

WHERE SCIENCE CONFLICTS WITH COMMON SENSE:
EYEWITNESS IDENTIFICATION REFORM IN
MASSACHUSETTS

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I. INTRODUCTION

Consider an eyewitness who testifies: “I could never forget the man who pointed the gun at me. It was him, sitting right in front of me. I am one hundred percent certain.” Common sense would strongly credit the testimony—the victim observed the assailant during a traumatic, seemingly unforgettable event and expressed no doubt about that person’s identity. However, decades of scientific research on memory and perception recommend greater caution because the factors affecting the accuracy of an eyewitness identification are often unfamiliar to jurors and are counterintuitive.¹ For instance, high stress and the visible presence of a weapon during the commission of the crime may decrease the likelihood of an accurate identification.² If the witness is of a different race than the person identified, the risk of error increases.³ A witness’s confidence in an eyewitness identification also is less

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¹ See *Commonwealth v. Gomes*, 22 N.E.3d 897, 909 (Mass. 2015) (citing *State v. Guilbert*, 49 A.3d 705, 720 (Conn. 2012)); *State v. Henderson*, 27 A.3d 872, 910 (N.J. 2011); SUPREME JUDICIAL COURT STUDY GROUP ON EYEWITNESS EVIDENCE, REPORT AND RECOMMENDATIONS TO THE JUSTICES 2 (2013) [hereinafter STUDY GROUP REPORT] (“[T]here is resounding agreement that eyewitness practices and procedures should reflect the findings of science, and that all involved in the criminal justice system, including jurors, should be educated about the often counterintuitive ways in which memory works.”).

² See Model Jury Instructions on Eyewitness Identification, 473 Mass. 1051, 1054 nn.f & g (2015) [hereinafter Model Jury Instructions].

³ See *Commonwealth v. Bastaldo*, 32 N.E.3d 873, 880–81 (Mass. 2015) (“The existence of the ‘cross-race effect’ (CRE)—that people are generally less accurate at identifying members of other races than they are at identifying members of their own race—has reached a near consensus in the relevant scientific community and has been recognized by courts and scholars alike.”); Model Jury Instructions, *supra* note 2, at 1055 n.i.

correlated with accuracy than most would expect.⁴ And had the identification first taken place in the courtroom during trial, the highly suggestive courtroom environment would further impair the reliability of the identification.⁵

The Supreme Judicial Court of Massachusetts has long recognized the fallibility of eyewitness identification evidence as “the primary cause of erroneous convictions,” and has relied upon research demonstrating its infirmities.⁶ Yet, until recently, Massachusetts judges generally did not instruct the jury to consider a variety of factors recognized in scientific research that affects the accuracy of eyewitness identifications.⁷ In addition, first-time in-court eyewitness identifications were not subjected to the same level of scrutiny as their out-of-court counterparts: single-person showups.

In 2011, acknowledging eyewitness identification evidence as “the greatest source of wrongful convictions but also an invaluable law enforcement tool in obtaining accurate convictions,” the court convened the Supreme Judicial Court Study Group on Eyewitness Identification (“Study Group”).⁸ The purpose of the Study Group was to “consider how [Massachusetts] can best deter unnecessarily suggestive procedures and whether existing model jury instructions provide adequate guidance to juries in evaluating eyewitness testimony.”⁹ The Study Group was comprised of law school professors and attorneys, as well as representatives from the four

⁴ See Model Jury Instructions, *supra* note 2, at 1055 nn.k & l; *Gomes*, 22 N.E.3d at 911–12.

⁵ See *Commonwealth v. Crayton*, 21 N.E.3d 157, 166 (Mass. 2014) (“[During an in-court identification,] even a witness who had never seen the defendant [can] infer that the defendant is sitting with counsel at the defense table, and can easily infer who is the defendant and who is the attorney.”).

⁶ *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1261 (Mass. 1995). See also *Commonwealth v. Walker*, 953 N.E.2d 195, 206–07 (Mass. 2011) (concluding that empirical research did not clearly demonstrate that the sequential display of photographic arrays was superior to simultaneous display); *Commonwealth v. Martin*, 850 N.E.2d 555, 570 (Mass. 2006) (Cordy, J., dissenting) (“There is no longer any doubt that mistaken eyewitness identification is the primary cause of erroneous convictions, outstripping all other causes combined, and that suggestive identification procedures are the primary cause of mistaken identifications.”). Since 1989, the National Registry of Exonerations has catalogued 1,769 exonerations of convicted persons, 556 of whom were misidentified by an eyewitness. See *Detailed View*, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Nov. 4, 2016). In Massachusetts, twenty-one of forty-two exonerations involved eyewitness identification evidence. See *id.*

⁷ See *Gomes*, 22 N.E.3d at 909 (“[The existing model jury instruction] identifies factors a jury may consider in applying their common sense”); *Commonwealth v. Franklin*, 992 N.E.2d 319, 331 n.24 (Mass. 2013) (restating the then-existing model jury instruction on eyewitness identification).

⁸ *Walker*, 953 N.E.2d at 208 n.16.

⁹ *Id.*

Massachusetts trial court departments with criminal or juvenile jurisdiction, the Attorney General's office, a District Attorney's office, the public defender's office (also known as the "Committee for Public Counsel Services"), the Office of Inspector General, and the Massachusetts Chiefs of Police Association ("Chiefs of Police").¹⁰ In 2013, the Study Group published a 162-page comprehensive review of the state of scientific research on eyewitness identification evidence and its recommendations on best practices for police departments, enhanced jury instructions, pretrial hearings, and continued education for judges and practitioners ("Study Group Report").¹¹ The Study Group Report provided the foundation for the Supreme Judicial Court to reexamine the admissibility and the evaluation of eyewitness identification evidence in Massachusetts.

During my first year as Chief Justice, the court overhauled its treatment of first-time in-court positive eyewitness identifications in a pair of cases, *Commonwealth v. Crayton*¹² and *Commonwealth v. Collins*,¹³ and crafted a provisional model eyewitness identification jury instruction in *Commonwealth v. Gomes*,¹⁴ which was subsequently revised after a public comment period.¹⁵ Meanwhile, individual police departments in Massachusetts have adopted new police protocols for eyewitness identification procedures, and legislation is pending that would establish uniform protocols.¹⁶ Eyewitness identification reform has progressed both inside and outside of the courts through a shared commitment to learning from reliable scientific research.

¹⁰ See STUDY GROUP REPORT, *supra* note 1, at i.

¹¹ See *id.* at ii.

¹² *Commonwealth v. Crayton*, 21 N.E.3d 157, 252 (Mass. 2014).

¹³ *Commonwealth v. Collins*, 21 N.E.3d 528, 536–37 (Mass. 2014).

¹⁴ See *Commonwealth v. Gomes*, 22 N.E.3d 897, 916–17 (Mass. 2015).

¹⁵ See Model Jury Instructions, *supra* note 2, at 1051, 1052; *Notice Inviting Comment on Provisional Jury Instruction Regarding Eyewitness Evidence*, MASS. COURT SYS., <http://www.mass.gov/courts/case-legal-res/rules-of-court/rule-changes-invitations-comment/invitation-to-comment-provisional-jury-instructions-eyewitness-identification.html> (last visited Nov. 4, 2016) ("The Supreme Judicial Court Rules Committee solicits comments on the provisional jury instruction regarding eyewitness identification evidence . . ."); *Supreme Judicial Court Announces New Jury Instructions on Eyewitness Identification*, MASS COURT SYS., <http://www.mass.gov/courts/court-info/sjc/attorneys-bar-applicants/sjcanounces-new-jury-instructions-on-eyewitness-identification.html> (last visited Nov. 4, 2016) ("The Justices of the Supreme Judicial Court today announce that they have approved new jury instructions on eyewitness identification. The new Model Instruction replaces the provisional instruction . . .").

¹⁶ See S. 800, 190th Gen. Court, Reg. Sess. (Mass. 2016). See also *Commonwealth v. Thomas*, 476 Mass. 451, 459–60 (2017) (noting that failure by police to follow certain eyewitness identification procedure protocol, which had been recommended by the Court in a prior decision, renders the identification procedure "unnecessarily suggestive").

II. *CRAYTON* AND *COLLINS*: FIRST-TIME IN-COURT (POSITIVE) EYEWITNESS IDENTIFICATIONS

Showup identifications, in which the police present a sole individual to an eyewitness rather than as part of a lineup or photographic array, are suggestive and “generally disfavored”¹⁷ because the witness reasonably may assume that the police have identified the individual as a suspect.¹⁸ In Massachusetts, police officers need “good reason” to conduct a showup in order for the identification to be admissible, which generally means that the showup must be conducted within a few hours of the eyewitness’s observation of the alleged offender.¹⁹ Yet, first-time in-court identifications, where the eyewitness identifies the defendant sitting at counsel’s table, have been admitted as a matter of course.²⁰ In *Commonwealth v. Crayton*, the court addressed the inconsistent treatment of these two similar procedures, and recognized that first-time in-court identifications are essentially showups that are conducted inside the courtroom long after the alleged crime.²¹ The court further developed its approach to in-court identifications in *Commonwealth v. Collins*, where an in-court identification followed a non-suggestive out-of-court identification in which the witness made “something less than an unequivocal

¹⁷ See *Crayton*, 21 N.E.3d at 165 (quoting *Commonwealth v. Martin*, 850 N.E.2d 555, 560 (Mass. 2006)).

¹⁸ *State v. Lawson*, 291 P.3d 673, 686 (Or. 2012). See *Crayton*, 21 N.E.3d at 166 n.13 (“[B]ecause showups involve a lone suspect, every witness who guesses will positively identify the suspect, and . . . [f]or that reason, misidentifications that occur in showups are less likely to be discovered as mistakes.” (quoting STUDY GROUP REPORT, *supra* note 1, at 76)).

¹⁹ See *Crayton*, 21 N.E.3d at 165 (“[T]here is generally ‘good reason’ where the showup identification occurs within a few hours of the crime, because it is important to learn whether the police have captured the perpetrator or whether the perpetrator is still at large, and because a prompt identification is more likely to be accurate when the witness’s recollection of the event is still fresh.” (quoting *Martin*, 850 N.E.2d at 560)); *Commonwealth v. Austin*, 657 N.E.2d 458, 461 (Mass. 1995) (“Whether an identification procedure is ‘unnecessarily’ or ‘impermissibly’ suggestive . . . involves inquiry whether good reason exists for the police to use a one-on-one identification procedure” (quoting *Commonwealth v. Thornley*, 546 N.E.2d 350, 352 (Mass. 1989) (citation omitted))).

²⁰ In-court identifications had been excluded where an impermissibly suggestive out-of-court identification procedure tainted the subsequent in-court identification. However, in the absence of any out-of-court confrontation, and thus no potential source of any taint, the in-court identification was generally admitted without scrutiny. See *Commonwealth v. Bastaldo*, 32 N.E.3d 873, 886 (Mass. 2015) (quoting *Commonwealth v. Brown*, 884 N.E.2d 488, 494 (Mass. 2008)); *Crayton*, 21 N.E.3d at 167 (“[W]here there had been no out-of-court identification to taint the in-court identification, the judge’s admission of the in-court identification conformed to our case law.”).

²¹ See *Crayton*, 21 N.E.3d at 166 (citing *Commonwealth v. Carr*, 986 N.E.3d 380, 400 (Mass. 2013)).

positive identification.”²² In *Collins*, the eyewitness viewed a photographic array but did not positively identify the defendant; she stated that she could not decide between two photographs, one of which depicted the defendant.²³

Several federal and state courts have confronted first-time in-court identifications but few have found them to be impermissibly suggestive.²⁴ In *Crayton*, the court examined three differences between an in-court identification and a showup that arguably could justify treating first-time in-court identifications as more reliable than out-of-court showups: (1) the identification procedure takes place in front of the judge and the jury; (2) the eyewitness is subject to immediate cross-examination; and (3) the defendant can request a less suggestive procedure, such as an in-court lineup.²⁵ None of these differences, though, persuaded the court that first-time in-court identifications are more reliable than out-of-court showups.

First, the court recognized the critical distinction between assessing confidence versus assessing accuracy. The opportunity for the jury to view the identification procedure in court may improve the jury’s ability to assess how confident the witness is, perhaps by evaluating the witness’s “facial expression, voice inflection, and body language.”²⁶ However, “[s]ocial science research has shown that a witness’s level of confidence in an identification is not a reliable predictor of the accuracy of the identification”²⁷ This is especially true “where the level of confidence is inflated by its suggestiveness.”²⁸ There are few identification procedures more suggestive than asking a witness whether the offender is in the courtroom, when the witness knows that the person sitting at defense counsel’s table is the person charged with the crime. Consequently, an in-court identification can generally inflate a witness’s confidence in the identification, making it more difficult for the jury to assess the accuracy of the identification.

²² *Commonwealth v. Collins*, 21 N.E.3d 528, 534 (Mass. 2014).

²³ *See id.* at 532.

²⁴ *See, e.g., Crayton*, 21 N.E.3d at 172 n.21 (“Only a few courts have concluded that a first-time in-court identification was impermissibly suggestive, but even in these cases, the defendant’s conviction either was not reversed, or was reversed only because of the cumulative effect of other trial errors.” (citing *United States v. Archibald*, 734 F.2d 938, 941–43 (2d Cir. 1984))).

²⁵ *See Crayton*, 21 N.E.3d at 167–69.

²⁶ *Id.* at 168 (quoting *State v. Hickman*, 330 P.3d 551, 564 (Or. 2014)).

²⁷ *Crayton*, 21 N.E.3d at 168.

²⁸ *Id.*

Second, the court was not convinced that, given the “unusually powerful” effect that the confidence of an eyewitness can have on the jury, the immediacy of cross-examination could nullify the suggestiveness.²⁹ A showup identification conducted on the eve of trial *outside* the courtroom, long after the alleged crime occurred, would not be admissible if defense counsel attended the identification procedure and cross-examined the witness.³⁰ Why should a court admit such an identification conducted *inside* the courtroom? The immediacy might even decrease the effectiveness of cross-examination because “defense counsel [would have] little opportunity to prepare . . . [.]”³¹ thus not nullifying the suggestiveness.

Third, the court rejected the premise that the defendant should bear the burden of seeking a less suggestive in-court identification procedure because “[p]lacing this burden on the defendant [would] suggest[] that the Commonwealth is entitled to an unnecessarily suggestive in-court identification unless the defendant proposes a less suggestive alternative”³²

Based on “[c]ommon law principles of fairness,”³³ the court established a new rule that, where an eyewitness to a crime has not been asked to identify the offender until the eyewitness testifies at trial, the court shall deem it an “in-court showup, and shall admit it in evidence only where there is ‘good reason’ for its admission.”³⁴ “Although . . . the defendant [generally has the burden] to move to

²⁹ *Id.* at 169 (quoting *Perry v. New Hampshire*, 132 S. Ct. 716, 737 (2012) (Sotomayor, J., dissenting)).

³⁰ *Crayton*, 21 N.E.3d at 169 (“[W]e have previously recognized how difficult it is for a defense attorney to convince a jury that an eyewitness’s confident identification might be attributable to the suggestive influence of the circumstances surrounding the identification.” (citing *Commonwealth v. Jones*, 666 N.E.2d 994, 1001 (Mass. 1996))).

³¹ *Crayton*, 21 N.E.3d at 169.

³² *Id.*

³³ *Id.* 169 n.16 (quoting *Commonwealth v. Jones*, 666 N.E.2d 994, 1001 (Mass. 1996)) (“We do not address whether State constitutional principles would also require ‘good reason’ before in-court identifications are admitted in evidence. Nor do we address the admissibility of in-court identifications in civil cases.”); *see also Crayton*, 21 N.E.3d at 165 (“[W]here an unreliable identification arises from ‘especially suggestive circumstances’ other than an unnecessarily suggestive identification procedure conducted by the police, we have declared that ‘[c]ommon law principles of fairness’ dictate that the identification should not be admitted.” (quoting *Jones*, 666 N.E.2d at 1001)).

³⁴ *Crayton*, 21 N.E.3d at 169. The court does “not address whether this new rule should apply to in-court identifications of the defendant by eyewitnesses who were not present during the commission of the crime but who may have observed the defendant before or after the commission of the crime, such as where an eyewitness identifies the defendant as the person he or she saw inside a store near the crime scene a short time before or after the commission of the crime.” *Id.* at 170 n.17.

suppress an identification,” the court placed the burden on the Commonwealth “to move in limine to admit the [first-time] in-court identification” because it made little sense to require the defendant to file the motion when only the prosecutor knew whether an in-court identification would be elicited.³⁵ The burden remained on the defendant to show that “the in-court identification would [have been] unnecessarily suggestive and that there [was] not ‘good reason’ for it.”³⁶

The rule from *Crayton* was subsequently applied in *Collins*, “where a witness before trial [had] made something less than an unequivocal positive identification of the defendant during a nonsuggestive identification procedure”³⁷ The concern with first-time in-court identifications is that the jury is evaluating a highly suggestive procedure “without the benefit of a nonsuggestive pretrial identification procedure.”³⁸ The danger in allowing the in-court identification after a nonsuggestive but equivocal identification is that the suggestive circumstances of the courtroom may artificially inflate the eyewitness’s confidence during the in-court identification. Relying on the Study Group Report and other research, the court recognized the risk of the jury giving more weight to the suggestive in-court identification than the nonsuggestive pretrial identification.³⁹

The rules from *Crayton* and *Collins* do not deprive the jury of relevant evidence or impinge on the jury’s fact-finding duties. Rather, these rules strongly encourage the prosecutor to replace the suggestive first-time in-court identification with a non-suggestive out-of-court procedure, thereby enabling the jury to focus on the identification free of any inflated confidence arising from the courtroom environment.⁴⁰ “All that is lost by barring first-time in-court showups where there is no ‘good reason’ for such a showup is the unfair evidentiary weight of a needlessly suggestive showup identification that might be given more weight by a jury than it

³⁵ *Id.* at 170–71.

³⁶ *Id.* at 171 (citing *Commonwealth v. Martin*, 850 N.E.2d 555, 560–61, 563 n.6 (Mass. 2006)). “[T]here may be ‘good reason’ for the first identification procedure to be an in-court showup where the eyewitness was familiar with the defendant before the commission of the crime, such as where a victim testifies to a crime of domestic violence.” *Crayton*, 21 N.E.3d at 170. “‘Good reason’ might also exist where the witness is an arresting officer who was also an eyewitness to the commission of the crime, and the identification merely confirms that the defendant is the person who was arrested for the charged crime.” *Id.*

³⁷ *Commonwealth v. Collins*, 21 N.E.3d 528, 536 (Mass. 2014).

³⁸ *Id.* at 534.

³⁹ *See id.* at 534–35.

⁴⁰ *See Crayton*, 21 N.E.3d at 171.

deserves.”⁴¹ Thus, the court in *Crayton* and *Collins* aligned the criminal procedural rules with the scientific research without reducing the availability of non-suggestive eyewitness identification evidence.

III. GOMES: A “PROVISIONAL” INSTRUCTION OF “NEAR CONSENSUS” PRINCIPLES

On the same day that the court heard oral arguments in *Crayton* and *Collins*, it also heard *Commonwealth v. Gomes*, in which the defendant at trial had requested that the judge give the model jury instruction that had taken effect in New Jersey not long before the defendant’s trial.⁴² Unlike the traditional Massachusetts jury instruction (i.e., the “*Rodriguez* Instruction”),⁴³ the New Jersey instruction had been overhauled to reflect the substantial breadth of scientific research on eyewitness identification as a result of the seminal case of the Supreme Court of New Jersey, *State v. Henderson*.⁴⁴

A preliminary question for the court was whether any change at all was warranted. The *Rodriguez* Instruction derives from the model set forth in *United States v. Telfaire*,⁴⁵ which serves as a model for many state and federal model instructions.⁴⁶ It provides a limited set of seemingly common sense factors for the jury to consider, and offers little to no guidance as to how to apply them.⁴⁷ The research shows, however, “that common sense is not enough[.]” many of the critical factors bearing on reliability are unfamiliar to jurors and are counterintuitive.⁴⁸ For instance, an eyewitness who

⁴¹ *Id.* (citing *Commonwealth v. Walker*, 953 N.E.2d 195, 208, n.16 (Mass. 2011)).

⁴² *See Commonwealth v. Gomes*, 22 N.E.3d 897, 902–03 (Mass. 2015).

⁴³ *See Commonwealth v. Rodriguez*, 391 N.E.2d 889, app. at 897–98 (Mass. 1979).

⁴⁴ *Gomes*, 22 N.E.3d at 902 n.10 (“In *State v. Henderson* . . . the New Jersey Supreme Court, having earlier remanded the case to a special master who considered more than 200 published scientific studies on human memory and eyewitness identification during a ten-day hearing, rendered a landmark decision regarding eyewitness identification where it concluded that ‘the court system should develop enhanced jury charges on eyewitness identification for trial judges to use.’” (quoting *State v. Henderson*, 27 A.3d 872, 878 (N.J. 2011) (citation omitted))).

⁴⁵ *United States v. Telfaire*, 469 F.2d 552, 558–59 (D.C. Cir. 1972).

⁴⁶ *See, e.g.*, MICH. MODEL CRIM. JURY INSTRUCTIONS § M Crim JI 7.8 (2016); N.H. CRIM. JURY INSTRUCTIONS § 3.06 (1985); TENN. PATTERN JURY INSTRUCTIONS—CRIM. § 42.05 (2015); W. VA. CRIM. JURY INSTRUCTIONS § 5.05 (6th ed. 2003); MODEL CRIM. JURY INSTRUCTIONS § 4.15 (3d Cir. 2015); SIXTH CIR. CRIM. PATTERN JURY INSTRUCTIONS § 7.11 (2015). *See Perry v. New Hampshire*, 132 S. Ct. 716, 728 n.7 (2012) (listing references to various federal and state court eyewitness jury instructions).

⁴⁷ *See Gomes*, 22 N.E.3d at 905–08.

⁴⁸ *Id.* at 909.

sees the defendant in multiple identification procedures may confuse the memory of the defendant at the prior procedure with the memory of the alleged offender at the crime scene.⁴⁹ Positive feedback from the officer conducting the identification procedure can inflate an eyewitness's confidence and distort the eyewitness's memory of the event. *Telfaire* and *Rodriguez* ignore these factors, and, as to other factors, sometimes provide instructions that conflict with reliable scientific principles.⁵⁰

After recognizing the need to update the model jury instruction, the court crafted jury instructions that were "intended to provide the jury with the guidance they need to capably evaluate the accuracy of an eyewitness identification."⁵¹ In doing so, the court sought to identify among the scientific research those principles that had been adopted by "a near consensus in the relevant scientific community."⁵² This "near consensus" standard is more demanding than the former test for the admissibility of expert testimony, set forth in *Frye v. United States*,⁵³ which considers "whether the community of scientists involved *generally accepts* the theory or process," because jurors may disregard expert testimony, but they must accept as true the judge's instructions.⁵⁴ In determining whether a principle had been adopted by "a near consensus in the relevant scientific community," the court relied on: (1) the numerous court decisions from other jurisdictions; (2) comprehensive reviews of the scientific literature; (3) meta-analyses of studies on specific issues; and (4) dozens of peer-reviewed studies.⁵⁵

The court concluded that the following five principles had been accepted by "a near consensus in the relevant scientific community":

⁴⁹ *Id.* at 926 n.27.

⁵⁰ See *Telfaire*, 469 F.2d at 558 ("You[, the jury,] may take into account both the strength of the identification, and the circumstances under which the identification was made."); *Commonwealth v. Rodriguez*, 391 N.E.2d 889, app. at 897–98 (Mass. 1979). In contrast, the court in *Commonwealth v. Santoli* removed the "strength of the identification" portion of the *Rodriguez* instruction "because it may suggest that the confidence with which a person makes an identification is a valid indicator of the accuracy of the recollection. There is doubt as to the soundness of that assumption." *Commonwealth v. Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997) (quoting *Commonwealth v. Jones*, 666 N.E.2d 994, 1001 n.9 (Mass. 1996)).

⁵¹ *Gomes*, 22 N.E.3d at 908.

⁵² *Id.* at 909.

⁵³ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

⁵⁴ *Gomes*, 22 N.E.3d at 907 (emphasis added) (citing *Commonwealth v. Langian*, 641 N.E.2d 1342, 1348 (Mass. 1994)).

⁵⁵ See *Gomes*, 22 N.E.3d at 908, 909, 916.

(1) human memory does not operate like a video recording that a person can replay to recall what happened; (2) a witness's level of confidence in an identification may not indicate its accuracy; (3) high levels of stress can reduce the likelihood of making an accurate identification; (4) information from other witnesses or outside sources can affect the reliability of an identification and inflate an eyewitness's confidence in the identification; and (5) viewing the same person in multiple identification procedures may increase the risk of misidentification.⁵⁶

Additional scientific principles that satisfied the near consensus threshold were included in the court's "provisional" model eyewitness jury instruction, which was attached as an appendix to the opinion and was to be used until public comments were submitted and an official model instruction was later issued.⁵⁷ Similar to the creation of the Study Group, in connection with the release of *Gomes*, the court established a Standing Committee on Eyewitness Identification ("Standing Committee") to provide guidance to the court on the evolving science and law of eyewitness identification.⁵⁸

During the months following the issuance of *Gomes*, comments to the provisional instruction were submitted that reformed the official model instruction that was released on November 16, 2015.⁵⁹ In contrast to the provisional instruction, the official model features a preliminary or contemporaneous instruction that judges must give upon request so that the jury may learn about the factors affecting the reliability of eyewitness testimony before eyewitness evidence has been presented and before jurors may have come to a conclusion regarding its accuracy.⁶⁰ The court also revised the model instruction to better reflect the current scientific research and to make it plainer and simpler in light of the guidance obtained from practitioners and judges that regularly grapple with these issues.⁶¹

⁵⁶ *Id.* at 903, 909; *see also* N.J. COURTS, IDENTIFICATION: IN-COURT AND OUT-OF-COURT IDENTIFICATIONS 3–6 (2012) (instructing a jury to consider the same five principles, among others).

⁵⁷ *Gomes*, 22 N.E.3d at 916–17, app. at 918–27.

⁵⁸ *See Supreme Judicial Court Announces New Standing Committee on Eyewitness Identification*, MASS. COURT SYS. (Jan. 12, 2015), <http://www.mass.gov/courts/news-pubs/sjc/2015/sjc-announces-new-standing-committee-on-eyewitness-identification.html>.

⁵⁹ *See Supreme Judicial Court Announces New Jury Instructions on Eyewitness Identification*, *supra* note 15.

⁶⁰ *See id.*

⁶¹ *See id.*

Through this iterative, collaborative process, the court set forth research-based model instructions that provided a more comprehensive set of factors for the jury to consider when analyzing eyewitness identification evidence.⁶²

IV. POLICE PROTOCOLS FOR EYEWITNESS IDENTIFICATION PROCEDURES

Reform in Massachusetts has also advanced outside of the courts, particularly with regard to police protocols governing eyewitness identification procedures.⁶³ The Study Group Report provides best practices aimed at reducing suggestion and preserving the independence of an eyewitness's recollection.⁶⁴ To begin, the Study Group suggests that every law enforcement agency should establish "a written policy on eyewitness identification" and "file a full report on every identification attempt, whether an identification is made or not."⁶⁵ Whenever possible, police should audio and/or video record each identification procedure.⁶⁶ The Study Group also recommends that, in order to reduce police suggestion prior to the identification, police should avoid leading questions, "prevent eyewitnesses from comparing their recollections[,] and "obtain a

⁶² *See id.*

⁶³ The court has expressly established or recommended some specific police protocols. *See Commonwealth v. Walker*, 953 N.E.2d 195, 208 (Mass. 2011) ("Unless there are exigent or extraordinary circumstances, the police should not show an eyewitness a photographic array . . . that contains fewer than five fillers for every suspect photograph." (citing *State v. Henderson*, 27 A.3d 872, 898 (N.J. 2011))); *Commonwealth v. Silva-Santiago*, 906 N.E.2d 299, 312 (Mass. 2009) ("What is practicable in nearly all circumstances is a protocol to be employed before a photographic array is provided to an eyewitness, making clear to the eyewitness, at a minimum, that: he will be asked to view a set of photographs; the alleged wrongdoer may or may not be in the photographs depicted in the array; it is just as important to clear a person from suspicion as to identify a person as the wrongdoer; individuals depicted in the photographs may not appear exactly as they did on the date of the incident because features such as weight, head, and facial hair are subject to change; regardless of whether an identification is made, the investigation will continue; and the procedure requires the administrator to ask the witness to state, in his or her own words, how certain he or she is of any identification.").

⁶⁴ Prior to the Study Group's formation, the Chiefs of Police met with representatives from "the Municipal Police Training Committee (MPTC), the Massachusetts District Attorneys' Association, the Boston Bar Association, the New England Innocence Project," and the Executive Office of Public Safety and Security (EOPSS) to discuss the state of eyewitness identification procedure reform. STUDY GROUP REPORT, *supra* note 1, at 103. The Chiefs of Police and the New England Innocence Project launched a project in which they collected and assessed the departmental policies on eyewitness identification of the State Police, transit police, and 250 of 351 cities and towns. *See id.*

⁶⁵ *Id.* at 86.

⁶⁶ *Id.* at 88.

detailed description of the [alleged] offender.”⁶⁷ Such protocols could help to minimize the outside influence that can affect a witness’s memory of an event.

The Study Group Report provides procedure-specific recommendations as well; showups, for instance, “should not be conducted more than two hours after the witness’s observation of the suspect.”⁶⁸ As time passes and a witness’s memory fades, the suggestive nature of a showup may outweigh the benefits of conducting an identification procedure in the field. For lineups and photographic arrays, the officer conducting the identification procedure should be unaware of who the suspect is in order to prevent the officer from inadvertently influencing the eyewitness.⁶⁹ Officers should also record a witness’s level of confidence immediately after the identification.⁷⁰ The Study Group’s research-based best practices have the potential to improve the reliability of eyewitness identification evidence before it reaches a court. In fact, police departments have not waited for legislation or court directive to reform their protocols; “[a] 2013 survey showed that about 85% of responding police departments [in Massachusetts] had modern, reform-based policies.”⁷¹ Indeed, “[a]ll Massachusetts police academies are [now] required to teach recruits research-based procedures, and training is mandated [in 2016] for every active-duty municipal police officer.”⁷² The model jury instructions refer to established policies in local or State police departments in that the jury is told to “consider whether the police, in showing the witness [a photographic array, lineup, or showup], followed protocols established or recommended by the Supreme Judicial Court or *the law enforcement agency* conducting the identification procedure that are designed to diminish the risk of suggestion,” and to evaluate an identification with “particular care” if those protocols were not followed.⁷³

⁶⁷ *Id.* at 86.

⁶⁸ *Id.* at 87.

⁶⁹ *See id.* at 88.

⁷⁰ *See* Commonwealth v. Silva-Santiago, 906 N.E.2d 299, 307 (Mass. 2009); STUDY GROUP REPORT, *supra* note 1, at 90.

⁷¹ William G. Brooks III, *That’s Him, I Think; The Role of the Police in Eyewitness Identification Reform*, HARV. L. & POL’Y REV.: NOTICE & COMMENT BLOG (Jan. 5, 2016), <http://harvardlpr.com/2016/01/05/thats-him-i-think-the-role-of-the-police-in-eyewitness-identification-reform/>.

⁷² *Id.*

⁷³ Model Jury Instructions, *supra* note 2, at 1056–57 (emphasis added).

V. CONCLUSION

The goal in reforming eyewitness identification procedural law and practice is not to get rid of eyewitness identification evidence, but to improve its reliability and assist the jury in evaluating its accuracy by implementing research-based protocols, because common sense alone is not sufficient to ensure the accurate evaluation of eyewitness evidence. As should be clear from this article, it takes a village to reach this goal: police departments committed to using proper protocols in conducting eyewitness identification procedures, a Study Group and Committee that includes prosecutors and defense attorneys dedicated to examining the scientific research regarding eyewitness identification, and courts willing to revisit long-standing practices in light of research findings broadly embraced by the relevant scientific community. Where common sense conflicts with reliable research, we must have the good sense to incorporate the research into the law.