COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11878

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,
v.
SANTIAGO NAVARRO,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF ESSEX COUNTY

BRIEF OF AMICI CURIAE THE INNOCENCE NETWORK AND THE INNOCENCE PROJECT, INC.

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INTEREST OF *AMICI CURIAE*

The Innocence Network (the "Network") is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 70 current members of the Network represent hundreds of prisoners with innocence claims in all 50 states, the District of Columbia, and Puerto Rico, as well as Australia, Canada, France, Ireland, Italy, the Netherlands, New Zealand and Taiwan.[1]

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[1] The member organizations that are signatories to this brief include the Actual Innocence Clinic, Alaska Innocence Project, Arizona Innocence Project, Arizona Justice Project, The Association in Defence of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project/Post-conviction Unit, The Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Hawai`i Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Innocence Project, Innocence Project France, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Texas, Irish Innocence Project at Griffith College, Italy Innocence Project, Justicia Reinvindicada, Kentucky Innocence Project, Knoops' Innocence Project (the Netherlands), Life After Innocence, Loyola Law School Project for the Innocent, Michigan Innocence Clinic, Michigan State Appellate Defender Office, Wrongful Conviction Units, Mid-Atlantic Innocence Project, Midwest Innocence Project, Minnesota

Its affiliate, the Innocence Project, Inc., is an organization dedicated primarily to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction evidence. It has a specific focus on exonerating long-incarcerated individuals through use of DNA evidence, including newly-developed DNA testing methods.

Amici are dedicated to improving the accuracy and reliability of the criminal justice system in future

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Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, New Mexico Innocence and Justice Project at the University of New Mexico School of Law, North Carolina Center on Actual Innocence, Northern California Innocence Project, Office of the Public Defender, State of Delaware, Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Oklahoma Innocence Project, Osgoode Hall Innocence Project (Canada), Pennsylvania Innocence Project, Reinvestigation Project, Resurrection After Exoneration, Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Taiwan Association for Innocence, Thurgood Marshall School of Law Innocence Project, University of Baltimore Innocence Project Clinic, University of British Columbia Law Innocence Project (Canada), University of Miami Law Innocence Clinic, Wake Forest University Law School Innocence and Justice Clinic, West Virginia Innocence Project, Western Michigan University Cooley Law School Innocence Project, Wisconsin Innocence Project, Witness to Innocence, and Wrongful Conviction Clinic at Indiana University School of Law.

cases. Amici have researched the causes of wrongful convictions and pursue legislative and administrative reform initiatives based on this research in order to enhance the truth-seeking functions of the criminal justice system.

Eyewitness misidentification is the leading contributing cause of wrongful conviction, occurring in 236, or 72 percent, of the 330 wrongful convictions identified through post-conviction DNA testing. Thus, the Network and the Innocence Project have a compelling interest in ensuring that courts employ legal remedies, including appropriate jury instructions, that adequately protect criminal defendants from the substantial risk of wrongful conviction based on misidentification. In this case, amici seek to present their perspective on the issue in the hope that the Court will adopt a rule that will minimize the risk of future wrongful convictions.

INTRODUCTION

For decades now, groundbreaking jurisprudence emanating from this Court has made clear that adequate jury instructions concerning the factors affecting the

accuracy of eyewitness identification[2] are necessary to equip juries with the guidance they need to evaluate identification evidence, evidence that is often the difference between guilt or innocence. This Court should explicitly direct trial courts to give applicable portions of the identification instruction in all cases in which identification is at issue, irrespective of whether the defense requests such an instruction.

The importance of the identification issue is by now well established: as this Court has repeatedly recognized, misidentifications are the most prevalent contributing factor in wrongful convictions, with misidentifications occurring in roughly 75 percent of the cases nationally in which DNA evidence later exonerated the defendant, including eight out of the nine such cases occurring in Massachusetts. Equally

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[2] Although we recognize that the identification instruction applicable at the time of the trial in this case was the instruction set forth in *Commonwealth v. Rodriguez* and its progeny, the reasoning behind the position that eyewitness identification instructions should be given in every case applies equally to those cases going forward under the model instruction promulgated by this Court in *Commonwealth v. Gomes*. In this brief, unless the context requires specification of which model instruction is being discussed, we will make reference simply to eyewitness identification instructions.

well established is the fact that juries simply will not be adequately equipped to evaluate identification evidence without an instruction: studies have shown, and this Court and other courts have repeatedly found, that juries are not well informed about the factors affecting the accuracy of eyewitness identification, and, indeed, many of those factors are counterintuitive. As a result, it has long been the law in the Commonwealth of Massachusetts that an eyewitness identification instruction is required whenever *requested by the defendant*.

This qualification that the instruction is only to be provided when requested has created an illogical disconnect in the jurisprudence. If the instruction is so critical to a jury's determination of guilt or innocence (which it is), and if the factors set forth in the instruction are so unknown or even counterintuitive to a typical jury (which they are), why do we tolerate any trials in which the jury will render a verdict without being provided with sufficient guidance on how to evaluate the identification evidence, simply because the defense counsel chooses tactically not to request the instruction or (more likely) because the defense

counsel mistakenly fails to make the request? We submit that there is no good reason.

In the final analysis, it is the trial court's responsibility to ensure that the jury is accurately and adequately instructed on all issues that the jury will be required to decide. In light of the recognized importance of the issue, trial courts should no more tolerate a jury determining guilt or innocence based on identification issues without adequate guidance than they would tolerate a jury determining guilt or innocence based on an inadequate instruction on the elements of a crime or the burden of proof. Whatever adversarial process interests might be advanced by requiring a defense request (whether based upon tactics or incompetence) are swamped by the societal interests in fair trials and juries finding the truth.

The idea of requiring *sua sponte* instructions is by no means novel. New Jersey, the other jurisdiction that has most rigorously examined the scientific research on eyewitness identification and applied it to jury instructions, explicitly requires that relevant portions of the identification charge be given in every case, irrespective of a defense

request. Moreover, this Court requires *sua sponte* jury instructions where applicable in numerous contexts without a defense request, including the voluntariness of confessions and certain defenses, because a failure to give the instruction risks an unfair trial. This Court should now explicitly place the vitally important instructions concerning eyewitness identification – which the research shows poses the greatest threat of wrongful convictions – into the category of areas in which an instruction is required in every case in which identification is at issue.

FACTS

Amici, The Innocence Network and The Innocence Project, Inc., adopt those undisputed facts set forth in the parties' briefs.

ARGUMENT

THIS COURT SHOULD REQUIRE THAT THE JURY BE INSTRUCTED ON ALL RELEVANT PORTIONS OF THE EYEWITNESS IDENTIFICATION INSTRUCTION IN EVERY CASE IN WHICH EYEWITNESS IDENTIFICATION IS AT ISSUE, IRRESPECTIVE OF WHETHER SUCH INSTRUCTION IS REQUESTED BY THE DEFENSE.

I. It Is The Duty Of The Trial Court To Ensure That The Jury Is Properly Equipped To Decide The Issues Applicable To The Case.

Massachusetts courts have repeatedly recognized the trial court's duty to instruct the jury on all

aspects of the law applicable to the case. *See, e.g.*, *Commonwealth v. Corcione*, 364 Mass. 611, 618 (1974) (urging that "the trial judge has the duty to state the applicable law to the jury clearly and correctly"); *Commonwealth v. Whitlock*, 39 Mass. App. Ct. 514, 520 (1995) ("The judge . . . had a duty to instruct the jury on all aspects of pertinent law applicable to the issues in the case."). Indeed, this obligation extends beyond the mere recitation of basic legal principles and requires the trial court to ensure that the jury is adequately equipped to decide issues of fact in the context of the law. As this Court has stated:

> The primary purpose of instructions to a jury is to assist them in the discharge of their responsibility for finding the facts in issue and then in applying to the facts found the applicable rules of law to enable them to render a proper verdict. The instructions should be full, fair and clear as to the issues to be decided by the jury, the rules to be followed by the jury in deciding the facts, and the law they are to apply to the facts found.

Commonwealth v. Mills, 436 Mass. 387, 398 (2002).

This responsibility is particularly important where there is a potential for the jury to misunderstand a key issue relevant to the case. Indeed, "[t]he very purpose of a jury charge is to

flag the jurors' attention to concepts that must not be misunderstood. . . ." *Lakeside v. Oregon*, 435 U.S. 333, 340 (1978). In such circumstances, there is no substitute to authoritative instructions from the trial judge, and neither expert witness testimony nor argument from counsel is an adequate substitute. *See Commonwealth v. Gomes*, 470 Mass. 352, 364 (2015) (describing the "authoritative" nature of jury's charge "in that juries hear them from the trial judge, not a witness called by one side") (*quoting State v. Henderson*, 208 N.J. 208, 298 (2011)).

II. Jury Instructions Concerning The Factors To Consider When Weighing Eyewitness Identification Evidence Are So Important — And Sufficiently Counterintuitive — That Juries Are Not Properly Charged Absent Such Instruction.

Ensuring that juries are properly equipped with guidance on how to evaluate eyewitness identification evidence is vitally important, and the danger associated with failing to do so is severe. Complicating the task of instructing the jury is the fact that the variables affecting the accuracy of eyewitness testimony are not widely known by lay jurors, and, indeed, in many respects are counterintuitive and contrary to what a typical juror would assume. As a result, a jury who is not properly

and sufficiently instructed on the factors relevant to evaluating eyewitness identification evidence simply will not be adequately equipped to evaluate evidence that is often central to the question of guilt or innocence.

Given that juries will not be adequately instructed on a critical issue absent the eyewitness identification charge, requiring a request from the defense before such instruction is given is difficult to justify. Whether a defense counsel chooses not to request the instruction as a tactical decision or simply fails to make the request out of inattention or incompetence,[3] whatever adversarial process interests are advanced by requiring a request are far outweighed by the societal interests in a properly instructed jury. Mandating an instruction in every case in which eyewitness identification is at issue is the better course.

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[3] Nor is a claim of ineffective assistance of counsel on appeal or collateral attack an adequate substitute in light of its necessary limitations and hindsight biases. As discussed more fully below, properly instructing the jury to evaluate the evidence in the first instance (and thus equipping the jury to serve its proper function as fact-finder) is better for defendants, for society, and for judicial economy than requiring an appellate court to make judgments about the risks of a miscarriage of justice based on a cold record.

A. The Eyewitness Identification Issue Goes To The Heart Of A Fair Trial Because Misidentification Is By Far the Leading Cause of Erroneous Convictions.

It is well recognized that eyewitness misidentification poses the biggest threat to innocent defendants. In fact, misidentification is a factor in nearly 75% of all wrongful convictions established through post-conviction DNA testing. *See* Supreme Judicial Court Study Group on Eyewitness Evidence, Report and Recommendation to the Justices 7 (2013) ("Supreme Judicial Court Study") (*citing* Innocence Project, Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification 3 (Benjamin N. Cardozo School of Law, Yeshiva University, n.d.)). Specifically, of the nine individuals who have been exonerated by DNA evidence in Massachusetts, misidentification played a role in the convictions of eight of them. Stanley Z. Fisher, *Eyewitness Identification Reform in Massachusetts*, 91 Mass. L. Rev. 52, 53 (2008).

Mr. Dennis Maher, for example, was convicted in 1984 for rape and sexual assault. *See* Stephanie Horst, *Beyond Bars*, Boston Globe, Sep. 4, 2011. Although Mr. Maher was identified by all three victims

as their assailant, he was exonerated (following nineteen years in prison) after DNA evidence established his innocence. *Id.* Mr. Maher's case, unfortunately, is by no means unique. Just in Massachusetts, misidentification has stolen 97 years from individuals whose innocence was later proven definitively by DNA evidence. *See* The Innocence Project, The Cases: DNA Profile Exonerees, *available at* http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA&c5=MA (last visited September 11, 2015). Nor do such cases affect only the wrongly convicted individual: "Behind each exoneration is the story of a man wrongfully convicted and incarcerated, and a victim whose assailant was never caught." Stanley Z. Fisher, *Eyewitness Identification Reform in Massachusetts*, 91 Mass. L. Rev. 52, 66 (2008).

The danger of misidentification leading to wrongful conviction is one that is well known to this Court. More than thirty years ago, in *Commonwealth v. Francis*, this Court stated that "[o]ne of the most troublesome problems in the administration of criminal justice is the possibility that eyewitness identification testimony is wrong, given by a witness

who sincerely but wrongly believes in the accuracy of his or her identification." 390 Mass. 89, 100 (1983). Indeed, this Court has acknowledged that "eyewitness identification is the greatest source of all wrongful convictions." *Commonwealth v. Walker*, 460 Mass. 590, 604 n.16 (2011). As recently as the landmark decision in *Commonwealth v. Gomes*, this Court recognized that "the mistaken eyewitness identification of a defendant whom the witness had never seen before the crime 'is the primary cause of erroneous convictions, outstripping all other causes combined.'" 470 Mass. 352, 364 (2015) (*quoting Commonwealth v. Martin*, 447 Mass. 274, 293 (2006)) (Cordy, J., dissenting); *see also Commonwealth v. Silva-Santiago*, 453 Mass. 782, 796 (2009) ("We have long recognized that '[e]yewitness identification of a person whom the witness had never seen before the crime or other incident presents a substantial risk of misidentification and increases the chance of a conviction of an innocent defendant.'") (*quoting Commonwealth v. Jones*, 423 Mass. 99, 109 (1996)); *Commonwealth v. Johnson*, 420 Mass. 458, 465 (1995) (noting that "mistaken identification is believed

widely to be the primary cause of erroneous convictions").

The importance of this issue simply cannot be overstated: "[t]he accuracy of an eyewitness identification is often the critical issue in a criminal case, the difference between a conviction and an acquittal." *Gomes*, 470 Mass. at 364.

B. As A Result, Massachusetts Courts Have Repeatedly Acknowledged The Necessity Of Informing Juries Regarding The Basic Scientific Principles Underlying The *Rodriguez* (And Now *Gomes*) Instruction.

In recognition of the danger posed by mistaken identifications, this Court has held repeatedly that juries should be informed of the factors that affect the accuracy of eyewitness identification. From the initial model instruction developed in *Rodriguez* and it progeny to the more detailed instruction laid out in *Gomes*, the importance of instructing the jury on eyewitness issues has been repeatedly stressed. The cases make clear that the instruction is designed to emphasize the importance of the issue and, critically, to provide the jury with the guidance it needs to evaluate eyewitness identification evidence.

As this Court explained in *Commonwealth v. Walker*, "[t]he purpose of the *Rodriguez* instruction is

to emphasize the importance of eyewitness identifications, inform the jury of the Commonwealth's heavy burden of proof as to the accuracy of the identification, and *to furnish the criteria by which the jury can assess the quality of identification.*" 421 Mass. 90, 99 (1995) (emphasis added). Similarly, in *Commonwealth v. Hallet*, this Court found that the trial court's omission of certain *Rodriguez* factors constituted a failure to adequately instruct the jury on "considerations that this court has said are important to the weighing of identification testimony." 427 Mass. 552, 558 (1998). Indeed, "[t]he cases make plain that judges should furnish jurors with a set of practical criteria by which they can assess the quality of an asserted identification." *Commonwealth v. Williams*, 54 Mass. App. Ct. 236, 239 (2002); *see also Gomes*, 470 Mass. at 365 ("Our jury instructions are intended to provide the jury with the guidance they need to capably evaluate the accuracy of an eyewitness identification.").

C. Eyewitness Identification Instructions Are Necessary In Particular Due To The Counterintuitive Nature Of the Scientific Principles Underlying Such Instructions.

This Court's emphasis on giving juries guidance in this area is well placed, as research demonstrates that average jurors are unfamiliar with many of the factors that could lead to misidentifications and that some of those factors are actually counterintuitive. In a 2006 survey that asked 111 jurors about eyewitness identification and memory, for example, the juror responses differed from expert responses on 87% of the issues. *See* Tanja Rapus Benton *et al.*, *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts,* 20 Applied Cognitive Psychol. 115, 118-21 (2006). Among other issues, only 41% of jurors agreed with the importance of pre-lineup instructions, and only 38% to 47% agreed with the effects of "the accuracy-confidence relationship, weapon focus, and cross-race bias." *Id.* at 120.

In addition, in a mock-jury experiment where researchers showed jurors different versions of a videotaped mock trial about an armed robbery, the researchers tested the reactions of jurors to eight

system and estimator variables. Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185, 190 (1990). They found that mock-jurors were "were insensitive to the effects of disguise, weapon presence, retention interval, suggestive lineup instructions, and procedures used for constructing and carrying out the lineup" and "gave disproportionate weight to the confidence of the witness." *Id.* Despite the fact that eyewitness confidence has been shown to have little if any correlation with accuracy, the researchers found that eyewitness confidence "was the most powerful predictor of verdicts" regardless of other variables. *Id.* In sum, the study found that jurors do "not evaluate eyewitness memory in a manner consistent with psychological theory and findings." *Id.*[4]

In 2013, the National Research Council was asked to assess the state of scientific research on eyewitness identification and recommend best practices

[4] Relying on survey questionnaires and mock-jury studies, including the studies mentioned above, the Special Master appointed by the New Jersey Supreme Court in *Henderson* found that "laypersons are largely unfamiliar" with scientific findings and "often hold beliefs to the contrary." *Henderson*, 208 N.J. at 272.

for handling eyewitness identifications by law enforcement and the courts. *See* National Research Council of the National Academies, *Identifying the Culprit: Assessing Eyewitness Identification* (2014). The Council stated that the shortcomings of eyewitness identification must be resolved by law enforcement and the judiciary having "a thorough understanding of human vision and memory." *Id.* at 69. Moreover, "[a]s discussed throughout [the] report, many scientifically established aspects of eyewitness memory are counterintuitive and may defy expectations. Jurors will likely need assistance in understanding the factors that may affect the accuracy of an identification." *Id.* at 111. As a result, the Council recommended that (i) courts take necessary steps to make juries aware of prior identifications and the factors that would impact those identifications, (ii) convey the factors that may influence a witness' visual experience of an event and the resolution and fidelity of that experience by expert testimony, and (iii) provide clear and concise jury instructions that would aid the juries in considering the factors. *Id.* at 111–12.

This Court and courts around the country have recognized that juries simply will not be adequately equipped to evaluate eyewitness evidence without a proper instruction. In *Commonwealth v. Gomes*, for example, this Court stated that "research makes clear that common sense is not enough to accurately discern the reliable eyewitness identification from the unreliable, because many of the results of the research are not commonly known, and some are counterintuitive." 470 Mass. at 366. In *State v. Henderson*, the New Jersey Supreme Court similarly found that juror surveys and mock-jury studies, while not definitive, "reveal generally that people do not intuitively understand all of the relevant scientific findings." 208 N.J. at 274. Noting that this research indicates a need for a mandatory jury instruction, that court asked "if even only a small number of jurors do not appreciate an important, relevant concept, why not help them understand it better with an appropriate jury charge?" *Id.* at 272.

Indeed, courts in other states have recognized the limitation of jurors' understanding and the importance of educating jurors regarding the scientific research and the factors that influence

eyewitness identification. For example, the Supreme Court of Utah stated:

> Although research has convincingly demonstrated the weaknesses inherent in eyewitness identification, jurors are, for the most part, unaware of these problems. People simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory process of an honest eyewitness. Moreover, the common knowledge that people do possess often runs contrary to documented research findings.

State v. Long, 721 P.2d 483, 490 (Utah 1986). *But see State v. Clopten*, 223 P.3d 1103, 1113 (Utah 2009) (holding instructions are not required where expert testimony is given on identification). Courts in Hawaii, Connecticut and Kansas have similarly noted the limitation of juries' understanding of eyewitness identification evidence and incorporated scientific research into their eyewitness identification instructions. *See State v. Cabagbag*, 127 Haw. 302, 313, 277 P.3d 1027, 1038 (2012) (recognizing that "it cannot be assumed that juries will necessarily know how to assess the trustworthiness of eyewitness identification evidence" and "[w]ithout appropriate instructions from the court, the jury may be left without sufficient guidance on how to assess critical testimony, sometimes the only testimony, that ties a

defendant to an offense"); *State v. Guilbert*, 306 Conn. 218, 234–35 (2012) (there is "near perfect scientific consensus" that "eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror"); *State v. Warren*, 230 Kan. 385, 397 (1981) ("We think it clear that, in order to prevent potential injustice, some standards must be provided to the jury so that the credibility of eyewitness identification testimony can be intelligently and fairly weighed.") see *also Perry v. New Hampshire*, 132 S. Ct. 716, 739 (2012) ("Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures." [footnotes omitted]) (Sotomayor, J., dissenting).

D. The Omission Of An Identification Instruction Cannot Adequately Be Cured By Defense Counsel's Cross Examination Or Arguments, Or By An Expert Witness.

Without supporting instructions from the trial judge, even effective cross-examination or summation arguments on eyewitness identification issues might well be given insufficient weight by the jury — or disregarded altogether — either because the jury will fail to understand the issues sufficiently without carefully crafted and authoritative instructions provided by the judge or simply will not credit defense counsel's points because they are coming from an advocate rather than the court. Likewise, while expert testimony is often critical to juror understanding of the identification issues in a case, jurors might view defense experts as partisan or paid mouthpieces and will therefore dismiss the expert testimony. This problem can be mitigated by the presence of authoritative, neutral instructions. Simply stated, even effective efforts by a defense counsel through cross, argument or the calling of expert witnesses do not provide an adequate substitute for detailed, authoritative and neutral instructions coming from the trial court itself.

In *Commonwealth v. Collins*, this Court recognized that "cross-examination cannot always be expected to reveal an inaccurate in-court identification where 'most jurors are unaware of the weak correlation between confidence and accuracy and of witness susceptibility to 'manipulation by suggestive procedures or feedback.'" 470 Mass. 255, 264 (2014) (*quoting* Supreme Judicial Court Study at 20). This Court stated in *Commonwealth v. Crayton* that "we have previously recognized how difficult it is for a defense attorney to convince a jury that an eyewitness's confident identification might be attributable to the suggestive influence of the circumstances surrounding the identification." 470 Mass. 228, 240 (2014); *see also Commonwealth v. Williams*, 54 Mass. App. Ct. 236, 244 (2002) (finding defense counsel's arguments in closing did "not render harmless in the circumstances the judge's failure to give any identification instruction at all").

In the instant case, the Appeals Court below suggested (we submit erroneously) that defense counsel's raising of the issue of misidentification on cross and in summation was somehow sufficient to apprise the jury of the issue even absent a fulsome

eyewitness identification instruction: "Defense counsel vigorously pressed the issue of identification, and that defense was squarely placed before the jury." 86 Mass. App. Ct. 780, 21 N.E.3d 982, 985-86 (2014). Although the eyewitness identification issue might well have been fairly "placed before the jury" by counsel's efforts, nowhere does the Appeals Court explain how the jury was properly equipped to resolve those issues once they were raised, in particular the counterintuitive factors expressed in *Rodriguez* (such as instructions regarding the type of identification), without an adequate instruction on how to properly evaluate those arguments. Logically, attention paid by defense counsel on cross and argument on eyewitness identification issues serves only to stress the importance of the eyewitness identification issues in a case, making the instruction from the trial judge more necessary, not less.

E. Given The Interests At Stake, An Eyewitness Instruction Should Be Given In Every Case, Irrespective Of Whether The Defense Requests Such Instruction.

Notwithstanding this Court's strong leadership on the identification issue generally, it is respectfully

submitted that there is an illogical disconnect in the jurisprudence of whether jury instructions on eyewitness identification must be given in the Commonwealth of Massachusetts. As detailed above, this Court has repeatedly recognized (a) the inherent problems associated with eyewitness identification and how those problems pose significant risks of convicting the innocent; and (b) that the scientific research on the factors influencing eyewitness identification is not obvious and indeed can be counterintuitive to juries. As a result, this Court has required that an eyewitness instruction be given when requested in order to "provide the jury with the guidance they need to capably evaluate the accuracy of an eyewitness identification." *Gomes,* 470 Mass. at 365.

Yet the question that has gone unanswered in the jurisprudence is as follows: given the recognition that the instruction is vitally important and that juries are not adequately instructed without it, why does the Court tolerate trials in which a jury is not properly instructed simply because the defense counsel chooses not to (or, more likely, fails to) request the instruction? In the face of the repeated recognition

by this Court that an eyewitness instruction is necessary to provide a jury with important guidance on how to evaluate eyewitness testimony, it is difficult to justify a failure to give such instruction, request or not.[5]

A jury simply is not properly instructed absent the eyewitness identification instruction, and we submit that whatever interests are advanced by requiring a request are far outweighed by the interests of finding the truth and conducting fair trials. Indeed, the other jurisdiction to rigorously examine the scientific research on eyewitness identification (New Jersey) requires that the instruction be given in every case in which identification is at issue. Moreover, this Court requires *sua sponte* instructions in many contexts when

[5] It is, of course, impossible to foresee every factual potentiality, and conceivably there could be a circumstance in which a defense counsel might have some legitimate ground to argue that one or more of the portions of the identification instructions would be prejudicial under the facts of a particular case. In that case, at least the grounds would be explicitly stated on the record and the trial court could weigh the articulated prejudice against the interests of a fully informed jury. We submit that it will be a rare case indeed in which the instructions will truly be unfairly prejudicial to a defendant, and providing the instruction in every case should, in any event, be the default position.

such instructions are vital to a fair trial. At this point, the lessons of the research and jurisprudence are plain that the eyewitness identification instruction should be in that category.

1. Whatever Interests Might Be Advanced By Requiring A Request By The Defense Are Outweighed By The Interests Of Truth Finding And Fair Trials.

As discussed above, the law is already clear that when eyewitness identification is at issue, an eyewitness instruction must be given if requested by the defense. Thus, the only time that the instruction will not be given is when the defense tactically chooses not to request the instruction (or incompetently fails to request it). We submit that whatever adversarial process interests are advanced by allowing a jury to be inadequately instructed for reasons of trial tactics (or incompetence) are far outweighed by the interests of truth finding and fair trials that are advanced by mandating the instruction in every case in which it is applicable.

Even assuming *arguendo* that a defense counsel's failure to request an eyewitness instruction charge could ever reasonably be explained by a tactical decision — and it is debatable whether a defendant

would ever be better off without the instruction,[6] whatever interests a particular defendant might have in choosing not to request an eyewitness identification instruction, it is well-settled that the trial court has a duty to ensure that a jury is accurately and adequately instructed. A trial court

[6] The thrust of the eyewitness identification instruction (whether under *Rodriguez* and its progeny or the new model instruction under *Gomes*) is to highlight factors that tend to undercut the reliability of identification, and we submit that it will be an unlikely circumstance when the absence of a request for the instruction would truly be the result of a conscious tactical decision. In this case, both the Appellate Court in its opinion below and the Commonwealth in its brief have suggested that counsel's failure to request a charge in this case was tactical. *Navarro*, 86 Mass. App. Ct. at 985 n.2; Commonwealth Br. 49. Neither the Commonwealth nor the appellate panel offer any record support for the proposition that the failure to request the instruction here was a conscious, tactical decision, and the speculation as to why defense counsel *might have* decided not to seek the instruction is just that, speculation. Although we generally leave issues relating to claims of ineffective assistance of counsel to defendant's appellate counsel, on the facts of this case we submit that trial counsel's failure to request the full *Rodriguez* instruction was objectively unreasonable under the circumstances. This is particularly true given the inherent limitations in the identifications provided by the two victim witnesses who identified the defendant notwithstanding the fact that the perpetrator's face was substantially obscured during the crime and the difference in the expressed certainty of one of the witnesses from the initial identification to that expressed at the trial. Both of those issues would have been discussed by the trial court had the full *Rodriguez* instruction been provided.

should not allow a jury to make guilt or innocence decisions based on misapprehensions about eyewitness identifications any more than it would allow the jury to render its verdict based on misapprehensions about the elements of the crime, applicable defenses, the burden of proof, or any of the other areas in which courts are required (as discussed further below) to give instructions *sua sponte*.

The weighing of interests is even starker in cases in which the absence of an instruction results from the inattention or incompetence of a defendant's trial counsel.[7] Although we put great faith in the adversarial process as a society, there are Constitutional limits: trial courts have explicit obligations to ensure a fair trial for both sides, including to ensure that juries are properly and adequately charged;[8] and there are Constitutionally

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[7] Because the vast majority of people have little or no knowledge of the factors affecting the accuracy of eyewitness identifications, a defendant is wholly dependent on his or her counsel to know about and make a request for the eyewitness identification instruction. Moreover, unlike many areas of a trial defense, the process of litigating instructions is highly technical and not likely to be obvious to a defendant. Thus, failures on the part of counsel will not be apparent to a defendant at the time of trial.

[8] As ably stated long ago by this Court: the trial court has both the power and the "duty of so

significant minimums on the effectiveness of defense counsel. Both of those Constitutional principles are advanced by mandating, in every case in which eyewitness identification is at issue, that the instruction be given.[9]

In sum, the lessons of decades' worth of scientific research and of the groundbreaking jurisprudence of this Court demonstrate that eyewitness identification is just too important to leave to the vagaries of whether defense counsel is competent enough to know of the instruction and diligent enough to make the request during the heat of a trial. Though defendants can make appellate and collateral arguments based on the unpreserved error of the trial court's failure to give the instruction and/or based on a claim of ineffective assistance based upon a counsel's failure to request the

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enlightening the intelligence and directing the attention of the jury that notwithstanding disparity in skill, ingenuity, and efficiency with which the various issues are presented, justice may be even and incline one way or the other only according to the weight of credible evidence." *Plummer v. Boston Elevated Ry. Co.*, 198 Mass. 499, 515 (1908).

[9] This rule poses the added benefits of ensuring consistency between trials for defendants and educating all trial participants as to these counterintuitive factors, counselors and judges alike.

instruction,[10] it is much better for defendants, for the judicial economy of appellate courts, and for the overall fairness of the system for the jury to be properly and adequately instructed in every case.[11]

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[10] Although the Appeals Court's decision seems to suggest that it can never be error for a trial court to fail to give an eyewitness identification instruction absent a request, *Commonwealth v. Navarro*, 86 Mass. App. Ct. at 985, that view is not consistent with the law. A court's failure to give an instruction that is called for by the facts of a particular case, notwithstanding the absence of a request, is reviewed as unpreserved error – that is, on the basis of whether there is a substantial risk of a miscarriage of justice. *See Commonwealth v. White*, 452 Mass. 133, 139 (2008) (failure to give *Pressley* instruction reviewed as unpreserved error despite no request by counsel); *Commonwealth v. McMaster,* 21 Mass. App. Ct. 722, 726–27 (1986) (court's failure to give unrequested portion of *Rodriguez* instruction reviewed for substantial risk of a miscarriage of justice). In any event, whether the failure to instruct is analyzed as unpreserved error by the trial court or as ineffective assistance of counsel, the standard is the same. *See Commonwealth v. Azar*, 435 Mass. 675, 686–87 (2002) ("[W]hether we view the unpreserved claim of error in the malice instructions directly, utilizing the substantial miscarriage of justice standard, or indirectly, by focusing on counsel's ineffectiveness in failing to object to the error, our approach is essentially the same . . . ."); Commonwealth *v. Livington*, 70 Mass. App. Ct. 745, 750–51 (2007) (same) (reversing conviction based on court's failure to give and counsel's failure to require necessary instruction).

[11] It is worth noting that the most recent authority in Massachusetts already seems to contemplate that the instruction will be given in every case, irrespective of whether it is requested. In *Gomes*, for example, this Court noted that "[t]his provisional instruction should be given, where appropriate, in trials that commence after issuance of this opinion until a model

When properly instructed, the jury will be adequately equipped to serve its proper role as finder of fact in the first instance, rather than relying upon appellate courts to make after-the-fact judgments about a risk of a miscarriage of justice based on a cold record.

2. The Other State That Has Rigorously Examined The Importance Of Eyewitness Identification, New Jersey, Requires That An Instruction Be Given *Sua Sponte* Whenever Identification Is At Issue.

We submit that it is significant that the other jurisdiction that has most rigorously examined the scientific research on eyewitness identification — New Jersey — requires that an eyewitness identification instruction be given in every case irrespective of whether requested by the defense. We submit that this

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instruction is issued." 470 Mass. at 354. Similarly, the Study Group's proposed preliminary instructions are expressly intended "[t]o be given before opening statements in all cases in which there is an eyewitness identification." Supreme Judicial Court Study at 117. Similarly, this Court held in *Commonwealth v. Bastaldo,* 472 Mass. 16 (2015) that the cross-race portion of the instruction is required if applicable (*i.e.,* unless parties agree that it is not applicable): "In criminal trials that commence after the issuance of this opinion, a cross-racial instruction should always be included when giving the model eyewitness identification instruction, unless the parties agree that there was no cross-racial identification." 472 Mass. at 18.

is the better rule and this example should be followed.

Recognizing that eyewitness misidentification is the leading cause of wrongful convictions across the United States, the New Jersey Supreme Court in *State v. Henderson* undertook an extensive examination of the current state of scientific research regarding eyewitness identification, including hearings presided over by a Special Master. 208 N.J. 208, 218 (2011). That court concluded that New Jersey's standard for assessing eyewitness identification evidence did not meet its goals and "overstate[d] the jury's inherent ability to evaluate evidence offered by eyewitness-es. . . ." *Id.* In so holding, the court pointed out that "[a]t stake is the very integrity of the criminal justice system and the courts' ability to conduct fair trials." *Id.* at 219.

Based on the research, the New Jersey Supreme Court found that: "first, [a] revised framework [was necessary where the judge would explore and weigh all] system and estimator variables . . . at pretrial hearings[,] when there is some actual evidence of suggestiveness; and second, courts should develop and use enhanced jury charges to help jurors evaluate

eyewitness identification evidence." *Id.* at 288. That court found that it was crucial that "enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case." *Id.* at 296. In emphasizing the need for adequate jury instructions, the New Jersey court specifically noted that jurors "do not intuitively understand all of the relevant scientific findings," *id.* at 274, and that jury instructions must help jurors "understand and evaluate the effects that various factors have on memory." *Id.* at 288.

Recognizing that "accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial," New Jersey required an identification charge be given *sua sponte* even prior to *Henderson*. *State v. Manzanal*, 2012 WL 1672895, at *5 (N.J. Super. Ct. App. Div. May 15, 2012) (citing *State v. Cotto*, 182 N.J. 316, 325 (2005)) (internal quotations omitted). In fact, New Jersey courts have repeatedly acknowledged that these instructions relate to the trial judge's duty to properly inform the jury on the fundamental principles

that control the case.[12] *See id.* ("A mandatory duty exists on the part of the trial judge to instruct the jury as to the fundamental principles of law which control the case." (quoting *State v. Butler*, 27 N.J. 560, 595 (1958)). As stated in *Henderson*, "[juries] must be informed by sound evidence on memory and eyewitness identification, which is generally accepted by the relevant scientific community. Only then can courts fulfill their obligation both to defendants and the public." *Id.* at 302-03.

3. Requiring Instructions To Be Given *Sua Sponte* Is Not Unique, As Massachusetts Courts Require Instructions In Other Contexts Where The Instruction Is Vital To Achieving a Fair Trial.

Massachusetts already requires trial judges to instruct the jury *sua sponte* in a variety of contexts. Courts must, for example, instruct juries on the elements of the offense, reasonable doubt, the definition of evidence, specific intent, prima facie evidence, absent witness, admission by silence, confessions and admissions, first complaint, and self-

[12] New Jersey courts have likewise recognized that failure to instruct the jury on identification is likely reversible error when identification is a legitimate issue at trial. *State v. Williams*, 2014 WL 1239362, at * 3 (N.J. Super. Ct. App. Div. Mar. 27, 2014).

defense, among other areas. *See* Model Criminal Jury Instructions for Use in the District Court ("Model Instructions"), Required Jury Instructions § 0005 (2009).

Indeed, courts have repeatedly recognized the necessity of an instruction, even absent a request, in certain contexts in order to preserve the Commonwealth's interest in preventing injustice to the defendant. This principle is perhaps most developed in the context of the voluntariness of confessions. In *Commonwealth v. Harris*, for example, this Court recognized that "the interest of the State in preventing a substantial risk of injustice" outweighed any interest in preventing the hindsight questioning of conscious strategic decisions. 371 Mass. 462, 472 (1976).

Consequently, Massachusetts courts consider it error for a judge to fail to deliver an instruction on voluntariness when it is an issue at trial. In *Commonwealth v. Vick*, for example, this Court held that there was sufficient evidence of the defendant's insanity at the time of inculpatory statements to raise the issue of voluntariness such that the trial court was required to deliver the applicable

instruction *sua sponte*. 381 Mass. 43, 45-46 (1980). Significantly, such instructions are not a matter of discretion or left to a defense counsel to request but are required based upon the judge's duty to properly instruct the jury. *See Commonwealth v. Collins*, 11 Mass. App. Ct. 126, 134 (1981) (emphasizing the trial judge's "obligation under Massachusetts law" to instruct the jury "even in the absence of a request" and finding reversible error where judge failed to do so); *see also* Model Instructions, Confessions and Admissions (Human Practice) § 3.560 (2009) ("If voluntariness is a live issue at trial, the judge must sua sponte conduct a preliminary hearing and then submit the question to the jury, even without a request from the defendant.").

It is well established that trial courts must also give *sua sponte* instructions, when applicable, on self-defense in order to ensure that a jury is properly able to weigh the evidence at issue. *See Commonwealth v. Harrington*, 379 Mass. 446, 450 (1980). Courts have repeatedly found that self-defense instructions were required, even absent a request by defense counsel, where the evidence sufficiently raised the issue. *See id.* (finding defendant was

entitled to *sua sponte* self-defense instruction); *Commonwealth v. Galvin*, 56 Mass. App. Ct. 698, 701 (2002) ("Because there was an evidentiary basis for a self-defense instruction, the judge should have instructed the jury on self-defense, *sua sponte,* even absent a request by defense counsel."); *Commonwealth v. Kivlehan*, 57 Mass. App. Ct. 793, 796 (2003) (trial court should have instructed on defense of another even in the absence of a request from the defendant, where the facts of a case permit).

Moreover, confessions and self-defense do not represent the only areas in which a judge might be required to deliver a *sua sponte* instruction. Limiting instructions on fresh complaint evidence, for example, is required in Massachusetts in order to guide the jury in weighing such testimony. *See Commonwealth v. Goss*, 41 Mass. App. Ct. 929 (1996) (emphasizing that the "toxicity" of fresh complaint testimony can only be removed by the instructions); *Commonwealth v. Almon*, 30 Mass. App. Ct. 721, 724 (1991) (finding error where trial court failed to give fresh complaint instruction). Numerous decisions have also found prejudice where the judge failed to charge the jury on a particular issue, even absent a request.

See, e.g., *Commonwealth v. Gonzalez*, 469 Mass. 410, 421-24 (2014) (holding failure to instruct on intoxication in relation to extreme atrocity or cruelty warranted new trial); *Commonwealth v. Harris*, 409 Mass. 461, 469-71 (1991) (holding that trial courts should give contemporaneous curative instructions and supplemental final instructions *sua sponte* where the actions of a victim advocate threaten to prejudice the defendant); *Commonwealth v. Livington*, 70 Mass. App. Ct. 745, 750-51 (2007) (holding that judge should have instructed jury as to defense of necessity *sua sponte* where the defense "was fairly raised by the evidence"); *Commonwealth v. Mills*, 47 Mass. App. Ct. 500, 506 (1999) (error to fail to instruct on prior bad acts evidence, even without defense request).

In light of how important eyewitness identification evidence is to the determination of a defendant's guilt and innocence and the recognized fact that juries simply will not be adequately instructed on the factors that affect accuracy of eyewitness identifications without the instruction, the eyewitness identification instruction should explicitly be placed in the category of instructions

that must be given in every case in which identification is at issue.

III. CONCLUSION

For the reasons set forth herein, *Amici Curiae*, The Innocence Network and The Innocence Project, Inc., respectfully submit that this Court should require that all relevant portions of the model eyewitness identification jury instruction be charged to the jury in every case in which eyewitness identification is at

issue, irrespective of whether such instruction is requested by the defense.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under Massachusetts Rule of Appellate Procedure 16(k), I, Matt Nickell, hereby certify that the preceding brief complies with the rules of court that pertain to the filing of briefs.

Matt Nickell

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CERTIFICATE OF SERVICE

I, Jean Ripley, hereby certify that on September 19, 2015, I caused two true copies of the foregoing to be served by first-class mail on the following attorneys:

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I also certify that on September 19, 2015, I caused an original and seventeen true copies of the foregoing to be served to the Clerk for the Supreme Judicial Court by Federal Express overnight delivery service by depositing a true copy thereof, securely enclosed in a properly addresses wrapper, into the custody of Federal Express, an overnight delivery service, for overnight delivery, prior to the latest time designated by Federal Express for overnight delivery.

Signed under the pains and penalties of perjury this 19th day of September, 2015.

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