases or, even more fundamentally, to take from the jury the responsibility of applying scientific principles to evaluate a witness's testimony. For a number of reasons set out below, my senior staff and I conclude that the Study Group's proposed approach is an unprecedented, unwarranted, and ultimately perilous approach.

The Study Group's first recommendation, "that the Court take judicial notice as legislative facts of the modern psychological principles regarding eyewitness memory . . ." is unclear – and, therefore, concerning – in at least two ways. First, the recommendation does not make clear whether it is only the appellate courts of the Commonwealth that are being asked to take judicial notice of these principles – *see* Report, Minority Report of James Doyle at 151 ("Authoritative *appellate* judicial notice of legislative facts embodying modern science eliminates much of this uncertainty without freezing the science." [emphasis supplied]) – or whether, instead, trial judges will be authorized to take judicial notice of these principles in the course of pretrial hearings and even at trial. Second, the recommendation does not establish at what level of detail courts will be expected to take judicial notice of "modern psychological principles." Taking judicial notice that there is psychological evidence indicating that people's intuitions about eyewitness testimony are often wrong is one thing; taking judicial notice that the "weapon effect" gives cause for concern about the reliability of an identification *in a particular case* is quite another.

In general, "[m]atters are judicially noticed only when they are indisputably true." *Nantucket v. Beinecke*, 379 Mass. 345, 352 (1979). Judicial notice "cannot be taken of material factual issues that can only be decided by the fact finder on competent evidence." *Commonwealth v. Kirk*, 39 Mass. App. Ct. 225, 229 (1995). That this Court can take judicial notice that people's intuitions about eyewitness identification often do not comport with the results of sociological research is indisputable. *How* such research may (or may not) call into question the reliability of an individual eyewitness identification, however, is the proper subject not of judicial notice but, instead, of "competent evidence." Put another way, that there is reason to be careful in evaluating eyewitness identifications does not mean that every such reason applies in every case of eyewitness identification. The extent to which a jury should question an eyewitness identification necessarily varies based on the facts of a case and is, therefore, the proper subject of expert testimony, not judicial notice.

To the extent that the Study Group's first recommendation calls upon the Supreme Judicial Court to take judicial notice that current psychological research on memory and eyewitness identification establishes that "many of the findings [of studies of memory and

eyewitness identification] are counterintuitive," Report at 18, quoting *State v. Guilbert*, 306 Conn. 218, 235-236 (2012), and that, therefore, issues surrounding eyewitness identification are always appropriate subjects for expert testimony, I agree. James Doyle is undoubtedly correct when he writes, in his minority report, that the time is past for "experts testifying about whether experts should testify." Report, Minority Report of James Doyle at 151. The Report certainly establishes that the issues surrounding eyewitness identification are numerous and complex enough to warrant expert testimony. To go further, however, and suggest that it is the role of the judge – and the jury instructions – "to educate juries on the science of eyewitness identification and to reduce the reliance on expert testimony . . .," Report at 51, evinces a fundamental misunderstanding of the role of judges, juries, and jury instruction.

My concern about the call for judicial notice "as legislative facts" of complex – and often conflicting – psychological studies is therefore heightened by the Study Group's fourth recommendation for a dramatic expansion of the model instruction on eyewitness identification. The existing instruction addresses factors affecting the reliability of eyewitness identification. It does not and should not instruct the jury on the scientific theories regarding eyewitness identification. The proposed instruction, however, would be the only instance in the criminal law in which the judge would instruct the jury in any way on the science underlying its content.

In contrast, the model jury instruction on criminal responsibility – an area at least as replete with (social) scientific complexity as eyewitness identification – does not attempt to educate the jury about the science underpinning the factual determinations that the jury must make. Rather, the instruction leaves the education of the jury in (social) scientific principles to those with the education, training, and experience to do so – experts. Similarly, the model instruction on duress does not purport to explain to the jury the psychological principles underlying the concepts of "free will" and "coercion." Here again, the instruction leaves that elucidation – in cases in which it is required – to experts qualified to evaluate conflicting psychological evidence and explain it to the jury – surely not the function of the judge. If the facts of a specific case dictate that the jury must be educated in the science underlying eyewitness identification, that role should be performed – as it always has been – by professionals educated and trained to perform that function, not by judges or drafters of jury instructions.

Viewed in this context, the danger posed by the Study Group's proposed model jury instructions is apparent. Read (or heard) for the first time, the proposed instructions amount to a catalogue of reasons to doubt the reliability of an eyewitness identification – *any* eyewitness identification. Absent is any acknowledgment that people regularly identify other people, including strangers, accurately. Also missing are any references to the studies – cited commendably by the Study Group – that suggest that, at least under certain circumstances, eyewitness identifications are reliable and/or that certain system and/or evaluator variables may not apply in an individual case.

Most fundamentally, however, the instructions track the likely contours of the testimony of most defense experts on eyewitness identification. A short thought experiment illustrates the problem. Imagine a murder trial in which one or more eyewitnesses provide important identification evidence. A defense expert likely would emphasize the systemic and evaluator

factors that can compromise the reliability of identifications. An expert for the prosecution likely would underscore the limitations of the research as applied in particular contexts. For example, if an eyewitness to the murder was a member of the military with extensive experience in confronting armed gunmen, the Commonwealth likely would seek to elicit expert testimony that such training could reduce or eliminate the "weapon effect." Because the proposed jury instructions touch only on the sources of concern about the reliability of eyewitness identification, however, the judge's instructions essentially would echo the testimony of the defense expert. Perhaps without intending to, the drafters of the proposed model jury instructions have created instructions that place the judicial thumb on the defendant's side of the scales of justice.

A related problem would arise if a defendant were to present the testimony of an eyewitness purporting to identify someone other than the defendant as the true culprit. In that circumstance, the judge's delivery of the proposed model jury instruction could be read as calling into question the defense witness's testimony – an at least equally inappropriate outcome. This is precisely why it is manifestly *not* the role of the judge and/or the jury instructions to educate the jury on scientific principles. Rather, that function is – as it always has been – the role of the expert witness.

This Court's existing model instruction on identification has withstood the test of time. Should this Court determine that it requires updating, a slight but critical modification of this instruction should suffice to alert jurors, in appropriate cases, that identification is obviously based upon memory, and that human memory is imperfect. The instruction was most recently reiterated in *Commonwealth v. Franklin*, 465 Mass. 895, 913 (2013) and is attached to this letter as Appendix A. The slight modification appears in italics at the outset of the instruction. It could be used as needed if, in fact, any revision of the existing instruction is necessary.

A related concern is the Study Group's third recommendation, the proposed pretrial hearing. Initially, I agree that such a preliminary hearing is appropriate in cases in which there has been a suggestive or highly suggestive confrontation that may have led to a misidentification. *See* Report, subparts I A, B, at 110.

As to the proposal in subpart I C, judges should not conduct hearings if a violation of best police practices has not caused a suggestive identification. Rather, such a deviation, if demonstrated by the evidence, should be addressed by a jury instruction. This is the practice regularly adopted by this Court. Thus, in reviewing similar concerns about the reliability of some statements made by defendants while being interrogated by police, this Court has noted that "[w]here, as here, there are grounds for questioning the reliability of certain types of evidence that the jury might misconstrue as particularly reliable, specific instruction to the jury may be appropriate." *Commonwealth v. DiGiambattista*, 442 Mass. 423, 446-447 (2004). Likewise, this Court has adopted a similar practice with respect to the testimony of a witness pursuant to a plea or immunity agreement. *Commonwealth v. Ciampa*, 406 Mass. 257, 263-264, 266, (1989). As these rulings establish, a deviation from a best practice is appropriately addressed by alerting the jurors to the deviation and allowing them to assess its significance.

Likewise, as to the proposal in subpart I D, there should not be a pretrial hearing merely because one or more factors exist(s) that might cast doubt on the reliability of a statement of

identification and the identification is uncorroborated. There are undoubtedly a great number of cases in which a statement of identification is made and at least one "estimator" variable exists. In cases in which witnesses testify to factors that cast doubt on the reliability of an identification, counsel are well equipped – and always have been – to use such facts persuasively in marshalling the evidence, including expert testimony, for the jury at trial. The existence of one or more "estimator" variables justifies neither fundamentally altering the jury's role nor subjecting witnesses and victims of violent and traumatic crime to an unnecessary hearing.

That the evaluation of an eyewitness identifications – a factual matter – must be left to the jury is well established. This Supreme Judicial Court has long recognized that:

> Nothing is more clearly a pure question of fact than the degree of weight that shall be given to the testimony of a witness. There are many reasons which may lead the tribunal charged with the decision of facts to discredit the testimony of a witness, and such a decision cannot be revised. Scarcely anything can be conceived of as more simple and devoid of complexity in law than settling the confidence to be reposed in a witness. Difficult as it may be in some instances, it involves little more than the exercise of experienced common sense. *The degree of credibility to be attached to the statements of anybody cannot be ruled as a matter of law.*

Davis v. Boston E. R. Co., 235 Mass. 482, 502 (1920) (cites omitted) (emphasis added).

Whether by judicial notice or pretrial hearing, therefore, the Court cannot and should not exclude the testimony of an eyewitness merely because of the presence of one or more factors that may call into question the reliability of the witness's identification. Similarly, no responsible expert on eyewitness identification would ever opine, to a reasonable degree of scientific certainty, that any specific, particular identification was not accurate and reliable. Whether a particular identification is accurate and reliable is a question of fact that can be decided only by a jury.

If the Court authorizes pretrial hearings in cases in which the identification procedures are not unduly suggestive, then the standard for invading the traditional province of the jury by excluding such identifications should reflect the unprecedented nature of such a ruling. That burden should be deemed to have been met only when it can be said that:

> no conscientious jury, acting intelligently, could honestly take the view that the statement of identification might be credible. If any rational jury, not acting on caprice or whimsy, could credit the statement of identification, then the identification is admissible.

Only this standard, if any, is appropriate as the jury ordinarily must be permitted to perform its duty at trial and determine whether the eyewitness identification is reliable.

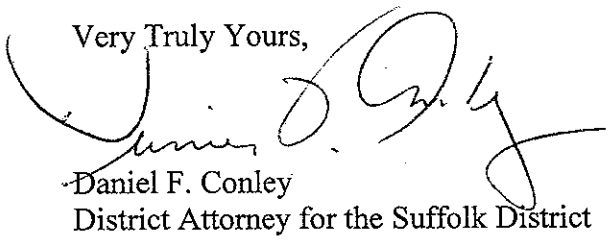
Again, I would like to thank the Court for the invitation to comment on the Study Group's report. As noted earlier, I agree fully with the report's recommendations that the Court require statewide implementation of best-practice protocols for the conduct of identification procedures and that a standing committee be established to review the state of the research on

eyewitness identifications and propose legal updates as necessary. I also concur that judicial notice of the complexity of the issues surrounding eyewitness identification warrants the Supreme Judicial Court in taking appellate judicial notice that such identifications are appropriately the subject of expert testimony.

Finally, I am aware that the Study Group has taken seriously its mandate to implement procedures to eliminate erroneous convictions based on faulty eyewitness identifications. In attempting to carry out its task, however, the Study Group has proposed unprecedented, unwarranted, and unwise revisions to legal practices that have stood the test of time. That juries in cases of eyewitness identification may require explanation of the current theories of memory and recognition most assuredly does *not* mean that the judge is the best person – or even an appropriate person – to explain these complex and, at least in some cases, contested issues. Likewise, it will rarely, if ever, be appropriate for a judge to take from the jury the task of resolving the factual question of the identification's reliability.

As the Court reviews the Report and resulting commentary, I would be happy to assist in any way.

Very Truly Yours,



Daniel F. Conley
District Attorney for the Suffolk District

MARGARET A. HAGEN, J.D., PH.D
DEPARTMENT OF PSYCHOLOGY
BOSTON UNIVERSITY

December 1, 2013

Comments on SJC Eyewitness Group Report

These Comments are being offered in reply to a Notice inviting responses to any part of the Report and Recommendations of the Supreme Judicial Court Study Group on Eyewitness Evidence.

I am a professor at Boston University where I teach courses, graduate and undergraduate, in psychology and the law. I hold a Ph.D. in psychology and a J.D. I am admitted to the bar in Massachusetts and Maine. I have taught the subject of eyewitness testimony for 30 years. I testified in a landmark case, *Commonwealth v. Francis, 390 Mass. 89; 453 N.E.2nd, 1204; 1983 Mass. LEXIS 1635,* where it was held that defendants in eyewitness cases do not have a constitutional right to an expert witness.

Hence:

In a Minority Statement appended to the Study Group Report, James M. Doyle, Esq., opposes the recommendation of the Group to expand opportunities and procedures for pretrial hearings on issues of identification reliability and admissibility and to train judges to conduct those hearings.

Mr. Doyle asserts that litigants "have no way to ascertain what an individual Massachusetts judge knows or believes about any of the general principles of memory that are inextricably bound up in the process of the evaluation of evidence." (150) He adds that "(P)arties to cases where eyewitness evidence is pivotal have no alternative to seeking to find, pay for, and offer the time-consuming testimony of expert witnesses who address core scientific issues of memory, perception, and recall." (150) He further states that: "Authoritative appellate judicial notice of legislative facts embodying modern science eliminates much of this uncertainly without freezing the science" and that "It can be expected that...retrospective fact-finding...will be more accurate." (151)

I will not comment on Mr. Doyle's representation of State due process jurisprudence because the Study Group covered this topic thoroughly in the report. I do wish to comment, however, on his account of Federal, specifically Supreme Court, eyewitness evidence analyses.

Mr. Doyle refers to the substantial body of law "vindicating the State and Federal constitutional guarantees of due process of law" stating that it is principally targeted at preventing police misconduct...ordinarily focused on a binary "in/out" decision...and is not well-adapted to issues like witness certainty... He writes that "The due process cases are concerned with the choice at the moment of choice more than with the sources and the justifications of the choice." (151-152.)

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This is a profound mischaracterization of the U.S. Supreme Court's long string of cases from *Wade* (1967) to *Perry* (2012) dealing with the reliability and admissibility—inextricably intertwined—of eyewitness testimony.

Indeed, Mr. Doyle's argument takes the Court's emphasis in *Perry* (the Court's most recent case) on the absence of police misconduct as a complete repudiation of the Court's careful consideration over almost 50 years of both the estimator and the system variables influencing the reliability and admissibility of eyewitness identifications.

It was no such thing.

It is true that the *Perry* Court held that in the absence of police misconduct the unreliability or unfair suggestiveness of an identification can be revealed to jurors by knowledgeable cross-examination and jury instructions, and that the defendant's right to a pretrial hearing on the reliability of the identification was at the judge's discretion, along with the right to have an expert witness educate the jury about the special nature of eyewitness evidence.

Yes, the very circumstances of the *Perry* identification itself make it clear that despite the Court's claimed faith in the knowledge of defense attorneys and the commonsense of jurors, the defendant's due process rights were indeed violated because of the extremity of the unreliability—as well as the suggestiveness—of the identification. At 2:30 in the morning, the eyewitness, Ms. Blandon, viewed from the 4th floor window of her apartment a poorly lit parking lot below in which she observed someone breaking into the vehicles parked there. She left the window to speak to her neighbor. She was never able to see the person full face and was unable to identify the defendant at a later date. Indeed, she "identified' the defendant when she was not even looking at him. She was away from the window at the door of her apartment speaking to the investigating officer while the defendant was being held below at the side of a police officer beside a patrol car. She described the man she had seen as a tall African-American man. When asked for a more specific description, she pointed to the window and said the person she had seen was in the parking lot standing next to the police car.

As the Study Group emphasized, "'It is the likelihood of misidentification which violates a defendant's right to due process.' (Jones at 108) The focus should be on ensuring that reliable evidence is presented to the fact finder whether or no misconduct is implicated." (at 3)

That the *Perry* case has muddled the U.S Supreme Court's progressive exposition of the importance to ensuring due process in the face of general ignorance of the scientific facts about the factors that affect the reliability of eyewitness evidence is no reason for the Commonwealth to follow suit.

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Judges, trained in the psychological science and armed with judicial notice of modern psychological principles regarding eyewitness memory as legislative facts, are well able to undertake such analyses in preliminary hearings with or without the assistance of expert testimony on the relevance of general system and estimator variables to the specific facts of the case.

I strongly urge the Supreme Judicial Court to adopt the extremely well-researched and well-reasoned recommendations of the Eyewitness Study Group stated in their report.

Respectfully,

Margaret A. Hagen, Esq.
Professor
Department of Psychology
Boston University

Sent: Friday, January 24, 2014 3:33 PM

To: Burak, Christine

Subject: Comments on Eyewitness Identification Report/Recommendations

Thank you for the opportunity to comment briefly on the report and recommendations of the Study Committee. The Committee was composed of numerous highly experienced judges and practitioners truly concerned with reducing the risk of erroneous convictions based on eyewitness identification evidence and their hard work and effort is laudable. It is not possible to comment on every point the Study Group makes or recommends and these comments should not be viewed as denigrating its work. However, some of the recommendations are in my view both premature and overly simplistic for such a complex, multifaceted topic as eyewitness identification, and in many ways elevate some of the "science" to the level of absolute truths, take the evaluation of eyewitness evidence out of the hands of the factfinder and could limit the ability of the parties to sufficiently present and argue their cases.

It is a given that no one wants a criminal justice system that is blind to in erroneous convictions or unreliable evidence. It is also a given that the current state of our law concerning identification evidence is better than most in reducing the risk of erroneous identifications. Unlike other jurisdictions, the *Botelho* approach will not admit the result of suggestive identifications, even if under the *Manson* approach the suggestive procedure is deemed otherwise "reliable." That was the problem the Oregon Supreme Court faced in the case cited by the Study group. Similarly, under state law we have the *Jones* case which can operate to exclude identifications not arranged by the police but which are still unnecessarily suggestive or unreliable. Furthermore this Court's development in case law, of eliminating certain factors that can impact reliability such as "strength or degree of certainty" and "good faith mistake," go beyond what other jurisdictions have done. Similarly, the Court's discussion in case law about factors in photo arrays and lineups eliminates many of the concerns expressed in the report and elsewhere. Whether further improvements, modifications of the law, that reflect the state of the science, and whether fostering additional discretion for trial judges' to deal with the many realities of the cases before them are better addressed through case law development or through the Court's supervisory and rulemaking powers, or some combination of them remains a fair question, despite this Court's obvious and highly appropriate desire to improve our system and the quality of our courts' decisions.

1. Judicial notice. The recommendation that the court take judicial notice of the many factors relating to both the procedural circumstances of id procedures and the so-called "reliability" factors surrounding identifications is particularly problematic. Notwithstanding the current state of the research and not withstanding what the Master in New Jersey concluded on the evidence before him, it is not universally agreed and has not reached the level that the law of evidence requires for judicial notice (easily ascertainable and not the subject of reasonable scientific debate). This is not the usual kind of topic for judicial notice, and is not easily ascertainable, especially as there are so many factors that attend identifications, both police conducted procedures and in-court identifications based on the witness's memory. Where there are many factors, some of which may foster a risk of error and others that may reduce that risk, it is difficult or impossible to determine the totality or combination of circumstances that would even warrant judicial notice. A totality inquiry is the best way to assess both admissibility and the evaluation of identifications and it is not appropriate to consider these factors individually or have one factor predominate over others. It is a large leap to now declare through the vehicle of judicial notice, that certain factors (alone or un combination) are undisputed scientific truths. Even the science of DNA, while long ago reaching the level to make it admissible, has not reached a level warranting "judicial notice," and of course we do not, and should not, instruct the jury about the "truth" or "absolute reliability" of various practices and circumstances affecting the reliability of DNA evidence, leaving those matters to expert testimony, cross-examination and argument. Being more flexible about the admission of expert testimony (once it has passed the Daubert admissibility threshold) about these subjects is a far better and more appropriate solution to get the appropriate information to the factfinder. In fact, the Connecticut Supreme Court case cited by the Study Group was primarily driven by the need for allowing expert testimony on identification..

2. Jury Instructions. The recommendation concerning judicial notice is tied directly to the recommendation concerning jury instructions. Revised jury instructions along the lines suggested by the Study Group should not be seen as a way to reduce the need for expert testimony as they not only incorporate telling the jury that certain things are "scientific truths", but they limit both parties from offering evidence pertaining to identification reliability, and from testing that evidence by cross-examination, contrary evidence and argument. Furthermore, many of the proposed instructions are cast in terms of "scientific truths" (reflective of the judicial notice recommendation) and yet others tell the jury that they "may consider" certain circumstances surrounding identifications and memory. In criminal cases something that has been the subject of judicial notice is still submitted to the jury and the jury is instructed that they may, but need not, accept the fact the court has judicially noticed, so in this way the proposal is at the very least inconsistent. It is also not clear whether if some factor was judicially noticed the proposal would require telling the jury that the court took notice of that "factor" even if the court gives the jury the option to accept it or not. They should not be told what the court did. To the degree the court may wish to give a trial judge discretion to mention something in the ID instructions that the jury "may" consider, it should of course be case-based, but not determined by the principles that attend judicial notice. The long litany of instructions on specific factors, including detailed "best practices, comes close to telling the jury what they must do or how they must assess ID evidence. The jury's role in

evaluating the evidence must remain paramount. To the degree the jury may be helped and to the degree they might be disabused of some notions about the reliability of IDs, again expert testimony, not judicial instruction, is the preferred approach.

3. "Best practices." It is important for the Court to separate the recommendations concerning memory and reliability from the recommendations concerning best practices. Many if not most prosecutors' offices and police departments have embraced most of the best practices outlined by the Study Group. They are generally agreed by most on all sides and the experts as appropriate. But there may be less agreement on all of the outlined procedures. Apart from legitimate funding and training issues which are real and have time consequences, they are also very detailed and the proposal would require strict adherence to each of the specific details as conditions of admissibility and again as instructions to the jury about how to view the result of a procedure that does not perfectly comply. To the degree the court may find it wishes to endorse certain of the best practices in the same way it has previously dealt with the recording of statements by the police, it might do so in a similar way, not making it a matter of admissibility but one of telling the jury what the Court has said about a practice, still leaving it to the jury to determine reliability. If it chooses to go this way, the Court should do it in a general way, not getting too involved in the details or specifics of the "best" way to conduct procedures. As a matter of the Court's special "supervisory" powers, while it does of course impact the quality of evidence adduced in our courts, the Court should be alert to imposing detailed strict requirements on the executive branch. And if a court-sanctioned best practice is not followed in a particular case, the Court should consider whether that should be the subject of a pretrial hearing and pretrial sanction?

4. Pretrial Hearings. To the degree Rule 14 discovery needs to be expanded to provide the defense with all the details of identification procedures conducted by those covered by the Rule, there can be little objection. It may be that such full discovery may limit the need for pretrial *"Dougan"* hearings. What the Study Group recommends, beyond *Botelho* , for suppressing out of court identifications and in-court identifications, is again based on an acceptance of the judicial notice principles. For all the same reasons, it would suppress (with some limited exceptions after a defendant raises the issue of witness certainty) both an out-of court and an in-court identification if the defendant proves to a preponderance that the out of court ID (presumably under *Jones*) is unreliable, with no option for the government to prove by clear and convincing evidence, an admittedly difficult burden, that the in-court ID has an independent source. It would also suppress both an out of court ID and an in-court ID if the defendant proves to a preponderance that the police failed to "substantially" comply with the best practices." The reference to Rule 15 application for interlocutory appeals, suggests that the Study Group in light of these suppression recommendations, may have considered that the government, which would have no other option, might be seeking a good number of interlocutory appeals. The Study Group does recommend some remedies beyond "in/out" that would include giving the judge discretion to give targeted jury instructions and admit expert testimony The remedy of jury instructions as a proposed remedy to outright suppressions still suffers from the same inherent problems as discussed above. To the degree the Study Group recommends the alternate remedy of allowing expert testimony concerning the asserted ground for unreliability or failure to comply with "best practices," that is again a preferable result and might be reached without a pretrial hearing.

The notion that the Court might choose to strongly signal that trial judges should be much more flexible in allowing expert ID testimony does comes with attendant costs, both financial, and in terms of court time and resources. But it seems that at this point in time that is the far preferable approach. It appears that the Study Group itself was split on whether to support further use of experts or whether it believed its recommendations should reduce a need for expert testimony.

4. The recommendation to support expanded, statewide training (which should be occurring in any event) on best practices and the further evaluation of the developing science of memory and reliability factors is easy to support, although the fact the Study Group saw a need for further evaluation of the science may be telling on the question of whether the science has reached the level warranting judicial notice and jury instructions that say certain factors are absolute truths.

Respectfully,

Pamela L. Hunt, Esq.

October 1, 2013

Christine P. Burak, Esq.
Legal Counsel to the Chief Justice
Supreme Judicial Court
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Boston, MA 02108

Re: SJC Study Group on Eyewitness Identification, Report.

Dear Ms. Burak:

I wanted to comment on best practices for eyewitness identification procedures by police generally, and particularly based on a case on which I worked, where there was an obviously wrong identification (the women owner of the car was "identified" as the driver, when later a friend of hers admitted driving it at the time, and they looked nothing like each other).

First, a terribly suggestive procedure occurred in that case, in that there was a photo "lineup" or array in which one of the six or eight photos was a very poor copy xerox, and the other photos looked similar in quality. You can guess which one was the poor quality; of course, it was the person the police "thought" was the perpetrator. Thus, I believe one crucial rule should be that when there is a photo array, the photo of the suspect should be at least of a similar quality or "look" as the other photos. I think this might be a fairly common problem where there is not already a "mug shot" of the suspect. This is important, because the first identification is often crucial. And while one can say, well, that is an issue for cross-examination, that is too late for a fair and just protection of defendants.

Second, in that same case there were photo identifications made by drivers of passengers in a car which were wrong, and the key point there is that the police officer presenting the photographs "knew" which ones he wanted the witnesses to pick. In other words, it was not a "**double blind**" situation. Now, we know in science, for example in drug trials, that the experimental trial must be

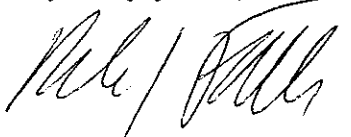
double-blind or it is useless. Even though doctors are well-educated and supposedly sophisticated and want the truth, it has been shown over and over that they will be prejudiced and report more favorably than is accurate their preference unless they do not know whether the pill is a placebo or not.

Thus, it is completely unrealistic to think that a police officer who knows who the suspect is, standing by while a witness is looking to see if a photo array or lineup contains the perpetrator, will not betray that suspect, unconsciously or consciously. We cannot continue to pretend that police officers are somehow more objective and pure than the rest of us, including doctors. **Thus, it is imperative that lineups and arrays be presented to witnesses by officers who do not know who is the suspect.**

I believe this last point is probably the most important change which could be made to make eyewitness identifications more accurate. Now, it may be appropriate to make an exception when a potential suspect is captured shortly after the incident in the surrounding area, and brought immediately before the victim: this has the advantage of the immediacy of the victim's memory, and the ability to dismiss the potential suspect immediately if that person is not the perpetrator. But other than that, it should be a hard and fast rule that any lineup, show-up, or photo array presented to a witness should only be presented by an individual or individuals who do not know which of the individuals in the lineup, show-up or photo array is the suspect.

Thank you for your consideration.

Very truly yours,



Richard J. Fallon

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January 24, 2014

Christine P. Burak, Esq.
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Re: Supreme Judicial Court Study Group on Eyewitness Evidence Report and Recommendations to the Justices

Dear Ms. Burak:

The Innocence Project respectfully submits these comments to the Supreme Judicial Court Study Group on Eyewitness Evidence's Report and Recommendations to the Justices (hereinafter, the "Report") for the Court's consideration.

The Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to prevent future miscarriages of justice. The advent of DNA testing has proven that innocent individuals are, in fact, convicted. It has also enabled the Innocence Project to study the causes of these injustices and pursue legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system – including preventing future wrongful convictions and identifying actual perpetrators.[1] In particular, the work of the Innocence Project has helped to expose the problem of mistaken identification as the leading cause of wrongful convictions, contributing to nearly 75 percent of such cases, including

[1] In 49 percent of the wrongful convictions proven by post-conviction DNA testing, our work also helped identify the real perpetrators of those crimes. Half of these true offenders are known to have committed a total of 139 additional violent crimes, including 76 rapes and 33 murders, following the arrest of the actually innocent person who was then erroneously prosecuted and convicted.

eight of the nine exoneration cases based on DNA evidence in Massachusetts.[2] The Innocence Project's extensive experience in mistaken eyewitness identification cases has led it to call for a variety of systemic reforms. These include improving police procedures so that officers are required to adhere to "best practices," proposing model legislation, and highlighting the need for expert testimony and expansive, science-based jury instructions to educate jurors about empirically-proven factors affecting the reliability of eyewitness identifications. The Innocence Project has served as *amicus curiae* in cases involving questions relating to the evaluation and use of eyewitness identification evidence around the country, most notably in *State v. Henderson*, 208 N.J. 208 (2011) and *State v. Lawson*, 352 Or. 724 (2012).

The Innocence Project commends the Supreme Judicial Court for achieving a consensus among stakeholders in the criminal justice system that comprehensively addresses the reliability of eyewitness identification evidence at both the front end – its collection by law enforcement – as well as the back end – when and how it is used in courts. It is this type of comprehensive and interdependent reform that creates the best and most realistic conditions to improve the fairness and reliability of the criminal justice system. Such reform will protect innocents from wrongful conviction, enhance public safety, and increase public confidence in the accuracy of criminal trials. *Accord* Report at 11.

The Study Group has carried out the Court's vision in a thoughtful, detailed and clear manner. The Report accurately describes and accounts for the findings of more than thirty years of peer-reviewed scientific research and offers an important roadmap for reform that, if approved by the Supreme Judicial Court, will be of use not only in Massachusetts, but throughout the country as other jurisdictions follow Massachusetts' lead and engage in holistic eyewitness identification reform. Just as the Study Group built on the work of the supreme courts of New Jersey and Oregon, so too will courts, legislatures and law enforcement agencies look to Massachusetts to guide their reform efforts.

The Innocence Project strongly supports the majority of the recommendations set forth in the Report, including those set forth in both minority reports. The Innocence Project also agrees with the comments and suggestions prepared by the Committee for Public Counsel Services (CPCS) and the Massachusetts Association of Criminal Defense Lawyers (MACDL). We appreciate the opportunity to offer the following comments and suggestions, which we hope will supplement the excellent work done by the Study Group.

COMMENTS AND RECOMMENDATIONS

The Innocence Project's greatest concern relates to the absence of sufficient guidance for courts evaluating the reliability of identification evidence once a pre-trial hearing is granted. While the Report offers detailed scientific findings concerning many aspects of eyewitness memory and perception, it does not offer courts specific guidance about how to apply those scientific findings to the task of evaluating identification evidence. We believe such guidance is necessary to ensure that the Report's recommendations are fully adopted.

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[2] Innocence Project, Know the Cases, http://www.innocenceproject.org/know/Search-Profiles.php (last visited Jan. 23, 2014).

So, for example, scientific research has established that, of the several flaws in the existing *Manson* balancing approach, none is more fundamental than the effect of suggestive procedures on the reliability factors. A suggestive identification procedure can artificially inflate a witness's self-reports regarding three of the five *Manson* factors: opportunity to view, attention paid, and certainty. *See Henderson* at 286 ("[W]hen [self-]reports are tainted by a suggestive process, they become poor measures in a balancing test designed to bar unreliable evidence.") Thus, despite the fact that suggestive identification procedures actually *decrease* reliability, suggestion can increase the likelihood that a court applying *Manson* will find that the identification was reliable. "The irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions." *Id.*

While the Report identifies those estimator variables that can be inflated by suggestion (as well as those self-reported variables that witnesses tend to overestimate and those that are not well correlated with accuracy, such as certainty and description accuracy), we do not believe that the Report provides sufficient guidance to courts considering the effects of suggestion on a challenged identification. Scientific research has demonstrated that the amount of suggestion that can substantially contaminate memory is directly correlated to the strength of the original memory.[3] For example, if a witness observes a crime for a few seconds, in darkness, from a great distance, and while under great stress, his ability to encode a stranger's facial features will be very poor, resulting in a weak memory of the perpetrator. The witness's identification will be more easily affected by a relatively small amount of suggestion when compared with a witness who had an excellent opportunity to view a perpetrator (in daylight, for a long period of time, in the absence of stress). Consequently, courts evaluating whether suggestion by state or non-state actors in a particular case rises to the threshold level necessary to hold a hearing, or so corrupts an identification as to make it inadmissible, must also look to the strength of the original memory as reflected by the estimator variables present in the case. These principles should be clarified for courts applying the new legal framework.

In addition, we believe it is critical for courts considering eyewitness identification evidence pre-trial to consider primary evidence in the form of the witness's testimony (with the understanding, expressed in the Report, that witness's memories can be altered by suggestive feedback and information obtained after the fact), initial crime reports to emergency services, and reports by first responders. This primary evidence will reveal both the witness's statements at the point in time closest to the crime and will also contain potentially objective evidence about estimator variables (e.g., lighting conditions, distance, disguise, the witness's physiological conditions, etc.). Such a preference should be articulated in the Court's ultimate findings. Finally, as mentioned in the Report and elsewhere in our comments, courts should be encouraged to hear from experts at pretrial hearings in cases involving compromised identifications or whenever courts would find such testimony useful. The availability of witnesses and experts at pretrial hearings will enable courts to fashion more precise and useful intermediate remedies which will make trials more efficient and accurate.

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[3] *See* Nancy Steblay et al., *The Eyewitness Post-Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, Psychology, Public Policy, and Law (in press) (Meta-analysis shows that the impact of feedback (suggestiveness) was less for accurate witnesses, who presumably had stronger initial memories, than for inaccurate witnesses, who had worse initial memories.)

General Principles

The Report is animated by certain general principles that the Innocence Project strongly supports:

- Perhaps most important to the future of eyewitness identification reform in Massachusetts is the Study Group's exhortation that the Report not be treated as a "definitive statement on the science of eyewitness identification, or on the police practices and criminal procedures most appropriate in light of the science." Report at 12. We agree that "[a]s a matter of justice, our courts must be able to respond to the science as it evolves rather than 'catch up' to advances in research after years of inaction." *Id.* We support the establishment of a Standing Committee on Eyewitness Evidence that would be responsible for periodic review of scientific and legal developments affecting eyewitness evidence and making appropriate recommendations to the Justices based on their findings. We urge the Court to create this committee and direct it to meet and report back to the Court on an annual basis.

- Relatedly, we strongly support the Report's emphasis on ongoing education and training of stakeholders. Indeed, we believe that ongoing education and training is essential to harnessing the full benefits of the Report's recommendations. Given the identified limitations of available resources, we urge the Court to identify creative and resource-efficient ways to ensure that meaningful education and training is provided on an ongoing basis to judges, attorneys and members of law enforcement. Of course, this training should also reflect any advances in scientific understanding identified by the Standing Committee on Eyewitness Evidence, described above. We therefore agree with the Study Group's suggestion that the Standing Committee on Eyewitness Evidence also be tasked with ensuring that the continuing education and training needs of stakeholders are identified and met. As noted in the Report, the Innocence Project is interested in working collaboratively with law enforcement to develop videotaped trainings that can be used during roll call. Report at 105.

- We support the Study Group's conclusion that judicial notice of legislative facts, expansive jury instructions, and improved police procedures, while sure to improve the collection and adjudication of eyewitness identification evidence, are not substitutes for expert testimony concerning the factors that affect eyewitness memory and perception, either pre-trial or at trial. We concur specifically with MACDL's reasoning on this point and support MACDL's recommendation that the Supreme Judicial Court make explicit the principle that these system improvements are not permissible grounds to deny defense counsel funds for an expert under G.L. c. 261, § 27C. MACDL Comments at 2.

- We agree with those members of the Study Group who felt "the trace evidence analogy most accurately captures the nature of eyewitness evidence and forms the appropriate basis for analyzing reliability." Report at 45. Neuroscience has demonstrated that long-term memories exist as physical traces in the brain. Working from this fact, researchers have endorsed the trace evidence analogy in the legal context. *Id. See also Lawson* at 748. This analogy supports the uniform adoption of protocols for the handling and treatment of eyewitness identification evidence to minimize the possibility of

contamination and maximize reliability and accuracy. For adjudicatory purposes, when eyewitness evidence is treated as trace evidence, the burden of production shifts to the proponent of the evidence to establish its baseline reliability, as is the general rule for all physical evidence. The requirement that the defendant prove a negative to challenge the admissibility of the evidence is a difficult burden to bear because the information necessary to establish the evidence's reliability (including the circumstances under which it was obtained) is within the control of the prosecution, not the defendant.

- Like CPCS and MACDL, the Innocence Project reads the Report to permit challenges to the admissibility of eyewitness identification evidence either under a due process rubric or under traditional evidentiary grounds. Report at 39-40; *Accord* CPCS Comments at 6-7; MACDL Comments at 5. Given that the Minority Statement of Attorney James M. Doyle takes the view that the Report has dispensed with the evidentiary approach, we agree with CPCS and MACDL that the Court should clarify that trial judges continue to possess the authority to exclude identification evidence, or craft alternative remedies, based on the application of traditional evidentiary rules, even where such remedies may not be constitutionally required.

Judicial Notice of Legislative Facts

The Innocence Project strongly supports the Report's recommendation that courts take judicial notice as legislative facts of relevant scientific findings regarding eyewitness memory and perception, as set forth in *Lawson* app. at 769-789. As Attorney James M. Doyle explained in his Minority Statement, judicial notice of scientific findings will increase accuracy and transparency in the adjudication of criminal matters. The Innocence Project concurs with the concerns raised by CPCS and agrees with CPCS's recommendation that, in adopting this recommendation, the Supreme Judicial Court make clear that the principles set out in the Report constitute a baseline and not a ceiling for what can be drawn from the scientific literature. CPCS Comments at 1-2. Further, and consistent with the Report's recommendation that courts recognize the evolving nature of the scientific literature, the principles set forth in the Report represent the research findings as they stand now and should not be viewed as stagnant.

The Innocence Project submits one additional scientific finding for the Court's consideration: scientific research has shown that identifications by trained observers (including members of law enforcement) are equally affected by the factors that have been shown to affect eyewitness memory and perception. [4] Yet most people believe that trained observers, as a rule, make more reliable and accurate identifications. These findings should be included as part of the body of research that the Report has collected to serve as the basis for judicial notice in cases involving

[4] *See, e.g.,* Claudia J. Stanny & Thomas C. Johnson, *Effects of Stress Induced by a Simulated Shooting on Recall by Police and Citizen Witnesses*, 113 Am. J. Psychol. 359 (2000) ("[S]everal reviews of the eyewitness literature concluded that there is little evidence that police recall witnessed events any more accurately than citizens.") (Collecting research). This finding is borne out by DNA exonerations that involved police officers misidentifying actually innocent suspects. *See* Case of Stephan Cowans (served 5.5 years), available at: http://www.innocenceproject.org/Content/Stephan_Cowans.php; Case of Steven Barnes (served 19.5 years), available at: http://www.innocenceproject.org/Content/Steven_Barnes.php; Case of Scott Fappiano (served 21 years), available at: http://www.innocenceproject.org/Content/Scott_Fappiano.php.

eyewitness identifications. Consequently, the Court should make clear that the mere fact that an identification is made by a police officer or other trained observer should not preclude defendants from raising challenges to that evidence or obtaining pre-trial hearings on the grounds set forth in the Report.

Police Practices

The Innocence Project's experience collaborating with members of law enforcement nationwide supports the Study Group's finding that a "well-trained detective who uses research-based techniques can decrease the likelihood of misidentification and preserve the witness's ability to recognize the offender later." Report at 85. Likewise, our experience supports the Study Group's conclusion that uniform, science-based practices that are memorialized in written policies on which members of law enforcement are regularly trained offers a substantial protection against the wrongful conviction of innocent suspects.

In addition to those comments of CPCS and MACDL with which we concur (see below), the Innocence Project would also urge the Court to amend the police practice recommendations contained in the Report as follows:

- All law enforcement agencies should be required to maintain a written policy, supported by the scientific research described in the Report, on eyewitness identification procedures. We expect – as with the decision in *Com. v. DiGiambattista*, 442 Mass. 423, 447-448 (2004), which ultimately compelled changes in police practice to require the recording of custodial interrogations – local law enforcement agencies will craft policies mindful of the Report's recommendations. Indeed, we understand that efforts are already underway within the law enforcement community to ensure police protocols at the local agency comport with the Report's recommendations guiding system variables. We recommend that the Police Practice Subcommittee work in coordination with the Study Group to define a mechanism to ensure that local law enforcement agencies comply uniformly – through the adoption of written policies – with the recommendations of the Court.

- The Report's recommendation that "[w]henever practicable, the police should videotape or audiotape a photo array or lineup" is a critical reform. Report at 88. The Innocence Project urges the Court to further require that, where recording is not practicable, police must document the reason(s) why recording was not practicable and find that reviewing courts may consider the proffered reasons in fashioning remedies for a failure to record.

- Comment I to the Police Practice Subcommittee's Recommendation raises concerns about the use of composites, sketches, and mug files. These concerns are well-founded. Composites or sketches were used in nearly 30 percent of the Innocence Project's DNA exoneration cases that involved eyewitness misidentification. While the best practices provide that "[t]he use of composites and sketches and the showing of mug files are disfavored," (Report at 87) we believe that a more specific recommendation, incorporating the findings of Comment I, should be included in the section "General Best Practices" (as opposed to "Best Practices for Showups"). This recommendation should specifically approve the use of mug files only where 1) the police investigation has

specific evidence to limit and guide the selection of suspects beyond general descriptors (age, race, and size), such as known affiliation with a particular gang; 2) after limiting mug files to a particular class based on evidence gathered in the investigation, police further limit the selected mug files, 3) police do not tell the witness or witnesses anything about the mug file classification (i.e., that it consists of known gang members or arrestees); and 4) all descriptors used to define a mug file search or collection, whether physical or electronic, should be documented and preserved.

- The Report provides for specific pre-lineup instructions that are designed to reduce the natural pressure a witness feels to make an identification, and to mitigate a witness's natural assumption that when he is called to make an identification the police have caught the perpetrator. Report at 106. Scientific research supports these instructions and we strongly urge the Court to adopt them as written, with one addition that will further the overarching goals of pre-lineup instructions: a standardized instruction that the witness should not feel compelled to make an identification.

- The Report provides for the possibility that a showup procedure could be used with more than one witness in the same case. Report at 89 (Recommending that "[i]f showups are to be conducted with multiple witnesses, they should be conducted in such a way that one witness cannot see or hear the procedure or results of another witness."). We agree with the recommendation that multiple witnesses must be separated and not permitted to witness another's identification procedure (including a showup) or to learn of the outcome of that procedure. However, due to the inherently suggestive nature of a showup, once one witness makes a positive identification of a suspect through a showup, resulting in probable cause for an arrest, any subsequent witnesses should be shown properly composed photo arrays or lineups. We urge the Court to amend the recommendation to incorporate this recommendation.

- We urge the Court to recommend that law enforcement consider utilizing hand held devices to conduct photo identification procedures instead of one-on-one show ups within two hours from the time a witness made observations of criminal activity. Being able to rapidly deploy a fairly constructed photo procedure instead of a one-on-one show up procedure can greatly reduce false show up identifications which are, all agree, inherently suggestive and particularly subject to what's known as a clothing bias. *See* Jennifer E. Dysart et al., *Show–Ups: The Critical Issue of Clothing Bias,* 20 Applied Cognitive Psychology 1009 (2006). *Accord Lawson* at 784.

In addition to the above recommendations, the Innocence Project concurs with the comments of CPCS and MACDL concerning best practices for Massachusetts Police Departments:

- Consistent with the Minority Statement of Attorney Natarajan and Judges Blitzman and Gertner, the Report's distinction between "Best Practices" and "Specific Best Police Practices" is unjustified. Report at 158-159; *See also* CPCS Comments at 2; MACDL Comments at 2. Instead, as the Minority Statement urges, the Court should adopt the single, unified set of "Best Police Practices" set out at pages 86-88 of the Report.

- Consistent with the scientific research, law enforcement should explicitly advise the witness, prior to obtaining a description, not to guess at any particular features of the perpetrator and to describe only those features that the witness clearly remembers. CPCS Comments at 3.

- There can be no rational basis to distinguish between photo arrays and other types of photographic identification procedures with respect to the need to document and preserve outcomes. The Report's recommendation that police preserve photographic arrays and document steps taken to preserve photographic arrays (Report at 86) should therefore be extended to include all forms of photographic identification procedures, including but not limited to mug books and electronic mugshot databases. In addition, all contemporaneous notes taken by police of the original description taken from any witness and any other statements by witnesses should be documented and preserved. CPCS Comments at 3-4; MACDL Comments at 3.

- The Report recommends that showups should only be conducted within two hours after the witness's observation of the suspect. Report at 87. For the reasons set forth in their letters, the Innocence Project strongly agrees with CPCS and MACDL that, in accepting the Report, the Supreme Judicial Court should also require that showups only be conducted where there is no probable cause to arrest the suspect independent of the crime under investigation. *Accord State v. Dubose*, 285 Wis. 2d 143, 165-66 (2005) ("[E]vidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary. A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array.) *See also* CPCS Comments at 4; MACDL Comments at 3.

Pretrial Hearings

In addition to the concern raised above regarding guidance to courts and the concerns raised below concerning jury instructions, we recommend that the Court revise the Report's recommendations on remedies available following pre-trial hearings:

- The Report now provides that "[w]here the court finds that police have failed to follow the Best Police Practices or failed to record the identification procedures where it was feasible to do so, it shall give appropriate jury instructions." The Innocence Project urges the Court to fashion strong cautionary language for courts to use where police have failed to follow the Best Police Practices or have failed to record the identification procedures despite the ability to do so.

    - When there is evidence that the police failed to follow the Best Police Practices, the following instruction should be given after the instructions on Identification Procedures set forth at 122-128: *In this case, if you find that the police did not follow the [Best Police Practice not followed], you should evaluate the identification that resulted from these procedures with particular care. Compare*

Commonwealth v. Ciampa, 406 Mass. 257, 264, 547 N.E.2d 314, 319 (1989) (accomplice testimony instruction).

- When there is evidence that the police failed to record an identification procedure where it was feasible to do so, the following instruction should be included after the instructions on Identification Procedures set forth at 122-128: *In this case, you heard evidence that the police did not make a video or audio recording of the (photo array or lineup) procedure. The Supreme Judicial Court—this state's highest court—has expressed a preference that such procedures be recorded whenever practicable. Since there is no recording of the (photo array or lineup) procedure in this case, you should weigh evidence of the alleged identification of the defendant that supposedly resulted from that procedure with great caution and care. The reason is that the Commonwealth may have had the ability to record the procedure that led to the alleged identification of the Defendant, which the Commonwealth is now asking you to find beyond a reasonable doubt was accurate, but instead is asking you to rely on a summary of those circumstances drawn from the possibly fallible or selective memory of its witness(es). The absence of the recording of this procedure allows you, but does not require you, to find that the Commonwealth has failed to prove the reliability of this alleged identification beyond a reasonable doubt.* CPCS Comments at 8-9 (*quoting Commonwealth v. DiGiambattista,* 442 Mass. 423, 447-448 (2004)).

Additionally, we join in the concerns raised by CPCS and MACDL with respect to the Report's recommendations for pretrial hearings:

- We strongly agree with CPCS and MACDL's position that the Court should not require corroboration where defendants seek pretrial hearings based on the presence of estimator variables that cast doubt on the reliability of the identification. CPCS Comments at 4-5; MACDL Comments at 5. We concur with CPCS's explanation of the problems with this approach, including that such a requirement may run afoul of the Supreme Court's holding in *Holmes v. South Carolina,* 547 U.S. 319, 331 (2006), but disagree with CPCS's proposed remedy. CPCS Comments at 4-5. Because we believe that there will be only a small number of cases where estimator variables alone would require a hearing, and because we know that corroboration is common in wrongful conviction cases (and, in particular, where eyewitness misidentification occurs) we submit that there should be no corroboration requirement to obtain a pretrial hearing where the defendant has shown that estimator variables cast doubt on the reliability of the identification. Of the 227 DNA exonerations stemming from convictions involving mistaken identifications, 123 (54 percent) involved at least one other evidentiary error (forensics, false confessions, and/or informants) that corroborated the misidentification. Indeed, recent research suggests that not only are multiple errors common in wrongful conviction cases, but that although the multiple errors may appear "independent" – e.g., a misidentification and a false confession – they each have the power to corrupt other, seemingly unrelated evidence.[5]

[5] *See* Saul M. Kassin, Daniel Bogart, and Jacqueline Kerner, *Confessions That Corrupt: Evidence from the DNA Exoneration Case Files,* 23 Psychol. Sci. 41, 45 (2012).

- For the reasons set forth in their letter, we agree with MACDL that the Court should modify the language of section I(B) (Report at 110) to read "a highly suggestive confrontation with the defendant or highly suggestive information obtained by the witness from other sources." MACDL Comments at 4-5. Alternatively, the Innocence Project proposes that the Court modify the language to read, "when the defendant makes a showing that a witness came to identify the defendant as a result of highly suggestive circumstances independent of any police involvement."

Jury Instructions

The Study Group recognizes that a major failing of the traditional *Telfaire*-based instructions is that they fail to explain "the nexus between eyewitness identification and memory." Report at 54. The proposed new instructions remedy this failure for estimator variables but fail to do so for system variables. Instead, the system variable instructions simply inform jurors about how law enforcement should conduct identification procedures and direct jurors to consider whether those elements were included in the identification procedures at issue. As a result, these instructions fail to offer jurors sufficient guidance for how to assess the reliability of identifications secured through procedures that do not meet the required standards and are, in this way, similar to traditional *Telfaire* instructions.

Instead, the Innocence Project recommends that system variable instructions identify the reasons for the best practices and the risks to reliability and accuracy when other procedures are used. For example, an instruction on type of administrator could advise, "Blind or blinded administration is required to ensure that the identification is the product of the witness's own memory as opposed to the witness's response to the conscious or unconscious cuing of the administrator. Where the person who administers the identification procedure knows who the suspect is and knows when the witness is viewing the suspect, the risk is increased that the witness's identification will be influenced by reaction to the administrator and will not be the witness's independent memory. You may consider any failure to conduct a blind or blinded administration in assessing the reliability of the witness's identification."

Another example of a system variable instruction where Best Police Practices are not followed which we encourage the Court to adopt comes from Connecticut:

> In this case, the state has presented evidence that an eyewitness identified the defendant in connection with the crime charged. That identification was the result of an identification procedure in which the individual conducting the procedure either indicated to the witness that a suspect was present in the procedure or failed to warn the witness that the perpetrator may or may not be in the procedure.
>
> Psychological studies have shown that indicating to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure increases the likelihood that the witness will select one of the individuals in the procedure, even when the perpetrator is not

> present. Thus, such behavior on the part of the procedure administrator tends to increase the probability of a misidentification.
>
> This information is not intended to direct you to give more or less weight to the eyewitness identification evidence offered by the state. It is your duty to determine whether that evidence is to be believed. You may, however, take into account the results of the psychological studies, as just explained to you, in making that determination.

State v. Ledbetter, 275 Conn. 534, 579-80 (2005).

In addition to this recommendation, we agree with the concerns raised by CPCS and MACDL:

- We agree with MACDL that the timing of jury instructions is critical. *See* MACDL Comments at 6; *see also Henderson* at 296. The Innocence Project urges the Court to require that, at a minimum, the proposed pre-charge be provided prior to opening statements and recommend that specific instructions relating to variables present in the case be provided prior to the first witness's testimony about identification.

- The Court should clarify that the Report did not intend to do away with the good faith or honest mistake instruction and that such instruction should be included as part of any required charge, absent unique circumstances in which that instruction is irrelevant. *See Commonwealth v. Pressley*, 390 Mass. 617, 620 (1983); *see also* CPCS Comments at 7; MACDL Comments at 6.

- The Innocence Project supports the additional instruction proposed by CPCS concerning the possibility of memory distortion from law enforcement's attempts to obtain a detailed description. CPCS Comments at 8.

- The Innocence Project supports the additional instruction proposed by MACDL concerning witness familiarity. MACDL Comments at 6-7.

CONCLUSION

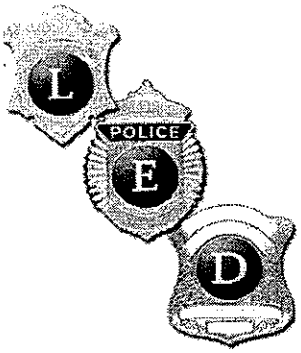
The Massachusetts Supreme Judicial Court has long been a pioneer in addressing the problem of eyewitness misidentification and incorporating scientific research on the factors that affect eyewitness evidence into its jurisprudence. *See, e.g., Com. v. Santoli*, 424 Mass. 827 (1997). The Court's decision to create a study group to address the interconnected and interdependent aspects of eyewitness identification reform continues this tradition, and the Innocence Project commends the Court for its vision and ongoing commitment to address the leading cause of wrongful convictions. The Supreme Judicial Court Study Group on Eyewitness Evidence's Report and Recommendations to the Justices represents the vanguard in eyewitness identification reform. For the reasons set forth herein, the Innocence Project strongly supports the vast majority of the proposed reforms. We respectfully submit our considered suggestions and recommendations in an attempt to further strengthen an excellent proposal. Should the Court

have any questions, we stand ready to assist.

Very truly yours,

Barry C. Scheck
Co-Founder and Co-Director
The Innocence Project, Inc.

Karen A. Newirth
Senior Fellow
The Innocence Project, Inc.



John Sofis Scheft, Esq.
Law Enforcement Dimensions, LLC

Policing with Perspective

December 2, 2013

Christine P. Burak, Esq.
Legal Counsel to the Chief Justice
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Dear Attorney Burak:

First of all, what a tremendous piece of work from the SJC Study Group on Eyewitness Evidence (hereinafter "SJC")!

As someone who has been involved in training officers about the pitfalls and promise of eyewitness identification since the DOJ Report in 1999, I really value the comprehensive and practical guidelines offered. These need to become second nature for law enforcement.

The report is beautifully written too.

I only offer one small suggestion.

The guidelines recommend that officers complete showups within 2 hours. See SJC at 87.

That makes a great deal of sense and reflects the standard that I convey in Chapter 25 of my book, *2013 Massachusetts Criminal Procedure Police Manual*, which is used around the Commonwealth for recruit, veteran and promotional training. But I also acknowledge that extensions have been approved for good cause. I think this understanding should be added to the SJC guidelines.

Please review the following excerpt from my book which explains my position. And thank you for your consideration.

Sincerely,

John Sofis Scheft
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Acceptable reasons for a delayed showup.

- **Very strong case.** *Comm. v. Hill,* 64 Mass. App. Ct. 131 (2005) approved a showup conducted 24 *hours* after the crime! Here, the victim observed an individual in her bedroom looking through her jewelry box. The victim had an unobstructed view of his face and reported her observations to Officer Moody. Later that day, a witness told Moody that he had seen a man fitting that description exit a car parked near the building. He described the unique vehicle—blue body with a white top, square headlights, a white bumper sticker with black lettering, and a large dent in the rear passenger door on the driver's side.

  The next morning, Officer Moody observed a similar looking car drive through a red light. He pulled it over and radioed for other officers to bring the victim to the scene. She arrived and identified the defendant immediately.

  Although 24 hours is a long time, this showup was not unnecessarily suggestive. First, Officer Moody had originally investigated the break and heard the victim and witness describe the intruder and his vehicle. He was the same officer who pulled over the defendant within a mile of the crime scene. The driver and the distinctive car fit the description provided by witnesses. The victim had not viewed other suspects or photographs, and no one else was present who might have pressured her to make an identification. The brief detention of fifteen minutes to facilitate this process was also reasonable.

- **Part of a series.** *Comm. v. Martin,* 447 Mass. 274 (2006): On a July morning, a fifteen year old girl left the beach in Yarmouth. A man grabbed her from behind and threw her to the ground and dragged her. She screamed. Another person approached, and the man fled.

  The victim told Officer White that she had a front view of her attacker -- a white male, about forty years old, tall and thin, wearing a light blue shirt with a green alligator logo. She also believed he was wearing shorts because she could see his legs. She returned to the scene with police and amplified her original description by adding that her assailant wore a yellow hat, had tanned skin and thinning brown hair.

  At the station, the victim helped create a composite and viewed several "mug" books. She did not identify anyone. Later, the police learned that a two year old picture of the defendant was among the photographs viewed, but he looked thinner and had a mustache and beard. The victim had reported no facial hair on her assailant.

  During the next four days, the police brought the victim to different areas in Yarmouth and Hyannis. Detectives and the victim stopped at least six times to view individuals who fit the general description. She did not identify anyone.

  Five days after the attack, Yarmouth police learned that Barnstable police had stopped a man who had been called to their attention by the victim's father. (Her father had been searching the area on his own.) At the time, the victim was at the Yarmouth police station preparing for another round of viewing when a detective told her: "There is a suspect on the beach." The detective did not mention her father. Upon arrival, the victim saw her father and realized that

he must have alerted police. The defendant was standing in the parking lot with two uniformed officers. She identified him, mentioning that she recognized a mark on his head. The SJC ultimately concluded that this mature, young girl was not overly influenced by her father or the police.

- *Series of showups similar to a lineup.* If the victim had assisted the police on the day of the attack and not been contacted until five days later, the showup would have been fatally flawed. Instead, the victim had looked at people in the community at least six times. At least two of these people had been flanked by uniformed officers. The final showup with the defendant was part of a series. It was the equivalent of a non-suggestive lineup.

- *Sensible approach under the circumstances.* Having the victim view men in a geographically reasonable area was a sensible approach to a difficult investigative problem. The police could not photograph or bring to the station each man in the area who matched the offender's description. They accomplished their task by canvassing the area with the victim.

- *Other options.* The police could have utilized other strategies to identify the defendant. They could have: (1) attempted to obtain the defendant's cooperation to appear in a lineup, or (2) attempted to get his permission to take his photograph, or (3) photographed him without his permission during their threshold inquiry, or (4) placed him under surveillance. While other options may have been less suggestive, the one that investigators chose was fair.

- **Emergency situation.** *Comm. v. Cox,* 6 Mass. App. Ct. 968 (1979) (victim was in hospital intensive care unit so showup permitted thirty hours after the shooting). *Stovall v. Denno,* 388 U.S. 293 (1967) (stabbing victim was about to undergo surgery; police had no choice but to arrange a one-on-one hospital room showup).

- **Multiple witnesses.** This strategy employs a showup with one witness to supply probable cause to arrest, and officers use photo lineups with other witnesses. Any suggestiveness associated with the delayed showup will not infect subsequent photo lineups.

M • A • C • D • L

Massachusetts Association of Criminal Defense Lawyers

November 25, 2013

Christine P. Burak, Esq.
Legal Counsel to the Chief Justice
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Re: Supreme Judicial Court Study Group on Eyewitness Evidence Report and Recommendations to the Justices

Dear Ms. Burak:

Kindly bring this letter to the attention of the Court. The Massachusetts Association of Criminal Defense Lawyers (MACDL) is well known to this Court. We have over 1,000 members, all of whom are members of the Bar of the Commonwealth whose work concentrates on the defense of criminal cases. For nearly 40 years, MACDL nominees have served on Court-appointed committees, as well as submitted amicus briefs in this and other courts. MACDL's advocacy in the courts and in legislative bodies is dedicated exclusively to the protection of liberties guaranteed by the Declaration of Rights and to improving the criminal justice system.

For the reasons set forth in this letter, MACDL largely supports the recommendations made by the Supreme Judicial Court Study Group on Eyewitness Evidence, including the concerns raised in both minority reports. We are all aware of the critical role that eyewitness evidence plays in criminal trials, and the tragic role of good-faith misidentifications in exoneration cases. The citizens of the Commonwealth deserve nothing less than eyewitness identification procedures and jurisprudence based on long-standing, widely-accepted scientific research. As set forth in *Perry v. New Hampshire*, 132 S.Ct. 716 (2012), protection against misidentification and the conviction of the innocent rests on many parts of the judicial system -- proper police identification procedures, motions to suppress and in limine, vigorous cross-examination, protective rules of evidence, expert testimony in appropriate cases, jury instructions on the fallibility of eyewitness identification, and the requirement that guilt be proved beyond a reasonable doubt. MACDL is pleased that the Study Group has taken a comprehensive look at eyewitness identification throughout the criminal justice system. Its recommendations are critically important to the criminal justice system.

With regard to specific recommendations, MACDL offers the following comments:

1. Judicial Notice of Legislative Facts

MACDL strongly supports the recommendation that this Court take judicial notice as legislative facts of the modern psychological principles regarding eyewitness memory, as set out in *State v. Lawson*, 352 Or. 724, 769-789 (2012). Judicial notice of these facts will create a common framework for litigants and the courts about eyewitness identification science which can be referred to in motions, pre-trial hearings, closing arguments, and jury charges. The facts found by the *Lawson* Court are not exclusive. Adoption of these principles should not preclude this Court, or the trial courts, from accepting additional scientific facts as set forth in cases like *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011) and *State v. Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012) or from modifying its findings in light of further research.

As the Executive Summary notes, judicial notice of these facts should not preclude the use of expert testimony to help the jury understand an often counter-intuitive scientific field or to explain how the general concepts herein might apply to a specific case. (page 4, n. 5) Experts are interactive – they can explain the science in a way that the jury can understand and can modify their answers based on the jury's reaction. If jurors seem confused, the expert can go into more detail or give more examples. Experts can also talk about the studies and why researchers believe that the judicially notice facts, which may be contrary to a juror's assumptions, are true. Nor should judicial notice of these facts be grounds for the denial of motions for expenses under G.L. c. 261, § 27C. Defense counsel may need the assistance of an expert to understand the scientific research in order to properly investigate, prepare, and litigate the case.

2. Recommended Best Practices for Massachusetts Police Departments, with Commentary and Model Forms

MACDL also strongly supports the adoption of unified best practices for all of the Commonwealth's police forces. MACDL also agrees with the position of Attorney Radha Natarajan, joined by the Honorable Jay Blitzman and the Honorable Nancy Gertner, in the Minority Statement that there should be no distinction between "Best Practices" and "Specific Best Police Practices". Instead, this Court should adopt a unified set of "Best Police Practices".

Unified Practices

As this Court may be aware, many of the Study Group's suggested practices were recently adopted in Connecticut by statute, Conn. Gen. Stat. § 54-1p. The Connecticut Police Officers Standards and Training Council (POST), under this statute, created a Mandatory Uniform Policy & Guidelines for Eyewitness Identification Procedures (General Notice 12-08). By the fall of 2013, policies have been adopted in all Connecticut police departments and every officer has received training in the uniform procedures and the underlying science. Among the many benefits of a uniform policy and training is that small departments may ask their neighbors for an officer to conduct a blind, sequential identification procedure, confident that the neighboring officer will be familiar with the uniform procedure and will conduct it in the same way as the department's own officers.

Preservation of Information

MACDL strongly agrees with the recommendation that police preserve information about any attempted identification procedure (page 86), including but not limited to the use of mug books or their equivalents. MACDL recommends that police preserve any contemporaneous record of a witness' description of a culprit and the viewing circumstances, even if that information is later repeated in a police report. MACDL also recommends that police be encouraged to ask witnesses whether they have heard anything about possible culprits or made their own inquiries into the incident prior to any identification procedure.

Contemporaneous Collection of Certainty Statements

MACDL approves of the contemporaneous collection and recording of witness certainty statements, recognizing that despite the very limited correlation between a witness' accuracy and confidence, such statements have investigative value. As set forth below, MACDL has concerns about the relevancy of such statements at trial. Witnesses can testify in a confident manner, but should not testify to their opinion of their identification accuracy.

Show-up Procedures

Regarding the recommendations about show-up procedures (page 87), MACDL recommends that a show-up procedure not be used if police have probable cause to arrest the suspect on grounds independent of this criminal investigation. If police can arrest the suspect, no good reason or exigency exists to use the more-suggestive show-up procedure instead of a properly presented photo array or line-up.

Victim-Witness Advocates

MACDL recommends that Victim-Witness Advocates be included in eyewitness identification training, and that their offices develop protocols regarding communication and sharing of information with witnesses. This is particularly important in cases where there is more than one witness, and not all witnesses have participated in an identification procedure.

3. Recommended Pretrial Hearing Protocols

MACDL largely agrees with the recommended pretrial hearing protocols.

Use of Certainty Statements at Trial for Impeachment Only

MACDL agrees with the position taken by Attorney Radha Natarajan and joined by the Honorable Jay Blitzman and the Honorable Nancy Gertner in the Minority Statement regarding certainty statements in the court room. A witness can obviously testify in a certain or uncertain manner about an identification, but a witness' present confidence and recollection of past confidence is not reliable evidence. Studies are clear that confidence can be inflated by after-acquired

information, including the arrest and prosecution of the identified person. As one study notes, "confidence may be used as a cautious indicator for accuracy during police investigations . . . it should never be allowed as evidence for memory accuracy in the courtroom." Odinot, et al., Eyewitness Memory of a Supermarket Robbery: A Case Study of Accuracy and Confidence after 3 Months, 33 L. & Hum. Behav. 506, 513 (2009). A contemporaneous record of the witness' confidence, made after a procedure that follows best police practices, and before any feed-back, should be admissible for impeachment purposes only.

Burden of Proof

MACDL endorses the Study Group's conclusion that "[s]cientific studies establishing the limitations of eyewitness identifications highlight the need in certain cases for a pretrial judicial determination..." as to "whether factors apart from police conduct cast doubt on the reliability of identification testimony." (page 109) In recognizing this need, the Study Group Report recommends under I(B) and I(D) that the defendant is entitled to an evidentiary pretrial hearing, an important step in the Study Group's decision to "broaden the opportunities for an evidentiary hearing." (page 43) Regarding those pretrial hearings that examine reliability issues based on estimator variables, absent police misconduct of any sort, MACDL supports the position of those Study Group members who view eyewitness evidence as trace evidence, an "analogy [that] most accurately captures the nature of eyewitness evidence and forms the appropriate basis for analyzing reliability." (page 45) Indeed, this view is grounded in the body of science the Study Group has endeavored to embrace. See, Report of the Special Master to the New Jersey Supreme Court in *State v. Henderson*, 28 N.J. 208, 27 A.3d 872 (2011). Further, the Henderson Special Master found it of critical importance that the courts "handle eyewitness identifications in the same manner they handle physical trace evidence and scientific evidence, by placing at least an initial burden on the prosecution to produce, at a pretrial hearing, evidence of the reliability of the evidence. Such a procedure would broaden the reliability inquiry beyond police misconduct to evaluate memory as fragile, difficult to verify and subject to contamination from initial encoding to ultimate reporting." Special Master's Report, 84-86.

MACDL supports the Study Group's recommendations in II(B)(1) and II(B)(3). MACDL urges that the new Massachusetts Model for pretrial hearings follow the Special Master's scientifically-based recommended protocol where non-constitutionally based challenges to the reliability of identification evidence are made. To that end, MACDL suggests that II(B)(2) be amended to place the initial burden on the Commonwealth to prove by a preponderance that the pretrial eyewitness identification is reliable.

Victims or Witness Exposed to Highly Suggestive Information without a Confrontation

MACDL notes that recommendation 1(B) (page 110) calls for a pre-trial evidentiary hearing when there is "a highly suggestive confrontation" between the defendant and witness independent of police involvement. However, suggestion may occur without a confrontation if the witness has been exposed to rumors on the street that the defendant is the culprit, or has made his or her own investigation in person, using social media, or websites such as those that collect mug shots. MACDL therefore recommends that recommendation 1(B) be expanded to apply to "a highly suggestive

confrontation with the defendant or highly suggestive information obtained by the witness from other sources".

Pre-Trial Hearing based on Estimator Variables

MACDL has concerns about recommendation I (D) (page 110) which limits pre-trial hearings to situations where "the pretrial eyewitness identification is uncorroborated" and the defendant makes a showing regarding estimator variables casting doubt on the identification's reliability. An identification can have a profound influence on the police investigation, on other witnesses, and even on the interpretation of forensic evidence. The conviction in many DNA exoneration cases did not rest solely on a single witness' identification. Often there were multiple mistaken eyewitnesses, flawed forensics, mistaken or perjured co-offender or informant testimony, and/or false confessions. For example, Stephen Cowan's conviction rested on a flawed fingerprint comparison and two mistaken eyewitnesses. See *Commonwealth v. Cowans*, 52 Mass. App. Ct. 811 (2001). Under the Study Group's Recommendation, Cowans would not have been able to challenge the witness' identification, no matter how many estimator variables were involved because it would be seemingly corroborated by the fingerprint evidence. A witness' identification should stand or fall on its own merits. The witness' reliability should not be bootstrapped by other evidence in the case, nor should the motion judge's view of the witness' reliability be potentially biased by other information about the case.

MACDL recommends that I (D) only include "when the defendant makes a showing of the presence of factors recognized in law or science ("estimator variables") casting doubt on the reliability of the identification."

Judicial Notice and Botelho Hearings

MACDL strongly supports Recommendation II(A) incorporating the Judicial Notice Concerning Contested Eyewitness Evidence into the factual findings in every case in which such evidence is contested. The variables which comprise this evidence are relevant to the two-part *Botelho* analysis described in II(B)(1). MACDL therefore suggests that II(C) be amended to state "Evidence at the Hearing: The Court will consider evidence of both system and estimator variables in making the determination described in II(B)(1), (2) and (3).

Traditional Evidentiary Rules

MACDL would be concerned if the Study Group's Report is interpreted, as Attorney James Doyle's Minority Statement suggests, to preclude motions in limine based on traditional evidentiary grounds to limit or exclude flawed eyewitness identification evidence. See *Perry v. New Hampshire*, 132 S.Ct. 716, 729 (2012) (referring to state and federal rules of evidence which permit trial courts to "exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury"). MACDL recommends that this Court explicitly state that trial judges may exclude or limit identification evidence under traditional evidentiary rules.

4. Recommended Jury Instructions

MACDL strongly favors many of the recommended jury instructions.

Pre-Charge Instructions

As Justice Palmer recognized in his concurring opinion in *State v. Outing*, 3 A.3d 1, 49 (Conn. 2010), instructions given at the end of what might be a long and fatiguing trial, and buried in an overall charge by the court, are unlikely to have much effect on the juror's minds. Jury instructions may come too late to alter a juror's opinion of a witness whose testimony might have been heard days before. MACDL believes it is vital to give pre-charge instructions before the opening statement and before or after an identification witness' testimony (see page 117).

Pressley Instruction

The recommended instructions do not include the charge on good faith or honest mistake set forth in *Commonwealth v. Pressley*, 390 Mass. 617, 620 (1983). MACDL urges this Court to include the *Pressley* instruction as a routine part of the jury charge.

Distinctive Feature Instruction

MACDL has concerns about Supplemental Instruction #4 (page 133) because the phrase "distinctive face or feature" is undefined. First, without some indication of how prevalent the described feature is within the community, it is hard to tell how distinctive it actually is. Moreover, the witness' description prior to seeing the defendant's image may be very vague. A witness may simply describe bad teeth, squinty eyes, big ears, freckles, or a scar on the cheek. There are many kinds of crooked, chipped, and decayed teeth which might all be described as "bad teeth" and which are distinctive, but in different ways. See *Commonwealth v. Schand*, 420 Mass. 783, 791 n. 7 (1995) (the phrase "bad/decaying teeth" could include the defendant, who had a gold tooth), see also http://www.centurionministries.org/cases/mark-schand (describing Schand's exoneration, after 27 years of imprisonment, following an erroneous conviction which "was based on [the testimony of] six eyewitnesses"). If the witness vaguely describes "a scar", and the defendant instead has a mole, birthmark, or a shaving cut, has the witness described a distinctive feature of this defendant? The instruction is also silent about whether it is significant if the defendant has a distinctive feature like a tattoo which the witness should have been able to observe, but did not mention or describe prior to seeing the defendant's image.

Familiarity Instruction

MACDL has concerns about Supplemental Instruction #6 (page 135). Familiarity is complex. Often witnesses and defendants are not complete strangers. A witness may recall seeing the defendant around the neighborhood, as a customer in a store, or as having attended the same high school in the past. However, a recent study showed a high error rate for high school students asked to identify pictures of those who had graduated from their school a year, or two years, earlier. The

authors concluded "surprisingly that recognition accuracy for casually familiar non-strangers is not reliably higher than that for strangers." Pezdek & Stolzenberg, Non-Stranger Identification: How Accurately Do Eyewitnesses Determine if a Person is Familiar?, Paper at the Meeting of the American Psychology-Law Society, Vancouver, Canada (March 2010).

In New York a defendant is entitled to a hearing to challenge a suggestive identification procedure unless, inter alia, "the protagonists are known to one another". *People v. Gissendanner*, 48 N.Y.2d 543, 399 N.E.2d 924, 423 N.Y.S.2d 893 (Ct. App. 1979). The exemption only applies if the culprit is a witness' "family member, former friend or long-time acquaintance" because "there is little or no risk that comments by the police, however suggestive, will lead the witness to identify the wrong person." *People v. Collins*, 60 N.Y.2d 214, 219, 456 N.E.2d 1188 (Ct. App. 1983). It does not apply where "where the prior relationship is fleeting or distant". *Id.* See *People v. Rodriguez*, 79 N.Y.2d 445, 593 N.E.2d 268 (Ct. App. 1992) (witness claimed defendant was "very familiar" from neighborhood and had been customer in his store "at least four-dozen times"); *People v. Williamson*, 79 N.Y.2d 799, 800, 588 N.E.2d 68 (Ct. App.1991) (victim had seen defendant more than 10 times in her store and more than 20 times in her neighborhood).

> MACDL recommends the following language:
> If the defendant is a witness' close family member, former friend or long-time acquaintance, then you may consider the witness' prior familiarity with the defendant as a positive factor. If, however, the witness' acquaintance with the defendant is fleeting or distant, then it may not positively affect the witness' identification. Prior exposure to a person can also lead to a mistaken identification if the witness confuses people he saw at a different times or places. ...

Reference to Research in Instructions

Finally, the proposed jury instructions do not indicate that they are based on generally accepted scientific research. It is important that jurors be informed that the instructions are based on scientific research that is generally accepted within the scientific community. The model Eyewitness Identification Instructions adopted by Dauphin County Court of Common Pleas in Pennsylvania repeatedly refers to scientific research and generally accepted scientific research.[1] See also New Jersey's Expanded Jury Instructions on Eyewitness Identification (referring to research).[2]

5. Recommendations for Education and Continued Review

MACDL strongly supports the recommendation for education and continued review. Taking Judicial Notice of Legislative Facts will create a common framework for the courts and litigants, but the courts and litigants need to understand those facts, and the science that underlies them, in order

[1] Available at: http://www.dauphincounty.org/government/Court-Departments/Offices-and-Departments/Court-of-Common-Pleas/Documents/Turgeon/Model-Eyewitness-Identification-Jury-Instructions.pdf
[2] Available at:
[2]http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.htm

to apply the recommendations in the Study Group's Report consistently and effectively. At MCLE's periodic eyewitness identification programs there seems to be considerable consensus between law enforcement, prosecution, and defense presenters about fundamental scientific principles, but that consensus is sometimes not shared by the bench and bar as a whole. There remain attorneys who are convinced that eyewitness identification is a matter of common sense and intuition and that the science is inapplicable or flawed. There may be some jurists who hold similar views. To paraphrase Mark Twain, wiithout training, you don't know what you don't know, and, more importantly, you don't know what you know for sure that just isn't so. MACDL strongly agrees with the recommendation to form a standing Education Committee on Eyewitness Evidence and a Standing Committee on Eyewitness Evidence. MACDL members have presented at MCLE and other programs about eyewitness identification. MACDL would be pleased to assist in creating curricula and materials and in participating on one or both committees.

Conclusion

MACDL strongly supports many of the Study Group's recommendations and hopes that this Court will consider its concerns and recommendations as well as the views of both Minority Statements.

Respectfully submitted,

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MASSACHUSETTS BAR ASSOCIATION

VIA ELECTRONIC AND U.S. MAIL

November 27, 2013

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Re: Report and Recommendations of the Supreme Judicial Court Study Group on Eyewitness Evidence

Dear Attorney Burak:

The Massachusetts Bar Association appreciates the hard work by the Supreme Judicial Court Study Group on Eyewitness Evidence and the opportunity to comment on the Report and Recommendations of the Study Group. The MBA submits this Comment in support of the great majority of the recommendations contained in the Report and Recommendations to the Justices of the Study Group on Eyewitness Identification Evidence ("Study Group") as well as the recommendations in the Minority Statement of Radha Natarajan ("Minority Statement"). In addition, the MBA's Criminal Justice Section Council were the principles of this comment, before being approved by a unanimous vote of the House of Delegates, and is comprised of prosecutors, defense attorneys, judges, academics, and attorneys involved in the correctional system.

The MBA strongly supports science-based legal reforms to prevent the wrongful conviction of innocent persons and to enhance the integrity of all criminal convictions. The recommendations in the Study Group's report provide a comprehensive approach to such reform, each recommendation supporting and building upon the others. The MBA urges this Court to adopt the following recommendations: (1) the Court should take judicial notice as legislative facts of established psychological principles of eyewitness memory; (2) there should be uniform statewide procedures for police departments, and as recommended in the Minority Statement, a substantial failure to adhere to any of the best practices should be sufficient to warrant a pretrial hearing on the admissibility of eyewitness evidence; (3) the Court should provide a basis for an expanded pretrial judicial inquiry into the reliability of eyewitness evidence, including, as is recommended in the Minority Statement, in any case "where justice so requires," and there should be an expanded array of remedies beyond those available for identifications involving suggestive police practices; (4) in-court identifications should be severely limited; (5) as is recommended in the Minority Statement, statements of certainty should be inadmissible; (6) the Court should adopt new and expanded jury instructions on eyewitness evidence, including, as is recommended in the Minority Statement, an instruction on the possibility that the eyewitness has made a "good faith

error," language that does not indicate that the defendant was a suspect, and an instruction indicating that the police may have obtained the defendant's photograph through a variety of sources; and, (7) the Court should establish further education and training for the judiciary and the bar.

(1) Judicial Notice

The MBA urges this Court to take judicial notice of certain scientific principles of eyewitness memory that have been demonstrated, through replicated, peer-reviewed studies, to be reliable. The idea of taking judicial notice of specific principles of eyewitness memory is not without precedent. Indeed, the Oregon Supreme Court justified its taking of judicial notice in this context as follows: "Based on our extensive review of the current scientific research and literature, we conclude that the scientific knowledge and empirical research concerning eyewitness perception and memory has progressed sufficiently to warrant taking judicial notice...." State v. Lawson, 352 Or. 724, 740 (2012). Additionally, this Court has previously taken judicial notice in cases where the principle had sufficient scientific foundation. Compare Commonwealth v. Pugh, 462 Mass. 482, 486 n. 4 (2012) (noting trial court took judicial notice, in a manslaughter case, of the biological circumstances that occur when a woman's water breaks during pregnancy), and Commonwealth v. Green, 408 Mass. 48, 49 (1990) (finding that trial court could have taken judicial notice that codeine is a derivative of opium), with Commonwealth v. Seng, 456 Mass. 490, 504 (2010) (finding that "[g]iven its uncertain foundation," the "CSI effect" was not a proper subject for judicial notice). This Court has further approved the taking of judicial notice in other instances where a social principle was justified by reports or studies. See, e.g., Commonwealth v. Milo M., 433 Mass. 149, 156 (2001) (taking judicial notice of actual and potential violence in public schools given recent publicized school shootings); Commonwealth v. Florence F., 429 Mass. 523, 529 (1999) (taking judicial notice of Massachusetts studies on correlation between children in need of services and delinquency). The principles that are recommended subjects for judicial notice in the Study Group's report have been demonstrated to be reliable over decades of scientific research. Therefore, they are proper subjects for judicial notice.

More importantly, however, this Court's taking judicial notice of certain scientific principles of eyewitness memory is essential to effectuating the other recommendations in the Study Group's report and in making *meaningful* reform. For example, to establish uniform police protocols, the Court must recognize the reliability of the science regarding memory and its ability to be contaminated through suggestiveness, a principle that already underlies this Court's constitutional approach to eyewitness identification evidence. Additionally, the expanded jury instructions, which inform jurors about principles for which there is significant scientific consensus, depends on the Court's acceptance of these principles at the outset.

To adopt the Study Group's recommendation regarding expanded pretrial hearings without taking judicial notice would lead to the necessity of expert testimony in every identification case simply to establish concepts that are uncontroversial and essentially undisputed. Not only would this waste valuable judicial resources, it would waste taxpayer dollars and would create an inequity for those indigent defendants who could not afford or obtain public funds to hire an expert. Without judicial notice, poor defendants would not have the same access to justice as those who could afford an expert.

Finally, this Court's taking judicial notice of the science helps ensure that trial courts throughout the Commonwealth will apply the law uniformly and in conformity with the reliable science. For example, consider the foundational evidentiary principle that evidence cannot be admitted if it would be more prejudicial than probative: For eyewitness identification evidence, an evaluation of its probative and prejudicial nature depends on an understanding and application of the science. It would take comprehensive, repeated, and effective judicial training to accomplish even a fraction of what judicial notice would accomplish immediately. Therefore, the impact of this initial recommendation would be significant.

The MBA urges this Court to take judicial notice of the scientific principles of eyewitness memory for which there is reliable data in order to effectuate the Study Group's recommendations and to ensure equal access to justice throughout the Commonwealth.

(2) Uniform Police Protocols

The MBA also strongly recommends that all Massachusetts police departments follow a uniform set of protocols on eyewitness identification that represent the latest best practices in the field, for the reasons expressed in the Report of the Study Group. These protocols should be intended to institutionalize our known best practices as they pertain, for example and without limitation, to giving proper instructions to the witness, controlling the content of, say, a photo array, following proper techniques in presenting persons or images for identification to witnesses, and conducting the identification procedure in accordance with best practices in the field.

Equally important, the MBA is also strongly in favor of recommending that police officers not only be trained to follow the protocols but also to understand the science behind them, again for the reasons expressed in the Report of the Study Group. For years now, many District Attorneys have been promulgating proposed protocols, based on suggested best practices in this area. Many District Attorneys also conduct regular police trainings. Trainings like this are wholly necessary and practicable. Further, they are critical to advance the goal of implementing protocols designed to reflect best practices in the field.

Additionally, the MBA is strongly in favor of adopting the view expressed in the Minority Statement, so as to require a pretrial hearing whenever a defendant shows that the police failed in a substantial way to adhere to *any* of the Best Police Practices identified by the Study Group at pages 86-88 of the Report. The reason for this is as follows: there is solid authority supporting the treatment of eyewitness identification evidence as we treat other "trace evidence" such as fingerprints, and in light of the great importance of eyewitness evidence in criminal cases, the MBA believes that this evidence should automatically be subject to rigorous evidence collection and maintenance standards. See, e.g., James M. Doyle, et al., The Eyes Have It-Or Do They? New Guides For Better Eyewitness Evidence Procedures, 16 Crim. Just. 12, 15 (2001). Psychologists now understand that there are many variables that can impact witness memory. E.g., Gary L. Wells and Elizabeth A. Olson, Eyewitness Testimony, 54 Ann. Rev. Psych. 277, 281-90 (2003). Some of these variables can be controlled by police officers. See id. at 285. Therefore, it is critical that police officers do all that they can do to control known variables that reduce the risk of collecting inaccurate identifications by following the best practices known in the field. To advance this critical need, police officers should be internally motivated not only to get it right and avoid unnecessarily suggestive procedures, but also internally motivated to avoid losing evidence pre-trial by not having followed their own police protocols in any substantial way. The MBA agrees that

there is no principled legal or scientific basis to distinguish among the effects of non-adherence with the select list of "specific best police practices" enumerated on pages 88-90 of the Report and the effects of non-adherence with the broader list of "best practices." If law enforcement officers choose not to follow their own protocols on eyewitness identification in any substantial way, this should be sufficient to trigger a pretrial hearing.

(3) Expanded Pretrial Inquiry

The MBA strongly supports the Study Group's recommendations to expand the availability of pre-trial evidentiary hearings on the admissibility of eyewitness evidence to include instances in which a defendant can show either: (a) that the police failed in a substantial way to adhere to Best Police Practices or (b) that the reliability of the identification is cast into doubt due to the presence of one or more "estimator" variables. In the view of the MBA, these recommendations are a natural extension of this Court's acknowledgment in Commonwealth v. Jones, 423 Mass. 99 (1996), of the perils of eyewitness identifications and the importance of ensuring the reliability of such evidence. Affording defendants a meaningful opportunity prior to trial to examine the reliability of eyewitness identification evidence is of integral importance to the broader goal of preventing wrongful convictions.

The MBA also notes that the Study Group's recommendation of an expanded list of available remedies that includes measures short of outright suppression of evidence, such as tailored jury instructions, will likely serve as an important counterweight to the expanded availability of pre-trial hearings. The range of possible remedies identified by the Study Group ensures that judicial response to an established lack of adherence with Best Police Practices is proportional to the likely impact on the reliability of the eyewitness identification in a particular case.

Additionally, the MBA agrees with the Minority Statement that this Court should grant trial courts discretion to hold pre-trial evidentiary hearings concerning eyewitness identification in any case "where justice so requires." This standard, modeled on the legal standard governing requests for post-conviction relief brought under Mass. R. Crim. P. Rule 30(b), is well understood and frequently applied by trial court judges. Allowing trial judges to apply this standard to the determination whether to grant a pre-trial hearing on the reliability of an eyewitness identification is therefore unlikely to unduly burden the court system or produce excessive numbers of pre-trial proceedings. Conversely, the potential benefits of permitting a hearing, where justice so requires it, substantially lessens the likelihood of wrongful convictions that are based on unreliable eyewitness identifications that do not fall neatly within any of the categories identified by the Study Group.

(4) In-Court Identifications

The MBA supports the Study Group's recommendation that in-court identifications be strictly limited to redirect, rebuttal, or where the defendant has challenged the witness's ability to make an in-court identification. This recommendation stems from the recognition that an in-court identification under highly suggestive circumstances is both unreliable and lacks probative value, whereas an out-of-court identification made under circumstances that conform with best police practices is more likely to be accurate and therefore is the most appropriate method of informing the jury that the defendant has been identified. The science, as well as the anecdotal evidence from exonerations, indicates that in-court identifications, despite their inherent flaws, are considered powerful evidence by jurors and are difficult to disregard or discredit even in the face of evidence that the identification is mistaken. This recommendation would not make it more

difficult for the Commonwealth to prove its case; it would simply limit the jury's consideration to eyewitness evidence that is reliable and probative of guilt. Adopting this recommendation is therefore *essential* to reducing wrongful convictions.

(5) Certainty Statements

The MBA recommends, in accordance with the Minority Statement, that this Court exclude certainty statements in trials involving eyewitness identification evidence. Certainty statements at trial typically come in the form of eyewitnesses testifying that it was the defendant who committed the crime and that the witness is "100%" sure or "absolutely positive" that the defendant was the person who committed the crime. As was recognized by this Court previously, statements of certainty are not sufficiently correlated to the identification's accuracy to justify a jury instruction. Commonwealth v. Santoli, 424 Mass. 837, 845-46 (1997). Given the scientific research that indicates that (1) certainty only moderately correlates to accuracy and (2) jurors tend to rely on certainty statements more than is justified by the science, this evidence should be excluded. Numerous wrongful convictions have been based on eyewitness identifications where the eyewitnesses were both highly confident and wrong. This truth only further illustrates what the scientific studies have found about the persuasiveness of a witness's certainty, even where such persuasiveness is unwarranted. In order to ensure that the jury bases its decision of guilt or innocence on relevant and reliable information, certainty statements should be excluded.

6) Jury Instructions

The MBA urges this Court to adopt new and expanded jury instructions to equip jurors with the knowledge necessary to better evaluate eyewitness evidence. Jurors need to be educated about the often counterintuitive ways in which memory works and the relevant factors to consider in assessing the accuracy of an eyewitness account. The failure to adopt new and expanded jury instructions leaves jurors to rely on mistaken beliefs and criteria in assessing the credibility and reliability of eyewitness evidence. The adoption of expanded jury instructions will lead to greater clarity and consistency in the analysis of eyewitness identification evidence and likely result in fewer wrongful convictions. Additionally, jury instructions that are grounded in scientific research may reduce the need for expert testimony in certain cases.

The MBA further urges this Court to adopt the recommendations in the Minority Statement regarding expanded jury instructions, including providing for a "good faith error" instruction in all identification cases where one would be warranted by the facts, eliminating the use of the word "suspect" within any jury instruction, and informing jurors in cases where the defendant was identified from a photo that the police have access to photos from a variety of sources. These additions to the language recommended by the Study Group, would help ensure that a defendant receives a fair trial and would maintain the presumption of innocence. Therefore, the MBA recommends that this Court adopt the jury instructions in the Study Group's report, modified by the language recommended in the Minority Statement, in order to help jurors consider identification evidence and therefore, reduce the likelihood of a wrongful conviction.

7) Education and Training

The MBA recommends that this Court establish further education and training for the judiciary and the bar regarding the science and law of eyewitness evidence. Although there is general acceptance within the scientific community of many of the principles of eyewitness memory, the science continues to develop and examine new areas. Furthermore, there

undoubtedly will be challenges with implementing legal reforms based on science where jurists and lawyers may be unfamiliar with the science. The Study Group's recommendation of a Standing Committee on Eyewitness Identification Evidence ("Committee") can serve as a resource to deal with these evolving issues. The Committee can educate the judiciary and the bar, review the effect of any recommendations and procedures within the courts, monitor any new developments in the science of eyewitness evidence, and ultimately serve as a conduit between this Court and all other stakeholders, allowing this Court to modify practice in a more efficient, effective, and just manner. Therefore, the MBA urges this Court to establish the Committee to help in the implementation of the Study Group's recommendations.

Conclusion

This is an exciting time for the Commonwealth – a time where Massachusetts has the opportunity to follow the lead of the New Jersey and Oregon Supreme Courts and to establish a comprehensive approach to eyewitness identification evidence that will result in fewer wrongful convictions. During the time where the integrity of Massachusetts convictions has been threatened by contaminated scientific testing at the state lab, it is imperative that this Court take a scientifically based approach to evidence. Such an approach would help restore confidence to the Massachusetts criminal justice system and promote fairness and access to justice. Therefore, the MBA strongly urges this Court to adopt the recommendations in this Comment and thanks the Court for its thoughtfulness and courage in addressing this issue. Thank you in advance for your consideration of our views.

Very truly yours,

Martin W. Healy
Chief Legal Counsel and
Chief Operating Officer

SUPPORTING MASSACHUSETTS PROSECUTORS
MDAA
Massachusetts District Attorneys Association

November 29, 2013

Via Electronic and First Class Mail

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Re: Supreme Judicial Court Study Group on Eyewitness Evidence

Dear Attorney Burak:

We write to you today in order to share our collective thoughts relative to the Supreme Judicial Court Study Group on Eyewitness Evidence's Report and Recommendations to the Justices ("Report"). Thank you for extending to us the opportunity to do so. For ease of reference, we have grouped our comments according to each of the corresponding recommendations of the Study Group.

Recommendation 1: Judicial Notice of Legislative Facts

The District Attorneys advise against the adoption of this recommendation. The proposed "legislative facts" outlined in the Report which would be used by the courts as binding factual determinations for future proceedings presents systemic problems. For one, courts can only properly take judicial notice of matters that are indisputably true. While the Report presumes the accuracy of the study upon which it is based, the study cited by the Study Group in support of its proposition that a "consensus" has been achieved found that 80% of the surveyed experts found sixteen of the proffered propositions reliable. That percentage, however, does not render any of the propositions indisputably true. Moreover, these "facts" are not appropriate for judicial notice where, as acknowledged by the Study Group, "[m]uch remains unknown about how memory works . . . [and] individual recommendations may need to be modified or discarded in light of the evolving scientific research." Secondly, adoption of these "facts" runs contrary to the well-established rule of law that the credibility of any expert testimony, including whether to accept or reject it, is a matter for the jury at trial, not an appellate court. Commonwealth v. McDonald, 459 Mass. 148, 159-161 (2011). Lastly, assuming arguendo judicial notice would be taken of both the facts and explanations as laid out in

State v. Lawton, 352 Or. 724 (2012), there are many citations to outside authorities which should be read to jurors. Doing so, however, would, in turn, produce a strong likelihood of exacerbating the already present issue of contamination, as it would provide a strong temptation for juries to conduct outside research.

Recommendation 2: Best Practices for Massachusetts Police Departments, with Commentary and Model Forms

The District Attorneys are in favor of the idea of adopting best practices for law enforcement regarding eyewitness identification procedures, but do have concerns as some recommendations are not adequately supported by research. Opposition has also been voiced relative to the use of the exclusionary rule as a punishment and deterrent when law enforcement does not follow the Study Group's "Best Police Practices," regardless of whether there has been a showing of an actual substantial likelihood of misidentification, on the basis that the exclusion of such identifications is unwarranted and frustrates the substantial public interest in having juries base their verdict on all relevant and material evidence. Suggested changes to the Study Group's specific recommendations relative to Best Police Practices are as follows:

- *B. General Best Practices*: another section should be added to the effect of, "If an identification is made, police should refrain from giving any feedback to the witness regarding the witness's selection."
- *C. Best Practices for Showups*: No. 1 should be replaced with, "Showups in certain circumstances may be necessary; however, this procedure has a greater potential for being unnecessarily suggestive than other identification procedures such as photo arrays or lineups." There should be no time limitation (e.g. two hours) on showups; an instruction to the jury as to the accuracy of showups which are conducted further in time from the incident is recommended if more than two hours. Further, no problem of contamination between witnesses would exist if the witnesses are properly sequestered from one another.
- *D. Best Practices for Photo Arrays and Lineups*: No. 4 should be eliminated; the research is not conclusive as to sequential vs. simultaneous presentations. (See Report, p. 74-75). Additionally, No. 9 should be replaced with, "Whenever practicable, police should videotape or audiotape the identification procedure, unless a victim or witness declines to be recorded."
- *E. Hearing Concerning Specific Best Police Practices*: The police practices listed in this section should be modified to reflect the recommendations above. Additionally, a defendant seeking to challenge an identification on this ground must identify in the motion to which protocol(s) he/she alleges that the police have substantially failed to adhere.

Recommendation No. 3: Protocols for Pretrial Hearings

There are several areas of concern with respect to the proposed protocols for pretrial hearings. Each of those concerns is addressed below:

- The District Attorneys advise against incorporating the "Judicial Notice Concerning Contested Eyewitness Evidence" into the factual findings of every case in which eyewitness evidence is contested for the reasons stated in their opposition to Recommendation No. 1 above. Similarly, under no circumstances should a venire be questioned about willingness to accept the facts set forth in the Judicial Notice Concerning Eyewitness Evidence for the same reasons.
- The District Attorneys advise against adopting the remedy of exclusion of out-of-court and in-court identifications where the defendant proves by a preponderance of the evidence that the police failed in a substantial way to follow certain specific Best Police Practices. This is nearly indistinguishable from the standard for obtaining a hearing in the first place. Moreover, even if the defendant proves by a preponderance of the evidence that police failed in a substantial way to follow certain best police practices, the identification is excluded absent any showing that it was suggestive or unreliable. This would mean excluding all showups, conducted more than approximately two hours from the offense, absent any opportunity to test the evidence for reliability before even a judge, much less the traditional venue of a jury. In its place, we would recommend that the remedy be a jury instruction tailored specifically to the proven lapse.
- There is also concern relative to the fourth circumstance entitling a defendant to a pretrial hearing, i.e. when "the pretrial eyewitness identification is uncorroborated and the defendant makes a showing of the presence of factors recognized in law or science ("estimator variable") casting doubt on the reliability of the identification." It is troubling that the term "uncorroborated" is not defined. Would an identification be subject to a pretrial hearing if it were corroborated by the defendant's statements and he then has them suppressed? If two witnesses make an identification, are they considered corroborated or uncorroborated? As an example, if there is a multi-perpetrator altercation and the defendant admits to being in the area but not to being the individual responsible for stabbing the victim, is an identification that he stabbed the victim uncorroborated? Additionally, how would subsidiary facts (e.g. the defendant is identified as having the knife in his hand) be handled?
- Further, while the Study Group cites heavily to Henderson v. State, 208 N.J. 208, 288-89, 293-94 (2012), Henderson only included system variables and not estimator variables as a basis for a hearing. (Henderson did, however,

state that estimator variables would be relevant at a pretrial hearing aafter the defendant made the appropriate showing based on system variables). The Study Group rejected that part of Henderson (pp. 42-44). While the Study Group noted that the threshold for a hearing was higher than that posited in Henderson, the number of factors on which the defendant may be entitled to a hearing is greatly expanded and includes non-police controlled circumstances such as victim stress, lighting, etc., i.e. circumstances which occur in virtually every identification.

- Henderson also contains a safety-valve provision that a judge can stop a hearing if it becomes clear that the defendant's initial claim of suggestiveness is baseless and no other claim is made. Henderson, at 208 N.J. 290-91. The Study Group's recommendations do not appear to contain such a safety-valve. Accordingly, a bare allegation of an estimator factor entitles a defendant to a full evidentiary hearing on every aspect of the identification without a specific claim of suggestiveness or unreliability.
- Under no circumstances should an in-court identification be precluded from the Commonwealth's case-in-chief where a judge has determined that a prior out-of-court identification is not unnecessarily suggestive or, if it was deemed so, that an in-court identification has a source independent of any taint. The Study Group's recommendation that all in-court identifications be prohibited unless the defendant challenges the ability of the witness to make such an identification is entirely unwarranted and will inevitably leave the jury wondering why the witness did not identify the defendant in court.
- Lastly, the Study Group's recommendations would mandate pretrial cross-examination of identification witnesses in virtually every case whether or not there is any specific allegation of suggestiveness or unreliability. This is a very wide net that in reality creates a special deposition system for identification witnesses, putting great stress on victims and witnesses and allowing for multiple opportunities for cross-examination without a direct link to ensuring that suggestive or unreliable identifications are kept from the jury. It would also preclude the introduction of evidence that historically has been and should be treated like any other constitutionally sound and relevant evidence, i.e. subject to full and fair cross-examination at trial so that the jury can make a determination as to credibility.

Recommendation No. 4: Eyewitness Identification Jury Instructions

As a general matter, with respect to the idea that jury instructions could or should preempt the presentation of expert testimony on issues raised and disputed in future cases, the Study Group's own report provides support for the conclusion that such an approach is unwarranted. According to the report of the Jury Instructions Subcommittee,

the science does not support the conclusion that jury instructions can replace expert testimony and effectively address a risk of misidentification. "To date, there are not studies that conclusively prove that revised jury instructions improve jury decision-making." (See Report, p. 57). In fact, the cited publication indicates that modified instructions had little or no effect on verdicts or on sensitizing jurors to relevant issues on witnessing conditions. Bornstein and Hamm, Jury Instructions on Witness Identification, 48 Court Rev. 48, 53 (2012).

Further, the recommended jury instructions that present as established, unquestionable facts, certain propositions regarding how memory works (and other matters), present constitutional problems. Whenever a defendant presents exculpatory eyewitness identification (or lack of identification evidence), these instructions presenting propositions as established facts, even if not supported in the evidence, violate the defendant's right of confrontation and his or her due process right not to have the jury presented with mandatory factual presumptions.

Concern also has been raised that the proposed jury instructions place too much faith in the products of individual studies and, as such, the jury instructions do not present a particular subject matter appropriately. Put another way, there is less of an issue with the topic of each jury instruction, and more of an issue with the analysis being heavily weighted towards factors that would diminish finding an identification has been made. For example, it might be appropriate to tell the jury that stress, lighting, etc. can affect an identification and that they can consider those factors among all others as to whether an accurate identification was made. It seems less appropriate to treat as indisputable the theory that stress necessarily would lessen the ability to make an identification, especially where there could reasonably be circumstances in which stress could heighten the identification.

Additionally, the jury instructions are far too specific. For example, the instructions suggest that officers should ensure that they are using a current photograph of the suspect. (See Report, p. 125). However, in certain circumstances, e.g. a cold-case, use of a photo of how the suspect appeared at the time of the crime may be more beneficial and accurate. Likewise, the three stages of memory and the comprehensive lists of best practices for identification procedures should be omitted from the final instructions. The information is far too detailed for the purposes of a jury instruction and is unnecessary for the instruction to have the desired effect of alerting the jury that they should consider particular identification evidence more cautiously. Instead, a more effective approach would be to provide the jury with simple, tailored instructions with respect to the specific practice(s) that the defendant has proven by a preponderance of the evidence that the police failed to follow in a substantial way.

Lastly, and with respect specifically to *Supplemental Instruction No. 2*, "Use of Alcohol," the second line of instruction should be replaced with, "Identifications made by witnesses with high levels of alcohol at the time of the incident tend to be less accurate than those made by witnesses with a low level of alcohol, or no alcohol at all."

Recommendation No. 5: Education and Continued Review

The District Attorneys support any initiative to educate the bench and the bar as to new procedures and protocols.

In closing, we appreciate the diligent work which the Study Group has done with respect to researching and proposing recommendations relative to the use of eyewitness evidence, and thank the Supreme Judicial Court for the opportunity to comment on the Study Group's Report and Recommendations. Should you have any further questions for the District Attorneys relative to the comments contained herein, please do not hesitate to contact us.

Very truly yours,

Jonathan W. Blodgett

President, MDAA
Essex County District Attorney

Comments on the Report and Recommendations made by the Supreme Judicial Court Study Group on Eyewitness Evidence

As a "foundational matter" required in order "to implement the recommendations of the Supreme Judicial Court's Study Group on Eyewitness Evidence," the Study Group recommends that the Court take "judicial notice as legislative facts" of certain propositions concerning memory and the effect of particular factors on the relative reliability of eyewitness testimony. (Supreme Judicial Court Study Group on Eyewitness Evidence, Report and Recommendations to the Justices. ["Report and Recommendations"] 2, 59). The Study Group then goes on to treat those "legislative facts" as factual determinations that should be binding on fact finders in future trials, through motions to suppress and jury instructions at trial, whether or not supported or challenged by evidence presented in the future proceedings. (Report and Recommendations, Recommendations 3 & 4, 109-146).

However, "legislative facts" are generally factual findings by a Legislative body supporting a particular policy determination that is binding in future proceedings through statutes or regulations. Black's Law Dictionary, 611 (7th ed. 1999). Alford v. Boston Zoning Commission, 84 Mass. App. Ct. 359, 368 (2013). The adoption of such "legislative facts" by the court as binding factual determinations for future presents some systemic problems.

We have a strong constitutional separation of powers mandate in the Commonwealth. "In the government of this Commonwealth ... [t]he judicial shall never exercise the legislative or executive powers, or either of them." Article 30 of the Massachusetts Declaration of Rights. The powers of the judiciary are basically limited to adjudicating cases or controversies, and carrying out certain ancillary functions, such as procedural rule making and judicial administration, that are essential to carrying out the primary adjudicatory function. Police Comm'r of Boston v. Municipal Court of the Dorchester District, 374 Mass. 640, 664 (1978). Outside of adjudications, the judiciary's rule making authority is limited to procedures regulating the

practice of law and proceedings before the court. Option of the Justices, 375 Mass. 795, 813-814 (1978).

The Supreme Judicial Court also has a limited authority to render advisory options on "important questions" asked by the legislature or the governor on "solemn occasions." Massachusetts Constitution, Part III, c. 3, art. 2. However, that constitutional provision defines the extent the court's authority to render advisory pronouncements on the law outside of any case or controversy. Answer of the Justices, 406 Mass. 1220, 1224 (1989). Outside of the confines of Part II, c. 3, art. 2, the Justices have no right to render advisory options or otherwise issue general pronouncements establishing substantive law. Id.

There is currently no case nor any question from the legislature or the governor before the court. The Study Group's recommendations, ask the court to do far more than just adopt procedures regulating the practice of lawyers in proceedings before the courts in the Commonwealth. They ask the Court to adopt specific factual determinations, based on records from out of state cases, that will then be binding on fact finders in all future cases.

The Study Group relies on State v. Lawson, 352 Or. 724 (2012) for the proposition that it would be appropriate for the Court to take judicial notice of particular "psychological principles" as legislative facts. (Report and Recommendation, 2, 59). However, the court in Lawson did no more than take notice of the materials reviewed by that court for the limited purpose of evaluating that jurisdictions existing test for the admission of identification evidence. "Based on our extensive review of the current research and literature, we conclude that the scientific knowledge and empirical research has concerning eyewitness perception and memory has progressed sufficiently to warrant taking judicial notice of the data contained in those various sources as legislative facts that we may consult for assistance in determining the effectiveness of our existing test for the admission of eyewitness identification evidence." Lawson, supra at 740.

In other words, the Oregon Court essentially did no more than make a Daubert/Lanigan type determination that the materials were sufficiently reliable for consideration in the determination of the particular issue before the court. The Oregon Court did not

adopt the research as establishing binding factual determinations for proceedings in the future. Rather, "[i]n identifying and describing the variables identified in the research, however, we do not seek to enshrine these variables in Oregon substantive law ... [O]ur acknowledgement of the existence of that research in these cases is not intended to preclude any party in a specific case from validating scientific acceptance of further research or from challenging particular aspects of the research described in this opinion." Id. at 741. The Oregon Court then went on to describe how the established rules of evidence could be used to appropriately address the admissibility of challenged eyewitness testimony. Id. at 749-763.

Further, according to the established law in the Commonwealth, courts can only properly take judicial notice of matters that are indisputably true. Nantucket v. Beinecke, 379 Mass. 345, 352 (1979); Commonwealth v. Greco, 76 Mass. App. Ct. 296, 301, further app. rev. denied, 458 Mass. 1105 (2010). In fact, even where it is proper to take judicial notice, the recognized proper practice in a criminal trial in the Commonwealth is to submit the factual issue to the

jury for their determination, unbound by any fact judicially noticed. Commonwealth v. Kingsbury, 378 Mass. 751, 754-755 (1979).

This traditional practice is consistent with the recognition that our system of criminal justice is fundamentally, and constitutionally, a jury trial system. Art. III, sec. 2 of the United States Constitution, ("The trial of all crimes, except in cases of Impeachment shall be by Jury"); Art. 12 of the Declaration of Rights; Commonwealth v. Guay, 465 Mass. 330, 338 (2013) (guaranteed right to be tried by an impartial jury). It also recognizes the well-established rule of law that the credibility of any expert testimony, and whether to accept or reject it, is a matter for the jury at trial, not an appellate court. Commonwealth v. McDonald, 459 Mass. 148, 159-161 (2011); Commonwealth v. Blake, 454 Mass. 267, 275-276 (2001); quoting Commonwealth v. Cowen, 452 Mass. 757, 762 (2008).

The Study Group does not base its recommendations for judicial notice on any claim that the propositions it promotes are indisputably true. Rather, the Study Group indicates no more than that there is a consensus on particular matters concerning eyewitness

identifications (Report and Recommendation, 1, 7, 17, 54-55) and promotes instructions on variables that "are not substantially in dispute." Id. at 55.

As support for the proposition that a "consensus" among the experts has been achieved, the Study Group particularly cites Kassin, et. al., On the "General Acceptance" of Eyewitness Testing Research: A Study of the Experts, 56 Psychol. 405, 407-411 (2011). (Report and Recommendation, 17). That article described the result of a survey of 64 "experts" who responded to a questionnaire asking for assessments of 30 statements. The results by no means show universal agreement on the reliability of all propositions recommended by the Study Group. For instance, the proposition that very high levels of stress impair the accuracy of eyewitness identification was only viewed as a reliable proposition by 60% of the experts. Id. at 412, Table 4. In the end, at least 80% of the surveyed experts found sixteen of the proferred propositions reliable. Id. at 465, 412, 413-414 & Table 4. Even then a majority at those experts only characterized four of those propositions as "very reliable." (Id. at 411, Table 3). These propositions were that 1) "An eyewitness's testimony about an event

can be affected by how the questions put to that witness are worded," 2) "Police instructions can affect an eyewitness's willingness to make an identification"; 3) "An eyewitness's confidence can be influenced by factors that are unrelated to identification accuracy" and 4) "Eyewitness testimony about an event often reflects not only what they actually saw but information they obtained later on."[1] Id. at 408, Table 1 and 411, table 3.

An 80% agreement rate among experts may be enough to justify expert testimony on the subject under a Daubert/Lanigan analysis, but it does not show that the proposition is indisputably true. In these circumstances it is inappropriate for the Court to take judicial notice of the Study Group's recommended factual propositions concerning memory and eyewitness identification, particularly as established factual

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[1] Some of the propositions were worded in a fashion that rendered them essentially immaterial. For instance, while 81% percent of the experts found reliability in the proposition that "Witnesses are more likely to misidentify someone by making a relative judgment when presented with a simultaneous (as opposed to sequential lineup," the proposition begs the question as to whether a relative judgment (that the particular subject looks most like the perpetrator) is something that should be avoided in all circumstances, rather than viewed a providing helpful information for the investigation even if not dispositive.

determinations binding on fact finders in future proceedings. Nor should they form the basis of jury instructions, to be given whether or not they are supported in the evidence presented in the case, that take factual issues concerning memory and eyewitness identification away from the jury.

The Study Group's Jury Instruction Subcommittee took it as one of their charges from the full Court "to consider whether improved jury instructions can reduce the need for expert testimony." (Report and Recommendation, 54). However, that does not appear to be a part of the actual charge from the Court. It is not part of the charge in Commonwealth v. Walker, 460 Mass. 590, 604 n.16 (2011) to consider "whether existing model jury instructions provide adequate guidance to juries in evaluating eyewitness testimony." It also does not appear to be part of the Court's general mandate to the Study Group to "offer guidance as to how our courts can most effectively deter unnecessarily suggestive identifications and minimize the risk of a wrongful conviction." (Report and Recommendation, 1).

In any case this appears to be an effort to address a problem that does not exist. Criminal

trials in the Commonwealth have not been overwhelmed by the presentation of lengthy expert testimony on the reliability of eyewitness identification. In fact, as a matter of practical experience, expert testimony on the reliability of eyewitness identification is seldom proferred or presented in criminal trials, even murder trials.

Particularly where it is well accepted that the experts on eyewitness identification can offer no more than probabilistic testimony and cannot demonstrate whether any particular witness or identification is in fact reliable (Oregon v. Lawson, supra at 741, New Jersey v. Henderson, 208 N.J. 208, 280 [2011]), the likely effect of any particular factor on the identification testimony in any particular case will effectively always be disputable. In these circumstances, if the scientific evidence deserves to be taken into consideration, then the trial fact finders in that case are best served by the full presentation of the relevant scientific evidence through expert testimony in that adversarial proceeding. That way the fact finder can be fully informed in order to make the best and most appropriate assessment of the evidence presented.

On the idea that jury instructions could or should preempt the presentation of expert testimony on issues raised and disputed in future cases, the Study Group's own report provides support for the conclusion that such an approach is unwarranted. According to the report of the Jury Instructions Subcommittee, the science does not support the conclusion that jury instructions can replace expert testimony and effectively address a risk of misidentification. "To date, there are no studies that conclusively prove that revised jury instructions improve jury decision-making." (Report and Recommendation, 57). In fact, the cited publication indicates that modified instructions had little or no effect on verdicts or on sensitizing jurors to relevant issues on witnessing conditions. Bornstein and Hamm, Jury Instructions on Witness Identification, 48 Court Rev. 48, 53 (2012).

Further, the recommended jury instructions that present as established, unquestionable facts, certain propositions regarding how memory works (and other matters, else such as the proposed instruction on the effect of alcohol which states as a fact that identifications made by a witness with high levels of alcohol "tend not to be accurate") present

constitutional problems. Whenever a defendant presents exculpatory eyewitness identification (or lack of identification evidence), these instructions presenting propositions as established facts, even if not supported in the evidence, violate the defendant's right of confrontation and his or her due process right not to have the jury presented with mandatory factual presumptions.

Virtually every criminal case involves some sort of identification evidence, since the identification of the defendant as the perpetrator is always an essential element that the prosecution has to prove. Mandating detailed instructions whenever any eyewitness identification testimony is presented in a case is a misguided way to address the concern that factors beyond the commonsense and knowledge of the jurors have the potential of affecting the reliability of eyewitness identification. Mandating the over long and over detailed instructions as recommended by the Study Group, whether or not the identification is even challenged or particular factors are raised in the evidence, has the distinct potential of placing undue judicial emphasis on a particular issue that may not otherwise be a live issue in the case. Such

instructions cannot help, despite the disclaimer in the recommended instructions, but be taken as a judicial expression of skepticism on the weight and credibility of the particular identification presented in the case. This is particularly true when the reliability of sincere eyewitness identification is not even particularly challenged, as is very often the case.

Further, as suggested earlier, generalized jury instructions are not an effective substitute for expert testimony on particular concerns actually raised by the evidence in a case. Such summary descriptions of the issues are inherently incomplete and potentially misleading.

Here for instance, the recommended instructions state that "[a]lthough 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." (Report and Recommendation, 120). However, to present complete information to the jury on this issue, a party should be allowed to show the jury that at least one study (cited by the Study Group) showed that only 60% of the experts consulted

found the proposition, that high levels of stress impair the accuracy of eyewitness testimony, reliable Kassin, et. al., supra at 408 Table 1, 412 Table 4. The litigant should also be allowed to show that studies have shown that moderate stress does indeed improve cognitive processing. Henderson, supra at 261. (Report and Recommendation, 29). It should then appropriately be left to the jury to determine whether the evidence showed the witness had experienced a high or moderate degree of stress and the likely corresponding effect on the reliability of the testimony.

For another example, the proposed instruction simply states that "A witness's level of confidence may not be an indication of the reliability of the identification." (Report and Recommendation, 128). But this is an incomplete and potentially misleading description concerning the consensus among experts since studies show that witnesses who express a high degree of confidence in their identification are in fact highly accurate (90%). (Report and Recommendation, 19). As things stand, the recommendations effectively require law enforcement to ask the witness about his or her level of certainty

and present the result in evidence. The instructions then effectively inform the jury that such evidence is unreliable, leaving the appearance that the prosecution attempted to sway the jury with valueless evidence. (Report and Recommendation, 124, 126, 127, 128).

Rather than address potential problems through jury instructions, inherently incomplete and potentially misleading, to be given in every case, whether or not supported by the evidence or the issues actually raised, the Court should continue to follow the traditional jury trial method. The Court should allow any potential and appropriate challenges to the reliability of testimony in the particular case to be raised in the evidence, through expert testimony or otherwise, and then left to the informed jury to make the appropriate assessment.

On a more particular point, the Study Group recommends that the subjects presented in every line-up or photo array be presented sequentially rather than simultaneously. The concern is that a witness may select the subject that looks most like the perpetrator. The Study Group acknowledges the differences of opinions and conclusions by experts on

the need or effectiveness of this preference (as reducing misidentification as opposed to simply reducing information obtained in general. Commonwealth v. Walker, 460 Mass. 590, 601-602 [2011]). (Report and Recommendation, 24, 75).

In support, the Study Group asserts that "The police and courts do not want to know which photo looks the most like the offender." (Report and Recommendation, 95). That is simply not true. An indication that a subject looks most like the perpetrator can provide valuable information on what the perpetrator actually looked like, particularly if the witness can identify particular features that look like the perpetrator's features. Evidence does not become irrelevant or inadmissible just because it may be less than dispositive. Nor does evidence become unfairly prejudicial just because it may be viewed as inconclusive. Commonwealth v. Pytou Heang, 458 Mass. 827, 851 (2011).

Any real danger from an exercise of relative judgment is not from identifying a subject as most closely resembling the perpetrator. It comes from the possibility that the witness will then become convinced that the selected subject must in fact be

the perpetrator. However, that possibility can be largely avoided by instructions to the witness that the perpetrator may not be in the array or lineup and that the investigation will continue regardless of whether they select a subject. Walker, supra at 602.

The courts in Henderson, supra at 256-257, Lawson, supra at 7820783, and this court in both Walker, supra at 601-603 and Commonwealth v. Silva-Santiago, 453 Mass. 782, 798-799 (2009), after reviewing essentially the same material as reviewed by the Study Group, have all concluded that given the debate concerning the issue, it is inappropriate to adopt a judicial preference for one method over the other. The Study Group has not suggested that there have been any significance new developments in the overall expert opinion on the subject. The Study Group simply disagrees with the SJC and the highest courts of New Jersey and Oregon. In these circumstances the Study Group has not shown that any change from the stance taken by this court in Walker and Silva-Santiago is warranted.

As for pretrial procedures regarding the admissibility of eyewitness testimony, the actual holding by the Oregon Supreme Court in Lawson, using

well established evidentiary that apply in both Oregon and the Commonwealth, provides a workable system to exclude eyewitness identification that have not been sufficiently shown to be the actual product of first hand observation and memory rather than post-event suggestive circumstances. Under that approach the proponent of the identification evidence must show by a preponderance of the evidence that the proffered testimony is actually based on the witness's personal observations made at the time of the event and that the identification is rationally based on those observations (rather than suggestive events that occurred later). Lawson, supra at 753-756. The opponent could then attempt to show that probative value of the proffered testimony (which would be diminished by a showing of reasons to doubt its reliability) is substantially outweighed by the potential for unfair prejudice. Lawson, supra at 756-758. See, Pytou Heang, supra at 851 (noting standard and nothing that evidence is not prejudicial merely because it can be viewed as inconclusive). Beyond those preliminary hurdles to admissibility, the weight credibility and reliability of eyewitness testimony

should be left to the jury to assess on the totality of the evidence presented during the trial.

The Study Group expressed concern that the Lawson approach could be viewed as weakening a defendant's protections from police procedures that violate due process. (Report and Recommendation, 45-46). This concern is misguided. The defendant already has a constitutionally based right to have an identification suppressed if it is based on police conduct that is so unnecessarily suggestive and conducive to irreparable misidentification as to violate due process. Walker, supra at 599. That constitutionally based law has not been called into question and its continuing existence is essentially a given.

Rather, the Lawson approach is only concerned with cases such as Commonwealth v. Jones, 423 Mass. 99, 109-110 (1996) concerning whether identifications that are not the product of impermissibility suggestive police procedures should nevertheless be excluded based on the common law. See, Commonwealth v. Odware, 429 Mass. 231, 235 (1999) (distinguishing between constitutional exclusions and common law exclusions). See Perry v. New Hampshire, 132 S. Ct. 716, 728, 730 (due process does not require exclusion

of identification because of suggestive circumstances not created by law enforcement, "our unwillingness to enlarge the domain of due process ... rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence.")

Significantly, the New Jersey Supreme Court limited its holding in Henderson on pretrial procedure to situations with suggestive circumstances were created by the police. New Jersey v. Chen, 208 N.J. 307 (2011). Where no impermissibly suggestive police action was involved, New Jersey Court relied on established evidentiary rules as a basis for any suppression. Id. at 318-319, 322-328. It also required a higher threshold showing, "some evidence of a highly suggestive circumstances" before any pretrial hearing is required. In the end, there is no need for any pretrial hearing approach that goes beyond an appropriate application of established rules of evidence.

The Study Group also recommends that the Court adapt a very detailed protocol for police procedures involving eyewitness identifications and then calls for first, suppression by the judge for any

substantial deviation from those protocols, whether or not there is any showing the deviation created any likelihood of misidentification in the particular case. (Report and Recommendation, 85-108, 110, 111, 115-116, 122-128). The Study Group asserts that: "Failure to adhere to these specific protocols carries a likelihood of tainting an identification by an eyewitness." (Report and Recommendation, 88). However, there is no study that supports the proposition that any particular identification has a likelihood of being erroneous because of any particular deviation from the recommended protocols. At the most the studies show an increased statistical possibility of an improperly based misidentification.

Further, the Report indicates that this particular approach was chosen because it "encourages police officers to employ best practices ... and provides a disincentive to ignore the protocols." (Report and Recommendation, 47). Such a use of the exclusionary as a punishment and deterrent to the police for not scrupulously following what has been deemed by the Study Group to be the best practices is entirely unwarranted and unjustifiably frustrates the substantial public interest in having juries base

their verdict in criminal case on the consideration of all relevant and material evidence.[2]

"Each time the exclusionary is applied it exacts a substantial social cost. ... Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." Rakas v. Illinois, 439 U.S. 128, 138 (1978). See Commonwealth v. Brown, 456 Mass. 708, 715 (2010) (application of exclusionary can frustrate public interest in the admission of relevant evidence of criminal activity). To date the exclusionary rule has been confined to the deterrence of unconstitutional actions by the police. Commonwealth v. Lara, 451 Mass. 425, 438-440 (2008).

Here the suppression of evidence without a showing of an actual substantial likelihood of a misidentification would be used to deter deviations from protocols imposed by the Court as a matter of common law. Not to enforce any constitutional rights,

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[2] The Hearing Subcommittee has also recommended that all in court identifications be prohibited unless the defendant challenges the ability of the witness to make such an identification. (Report and Recommendation, 48). That recommendation is entirely unwarranted and will inevitably leave the jury wondering why the witness did not identify the defendant in court.

but rather to enhance the general reliability of a particular type of evidence.

Where the concerns go at most to the weight and reliability of any evidence produced, use of the exclusionary rule as a prophylactic deterrent imposes too great a cost on the public interest in having verdicts in criminal cases based on a consideration of all relevant and material evidence. The court should not adopt the Study Group recommendation that pretrial suppression should be warranted for a deviation, "substantial" or not, from the proposed police protocol without a showing by at least a preponderance of the evidence that there is a likelihood that the identification is in error because of the deviation.

CONCLUSION

For all the above stated reasons, the Court should not take "judicial notice as legislative facts" of propositions concerning the general reliability of eyewitness identification as factual determinations binding in future proceedings, nor should the court attempt to address concerns about the reliability of eyewitness identification through mandatory factually detailed instructions going way beyond evidence or issues presented in a particular case.

As recognized in Lawson, supra the existing rules of evidence supply an appropriate basis for considering whether particular identification testimony is appropriately based and admissible beyond that the reliability and credibility should be left to the jury to assess in the totality of the evidence presented during trial.

Dated: November 21, 2013

Authored by: Robert C. Thompson, Esquire
Assistant District Attorney
Plymouth County District Attorney's Office
On behalf of the District Attorneys

COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT
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BARBARA J. ROUSE
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February 4, 2014

Honorable Roderick L. Ireland
Chief Justice
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Dear Chief Justice Ireland:

Enclosed please find the Position of the Superior Court with respect to the recommendations of the Supreme Judicial Court Study Group on Eyewitness Evidence (the Group). At the Superior Court Education conference last November, Judge Robert Kane, chair of the Group, reported on the Group's work and its recommendations. The justices then voted to have the Chief Justice refer the Group's report to a Superior Court committee for consideration and comment. I appointed a select committee to further solicit the views of all Superior Court justices, discuss the numerous submissions received, and draft a preliminary position for the Criminal Committee of the Superior Court, comprised of 18 justices who represent a wide range of background and experience. The Criminal Committee then reviewed the select committee's report and discussed the issues in depth. The Committee again invited other members of the court to share their views. Although time constraints did not allow the Committee's draft to be put to a vote of the full Court, the enclosed Position fairly reflects the views of the vast majority of the Superior Court justices who strongly disagree with the Group's report and many of its recommendations. I have indicated to Superior Court judges that, notwithstanding the Position paper, they are free to forward individual views to the Supreme Judicial Court. I have sent a copy to Judge Kane.

We appreciate the Supreme Judicial Court's consideration of both the Group's report as well as the Position of the Superior Court. We welcome any questions you may have and stand ready to discuss this at your convenience.

Sincerely,

Barbara J. Rouse

BJR/bk
Enclosure

POSITION OF THE SUPERIOR COURT REGARDING STUDY GROUP ON EYEWITNESS EVIDENCE RECOMMENDATIONS

The Superior Court engaged in an extended process to carefully consider and discuss the report and recommendations produced by the Supreme Judicial Court Study Group on Eyewitness Evidence ("the Group"). All the justices of the Superior Court were invited to submit their views regarding the Group's extensive report. The Chief Justice appointed a select committee to further solicit the views of all Superior Court justices, discuss the numerous submissions received, and draft a preliminary position for the Criminal Committee of the Superior Court. The Criminal Committee then reviewed the select committee's report and discussed the issues in depth. While the Superior Court was not unanimous, the vast majority of the Superior Court justices strongly disagreed with the Group's report and many of its recommendations. Based upon this process, the strong sense of the Superior Court is that the Group's recommendations relating to pre-trial hearings, judicial notice, and jury instructions are deeply flawed and should not be adopted. While every judge wishes to guard against wrongful convictions, issues arising from eyewitness evidence can be effectively addressed in a balanced fashion using less drastic techniques than those recommended by the Group.

As a general matter, many of the Study Group's recommendations would have the effect of radically changing and diminishing the importance of a jury's evaluation of trial evidence. The Group's recommendation that juries be instructed regarding the neuroscience of information acquisition, storage and retention is, of course, not limited to the issue of identification. The same principles apply to all aspects of human experience. Our memory of an event or occurrence, like our memory of the particular features of another person, is based on all of the same factors (sometimes called "estimator variables" in the social science) and influences that can affect an identification. The foundation for the Group's recommendation simply states the obvious- that people are fallible in what they believe they observed. Thus, if courts are now to instruct juries on the way in which humans acquire, store and retain information, the instruction should be applied to all aspects of percipient witness testimony. There is absolutely no scientific or logical rationale for limiting it to issues of identification (indeed, to do so could be perceived as vouching for the accuracy of a witness's testimony of other observations such as the substance of a conversation, statements attributed to a defendant, the speed of a vehicle immediately before a collision, the length of time that a robber was in the

bank, the degree of force used in committing an assault, etc). The Superior Court believes that such an approach is unwise and an infringement upon the role of the jury.

The Study Group's recommendations would effect a radical change in the trial of criminal cases involving eyewitness testimony. Although couched in scientific terms and wrapped in the gloss of scientific studies, the fact that witnesses describe actual events as a product of their memory, which may or may not be affected by external factors, is not a new discovery. It is why the Anglo-American system of justice has been designed as an adversarial process. The principal purpose of cross-examination is to test the accuracy of a witness's memory - of what she thinks she actually saw. As stated by Dean Wigmore, cross examination is the "greatest engine ever invented for the discovery of the truth." Wigmore, 5 *Evidence* § 1367, at 29 (3rd Ed. Little, Brown & Co. 1940). That point was emphasized by the Supreme Court: "[W]hile identification testimony is significant evidence, such testimony is still only evidence, . . . Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification - including reference to both the suggestibility in the identification procedure and any

countervailing testimony such as alibi." *Watkins v. Sowders*, 449 U.S. 341, 348 (1981).

While the Committee recognizes that many wrongful convictions in the past have been the product of a misidentification, see *Commonwealth v. Walker*, 460 Mass. 590, 604 n.16 (2011), it is not at all clear that the risk of an erroneous conviction based on eyewitness misidentification is a pervasive issue in the current Massachusetts criminal justice system. We begin with the unassailable position that any wrongful conviction based on misidentification is one too many. However, before adopting what many view as skewed jury instructions or a peculiar use of the judicial notice doctrine, we should understand how prevalent the risk of misidentification is currently. The risk of erroneous convictions in Massachusetts is likely less than elsewhere based on (1) permitted use of expert witnesses; (2) use of standard or model jury instructions that include *Biggers* factors; (3) instructing on special concerns for cross-racial identifications. Overlaid on these practices is the *Silva-Santiago* dictate that police follow certain protocols in conducting identification procedures and the fact that many (perhaps a large majority) police departments have adopted best practice guidelines as recommended by several district attorneys, the Attorney General, and the Department of

Justice. Taken together it is clear that Massachusetts has already taken substantial steps to reduce the risk of suggestiveness in out-of-court identifications and to ensure that jurors understand the importance and fallibility of eyewitness identification testimony. Coupled with the dramatic increase in the collection of forensic and DNA evidence, it is highly probable that the risk of an erroneous conviction is substantially less today than in decades past.

Equally troubling, the Group's recommendations relating to a dramatic expansion of pretrial hearings, the exclusion of reliable evidence for a police failure to follow "best practices", the prohibition of in-court identifications on direct examination, and the rather bulky proposed jury instructions that may disparage eyewitness evidence are based upon the assumption that the social science regarding eyewitness testimony is well established, stable, and relatively monolithic. This assumption may be false. As recognized by the Supreme Judicial Court in *Walker* and as acknowledged by the Group, the social science in this area is evolving. At the present time, for instance, the National Academy of Sciences is holding hearings and studying the state of this social science. The Group's more controversial recommendations should be tabled while this social science is carefully vetted.

The Superior Court also has concerns regarding the Group's specific proposals.

Hearings

Currently, Massachusetts law allows for an eyewitness identification to be suppressed if the identification was the product of an unduly suggestive police procedure (see, e.g., *Commonwealth v. Cavitt*, 460 Mass. 617 (2011)) or, if especially suggestive circumstances occurred independent of state action that produced an unreliable identification (see, e.g., *Commonwealth v. Jones*, 423 Mass. 99 (1996) (suggestive procedures produced unreliable i.d.; witness first identified defendant as he was shackled together with other prisoners in a courtroom long after the crime)). The Group recommends a dramatic expansion of pre-trial hearings relating to eyewitness testimony. The Group would mandate evidentiary pretrial hearings, not only in the two situations set forth above, but also when: "(iii) the police failed to follow certain specific best police practices on eyewitness identification in a substantial way in conducting or arranging a pretrial identification procedure; or (iv) when the pretrial eyewitness identification is uncorroborated and the defendant makes a showing of the presence of estimator variables casting doubt on the reliability of the identification" (Report 47).

This expansion of hearings appears unwise. As a practical matter, the hearings recommended under (iii) (i.e., police violate in "a substantial way" a "best" practice when arranging an identification) already take place in the context of an unduly suggestive identification hearing (e.g., the identification is unreliable due to the unnecessarily suggestive lineup, method of showing an array, pictures in an array, an allegedly tardy one-on-one showup). If the Group is suggesting that the court exclude a perfectly reliable identification simply because the police did not follow "best" practices with precision, such an evidentiary approach would make little sense. For example, if the array was perfect and presented in a double blind fashion, but the officer forgot to record the process, there still is no undue risk of misidentification or wrongful conviction.

The Group's recommendation to exclude reliable evidence in the absence of a constitutional violation is remarkably unique and unwise. The Supreme Judicial Court never has adopted such an approach. For example, *DiGiambatista* recommends the "best practice" of recording police interviews, but provides a cautionary instruction - not outright exclusion - should the police fail to follow the desired practice. Likewise, the humane practice rule requires exclusion of a confession only if the

judge finds it involuntary; this equates to the common law remedy that already exists for unreliable non-state action identifications under *Commonwealth v. Jones*.

Furthermore, this approach invites an entirely new ground for either an interlocutory or direct appeal based on a trial judge's determination that some departure from best practices was not "substantial". What happens if a trial judge denies an evidentiary hearing on reliability and a defendant is convicted based on identification evidence that the jury has credited? On direct appeal, if the appellate court determines that the trial judge erred in denying a hearing, should the conviction be reversed even where a trial jury has credited the identification evidence? Put another way, is the denial of a "reliability hearing" automatically prejudicial or can it be harmless error in light of trial evidence showing that the identification was reliable notwithstanding some deviation from best practices?

The hearings suggested in subpart (iv) ("estimator variables casting doubt on reliability") are the most troubling. First, the Group recommends that such evidentiary hearings be held when the identification is "uncorroborated." Although the Group apparently felt that this "uncorroborated" condition will be a limit on such hearings, it will not. The term "uncorroborated" in this context is unclear. For example, need

there be multiple eyewitnesses; what if all the eyewitnesses were subject to the same "estimator variables"; what if the corroboration was obtained, at least in part, as a result of the challenged identification? The result will be an evidentiary hearing in every case involving an eyewitness identification regardless of whether there exist unduly suggestive circumstances. Second, and more troubling, is the fact that these types of hearings place the judge in an inappropriate position and denigrate the role of the jury as fact-finders. These proposed hearings would focus, not upon police misconduct, but upon the presence of such "estimator variables" as the amount of light, the brevity of the encounter, the nature of the encounter, the presence or absence of a weapon. Judges may be intelligent and experienced, but they do not have some special expertise in judging the effect of these environmental factors, or "estimator variables". To the contrary, these matters are highly fact specific and a matter of common sense. With appropriate jury instructions, there is no reason to think that the jury could not do just as good a job as the judge in evaluating the importance of these "estimator variables."

The Group also makes the highly questionable recommendation that in-court identifications of the defendant be excluded from direct examinations during trial. There is little doubt that

such in-court identifications are necessarily suggestive. After all, the defendant is usually the only non-lawyer sitting at counsel table. Still, the suggestive nature of the identification is patently apparent to the jury, and the in-court identification is plainly relevant and necessary. The Commonwealth, after all, has to prove that the defendant was the person who committed the crime. One can imagine the absurd situation where the victim grandmother (who is not cross examined on identification) claims that she was robbed by her grandson but is prohibited from identifying her grandson in court. There is also the practical matter that the defendant often looks considerably different in court than he or she did at the time of the prior identification. Further, an in-court identification is particularly important in many co-defendant cases. The Group's recommendation that in-court identifications be excluded from direct testimony is a reversal of centuries of practice and is not supportable.

Overall, the Superior Court Criminal Committee recommends that the Supreme Judicial Court not adopt the recommendations regarding altering the scope of pretrial hearings in cases involving eyewitness identifications; the current practice provides for adequate remedies for unduly suggestive identifications. Likewise, the Supreme Judicial Court should not

adopt an evidentiary rule that would prohibit in-court identifications of the defendant on direct examination.

Judicial Notice

The Group "recommends that the Court take judicial notice as legislative facts of the modern psychological principles regarding eyewitness memory, as set out in *State v. Lawson*, 352 Or. 724, 769-789 (2012)…" Such a use of the judicial notice is ill advised and better accomplished with somewhat modified jury instructions and police practices. While the Group's survey of social science and psychological studies is impressive and commendable, there is little doubt that the science related to eyewitness testimony is fluid and still evolving.[1] In addition, some of the psychological principles cited by the Group are better evaluated by a jury. For example, the Group posits that "moderate amounts of stress may improve focus" while "high levels of stress or fear can have a negative effect on a witness's ability to make accurate identifications." Taking judicial notice of such a "fact" accomplishes little. It is for

[1] Although the Group reports that "there is now general scientific consensus on many areas affecting eyewitness identification", this may be an overstatement. Much of the research in this area is in the form of academic studies and articles. In certain areas, for example, in cross-ethnic identification or the effect stress may have upon an identification, there is little, inconsistent, or debatable research. The Group candidly recognized the fluid nature of this "science" when it stated: "Much remains unknown about how memory works and how jurors perceive eyewitness testimony....recommendations in this report may ...need to be modified or discarded in light of the evolving scientific research" (147).

a jury, perhaps aided by expert testimony, to determine what degree of stress the witness was experiencing and what effect it had upon the identification. Likewise, the "duration of exposure" of a witness to the suspect or the witness' "characteristics and condition" (e.g. the level of the witness' intoxication) are highly fact specific determinations best committed to the common sense of the jury. Massachusetts law does not permit this type of evolving social science to be considered a "legislative fact". See Section 202 Massachusetts Guide to Evidence. Nor are these very general and fact dependent matters proper as judicial notice of "adjudicative facts" in that they are still not "capable of accurate and ready determination by resort to resources whose accuracy cannot reasonable be questioned." Section 201 Massachusetts Guide to Evidence. Most telling, judicial notice accomplishes nothing that expert testimony or appropriate jury instructions cannot achieve in a more appropriate fashion and in a manner consistent with trial by jury.

Jury Instructions

The recommended model jury instructions are faulty in several regards. The Group's model instructions spend a great deal of time instructing on "how memory works." As previously discussed, these matters are not the appropriate subject of

judicial notice. The Group's recommended cautionary instruction to jurors, which emphasizes the fallibility of the human mind and memory, is likely to lead to a juror's disregard of reliable and accurate identifications. The Superior Court believes that a more balanced jury instruction, along the lines of our attached proposed instruction, will provide the necessary safeguard against the risk of wrongful convictions based on misidentification.

The Group's proposed instructions would effect a radical change in the division of responsibility among judge, attorneys and juries in our adversary system. Historically, judges take judicial notice of facts only when asked to do so by the parties, the facts so noticed are presented to the jury before the close of evidence and, in criminal cases, judges are required to instruct the jurors that they "may, but are not required to, accept as conclusive any fact which the Court has judicially noticed." In contrast, judges instruct jurors only on the applicable law and jurors are *required* to follow the law as instructed. It is unclear whether the Group contemplates that judges will treat instructions on the "science of memory" and studies relating to identification and best police practices as instructions on the law. The following examples illustrate the difficulties inherent in the confusion of roles that will result

if the proposed instructions are adopted and judges instruct jurors on judicially noticed facts. Defendants, and presumably the Commonwealth, will have the right to present testimony via qualified experts on the science of and studies relating to memory and best police practices. Currently, judges instruct jurors that they may accept or reject, in whole or in part, the testimony of expert witnesses. In cases in which an expert's testimony is consistent with the proposed instruction, that instruction would appear to be in conflict with the requirement that jurors are required to follow the court's instructions. Further, the extent to which a qualified expert may offer testimony that is inconsistent with the proposed instructions on direct or cross-examination is unclear. There is a risk that if jurors were to hear and credit such testimony, the authority of the judges' instructions on the law would be weakened. Finally, it is unclear how jurors will be instructed to consider expert testimony where the expert testimony is not inconsistent with, but is more detailed than the proposed instructions and/or there is conflicting expert testimony. These are but a few illustrations of the incompatibility of the proposed instructions with the adversary system.

The Group's jury instructions on "how memory works" would be better introduced by a qualified defense expert. Further,

the addition of this "how memory works" instruction unduly lengthens the jury instructions and has the effect of instructing the jury to doubt any eyewitness identification. Therefore, the instructions that run from page 119 to 122 should be eliminated or drastically reduced. Second, the instructions inappropriately detail the "best practices" that the Group recommends be followed by police departments. This is an inappropriate use of jury instructions and, again, such a litany of preferred police practices unduly complicates and prolongs the jury instructions. Overall, the proposed jury instructions are plainly skewed against any proffered eyewitness testimony. While some current research indicates that certain identifications made within 15 minutes of the incident are highly reliable, the proposed instructions make no mention of this research. The proposed instructions also apparently assume that the trial will not involve a duel of expert testimony that takes differing approaches or opinions regarding eyewitness evidence. If one side offers a qualified expert who provides a different opinion on "how memory works", the court should not put its thumb on the scale and instruct the jury by adopting a contrary theory.[2] The preferred approach would be to modify the

[2] An example might be helpful. It is far from outlandish to assume that the Commonwealth might offer expert testimony that, in certain circumstances, memory does "work like a videotape". A witness who observes, in excellent conditions, a particular incident, such as a car accident or a conversation or a drug transaction, may indeed

existing SJC instruction on eyewitness testimony with limited additions such as a caution regarding "confidence and accuracy" (found at page 128 in the Group's report) and instruction regarding cross-racial or cross-cultural identification (page 134 of the Group's report). A draft of such a proposed instruction is attached. The jury additionally should be instructed (both at the time the identification is admitted and during the judge's charge) that they should disregard the identification unless the Commonwealth, based upon all the evidence, proves identity beyond a reasonable doubt.

The overall effect of the Group's recommended jury instructions is to denigrate or limit the value of eyewitness testimony. The instructions reflect an assumption that jurors do not understand the nature or value of eyewitness testimony, and, thus, pretrial hearings should vigorously cull out certain eyewitness identifications, and jury instructions should limit the use of such identifications. This assumption of juror incompetence or ignorance, however, may well be unwarranted. Shorn of the social science labels (e.g., "system variables" and "estimator variables"), almost all of the factors affecting the

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play that sequence of images over and over in his or her mind in a consistent and accurate fashion. The defense might offer an expert who discredits the Commonwealth's expert and testifies that memory is a selective process. In this situation, it would be both unfair and unwise for the trial court to take sides and instruct the jury that, as a matter of law, "memory does not function like a videotape ... accurately capturing a person, a scene, or an event."

value of eyewitness testimony are common sense matters that jurors frequently take into account when assessing evidence or credibility. For example, any reasonable juror can easily comprehend that the reliability of an identification may be affected by the lighting conditions, the viewing duration, earlier familiarity with the person or object, the extent of intoxication of the identifying witness, the use of disguises, and the level of stress or duress. These are matters of common sense of which jurors might be reminded during jury instructions. There is no need, however, to adopt the Group's recommended jury instructions that have the overall effect of placing a judicial thumb on the scales by discounting the value of eyewitness testimony.[3]

"Best" Police Practices

The Group's efforts to define the "best practices" for Massachusetts police departments to follow concerning eyewitness identifications deserve praise. Of course, a committee of

[3] Often the value of a proposal can be tested by reversing an assumption. The Group's proposed recommendations fail this test. For example, assume that the defendant (not the government) wishes to present eyewitness evidence (e.g., an eyewitness claims that the shot came from the grassy knoll and not the book depository). If the government challenged the eyewitness testimony at a pretrial hearing claiming that it was unreliable due to "estimator variables" such as the stressful situation or the limited duration of viewing, a judge probably would commit reversible error excluding such exculpatory evidence. Likewise, if a judge adopted the Group's recommended jury instructions regarding this eyewitness testimony, the defendant legitimately could argue that the judge had denigrated this exculpatory evidence and had denied the defendant's Sixth Amendment right to have his case fairly tried to a jury. This example highlights one of the more troubling aspects of the Group's approach: a disregard of the value and sense of the jury.

Superior Court justices has no special expertise in determining if such practices are practical in the everyday law enforcement. In addition, the SJC should give considerable thought as to how to effectuate these "best practices." As set forth above, the Committee does not agree with the recommendation that hearings be held on every "substantial" violation of these practices; instead, the hearings should be confined to those situations where the police have failed to adhere to some practice or performed some act that may substantially affect the reliability of the identification. In a non-constitutional setting, serious separation of powers concerns arise should a court impose certain preferred police practices under the threat, if the practices are not followed, of evidentiary exclusion.

Conclusion

The Group's report provides an excellent summary on current and evolving research relating to eyewitness testimony and should be required reading for all trial judges. The "best practices" to be followed by Massachusetts police departments appear to be appropriate goals that hopefully can be implemented quickly. The Group's recommendations for expanded hearings, judicial notice, and unduly detailed jury instructions, however,

are deeply flawed. The Supreme Judicial Court should not adopt the vast majority of the Group's recommendations in these areas. These criticisms of the Group's recommendations should not be construed as a denial of the fact that eyewitness identification evidence still carries with it the risk of wrongful conviction. That risk, however, is best addressed by less drastic remedies. For example, a *DiGiambatista* style instruction might be appropriate should the police fail, in a material fashion, to follow a significant "best" practice. Likewise, jury instructions in this area are in need of revision along the lines of the proposed attached draft. Furthermore, trial judges should be encouraged to permit admissible expert testimony on issues of eyewitness evidence. The Group's report sounds an important alarm, but many of its recommendations are neither appropriate nor practical.

February 3, 2014

ATTACHED PROPOSED JURY INSTRUCTION

One of the most important issues in this case is the identity of the person who committed the crime. The Commonwealth alleges, and therefore must prove beyond a reasonable doubt, that this defendant was in fact the perpetrator of the crime or crimes alleged in the indictment. It is not essential that a witness him/herself be free from doubt as to the correctness of his/her identification of the defendant. However, the jury must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant, based on all the credible evidence, before you may convict him/her.

Identity may be proved by direct evidence or by circumstantial evidence and the reasonable inferences flowing therefrom, or by some combination of direct and circumstantial evidence, but it must be proved, as I said, beyond a reasonable doubt.

You have heard testimony that a witness identified the defendant [as the perpetrator of the crime]. You must be satisfied that any identification of the defendant is reliable and accurate based on all the credible evidence in the case.

In determining whether any identification is reliable and accurate, you should consider all of the relevant evidence. Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and make a reliable identification. For example, you should consider the circumstances at the time of the witness's observations - the lighting, the length of time the witness had to make the observations about which he/she has testified, the distance between the witness and the offender, the lighting conditions, whether the offender was disguised or had their features obscured in some way, or whether the offender had a distinguishing mark or physical characteristic, and the witness's level of alertness and sobriety at the time of their observations.

You should also consider the circumstances under which the witness came to identify the defendant as the perpetrator. An identification that is the product of some suggestion, by the police or others, should be scrutinized with caution and care. If the identification occurred as part of the police investigation, through the showing of photographs or through a line-up or in some other manner, then you should consider whether the police followed established or recommended protocols

in conducting the identification procedure. If there was a significant departure from police protocol then you must consider whether it renders the subsequent identification unreliable and inaccurate.

Bear in mind that a witness's identification of another person is a function of the human mind and memory. A person's memory may not be fixed. Rather it may change based on the passage of time and be influenced by other events or suggestions. Also, consider that a person's ability to accurately observe and remember an offender may be affected by the presence or use of a weapon and by high levels of stress at the time of the events. A witness's level of confidence in the identification is not necessarily a reliable indicator of the accuracy of an identification, especially where there has been some suggestive conduct by the police or others, such as confirming the identification made by the witness. On the other hand, a moderate degree of stress may focus the mind. Likewise, an identification obtained by selecting a person from a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.

Another factor to consider is whether the witness and the perpetrator are of a different race or a different ethnicity.

You should consider that people of all races and all ethnicities may have greater difficulty in accurately identifying members of a different race or a different ethnicity.

Of course, you must consider the credibility of each identification witness in the same way as any other witness. Further, you must also consider the possibility of a "good faith error" by the identifying witness. That is, in addition to assessing the credibility of the witness, you should consider whether the witness could be honestly mistaken in his/her identification of the defendant as the offender.

Finally, in evaluating the credibility and reliability of any witness's testimony, do not consider that testimony in isolation. Consider the testimony in the context of all the other evidence in this case. With respect to identification evidence, consider whether there is other evidence in the case, direct or circumstantial, that tends to support or detract from the reliability of an identification.

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November 26, 2013

Comments on Report and Recommendations of the
The Supreme Judicial Court Study Group on Eyewitness Evidence

Dear Judge Kane and Members of the Study Group:

I thank the Committee for the incredibly comprehensive response to the serious and disturbing problems posed by eyewitness identifications set forth in the Report and Recommendations of the Supreme Judicial Court Study Group on Eyewitness Evidence ("Report"). For my part, I know that this very positive contribution will improve my ability to provide a fair trial. The proposals for police identification procedures may well be the strongest part of the report. For that reason, and because of my role as trial judge rather than a law enforcement professional, I have concentrated particularly on the proposed Instructions that I may someday be asked to give. At Judge Kane's suggestion, I have also included an Addendum to this letter, setting forth some proposed alternative language on certain aspects of the instructions.

I strongly support the request of the Superior Court as a whole for additional time to comment on the Report. Certainly, the collective wisdom of a court that had seen first hand how eyewitness identifications play out in trials would be invaluable in addressing the problems identified in the Report. By submitting these comments, I in no way intend to depart from the collective effort of my colleagues. Indeed, I strongly support that effort.

Unless and until there are comments from the full Superior Court, I do not want to let the December 1 deadline pass without responding. For the reasons that follow, I am quite concerned about several aspects of the instructions. I want to stress, however, that, while this letter focuses on those concerns, I do not mean in any way to minimize my great appreciation for the Report as a whole.

Narrow Focus

After alluding to the crucial possibility of an honest but mistaken identification, the instructions state: "With respect to the accuracy of the identification, I will now instruct you on how memory generally works and on the specific factors that you should consider in determining the accuracy of a witness's identification." The statement may be problematic for a number of reasons.

First, the statement focuses exclusively on memory, when the real question is accuracy – a broader concept not limited to the operation of the brain. A major aspect of "accuracy" is consideration of a witness's identification in light of all the evidence in the case. Corroboration from other sources can be, and often is, the most important part of evaluating the accuracy of a memory. It may come from facts provided by other witnesses or exhibits. It may come from the details or other elements of what is remembered, such as a distinctive feature of a person or place that the person would not know unless the memory was accurate. Those same sources may call into question the accuracy of the memory. None of this has anything to do with how memory works. Yet testimony by a highly respected researcher – who was cited with approval in the Report and is probably well in the mainstream of memory research – states "that it [is] "virtually impossible without independent corroboration to determine the difference between an accurate memory and a false one." See Commonwealth v. Shanley, 455 Mass. 752, 760-761 (2010) (paraphrasing testimony of Dr. Elizabeth Loftus). Is there research showing that most convictions based upon mistaken eyewitness identification result from misunderstanding how memory works, as opposed to underestimating the importance of corroboration?

The instructions might point out that the presence or absence of corroboration may help the jury evaluate the accuracy of a memory in a given case. Often, juries understand the weakness of the uncorroborated testimony of an eyewitness. They also seem to understand the power of corroboration. The instructions should not divert attention from that intuition. Divorcing the discussion of the accuracy of memory from the potentially more important corroborating evidence, or lack of corroboration may lead the jury down an undesirable path.

Second, a discussion of the science should follow a warning that ". . . that the scientific research cannot demonstrate that any specific witness is right or wrong, reliable or unreliable, in his or her identification." State v. Lawson, 352 Or. 724; 291 P.3d 673, 685 (the scientific research is "probabilistic"). Also, no one scientific factor can tell you whether a memory is reliable or whether a particular individual in a particular situation has remembered correctly or not.

Third, and importantly, the instructions on memory are very long. That is true in absolute terms, but also relative to the length of the total instructions. This is likely to create an impression of its own. For instance, it may isolate and overemphasize the eyewitness testimony when, as suggested above, the jury may receive more accurate guidance from corroborating evidence independent of memory altogether.

The length and focus on eyewitness testimony may also suggest to the jury that the judge has a problem with the eyewitness testimony in the particular case. The jury may take that unconscious cue from the length and general subject matter of the instruction, more than the particular science, which may fall on deaf ears to jurors, particularly those who are science-averse. Indeed, while the instructions recognize that memory is not like a tape recorder, they may be faulted for failing to adapt to human, lay decisionmakers, who are not abstract or rational

processors of information in all respects and who will probably hear these instructions somewhat impressionistically.

I think that redrafting the instructions could probably mitigate all of the above concerns.

Judicial Role

The notion that I will instruct the jury "on how memory generally works" makes me uncomfortable, given my usual judicial role.

First, I am sure that, as a judge rather than a brain scientist, I fail to qualify for this task under at least two prongs of Daubert-Lanigan (qualifications and application of general science to the specifics of the case). As discussed more below, the specifics of a particular case may make my comments particularly inappropriate or misleading. To me, at a minimum, it is jarring for a judge to instruct about science.

Second, by putting incomplete science in the mouth of the court, the proposed model instruction runs counter to the standard instruction that experts (and judges) do not decide cases, juries do. Yet, if a real expert testifies on the same points, with credentials and the expertise to apply general science to at least some of the facts of the particular case, I will tell the jury that it does not have to believe an expert witness just because he or she is an expert. Of course, I also tell them that they must follow my instructions.

A third and related problem is that some of the instructions are phrased as positive statements, instead of as remarks about what "may" or "can" occur. The Judicial Notice portion of the Report speaks in terms such as "studies reveal . . ." or "scientists generally agree . . ." A minor improvement in the proposed instructions might include prefacing some of the remarks by following this phrasing and, for instance, saying "scientists tell us" or "there is research suggesting (or showing) that . . ."

I favor the current phrasing of the existing model instructions, which points out to jurors certain aspects of the testimony that they should consider on the issue of accuracy. That phrasing appropriately reflects the expertise of the courts and the judge in evaluating testimony. It is, of course, more than a matter of phrasing. It also goes to the credibility of the instructions themselves and the jurors' receptivity to them. Indeed, I wonder how many jurors will actually listen to "science," particularly coming from a judge. Those who are scientifically inclined are not likely to view a judge as a reliable scientific source. Those who are not will probably have their eyes glaze over or recall bad memories of their own academic difficulties with science.

The more basic problem with judicial instructions on science will persist despite changes in terminology, I fear. I think that the current state of brain science and the complexity of memory itself will defeat any attempt to fashion instructions that judges can fairly give on "how memory generally works."

On the other hand, the Report makes great strides in setting forth protocols for identification, which appear very well grounded in both science and practicality. We should be reminding jurors generally that memory does not work like a tape reporter. I would eagerly give an instruction that, for instance, juries should weigh with great caution and care any evidence of identifications conducted in violation of protocols, because the protocols exist for a reason. Cf. Commonwealth v. Silva-Santiago, 453 Mass. 782, 798 (2009), citing Commonwealth v. Diaz, 422 Mass. 269, 273 (1996) and Commonwealth v. DiGiambattista, 442 Mass. 423, 441-442 (2004)(adopting a model jury instruction). Likewise, I would welcome instructions phrased in the current fashion of instructing juries simply that they should consider certain aspects of the identification evidence as bearing upon reliability. I suggest that instructions phrased in that manner are entirely appropriate and avoid the problems I mention above.

Specific Issues

While some aspects of the instructions just cited will be great improvements, I have a number of concerns with several specific statements in the draft instructions.

The problematic statements strike me as having one or more of the following problems: oversimplification, incompleteness, overstatement (or too much definitiveness) or overgeneralization. It is obviously necessary to simplify a lot of scientific research and theory to draft instructions that will work for all cases. Unfortunately, that also means that, in some cases, the instructions will be inaccurate or misleading in light of some of the more complex problems in understanding memory. Indeed, if judges are instructing on science, are they limited to noticing facts included in the Committee's report? If so, what is the justification for such a limit?

I would expect at least the following problems if trial judges give the model instructions:

- Scientifically-based requests by counsel to modify or supplement the instructions to address the science of memory specifically applicable to the specific facts of the case (to include facts judicially noticed pursuant to part I of the report; to include additional facts equally accepted for judicial notice purpose; to omit facts that do not apply or are misleading in the particular case);

- If the Court grants such requests, it may effectively assume the role of adding factual support for one side of the case (or undercutting the standard instruction) by instructing on additional science and, in the case of prosecution requests, raising questions of the defendant's rights and the court's neutrality;

- If the Court denies such requests, it risks misleading the jury on factual matters;

- Once the Court assumes the role of teaching brain science, if defense counsel fails to request an instruction on a particular aspect of judicially noticeable science, that could

give rise to ineffective assistance of counsel challenges; a corollary is that the Court might have to give additional brain science instructions sua sponte if it believes that failure to request the instruction amounts to ineffective assistance;

- Having told the jury about how memory works, the jury will likely expect the court to answer its questions about brain science, if they send me a question during deliberations. The court can decline to respond, but the jury will then probably just speculate about the answer from their own experience, lore and readings, given that the court has opened up the issue of brain science.

Each of these concerns arises when considering the specific issues below.

a. Memory Loss ("rapid memory loss instructions")

Take two statements regarding the rapidity of memory loss. One says that "[m]ost memory loss occurs shortly after the initial observation, sometimes within minutes or hours."A similar statement is that "[s]howups conducted more than two hours after an incident tend to be less accurate than showups conducted within two hours of the accident." I note only in passing the irony that this instruction will be given nearly contemporaneously with the instruction that we have no transcripts, so the jury will have to rely on their own memory of the trial testimony (given days or weeks earlier) during deliberations.

The more important point is this: the rapid memory loss instructions describe the classic "forgetting curve" accurately enough (see Memory at 87-89[1]), but they do not capture other generally accepted features of memory and even may be taken to contradict those features.

For starters, the concept of "memory loss" is ambiguous, because it does not make clear whether it refers to storage or retrieval. Memory traces may exist, but present recall may be difficult. Most people would not make the distinction, but it can be important to the timing of conscious recall. For instance, the instruction ignores the research establishing the importance of context to the ability to recall memories that have been stored but are hard to access. Memory at 98-99; Brain Rules at 113-114. A witness may well recall events accurately some time later upon going to a location. Or some other significant stimulus may remind him or her of the circumstances at the time of the crime and the details then observed. Reexposure to such stimuli may occur more than minutes or hours later.

There are some other problems with the rapid memory loss statements. Is there really enough significance to "two hours after an incident" to elevate it to the level of a jury instruction that gives the impression of a bright line (I am not aware of, and do not see a citation to, any studies

[1]These comments refer to the following secondary sources, which summarize some of the basic research: Richard F. Thompson and Stephen A. Madigan, Memory: The Key to Consciousness (Princeton University Press 2005) ("Memory"); Brain Rules (Pear Press 2008) ("Brain Rules"); Mahzarin R. Banaji and Anthony G. Greenwald, Blind Spot: Hidden Biases of Good People (Delacorte Press 2013) ("Blind Spot").

that suggest a step function of forgetting at the 2 hour level, as opposed to a gradual, perhaps exponential process of forgetting soon after an event).

The statement that "a brief or fleeting contact is less likely to produce an accurate identification than a longer exposure to the person who committed the crime" ignores the fact that some memories can form in a split second and (particularly with attention and without interference) can accurately guide a future recognition. See Memory at 27-28. A less definitive statement seems appropriate (such as by adding "may" or "often").

For the above reasons, I am more comfortable with minor modifications the general statement in the existing instructions that the jury should consider the length of time between the events and the identification. I think the jury will get the point.

b. What Does Get Remembered

Even if those phenomena are not present, should the jury know what does get remembered, given a blanket statement about most memory loss occurring quickly. The statement about "most memory loss" begs the question of what gets remembered (stored long-term).

I start with a fact that appears in the first part of the Report, but not in the instructions.

Apparently, one can remember enough to identify a person, without being able to describe him or her. The Report (at 65) states that the following is indisputably true and should be the subject of judicial notice:

> F. Description
>
> Contrary to a common belief, studies reveal that there is little correlation between a witness's ability to describe a person and the witness's ability to later identify that person. [citation omitted].

That scientific fact might be significant in a case where the eyewitness is cross-examined extensively on the apparent conflict between an identification and a previous inability to describe the person. That may tend to validate the identification, instead of detract from it (note that, by contrast, most of the science included in the proposed instructions undercuts identification testimony). Should the court give an instruction to that effect upon request?

I have already referred to the research showing improved recall if one recreates the context in which the memory was encoded. See above, citing Memory at 98-99; Brain Rules at 113-114. It also appears that repeating the memory shortly after the event and then at fixed intervals tends to create reliable long-term memories. Brain Rules at 130.[2] This potentially important fact seems

[2]That may have implications for police investigation, but my concern is the instructions. It also may be unavoidable that the rule preventing witnesses from talking about their observations may preclude one of the best means of preserving memory, thereby creating witnesses with worse memory, subject to more effective cross-examination.

to be inconsistent with (or at least absent from) the "most memory loss" statement. As with context, the failure to alert the jury to the repetition phenomenon, if present in a particular case, may unduly undermine an otherwise credible eyewitness. Yet, if the judge points out the positive contribution of context and repetition, she may appear to be testifying for the prosecution, if not vouching for the witness. More basically, how will a lay judge know when these phenomena are operative so as to give the instruction if requested or to respond to a jury question if asked?

On a related point, I do not see a citation to research that tells us whether or not seeing the perpetrator a second time falls within the "recreation of context" principle in at least some, if not most people. If seeing the face of someone who victimized you is a partial recreation of the conditions of the crime, then the instructions risk injustice to victims by omitting this phenomenon.

The vividness of a statement or event also, apparently, makes it more likely to be stored. Blindspot at 14. The proposed instructions make the related point that emotional content may also increase retention (Report at 120), although of course the instructions note that excessive emotion can have the opposite effect. How does the jury assess whether emotion is "excessive?" Or are they to assume that the extreme emotion associated with being a victim to (almost) all crimes against the person impairs memory and if so, where is the scientific support for a proposition that appears impossible to test ethically on humans? Then again, it also appears that in some people, PTSD results in a painful memory that will not go away (contrary to the instructions' statement that intensely emotional experiences impair storage). Memory at 146-147, 151-153. The jury is likely to be aware of the inability of a PTSD victim to forget what happened in extremely traumatic situations, even though no one knows why some people experience that persistent memory problem and others do not. Memory at 151-153.

The generalization about rapid memory loss may also prompt questions about popular notions such as repressed memory or by delaying recall of traumatic memories that have been stored until some of the pain subsides. Apparently, these popular notions are unsupported by the literature. Memory at 146-147, 151-153. On the other hand, the Supreme Judicial Court has allowed testimony on dissociative amnesia, which is said to be recognized in the DSM-IV. See Commonwealth v. Shanley, 455 Mass. 752, 760-768 (2010). One expert whose studies figure prominently in the Report has testified "that repetitive traumatic experience would make it more likely that someone would remember a particular event." See id., 455 Mass. at 761 (paraphrasing testimony of Dr. Elizabeth Loftus). With such popular notions in circulation, some jurors may well ask the judge to instruct them whether the "most memory loss" statement holds true in the event of repressed memory, PTSD or the like. I will have to decline to answer such questions, despite my earlier attempt to tell them about brain science. What jurors will do with such a lack of "guidance" on a popular assumption about memory is anyone's guess.

c. Omission of Judicially Noticed Facts

Any of the scientific facts described in the judicial notice part of the Report has a claim for inclusion in instructions. That potentially puts the judge in the position of deciding what science applies to the facts of a particular case – a task that really calls for expert scientific judgment. Even limiting the judge to the model instructions does not solve that problem because the judgment about what to include and what to exclude has two shortcomings: (1) it cannot establish which scientific facts will apply to the particular case and (2) the exercise of standardization and simplification itself falls omits much potentially relevant and accurate science.

d. Additional Discrediting Facts

For instance, just as the memory-as-tape recorder misconception should be corrected, should the jury also be advised that even an interview while memory is still fresh may be affected by the content of the questions – even one that complies with the new proposed police techniques? For instance, witnesses will tend to give different answers to questions depending upon how phrased (e.g. how fast was the car going when it smashed into the other car versus how fast was the car going when it collided with the other car). The Committee's report (at 81) cites studies documenting this phenomenon. See also Blindspot at 10.

e. Race and Other Unconscious Associations

The instructions regarding cross-racial identification are a major improvement, but still have two problems.

First, the point can be misunderstood as referring to racial prejudice, unless the jury is also told that the effect does not depend upon whether the witness is racist. The racial identification bias can arise from unconscious associations of people with good intentions, who are not bigoted. Blindspot at 46-52. Yet, given the current state of race relations, jurors may assume that the misidentification problem relates to prejudice against certain groups and may discount the phenomenon if they believe that the witness is not "prejudiced" in the sense of hostile to another race. The instructions should make clear that they do not depend upon whether the witness is hostile to, or consciously biased against, any race.

Second, eliminating convictions due to race bias is paramount, but the unique evil presented by the history and reality of racial discrimination is far from the only problem presented by group bias. The racial bias in identification is only one example of broader phenomena that could lead to erroneous identifications in other circumstances. Unconscious associations arise simply by virtue of the human brain's innate tendencies to use categories to simplify information processing. Blindspot at 139. If those unconscious associations cause inaccurate eyewitness

identification that result in wrongful convictions, it is small consolation that the verdict is free of race bias. Should the jury be instructed about this? Practically speaking, that will be very hard to do, even though not doing so is scientifically suspect.

f. Posing unanswerable scientific questions

Finally, the proposed instructions raise scientific answers that a jury cannot possibly answer. I have already pointed out the problem in determining, on the facts of a particular case, whether the witness experienced stress extreme enough to interfere with memory, or whether it actually reinforce memory. A similar problem exists with the supplement instruction #1 on the use of a weapon, which includes the following statements:

> 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.

How does the jury know whether the particular crime was "of short duration" or a "longer event[]" for this purpose? Or maybe the duration was "just right" so that the weapon becomes irrelevant. Having posed a scientific problem, the instruction leaves the answer to unscientific speculation in some of the most serious cases – those involving a weapon. Cross-examination and argument are the typical way of dealing with these issues, coupled with an instruction similar to the first two sentences (if one substitutes "may or may not" for "can").

CONCLUSION

The point of all of this is not to make the perfect the enemy of the good. Rather, it is to urge a less radical intrusion of the judge into the science and transmission of a one-size-fits-all instruction to juries in cases where a different emphasis would be appropriate (and would be reflected in the testimony of a real expert, i.e. not the judge). I think the new instructions make very important points, particularly in telling jurors to question their conscious assumptions about how memory works, thus allowing their intuitive sense of the fallibility of memory (including their own) to operate. I would favor less of a departure, however, from the existing approach, which suggests to jurors what factors they may want to consider, instead of couching this in the language of science.

Finally, some may view these comments – by a judge who dabbles in popular books about brain science – as an example of the most troubling aspect of going down this road. There are other neuroscientific principles that deserve judicial notice as much as those included in the instructions. Presumably, the instructions omit those principles not because of a lack of scientific acceptance, but because of the practical reality that model instructions must standardize, simplify and eliminate principles of limited applicability. But once the court goes down the road of instructing on science, there is no principled way to stop taking notice of other generally accepted principles of neuroscience. Do we really want judges to decide which

scientific principles belong in jury instructions given the circumstances of individual cases? I have included specific citations to my own readings to demonstrate by my own example just how dangerous this can be!

Very Truly Yours,

Douglas H. Wilkins
Associate Justice,
Superior Court

ADDENDUM

Proposed Alternative Instruction

(substitute for the proposed final instructions, starting with the last paragraph on p. 118)

With respect to the accuracy of the identification, there are a number of things to consider.

First, you should view the identification in light of all the other evidence in the case. Ask yourself whether the identification is consistent or inconsistent with the other facts that you find. Does the answer to that question help you determine whether the identification is accurate or not? Sometimes, a piece of evidence from an exhibit or from someone other than the identifying witness tends to corroborate or refute the identification. If you believe that independent evidence to be true, then it may help you determine the accuracy or inaccuracy of the identification itself.

You should also consider the content of the identification testimony itself. Sometimes, there is something about the witness' memory that may give a clue as to whether the identification is accurate. For instance, ask yourselves whether there is some detail or other aspect of the memory that the witness would likely know only if the identification were accurate. Or is there something about the gist or the details of the memory that suggest that the witness does not really have an accurate recollection in some way?

Finally, you should recall my earlier instruction to avoid speculation. That includes putting aside any assumptions you might have about how memory works. You may not even be aware of those assumptions, so this task is not easy, but it is critically important. That is because scientists tell us that, surprisingly, many of us have common assumptions about memory that are actually incorrect.

I mention science. Science cannot, of course, tell us whether any particular witness' memory is accurate or not. Science can only speak to probabilities. In other words, it can identify certain things that may help or hinder memory, as well as certain ways in which memory can be influenced or altered without the witness even knowing. These factors may or may not be present in this case.

Moreover, I am not a scientist and I don't expect you to be. In fact, you should not rely upon anything you may have heard or read outside the courtroom about memory or about identification testimony in your deliberations. I further instruct you to avoid some common assumptions about memory that scientists tell us are not true.

Keep in mind that memory does not work like a camera or digital recorder. Mistakes or omissions can occur at the time of the original events. If that happens, a later recollection may

be incorrect. Memory can also fade quickly. Over time, it can be influenced and even changed by things that the witness may hear or see. The witness may be unaware of these problems and may honestly believe that his or her memory is accurate, when in fact it is not. That is one reason why I pointed out to you that a witness' identification may be honest but mistaken. On the other hand, obviously, it is also possible for some memories of events, including identification of individuals, to be quite accurate.

The final decision is yours, so let me suggest a number of factors that you should consider.

[skip to p. 119 – "One factor to consider is the witness's opportunity to observe an event or person . . .]

[Rather than propose changes to the remaining draft instructions, I suggest omitting the discussion of how memory works and retaining the language suggesting factors to consider, with the changes proposed in the text of my comments above.]

COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT
200 Trade Center
Woburn, Massachusetts 01801

PETER B. KRUPP
Associate Justice

February 12, 2014

Christine P. Burak
Legal Counsel to the Chief Justice
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Re: Comments on the Report and Recommendations of the Supreme Judicial Court Study Group on Eyewitness Evidence

Dear Ms. Burak:

I write with comments on the Report and Recommendation of the Supreme Judicial Court Study Group on Eyewitness Evidence ("the Report"). I have also received and read the comments by the Superior Court's criminal law committee and write separately only because I disagree with some of the positions taken by my colleagues. (I am not a member of the Superior Court's criminal law committee and was not privy to the committee's comments until after they had been completed last week.) Many of my comments are a reaction to the positions taken by the Superior Court committee.

Recommendation

I urge the Court, at minimum, to promulgate:

(i) best practices for the police to conduct out-of-court identification procedures consistent with the best scientific research we have to date;

(ii) a neutral jury instruction on the factors that affect the formation, storage and retrieval of memory, which should be used in cases of stranger identifications, and which is adaptable in light of the particular factors relevant to the identification in a particular case; and

(iii) an adaptable instruction to be given if material portions of the prescribed police procedures for out-of-court eyewitness identifications are not followed and if they may have a serious impact on the accuracy or reliability of the witness identification.

Although critical of the Report, I believe the Superior Court committee's comments embrace at least (i) and (iii) and a version of (ii).

Discussion

Stranger identification evidence is different from other types of testimony. It captivates the jury's imagination. The in-court identification, which is usually the byproduct of an out-of-court identification procedure, is often the emotional high point -- the "j'acuse" moment -- in a trial. Even when it is accompanied by corroborating evidence, the eyewitness testimony is often crucial. As the Court has recognized repeatedly, the issue of stranger identification is at once remarkably persuasive to (and expected by) juries, see Commonwealth v. Johnson, 420 Mass. 458, 465 (1995) (there is a "tendency of juries to be unduly receptive to eyewitness evidence"), yet "presents a substantial risk of misidentification and increases the chance of a conviction of an innocent defendant." Commonwealth v. Alicea, 464 Mass. 837, 847 (2013), quoting Commonwealth v. Jones, 423 Mass. 99, 109 (1996). The Court has recognized the problems repeatedly. See, e.g., Commonwealth v. Walker, 460 Mass. 590, 600-604 (2011); Commonwealth v. Silva-Santiago, 453 Mass. 782, 796-797 (2009); Commonwealth v. Vardinski, 438 Mass. 444, 450 (2003). See also Commonwealth v. Johnson, 420 Mass. at 467 ("studies conducted by psychologists and legal researchers . . . have confirmed that eyewitness testimony is often hopelessly unreliable").

Identification testimony is also different from other lay observations and much other lay witness testimony. My colleagues suggest that if a jury is to be instructed regarding the way memory works when it comes to identification, then there is no logical rationale for not applying it to "all aspects of percipient witness testimony." To me, the difference is profound. Other percipient witness testimony can be reported to the police in a statement in response to non-leading police questions. "Tell me what you saw and heard" can evoke the substance of a conversation, statements attributed to the suspect, the speed a vehicle was traveling immediately before a collision, the color of the light when the vehicle went through the intersection, and the length of time a robber was in the bank. It can evoke a description of the clothes, height, and facial features, of a suspect. But it will not in virtually all instances result in the identification of a stranger.

In most instances, the identification of a stranger is made only in response to a situation that is suggestive in some way and usually well after the observation of the perpetrator. It will be the selection of a person or photograph from a line-up, photo array, or show-up arranged by the police after a period of investigation. (The exception is the extremely rare instance where a witness randomly encounters a

person "on the street" and claims to recognize him as the perpetrator.) In the routine situation, despite cautionary instructions usually the witness believes the police have been looking into the case and, as a result, now have photographs, for example, to show the witness. The implication that the suspect is among the photographs is clear from the circumstances, even if the witness is told that the suspect may or may not be among the group of photographs. The witness may fairly wonder: Why are the police here now if it were not to show me a photo of the suspect? Why did the detective to whom I gave a statement a few days ago pick me up at work, bring me down to the police station, introduce me to a police officer who I never met before to have him show me photos if they did not think they had the guy? And, of course, the police compile the photos or select the people in the lineup to show to the witness in the first place. The possibility of suggestiveness is inherent in the process.

Similarly, when the witness two years later is subpoenaed to testify at trial, and meets with the prosecutor to prepare, there is no mystery to the witness (even if it is not discussed) that the witness previously made an identification, the prosecution has gone forward, and the prosecution thinks enough of the witness' identification to want to call the witness. Again, suggestivity or confirmation bias is inherent in the process.

The problem of mistaken identification was underscored on the local level again last week when the National Registry of Exonerations reported the shameful statistic that Suffolk County had the second highest per capita rate of exonerations in the country for counties with a population over 300,000 people; second only to New Orleans. According to its case summaries, about half of the overturned Suffolk County convictions involved mistaken identifications. The same is true if one looks at exonerations throughout the Commonwealth. See http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last viewed Feb. 12, 2014, filtering the list for Massachusetts cases). While these statistics say as much about the way Massachusetts has handled claims of wrongful convictions as it does about the manner in which those convictions were procured, it undermines the suggestion that Massachusetts does not have a problem with wrongful convictions based on unreliable identifications; or that it has done enough to erect safeguards to avoid the problem in the future.

To be sure, many of the safeguards recommended in Walker and Silva-Santiago are of recent vintage. But the Court's suggestions to police departments to adopt protocols for better ways of handling out-of-court identification procedures are as yet relatively toothless. They are currently dependent on voluntary police compliance without the possibility of a meaningful sanction (or explanation to the jury of the available alternatives) in the event of non-compliance. In each of these

recent cases, the Court concluded that the police failings went to the weight and not the admissibility of the identification procedure and/or took comfort in the fact that a defense expert was called to explain the police failings. Walker, 460 Mass. at 603-604; Silva-Santiago, 453 Mass. at 798-799. But the police failure to follow best practices will not always be self-evident to a jury (indeed, many of the findings of social science are counter-intuitive); and many defense attorneys will not know or think to call an eyewitness identification expert. In addition, such eyewitness identification experts are few, many are located outside of Massachusetts, and all are expensive. Many a defendant will be unable to afford to hire such an expert. Moreover, while the social science is evolving and certain propositions may be subject to reasonable debate, the overwhelming force of such expert testimony is not reasonably disputable.

In my prior practice, I called eyewitness identification experts three times that I can recall. In each of those instances, the expert's testimony about the way memory worked, the findings of social science research, and the studies about best police practices was not challenged by the prosecution. Cross examination usually amounted to the tepid, self-evident and conceded points that the social science research is limited largely to controlled (and therefore not "real world") studies and that it is limited to general principles rather than whether the particular witness in the case was accurate or reliable. To my mind, these points can be strongly woven into model jury instructions and, to the extent social science research evolves on a point and creates a question about a particular instruction, that portion of the model instruction might be challenged prior to the charge.

One other dirty little secret bears on the Court's reliance on defense experts for educating a jury about otherwise relatively clear principles related to eyewitness identification: many criminal defense attorneys -- even if they think to call an expert and can afford to do so -- are not skilled in putting on a case or calling an expert. Criminal defense attorneys are trained in cross-examination; they are hard-wired to challenge a prosecution witness or theory. When it comes to putting on an affirmative case, they are not always trained or skilled. The principles of eyewitness identification affect every stranger identification case. They are simply too important, too counter-intuitive, and too widely accepted in the research to be left to the vagaries of a defendant's income or available resources, or to the talent or insight of the defense attorney.

I would strongly recommend that the court adopt a form of the instruction proposed on pages 117-122 of the Report. The concepts outlined in the draft instruction appear well-founded based on the social science research; are consistent with the testimony of eyewitness identification experts when called to testify; and

many have already been recognized by this Court, as is evident from the footnotes to the Report's draft jury instruction. See Report at 135-146. The fact that the court would be instructing the jury based on social science research does not trouble me. We routinely incarcerate people as sexually dangerous people based on statistical, demographic social science research, which is subject to change and re-evaluation; and we routinely brand people as sex offenders of various levels of risk based on similar information. Social science informs many of the agency decisions to which we routinely defer. The fact that we instruct jurors based on the best information social science has to offer imposes no greater threat to, or burden on, the justice system.

My Superior Court colleagues embrace the promulgation of best police practices, without professing sufficient expertise to articulate them. I agree that the Court should adopt or recommend best police practices for conducting out-of-court identification procedures for stranger/witnesses. I commend the Report for recommending such "best practices."

I also read my colleagues' comments as embracing instructions, like those authorized in Commonwealth v. DiGiambattista, 442 Mass. 423 (2004), to be used in specific instances where the prescribed "best practice" has not been used by the police. I also agree with this recommendation. Best practices without instructions that inform the jury about those practices and the implication of failing to abide by those practices will merely leave compliance to the good will of police departments with varying results. In contrast, the threat of a DiGiambattista instruction appears to have had its intended salutary effect. See, e.g., Commonwealth v. Spencer, 465 Mass. 32, 47 (2013) ("statements to police are now frequently recorded"); Commonwealth v. Stone, 70 Mass. App. Ct. 800, 803 n.1 (2007) (since DiGiambattista, "the Pittsfield police department has enforced a policy that all statements must be recorded with either audio or visual equipment"); Commonwealth v. Rios, 28 Mass. L. Rptr. 639, 642, 2011 WL 4089553 (Mass. Super. 2011) (Agnes, J.) ("In recent years, largely as a result of [ ] DiGiambattista, [ ] both trial and appellate judges commonly receive in evidence as an exhibit a video or audio recording of the actual custodial interrogation in a case as opposed to hearing witnesses give accounts of what happened and what was said.").

I am confident that if a DiGiambattista-like instruction is authorized, it will largely reduce the type of system variables that inject suggestivity (or unreliability) into the system. In a case presenting significant estimator variables and/or failures by the police to follow established protocols that seriously undermine the reliability of an identification, it should still be available to the trial court on motion and hearing to evaluate and exclude an identification if it is unreliably tainted by such variables.

The Court should make a right to such a hearing explicit. Expecting, as I do, the success of a DiGiambattista-like instruction, however, I believe these hearings would be few and far between. The point here is not to take away from the jury the ability to evaluate the accuracy and reliability of the identification in any but the most extreme cases, but to give the jury all the tools necessary fairly to assess the reliability and accuracy of the identification.

If the police follow the Court's prescribed best practices, for a number of reasons I believe the "Identification Procedures" instruction at pages 122-128 of the Report should not be given. First, and most important, in most cases (especially once the "best practices" are systematically implemented) the instruction amounts to vouching for the police procedure and, worse, vouching for the accuracy (or greater accuracy) of the eyewitness identification itself. The point of setting out "best practices" is to minimize the suggestive impacts (whether conscious or unconscious) of system variables. If the circumstances can be controlled by the police, they ought to be controlled in the least suggestive manner possible. The "best practices" should get us to a point where system variables are as close to neutral as possible. They do not establish or fortify accuracy or reliability; they minimize a particular class of police-induced unreliability. The "best practices" should establish a floor; an expectation we all should have for how law enforcement handles eyewitnesses in a dynamic investigatory environment. Following "best practices" gets us to neutral. It gets us to a state of least suggestivity.

The Identification Procedures instruction, however, has the effect of vouching for the police -- and the accuracy of the identification -- in those instances in which the police have followed "best practices." Such an instruction is inappropriate because the comparison (i.e. certain system variables "can affect the accuracy of an identification," Report at 122) is a comparison to a state of unacceptable suggestivity. We should instruct regarding "best practices" only where there is a serious deviation from those practices (i.e., where the conduct by the police serves to interject a system variable into the process) and only to the extent of the deviation, not unlike the case-specific instructions we might give in connection with estimator variables; or when the defense challenges the suggestivity of the eyewitness identification procedure used by the police.

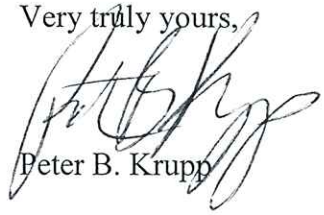
Second, setting out best practices for the police together with an instruction about failures to comply with them if they are not implemented is more than sufficient, as we have seen with DiGiambattista, to insure compliance with those practices. It is an inappropriate use of a jury instruction to vouch for the police procedures as a way to induce compliance with best police practices. Third, the instructions as a whole are long. They can be significantly shortened by omitting the

Identification Procedures instruction (that is, by not telling the jury that the police could have acted more suggestively, but they did not in this instance).

For these reasons, I believe the Identification Procedures instruction should not be given in circumstances where the Court's prescribed best practices are followed. When they are not, however, the Court should adopt and/or authorize a DiGiambattista-type instruction, adaptable to the circumstances, to be given when such a failure raises questions about the accuracy or reliability of the resulting eyewitness identification to educate the jury about the type of suggestiveness unnecessarily injected into the process.

Thank you for the Court's consideration.

Very truly yours,



Peter B. Krupp

December 11, 2013

The Honorable Justices of the Supreme Judicial Court
John Adams Courthouse, Suite 2500
One Pemberton Sq.,
Boston, MA 02108-1750

Dear Chief Justice Ireland and Justices of the Court:

I write to comment on the Report and Recommendations to the Justices submitted on July 25, 2013 by the Supreme Judicial Court Study Group on Eyewitness Evidence. While I hold in high regard both the membership of the committee and the diligence with which they have pursued their task, there is much in the report that I find troubling.

In the Executive Summary of the report there is a statement that strikes me as both remarkable in its candor and breathtaking in its presumption: "The Police Practices Subcommittee was of the view that uniform statewide practices should be adopted to ensure that all Massachusetts police departments employ best practices on eyewitness identification procedures." There is no doubt that the report as a whole makes clear that the judiciary should determine what those best practices are, as embodied in "Recommendation 1: Judicial Notice of Legislative Facts." If these practices are "adopted," the Study Group makes the "strong recommendation" that "police agencies conduct comprehensive, *mandatory* training" on those practices (emphasis supplied). In its Appendix to Hearing Subcommittee Recommendations, the committee sets forth nine protocols (with various subcategories) that the police are to follow, and provides that "a substantial failure"-- as apparently defined by any justice of the trial court-- in *any* category should warrant a hearing (emphasis supplied)." Even if the result of such a hearing is that the identification at issue is admissible under the current law of Massachusetts, the judge may, in his or her discretion, impose new "intermediate remedies." Presumably, these may include jury instructions suggesting that the jury view the identification procedure employed with particular skepticism. Thus, just as there is no doubt that the judiciary will decide what the best identification practices are, so there is little doubt that the judiciary will have at its disposal an arsenal of tools with which to enforce compliance with its standards.

Assuming, arguendo, the desirability of uniform statewide identification practices for all Massachusetts police departments, the Study Group seems never to have considered the more basic question of whether it is appropriate for the judicial branch to impose such practices on the executive branch. I submit it is not. The collection of evidence, and its presentation in a court of law, is a core responsibility of the executive branch of government. It is not for the judiciary to arrogate to itself the role of super police commissioner for the Commonwealth. Well familiar to this court are the words of Article 30 of the Massachusetts Declaration of Rights: "In the

government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

I recognize, of course, that despite the majestic words of Article 30, as a practical matter there is an unavoidable overlap in some functions of the branches. Certainly the judicial power to enforce constitutional standards and to establish appropriate criteria for the introduction of evidence will necessarily and properly influence the executive branch in its evidence- gathering function. That seems to me quite different from what is contemplated here, a deliberate attempt by the judiciary to seize direction of the investigative processes of the law enforcement arm of the executive branch.

I believe that judicial modesty is in order not only for constitutional reasons, but for practical ones as well. I am not persuaded that in the ordinary course of events the executive branch of government, and to the extent appropriate, the legislative branch, are less equipped, or would be less committed to the important goal of improving eyewitness evidence, than the judiciary. Prior to my appointment to the bench I worked as an assistant district attorney in Norfolk County. In reviewing my records, I find that on July 15, 2004, some nine years ago, then- District Attorney William R. Keating offered a well-attended daylong seminar to police personnel in Norfolk County on the topic of "Building an Effective Identification Case." Speaking at the conference were Dr. Mahzarin R. Banaji from the Department of Psychology at Harvard University, Professor Deborah A. Ramirez of Northeastern University School of Law, Northhampton Police Detective Kenneth A.Patenaude, and myself. Among other materials provided participants in the conference was *Eyewitness Evidence-- A Guide for Law Enforcement.* The *Guide* was developed by the U.S. Department of Justice's Technical Working Group for Eyewitness Evidence (of which the aforementioned Det. Patenaude was a member) and issued in October, 1999. Police departments represented at the seminar were encouraged to adopt the practices suggested by the *Guide.* At the time of Dist. Atty. Keating's seminar, I was informally aware that similar efforts were underway in other counties. It may be that implementation of good eyewiiness practices has faltered from lack of appropriate follow-up or for some other reason, but that has not been established. Nor can it be established merely on anecdotal evidence because whatever the level of training and enforcement, performance in the field will always fall somewhat short of 100% compliance. It may be that there is a shortage of resources to provide appropriate training for officers; to that proposition, however, I bring a degree of skepticism. It does not seem to me that the kinds of practices set forth in the *Guide* are of such complexity as to require extensive training; moreover, good practices can routinely be reinforced by good supervision. In any event, judicial promulgation of "best practices" will not itself generate ongoing funding for police training.

Let me now turn to some additional concerns. It is quite clear that if the recommendations of the Study Group are adopted *in toto* that eyewitness identification evidence will occupy a preeminent and unique position. Where identification is at issue in a criminal case, we already instruct juries that "one of the most important issues in this case is the identification of the defendant as the perpetrator of the crime." The Study Group suggests that "before opening statements in all cases in which there is an eyewitness identification," we should be required to make the same point in a pre-charge which will go on to talk about "the general nature of memory."[1] Generally, the precharge, like the proposed final identification charge emphasizes the unreliability of memory. The Study Group suggests that the new, emphatic instructions in no way "lesson or obviate the need for expert testimony on how memory works." In other words, the jury will be warned at the outset on the unreliability of eyewitness identification, will then be presented with evidence of the identification (albeit possibly subject to "remedies beyond the exclusionary option"), will then hear testimony suggesting flaws in the identification procedure in the particular case before them, and then be all but instructed that they are to believe that testimony.

All of these procedures rest in part on the Study Group's recommendation that The Supreme Judicial Court "take judicial notice is legislative facts of the modern psychological principles regarding eyewitness memory set out in *State* v. *Lawson*, 352 Or. 724, 769-789 (2012)." This proposal is, to say the least, an unusual use of judicial notice. Also, it is difficult to discern an appropriate limiting principle. At the very least, surely it is obvious that observation and memory *in general* are subject to the same limitations as observations and memory of identity. Should we not take "judicial notice" of those "legislative facts" and appropriately caution juries? It is also true that we are aware, or have the capacity to make ourselves aware of other "psychological principles," or even scientific principles in general. For example, we know a lot about the common psychological mechanisms that discourage rape victims from coming forward and reporting rapes immediately after they are victimized. Would it be appropriate for us to take "judicial notice" of those "legislative facts," and begin delayed disclosure rape cases with an instruction that one of the most important issues is the credibility of the victim and to explain

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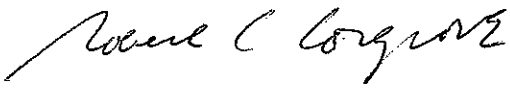
[1]If I may be forgiven one lapse from my general resolve not to delve into the minutiae of the report, I note that the pre-charge follows the conventional wisdom among those in the legal community with special concerns about identification in its assumption that the average juror labors under the misconception that memory functions like a videotape. Thus, the caution that, "Memory does not function like a videotape or DVR." I think it fair to say that I have never met a single human being who expressed to me the view that memory functions like a videotape. There is a reason that the English language contains the expression, "photographic memory:" people recognize that in its ordinary sense, memory is anything but photographic.

how common it is for a victim to delay a report of rape and why? I think the answer is obviously "no," but the harder question is why the answer here should be "no," but the opposite answer apply to eyewitness identification.

Finally, a word about the new hearing procedure. As my comments above imply, I am extremely dubious of a plan that would allow the motion judge to impose new remedies beyond the exclusionary rule. This seems to me an intrusion on the function of the jury, or at the very least, an expression of mistrust in their competence, and the competence of trial counsel. It promises to open up new areas of judicial discretion, and concomitant judicial review. It is the rare identification case which does not offer an opportunity for a motion to suppress, but such cases are obviously about to become even rarer. The opportunity for discovery and the need to guard against post-trial allegations of ineffective assistance of counsel will ensure the filing of such motions at every opportunity. Finally, alleged victims will find themselves making additional appearances in court for evidentiary hearings.

Let me close by thanking you for your patience and your consideration of my concerns. While I obviously differ from the Study Group in many respects, I appreciate very much their hard work and their insights into the important issue of eyewitness evidence. All of us, I am sure, however much we may differ as to appropriate means, share the desire that the results of criminal proceedings be as fair and accurate as possible.

Respectfully submitted,



Robert C. Cosgrove,
Justice of the Superior Court

cc: Superior Court Eyewitness Identification Report Subcommittee
Hon. Robert J. Kane, Chair, SJC Study Group on Eyewitness Evidence

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REGIONAL ADMINISTRATIVE JUSTICE

February 12, 2014

The Honorable Justices of the Supreme Judicial Court
Supreme Judicial Court
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RE: Comments on the Report and Recommendation of the Supreme Judicial Court Study Group on Eyewitness Evidence

Dear Justices:

Judge Janet Kenton-Walker and I are submitting this letter principally to emphasize that there are justices of the Superior Court who are not in agreement with all the positions advocated in the report prepared by the Criminal Committee of our Court, of which we are members. We are concerned that the majority of the Superior Court, seemingly concerned about changing the judicial system's approach to handling such evidence, has essentially presented its critique of the Report and Recommendation of the Supreme Judicial Court's Study Group on Eyewitness Evidence ("Report"), without offering the type of concrete proposals which address the critical issue recognized by the SJC, *i.e*, that "eyewitness identification is the greatest source of wrongful convictions...." *Commonwealth v. Walker*, 460 Mass 590, 604 n.16 (2011).

While we do not necessarily agree with all the Report's proposals, we think there are certain fundamental suggestions therein, premised on the presently established psychological science and studies, as well as decisions from other jurisdictions, that should form the basis of pre-trial processes designed to limit the potential for such wrongful convictions.[1] Taking notice

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[1] It is hardly a recent revelation that "[t]he single most important factor leading to wrongful conviction in the United States . . . is eyewitness identification," as we must, and acknowledge that "[i]t is widely accepted by courts, psychologists and commentators that '[t]he identification of strangers proverbially untrustworthy.'" *United States v. Brownlee*, 454 F.3rd 131, 141 (3rd Cir. 2006), citing Felix Frankfurter, *Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen*, 30 (Universal Library ed., Grosset & Dunlap 1962) (1927).

of presently established social science is warranted in such pre-trial processes, and does not represent a radical departure from other areas where the SJC has acknowledged established scientific principles. In addition, there is significant benefit in reducing the number of cases, and attendant cost, where it would be necessary to employ expert witnesses at the pre-trial stage to establish that which is essentially uncontroverted.

While the majority of the Superior Court praises the Report's efforts to define "best practices" for Massachusetts law enforcement agencies to follow in dealing with eyewitness identifications, it rails against any process to enforce these practices, and thereby fails to advance the ball toward remedying the risk of wrongful convictions that may flow from misidentifications.

We view the trial court's obligation to insure against wrongful convictions requires the development of a pre-trial process and tools to test not only the constitutionality of such evidence, but also its reliability before it goes to a jury; and should such evidence fail to pass such tests, there should be a range of remedies. At one end of the spectrum (and in most cases), the courts can insure with relevant instructions that the jury has a complete understanding of the fallibility of such evidence when it is weighing it. At the other end of the spectrum, identification evidence may need to be suppressed even when it does not rise to the level of unconstitutional suggestiveness.

The only way to enable judges to exercise their judgment in such cases is to acknowledge their gatekeeper function on the issue of reliable identifications, and to require hearings in appropriate cases. Informed judges are well equipped to make reliability determinations. We are asked to do this in evaluating other evidence much less capable of leading to wrongful convictions, *e.g.*, expert opinions, vicarious admissions under Mass. G, Evid. 801 (d)(2)(C), and statements under Rule 804(b)(8) (C). Moreover, in the case of confessions, our empirical knowledge that under certain circumstances they are not trustworthy has resulted in the creation of a process designed to protect against wrongful convictions. The judge holds an evidentiary hearing on the issue of the voluntariness of the statement. If it passes judicial muster, it is tested again by the jury, having been informed by the court of certain factors that will impact the voluntariness of the statement. Inserting such an extra level of procedural protection in the realm of identification testimony where it has been scientifically concluded that there are serious myths and misconceptions regarding the efficacy of such evidence is particularly appropriate. And, if it gets to the jury, it is not enough to simply tell them that they should consider certain factors, but fail to explain the reason those factors must be examined in a particular light.

Thus, a process that gives Superior Court judges an opportunity to determine whether sufficient so-called system variable and/or estimator variables are present to lead a judge to conclude that the evidence is so unreliable as its admission would risk leading to a wrongful conviction, and to permit a range of remedies depending on the level of unreliability, including potentially exclusion in the most serious instances of unreliability, is necessary. The problem with reliance solely on the constitutional test of an impermissibly suggestive identification procedure is two-fold. There are cases where identifications may be wholly unreliable even in the absence of suggestive procedures, and, moreover, courts have rarely concluded that an identification was ultimately unreliable, no matter how suggestive the setting in which it was made. Accordingly, suppression is infrequently granted, and the Due Process Clause has not

provided sufficient protection against wrongful convictions based on eyewitness misidentification.

Thus, a pretrial hearing, whether held as a motion in limine or in the setting suggested by the Study Group, or as in the alternative approaches suggested by the minority statements, should become an essential part of the process. At its base is the requirement of judicial notice of the core principles of the modern science relating to eyewitness memory. It is against those principles that the court is guided in its determinations of reliability. The trial court must be able to consider the so-called estimator and system variables to assess reliability. What good is the establishment of police protocols if the court is not able to enforce them by considering violations when determining if the evidence is reliable? How effective would *Miranda* warnings be if there was no consequence for the failure to administer them? What good is the recognition of the existence of estimator variables that cast doubt on the reliability of an identification if there is no remedial process in place?

Whether the pretrial hearing is in the form that the Study Group suggests, or woven into the pretrial procedure presently available (as Attorney Doyle's minority statement seems to suggest) and treated as an evidentiary issue, or embodied in an evidentiary pretrial hearing concerning pretrial eyewitness identification in any case "where justice so requires" (as suggested by the minority statement of Attorney Nataragan), should be the issue, not whether a pretrial hearing should or should not be held.

More specifically, we would respectfully urge the SJC to consider that once a defendant has made an initial showing of unreliability premised on external factors and/or police conduct, a pretrial hearing should be held. The burden should be on the Commonwealth to show by a preponderance of the evidence (1) that police substantially followed an established protocol or did in fact follow the protocol, (2) that the effect of any estimator variables did not render the identification unreliable, and (3) that the identification was not overly suggestive.

Following the pre-trial hearing and taking the presently accepted science as true, the judge shall make findings of fact based on that science when considering whether or not the Commonwealth has sustained its burden. Either party should be permitted to present expert testimony at that pre-trial hearing in support of their respective positions, but the need for such testimony will be limited. If the Commonwealth does not sustain its burden, depending on the seriousness of the failures, the court can effectuate a remedy ranging from charging the jury such as in a *Bowden* or *DiGiambattista* scenario, to charging the jury to draw an adverse inference, to suppression when there is a very substantial likelihood of irreparable misidentification. Assuming the evidence is not suppressed, either party should be permitted to present expert testimony to the jury.

As to the scope of new jury instructions, we believe the Superior Court majority's proposals are an improvement, but do not go far enough, although we are not convinced that the proper balance is accomplished by the Study Group's suggestions.

The Superior Court report, relying on *Commonwealth v. Jones*, 423 Mass. 99 (1996), suggests that there is a "common law remedy that already exists for unreliable non-state action

identifications", and compares the status quo with the humane practice process. As noted in *Walker*, 460 Mass. at 605, however, "[i]n [*Jones*], we recognized that common-law principles of fairness dictate that unreliable identification arising from especially suggestive circumstances should not be admitted in evidence even where the police were not responsible for the suggestive confrontation. We have not suggested, however, that in the absence of an unnecessary suggestive police identification procedure or especially suggestive circumstances, a judge must serve as a gatekeeper of eyewitness identifications offered by the Commonwealth and admit only those identifications the judge finds to be reliable." The Court goes on to recognize that in *State v. Henderson*, New Jersey initiated the requirement of a pretrial hearing where a judge will consider all of the factors relevant to the reliability of the identification and determine whether there exists a very substantial likelihood of irreparable misidentification, and created the Study Group to consider precisely that approach. 460 Mass. at 605-606. Thus, we do not believe that *Jones* provides for the gatekeeper function at issue here or comparable to a voluntariness determination.

We doubt that trial judges in Massachusetts have been permitting hearings on the reliability of eyewitness identifications, particularly in view of the constraints of *Commonwealth v. Payne*, 426 Mass. 692, 694 n.3 (1998), quoting *Commonwealth v. Warren*, 403 Mass. 137, 139 (1988) ("When the procedures are not suggestive, the pretrial identifications are admissible without further showing.") We hope the SJC, informed by the Study Group's Report, the overwhelming weight of scientific authority, and jurisprudence from other jurisdictions, will consider sixteen years later that pre-trial judicial testing of reliability in appropriate cases would serve the ends of justice.

Repectfully,

/s/

Kenneth J. Fishman

/s/

Janet Kenton-Walker

KJF:s

CC: Chief Justice Barbara Rouse
Justice Robert Kane, Chair of the Study Group