SJC-13383

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH,
Appellee,

v.

DANIEL BRUM,
Appellant.

ON APPEAL FROM A JUDGMENT OF BRISTOL SUPERIOR COURT

BRIEF *AMICI CURIAE* FOR THE CRIMINAL JUSTICE INSTITUTE AT HARVARD LAW SCHOOL, THE NEW ENGLAND INNOCENCE PROJECT, THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE INNOCENCE PROJECT IN SUPPORT OF THE DEFENDANT-APPELLANT AND REVERSAL

Katharine Naples-Mitchell, BBO 704239
Eliza Lockhart-Jenks, BBO 691044
Suzanne Van Arsdall (*on the brief*)
Criminal Justice Institute at
Harvard Law School
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 496-8143
knaplesmitchell@law.harvard.edu
elockhartjenks@law.harvard.edu

Radha Natarajan, BBO 658052
New England Innocence Project
1035 Cambridge Street, Suite 28A
Cambridge, MA 02141
617-945-0762
rnatarajan@newenglandinnocence.org

Chauncey B. Wood, BBO 600354
Massachusetts Association of Criminal
Defense Lawyers
50 Congress Street, Suite 600
Boston, MA 02109
(617) 248-1806
cwood@woodnathanson.com

Anton Robinson (*on the brief*)
Innocence Project
40 Worth Street, Suite 701
New York, NY 10013
(212) 364-5974
arobinson@innocenceproject.org

Counsel for amici curiae

March 23, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Guidelines and Jury Instructions

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the Criminal Justice Institute represents that it is a clinical program of Harvard Law School, a 501(c)(3) organization under Federal law and the laws of the Commonwealth of Massachusetts. The New England Innocence Project represents that it is also a 501(c)(3) organization. MACDL represents that it is a 501(c)(6) organization under the laws of the Commonwealth of Massachusetts. The Innocence Project represents that it is also a 501(c)(3) organization. *Amici* do not issue any stock or have any parent corporation, and no publicly held corporation owns stock in amici.

PREPARATION OF AMICUS BRIEF

Pursuant to Appellate Rule 17(c)(5), amici and their counsel declare that:

(a) no party or party's counsel authored this brief in whole or in part;

(b) no party or party's counsel contributed money to fund preparing or submitting the brief;

(c) no person or entity other than the amici curiae contributed money that was intended to fund preparing or submitting a brief; and

(d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

STATEMENTS OF INTEREST OF AMICI CURIAE

The **Criminal Justice Institute at Harvard Law School** ("CJI") is the curriculum-based criminal defense clinical program of Harvard Law School, providing classroom instruction and hands-on experience for students who represent indigent adults and juvenile clients facing misdemeanor and felony charges in the Boston criminal courts.[1] CJI also researches issues in the criminal legal system, particularly those that impact poor people and people of color both nationally and in Massachusetts. CJI advances issues of importance to our clients which may affect their rights in court, as well as broader issues that impact the administration of justice in the criminal legal system. The manifold evidentiary issues in this case—including dangerously suggestive procedures for identification from video surveillance heightening the possibility of misidentification—are precisely such an issue.

The **New England Innocence Project** ("NEIP") is a nonprofit organization dedicated to correcting and preventing wrongful convictions in the six New England states. In addition to providing pro bono legal representation to individuals with claims of innocence, NEIP advocates for legal and policy reforms that will reduce the risk of wrongful convictions. This includes ensuring that the presumption of innocence applies robustly and equally to all people and at all stages of the criminal

[1] The Criminal Justice Institute does not represent the official views of Harvard Law School or Harvard University.

process, from the moment of their first encounter with police through trial. It also includes ensuring that all evidence, regardless of its source or pedigree, is subjected to appropriately rigorous scrutiny and bears sufficient indicia of reliability before it is used against a criminal defendant.

The **Massachusetts Association of Criminal Defense Lawyers** ("MACDL") is an incorporated association of more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal legal system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal legal system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

The **Innocence Project** is an organization dedicated to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction DNA evidence. To date, the work of the Innocence Project and affiliated organizations has led to the exoneration of at least 375 individuals who post-conviction DNA testing has shown were wrongly

convicted. *DNA Exoneration in the United States*, Innocence Project (2022), https://innocenceproject.org/dna-exonerations-in-the-united-states. The Innocence Project has a compelling interest in ensuring that criminal trials reach accurate determinations of guilt and promote justice. Because wrongful convictions destroy lives and allow the actual perpetrators to avoid taking responsibility for their actions, the Innocence Project's objectives help to ensure a safer and more just society.

SUMMARY OF ARGUMENT

This identification case exposes gaps in this Court's doctrine that must be addressed to prevent and correct wrongful convictions. The significant evidentiary issues in this case raise questions about the very foundation of the conviction; however, *amici* focus chiefly on two critical errors that skirted the science-based safeguards this Court adopted in *Commonwealth v. Gomes*, 470 Mass. 532 (2015), and its progeny: the introduction of an unreliable identification produced under highly suggestive circumstances and the prosecutor's insistence that the jury identify the defendant from video that did not clearly show the perpetrator's face.

First, this Court should revisit the criteria governing admissibility of lay opinion on identification to incorporate relevant science about identification that this Court accepted in *Gomes* and its progeny. *Infra* at 13-15. This standard should acknowledge the role of suggestion and contamination even on familiar witnesses and enumerate science-based factors courts must consider that either mitigate or

enhance concerns about reliability in deciding on admissibility. See *Commonwealth v. Johnson*, 473 Mass. 594, 601-602 (2016). *Infra* at 15-24. Under current law and this modified standard, Ms. Bizarro's unreliable out-of-court identification should not have been admitted because it was not helpful to the jurors. Where the surveillance video was taken from too far a distance to be able to discern facial features, the basis for her identification—clothing and gait—is not supported by the video or social science on reliable identification by familiar witnesses. In addition, her perception was tainted by Mr. Raposo's strong suggestion about who to identify ("DB stabbed me," T9/100). On these facts, even Ms. Bizarro's long-term familiarity with Mr. Brum cannot mitigate reliability concerns. *Infra* at 24-28.

Second, the prosecutor urged the jury to identify Mr. Brum from this unclear video, in circumstances that extensive social science research illustrates carry the highest possible level of suggestion: a show-up of a single defendant, made in court during his trial, from a video filmed at a distance and an angle, with none of the required advisements or protections for show-up identifications. *Infra* at 28-34. Building on this Court's recent decision in *Commonwealth v. Davis*, 487 Mass. 448 (2021), this unreasonable closing argument created a substantial risk of a miscarriage of justice. *Infra* at 34-38.

Finally, the prosecutor implored the jury to identify Mr. Brum after arguing earlier in the case that the video was so unclear it required Ms. Bizarro's lay opinion

to understand it. But when Ms. Bizarro, protected by a grant of immunity, recanted her earlier identification, said she had been coerced to testify by the victim (her abusive ex-boyfriend), T9/7, and explained that the video was too unclear and the image of the perpetrator too nondescript to identify any individual, T9/16-17, 26-27, the prosecutor reversed course and told the jury to ignore her testimony and rely only on the "rock-solid" video, T9/141:11-13, which *the prosecutor* insisted depicted Mr. Brum. The prosecutor's flip-flop should have been precluded by judicial estoppel. *Infra* at 38-42.

Mr. Brum's conviction must be reversed, and this Court's guidance is necessary to prevent such unreliable evidence from infecting future cases.

ARGUMENT

I. This Court should modify the test for admissibility of lay opinion on identification to incorporate scientific principles related to the reliability of identification evidence detailed in *Gomes* and its progeny.

While expert witnesses, after meeting the rigorous *Daubert-Lanigan* standard, may offer opinions to jurors, lay opinion testimony is generally prohibited except in the limited circumstance where "there is some basis for concluding that the [lay opinion] witness is more likely to *correctly* identify the defendant from the [video] than is the jury." *Commonwealth v. Vacher*, 469 Mass. 425, 441 (2014) (emphasis added), quoting *Commonwealth v. Pleas*, 49 Mass. App. Ct. 321, 326 (2000).

In evaluating the admissibility of lay opinion testimony on identification, the court must first determine if the witness's testimony will help the jury in making their own identification. *Commonwealth v. Wardsworth*, 482 Mass. 454, 475-477 (2019); Mass. G. Evid. § 701(b). Courts have considered factors including the quality of the surveillance image, the witness's familiarity with the defendant, and whether the person in the image was disguised or whether the defendant's appearance changed between the time of the crime and the trial. *Pleas*, 49 Mass. App. Ct. at 326. For lay opinion testimony to be admissible, the image must not be "so unmistakably clear or so hopelessly obscure that the witness is no better-suited than the jury to make the identification." *Pleas*, 49 Mass. App. Ct. at 325, quoting *United States v. Jackman*, 48 F.3d 1, 5 (1st Cir.1995). The image must fall into some middle gray area such that the witness's "sufficiently relevant familiarity with the defendant," *Vacher*, 469 Mass. at 441 (citations and quotations omitted), would make them better suited than the jury to make an identification.

However, this does not end the inquiry. *Wardsworth*, 482 Mass. at 477. Even if lay opinion testimony on identification is potentially helpful to the jury, a judge must still exclude an identification if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *Id.*; Mass. G. Evid. § 403; see *Pleas*, 49 Mass. App. Ct. at 327-328; *Commonwealth v. Connolly*, 91 Mass. App. Ct. 580, 592 (2017).

The factors courts currently use to determine the admissibility of lay opinion testimony on identification do not evaluate the *reliability* of that testimony using science-based principles. See *Commonwealth v. Gomes*, 470 Mass. 532 (2015); *Commonwealth v. Johnson*, 473 Mass. 594, 596-603 (2016); *Commonwealth v. German*, 483 Mass. 553, 562-565 (2019). As the increasing use of technology in criminal investigations leads to more frequent identifications by surveillance footage, this Court should ensure that the admissibility of lay opinion testimony is consistent with this Court's science-based approach to identification evidence and does not, instead, increase the risk of wrongful convictions.

A. The current framework for admitting lay opinions on identification provides insufficient guardrails against unreliable evidence.

The logic behind the exception allowing lay opinion on identification has been that the witness "has some superior knowledge [familiarity] that puts him in a better position [than the jurors] to make the identification." *Connolly*, 91 Mass. App. Ct. at 590 n.10; see *Wardsworth*, 482 Mass. at 475. But a witness's lay opinion on identification can only be helpful to jurors if it is *reliable*. To ensure "a jury's ability accurately to evaluate identification evidence," and to "fairly protect the defendant from [] unreliability", *Johnson*, 473 Mass. at 601, quoting *Commonwealth v. Jones*, 423 Mass. 99, 110 (1996), the standard for admissibility of lay opinion on identification should incorporate relevant science-based factors that currently guide admissibility for a percipient eyewitness.

Prior familiarity, though an important factor in assessing the reliability of an identification, does not inoculate an identification from being mistaken. Factfinders and judicial gatekeepers currently lack guidance on how to assess familiarity in this context. Familiarity should be considered a "plus factor" in identification *only when* the witness is a "family member, friend, or longtime acquaintance." Model Jury Instructions on Eyewitness Identification at 4 (Nov. 6, 2015); *Johnson*, 473 Mass. at 602. Indeed, scientific research demonstrates that an eyewitness's purported prior familiarity—if based on *insufficient* prior contact[2]—may actually *increase* the risk of misidentification; having some prior contact—but not long-term familiarity—can unduly inflate a witness's sense of confidence in the accuracy of their identification. Coleman, Newman, Vidmar & Zoeller, Don't I Know You?: The Effect of Prior Acquaintance/Familiarity on Witness Identification, Champion 52, 53-54 (Apr. 2012) (summarizing research that participants with longer interaction time in experiments were more likely to make false-positive identifications); Read, The Availability Heuristic in Person Identification: The Sometimes Misleading Consequences of Enhanced Contextual Information, 9 Applied Cognitive Psychol.

[2] The testimony of a police witness acquainted with the defendant only during investigation is a particularly concerning example of fleeting familiarity lacking the reliability necessary for identification. See, e.g., *Wardsworth*, 482 Mass. at 476 (holding police identification testimony inadmissible for lack of familiarity *and* substantially more prejudicial than probative); *Vacher*, 469 Mass. at 442 (finding police testimony improper where the detective lacked special familiarity with the defendant); see also *Commonwealth v. Austin*, 421 Mass. 357, 366 (1995).

91, 94-100 (1995). Further, witnesses are not always reliable reporters when it comes to familiarity. *Commonwealth v. Thomas*, 476 Mass. 451, 461 (2017) ("[R]esearch has shown that the perception of familiarity is often unreliable." (citations omitted)); see also Pezdek & Stolzenberg, Are Individuals' Familiarity Judgments Diagnostic of Prior Contact?, 20 Psychol. Crime & L. 302 (2014) (finding only 45 percent of study participants accurately identified individuals as either familiar or unfamiliar so that, "in all conditions, the overall miss rate was higher than the hit rate").

Even if a witness is *truly familiar*, they can still be primed into misidentification. For example, leading a witness to believe that they are about to view an image of someone they already know introduces irreparable contamination. See, e.g., Kerstholt et al., The Effect of Expectation on the Identification of Known and Unknown Persons, 6 Applied Cognitive Psychol. 173, 173-178 (1992) (expecting to see a known person increased false-positive identifications); Young et al., The Faces That Launched a Thousand Slips: Everyday Difficulties and Errors in Recognizing People, 76 Brit. J. Psychol. 495, 505 (1985) (subjects self-reported being more likely to identify strangers as familiar when they were expecting a familiar person). Once that level of suggestion has been introduced, it is impossible to determine after the fact whether the witness's identification is based on their familiarity with the person or resulted from their contaminated perception. Model Jury Instructions on Eyewitness Identification, *supra*, at 5 ("[T]he accuracy of

identification testimony may be affected by information that the witness received between the event and the identification . . . . The witness may not realize that his or her memory has been affected by this information.")

In determining whether a witness's prior familiarity will be helpful to the jury, courts must also assess whether the image lends itself to better recognition by a familiar rather than unfamiliar witness. Research findings indicate that sufficient familiarity can aid identification of *a face* but does not provide the same advantage for other aspects of a person's appearance. Burton et al., Face Recognition in Poor-Quality Video: Evidence from Security Surveillance, 10 Psychol. Sci. 243, 247 (1999) ("The advantage given by familiarity appears to be largely due to recognition of the face itself, rather than recognition of other cues such as gait, body shape, or clothing."). Indeed, there is a unique and specific process, and region of the brain, for recognizing faces. Chang & Tsao, The Code for Facial Identity in the Primate Brain, 169 Cell 1013 (2017). People rely on internal facial features (eyes, nose, mouth) to process familiar faces, rather than external features like hair or face shape. Johnston & Edmonds, Familiar and Unfamiliar Face Recognition: A Review, 17 Memory 577, 581, 588-589 (2009). Thus, inability to see internal facial features in an image (due to obstructions or angle) is relevant to the reliability of a lay opinion. Clutterbuck & Johnston, Demonstrating How Unfamiliar Faces Become Familiar Using a Face Matching Task, 17 European J. Cognitive Psychol. 96 (2005); Hill,

Schyns & Akamatsu, Information and Viewpoint Dependence in Face Recognition, 62 Cognition 201 (1997). Identifications by familiar persons can also be impaired by distance and lighting conditions. DeJong, Wagenaar, Wolters & Verstijnen, Familiar Face Recognition as a Function of Distance and Illumination: A Practical Tool for Use in the Courtroom, 11 Psychol., Crime & L. 87 (2005). Thus, the vantage, distance, and quality of the video as well as the extent to which the person's face can be seen all matter for the reliability of a lay witness's identification.

The risks of misidentification by familiar witnesses are not hypothetical—in dozens of cases, people were identified by familiar witnesses and then later exonerated by DNA. Indeed, 15% of the first 325 DNA exonerations involving misidentification involved familiar witnesses. West & Meterko, Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years, 79 Alb. L. Rev. 717, 737 (2015). "This fact is important to consider, as people generally have difficulty comprehending how someone can misidentify a person with whom they are familiar." *Id.* Even long-term familiarity may not establish an accurate, reliable identification. Consider the case of Michael Anthony Williams in New Orleans, where the victim knew Mr. Williams growing up, had been his tutor in math the previous year, and had seen Mr. Williams during his repeated visits to

her father's store.[3] The victim identified him immediately by name after being raped. Mr. Williams was later exonerated by DNA after spending nearly 25 years in prison. In the case of Marvin Mitchell here in Massachusetts, an eleven-year-old rape "victim had been dragged from the street by a young man (early twenties) whom she had seen in her neighborhood almost every day for about two years." *Commonwealth v. Mitchell*, 35 Mass. App. Ct. 909, 909 (1993). Mr. Mitchell was exonerated by DNA after spending seven years in prison.[4]

In light of the extensive social science research that bears on the reliability of an identification, *amici* propose that the Court adopt a four-step analysis for admission of lay opinion on identification based on "common law principles of fairness," see *Johnson*, 473 Mass. at 596-603. The first three steps concern whether a lay opinion on identification would be *helpful* to the jury in making a *correct* identification. The fourth step concerns whether, even if potentially helpful, the testimony should be excluded as substantially more prejudicial than probative.

Step 1: Image quality – Does the jury need assistance making an identification from an image because the image quality is neither "hopelessly

[3] *Michael Anthony Williams*, Nat'l Registry of Exonerations (last updated July 10, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3749.

[4] *Marvin Mitchell*, Nat'l Registry of Exonerations (last updated Jan. 2, 2018), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3478.

obscure" nor "unmistakably clear"? If yes, proceed to step two. If the image falls at either end of this spectrum, such that the witness is in no better position than the jury, lay opinion testimony would be unhelpful to the jury and inadmissible.

Step 2: Reliably advantageous perspective – If the image quality falls somewhere in the middle, the court next asks whether the witness has an advantageous perspective that the jury does not possess:

(A) Does the witness have "sufficiently relevant familiarity"—a family member, friend, or longtime acquaintance of the defendant? If the answer is no, the witness's testimony would be unhelpful and inadmissible.

(B) Considering the angle, distance, lighting, and presence of obstructions in the image, does the image provide sufficient opportunity to view the person's internal facial features to support reliable recognition by a familiar witness? If the answer is no, the witness's testimony would be unhelpful and inadmissible.

(C) Does the witness have unique familiarity with how the defendant looked *at the time* the image was taken to help the jurors make an identification, which jurors do not have from another source? For example, courts could consider whether the defendant's appearance at trial is so different from the defendant's appearance around the time of the crime that the jury would not be able to determine whether

the defendant might be the person in the video.[5] It is critical that this evaluation does not presume guilt: it would be entirely improper to admit lay opinion testimony because the *unknown person in the video* is disguised and the *defendant* is not disguised at trial.[6]

Step 3: Evaluating contamination – If the image provides a reasonable opportunity for a truly familiar witness to view the person's internal facial features, the court must still consider whether the lay opinion was a product of suggestion or bias to assess its reliability. If there is evidence of suggestion or bias, the court should determine (A) the extent to which the lay opinion on identification is borne of suggestion—by police, the prosecutor, or through other contamination, including by media or a civilian witness. See *Johnson*, 473 Mass. at 601. The court should then examine (B) science-based factors related to reliability of familiar identifications, including: the nature, scope, and duration of the witness's familiarity; the basis of their identification as deriving from internal facial features; the ability to make an

[5] Booking photos from the defendant's arrest shortly after the crime might obviate the helpfulness of such testimony, however.

[6] Further, this would not necessarily *help* the jury. "[D]eliberate disguise can move the appearance of a known face outside the recognizable range." Noyes & Jenkins, Deliberate Disguise in Face Identification, 25 J. Experimental Psychol. 280, 286 (2019). Thus, familiarity provides little advantage when identifying someone attempting to evade identification through disguise, especially if the disguise obscures a person's internal facial features which "play a key role in familiar face recognition" as opposed to external features like hairstyle, often relied upon by unfamiliar witnesses. *Id*. at 287 (citations omitted).

identification based on the quality of the image, including the extent to which angle, distance, or lighting affects the witness's opportunity to observe the *face* of the person depicted; and whether the lay opinion is a cross-racial or same-race identification, see *Gomes*, 470 Mass. at 382 & n.10. The court should then (C) weigh the level of suggestiveness against these factors that tend toward or detract from reliability: "Where the independent source of an identification is slim, [minimal] suggestiveness may be sufficient to support a finding of inadmissibility; where the independent source is substantial, a greater level of suggestiveness would be needed to support a finding that the danger of unfair prejudice substantially outweighs the probative value of the identification." *Johnson*, 473 Mass. at 604. If the "identification is so unreliable that it would be unfair for a jury to give it any weight," the judge must rule it inadmissible. *Id*. at 602.

Step 4: Weighing probative value and prejudicial effect – Even if the testimony would constitute proper lay opinion under the first three steps, the court must also consider whether the prejudicial impact of the lay opinion substantially outweighs its probative value. For example, a law enforcement witness might have an outsized influence on the jury and could imply otherwise-inadmissible prior bad acts of the defendant; a witness testifying to repeatedly viewing the video could improperly heighten juror confidence in their identification. *Wardsworth*, 482 Mass. at 477; see *Pleas*, 49 Mass. App. Ct. at 327-328 (discussing danger of unfair

prejudice from identification by police officer, parole officer, or person previously incarcerated with the defendant).

As discussed in Part II *infra*, a lay opinion on identification can significantly impact a jury in circumstances that are already highly suggestive. It is therefore imperative that the admissibility determination for this exceptional opinion evidence evaluate the opinion's reliability.

B. Ms. Bizarro's testimony should not have been admitted because the circumstances of her identification from video surveillance were unnecessarily suggestive, unreliable, and not cured by her familiarity with Mr. Brum.

Ms. Bizarro's out-of-court lay opinion on identification should not have been admitted against Mr. Brum, both under the current rubric governing admissibility and under *amici*'s proposed modified rubric focused on reliability. Despite Ms. Bizarro's familiarity with Mr. Brum, her opinion was not helpful to the jury because, where it was not possible to see the internal facial features of the person in the video, the jury was in as good a position as Ms. Bizarro to compare the person in the video to Mr. Brum. In addition, because her identification was irreparably contaminated by suggestion, it should not have been admitted.

Considering image quality in this case, the video was imperfect but not hopelessly obscure, satisfying the first step and suggesting that lay opinion testimony could conceivably help the jury. Familiarity also was not an issue, as Ms. Bizarro testified to being a longtime acquaintance of Mr. Brum over a lengthy period, T9/68.

However, the nature of the video—viewing the person from a distance, angled from above, and not depicting internal facial features—should have rendered her testimony inadmissible. Research findings indicate that this video would be unlikely to give a familiar witness an identification advantage over the jury because the features needed to make that identification are obscured.

Even should the court go further, the role of suggestion in Ms. Bizarro's identification of Mr. Brum is undisputed and unmistakable. Before she ever viewed the video, Ms. Bizarro was told by Mr. Raposo who to identify from it. T9/100. As a result, Ms. Bizarro went into the police station reporting that Mr. Brum committed the crime and identified the image as Mr. Brum after a cursory glance. See T9/80:19-22 ("And in fact, a police officer was walking in with an image of Daniel Brum. And as he's walking in with it, before he can even place it down and show it to you, you went oh, that's him right there. Do you remember that?"); *id.* at 103-106, 107:7-108:10. This level of suggestion is even more substantial than in *Johnson*, where this Court upheld the suppression of identification evidence.

Considering next the factors that mitigate or exacerbate the role of suggestion, the extent of Ms. Bizarro's familiarity with Mr. Brum weighs in favor of reliability. Unlike cases where the witness and defendant had repeated but passing familiarity, Ms. Bizarro testified to knowing Mr. Brum for 15 years and growing up in the same neighborhood. T9/68. However, multiple factors—including the distance, angle, and

lighting conditions—undermine the reliability of Ms. Bizarro's lay opinion and weigh strongly against admissibility. The video is filmed from above, much of the altercation is in dark shadow, and even when the perpetrator runs into sunlight, he is in profile and far from the camera. The perpetrator does not have visible distinctive markings (tattoos, piercings, a unique hairdo) and is not wearing distinctive clothing—he appears to be a light-skinned male, with short hair, wearing a light-colored t-shirt, darker knee-length shorts, and light-colored shoes. Def. Br. at 11-12.

Perhaps most significantly, the video does not clearly show the perpetrator's face. It is therefore unsurprising that Ms. Bizarro based her identification on his clothing and walk, see T9/108:4-10, not his facial features. Because familiarity is only a real advantage if the witness can see the person's face, Ms. Bizarro's reliance on clothing raises a substantial risk that her identification resulted from "clothing bias." Lindsay, Wallbridge & Drennan, Do the Clothes Make the Man? An Exploration of the Effect of Lineup Attire on Eyewitness Identification Accuracy, 19 Canadian J. Behav. Sci. 463 (1987); Dysart, Lindsay & Dupuis, Show-ups: The Critical Issue of Clothing Bias, 20 Applied Cognitive Psychol. 1009 (2006). Where the person in the video was wearing generic clothing, and where Ms. Bizarro explicitly credited that generic clothing as leading to her identification, it is entirely possible that this "similar clothing" led to a false perception of recognition.

Ms. Bizarro claimed to also recognize the man in the video based on his walk, even though the video actually shows the man jogging or running, raising a question about the reliability of her opinion. Even if the man had been walking, the scientific literature on gait recognition is inconsistent—while movement can facilitate recognition by familiar people, see, e.g., Hahn, O'Toole & Phillips, Dissecting the Time Course of Person Recognition in Natural Viewing Environments, 107 Brit. J. Psychol. 117 (2016), gait is at best a mediocre basis for identifying familiar people. See Cutting & Kozlowski, Recognizing Friends by Their Walk: Gait Perception without Familiarity Cues, 9 Bull. Psychonomic Soc'y 353 (1977) (college students asked to identify walking silhouettes of six dorm-mates, who knew the six options in advance, were less than 40% accurate).

Weighing these factors adapted from *Johnson* and the scientific literature, there is a high risk that Ms. Bizarro's identification resulted directly from being told that Mr. Brum committed the crime and thus was in the video. While, in many circumstances, her extensive familiarity with Mr. Brum might have undermined the significance of this suggestion, here her familiarity provided little to no advantage in viewing a video that did not depict the internal facial features of the perpetrator. Furthermore, clothing bias may have played a significant role, since Ms. Bizarro specifically noted generic clothing as a basis for her identification. Even without

considering Ms. Bizarro's *recantation* of this testimony, Ms. Bizarro's identification was so unreliable as to render it inadmissible against Mr. Brum.

Finally, any negligible probative value of her unreliable testimony was substantially outweighed by the danger of unfair prejudice to Mr. Brum. After her testimony was introduced substantively, it irreparably contaminated the jury's perception of the video. The prosecutor later inviting the jurors to throw out her identification *after* it had already contaminated their own perception, see T9/140:16-23, was an impossible request. This is why there must be stronger guardrails for admissibility of lay opinion testimony in the first instance.

II. The prosecutor improperly asked the jury to make a show-up identification in highly unreliable and suggestive circumstances based on distant and unclear video, requiring reversal.

In this case, jurors were asked to identify Mr. Brum under the highest possible levels of suggestion: an in-court show-up with only one option—Mr. Brum, the defendant at trial; none of the advisements (or similar jury instructions) that an eyewitness is ordinarily given before a show-up in the field; the presentation of video evidence after contamination from an out-of-court lay opinion; and highly improper statements by the prosecutor in closing argument overstating the video's quality and imploring the jurors to identify Mr. Brum from a video that did not clearly show the perpetrator's face. T9/140:16-23. The prosecutor's core thread throughout the closing argument was the "beautiful video," *id.* at 136:9, and the jury's capacity to

directly identify Daniel Brum from it. See, e.g., *id.* at 137:12-16 ("You see this video. You can see Mr. Brum, left side of him, right side of him."); *id.* 138:14-17 ("[Y]ou see Mr. Brum enter the frame, and you can see his hairline. You can see his build, his skinny build. You can see him approach and run towards Jordan Raposso [sic]."); *id.* 140:1-3 ("Take a look at the video. Who do you see in that video? You see Daniel Brum. You can see by his build, his hairline, and his body."); *id.* 141:11-13 ("Police . . . didn't stop once they had this rock-solid video that shows Daniel Brum stabbing Jordan Raposso [sic] . . ."). Because this issue is unpreserved, this Court reviews for a substantial risk of a miscarriage of justice. *Davis*, 487 Mass. at 467.

A. Asking the jury to make a show-up identification from an angled, distant video where no facial features can be perceived and after being subjected to significant suggestion is inherently unreliable and creates grave risk of misidentification and wrongful conviction.

There is no more suggestive circumstance than an in-court show-up from a surveillance video that is unclear and far away, where the defendant is the only person presented to the jury as the possible suspect, and the defendant is being prosecuted for the filmed offense. See, e.g., *United States v. Greene*, 704 F.3d 298, 307 (4th Cir. 2013) ("Even the best intentioned among us cannot be sure that our recollection is not influenced by the fact that we are looking at a person we know the Government has charged with a crime."). See *Crayton*, 470 Mass. at 237 (noting danger of identifying "the defendant out of reliance on the prosecutor and in conformity with what is expected of them rather than because their memory is

reliable"), citing Mandery, Due Process Considerations of In-Court Identifications, 60 Alb. L. Rev. 389, 417-418 (1996).

One-on-one "showup" identifications "are generally disfavored because they are viewed as inherently suggestive." *Commonwealth v. Crayton*, 470 Mass. 228, 235 (2014), quoting *Commonwealth v. Martin*, 447 Mass. 274, 279 (2006); see *Commonwealth v. Torres*, 367 Mass. 737, 740 (1975). A robust consensus among empirical researchers confirms that, even when a showup occurs immediately and a lineup occurs after a delay, "showups put innocent suspects at greater risk than lineups." Neuschatz, Wetmore, Key & Cash, A Comprehensive Evaluation of Showups, *in* Advances in Psychology and Law 43, 56, 65 (Miller & Bornstein eds., 2016) ("showups consistently had more false identifications"); Wells et al., Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence, 44 Law & Hum. Behav. 3, 26–27 (2020) (misidentifications from show-ups account for 15% of exonerations resulting from DNA evidence).

As this Court has further recognized, "an 'in-court identification is comparable in its suggestiveness to a showup identification,' … and may even be more suggestive." *Commonwealth v. Collins*, 470 Mass. 255, 261 (2014), quoting *Crayton*, 470 Mass. at 236. See also, e.g., *Commonwealth v. Dew*, 478 Mass. 304, 313 (2017). A "near consensus" of scientists agree. See, e.g., E. Loftus et al., Eyewitness Testimony: Civil and Criminal §10-17[d] (2021) ("The suggestivity of

asking a witness to identify a criminal in court while the defendant sits expectantly with his or her lawyer is nearly too obvious to mention."); *id.* §3-5[f] ("social science makes abundantly clear [that] in-court identifications may be both the most suggestive and the least reliable"); Wells et al., *supra*, at 27 ("the in-court identification is arguably even more suggestive than a typical showup"); Nat'l Research Council of the Nat'l Academies, Identifying the Culprit: Assessing Eyewitness Identification 110 (2014); Garrett, Eyewitnesses and Exclusion, 65 Vand. L. Rev. 451, 452 (2012) (describing in-court identification as "the least reliable evidence" of identity).

An identification "from a videotape containing only one individual is analogous to a one-on-one identification, which is considered inherently suggestive." *Commonwealth v. Forte*, 469 Mass. 469, 477 (2014). Research has demonstrated that matching tasks—determining if a match exists between the image of an unfamiliar face and other images—can be difficult. See, e.g., Megreya & Burton, Matching Faces to Photographs: Poor Performance in Eyewitness Memory (Without the Memory), 14 J. of Experimental Psychol.: Applied 364, 364-372 (2009) (reporting 15% error rate using high-quality images, even when no memory or suggestion was involved); White, Kemp, Jenkins, Matheson & Burton, Passport Officers' Errors in Face Matching, 9(8) PloS One e103510 (2014).

Matching unfamiliar faces from images (like jurors identifying a defendant from video) carries particular risk of misidentification, including differences in orientation, lighting, distance, and viewpoint. Hancock, Bruce & Burton, Recognition of Unfamiliar Faces, 4 Trends in Cognitive Scis. 330, 330-337 (2000). "Even with high quality video, matching to photographs is surprisingly error-prone." *Id.* at 334. Study after study confirms these results: "matching the identity of unfamiliar faces is highly fallible, even when high-quality footage is used." Henderson, Bruce & Burton, Matching the Faces of Robbers Captured on Video, 15 Applied Cognitive Psychol. 445 (2001); Davis & Valentine, CCTV on Trial: Matching Video Images with the Defendant in the Dock, 23 Appl. Cogni. Psychol. 482, 489-490 (2009). See also, e.g., Bruce, Henderson, Greenwood, Hancock, Burton & Miller, Verification of Face Identities from Images Captured on Video, 5 J. Experimental Psychol. Applied 339 (1999).

A matching task is even more prone to error when (a) the video is unclear, dimly lit, angled, or taken from a distance and (b) the identification is tainted by suggestion. See, e.g., Burton et al., *supra,* at 247 ("When viewing poor-quality videos, people are . . . very poor at recognizing unfamiliar targets."); Bruner & Potter, Interference in Visual Recognition, 144 Sci. 424, 425 (1964) ("[E]xposure to a substandard visual display has the effect of interfering with its subsequent recognition. The longer the exposure and the worse the display, the greater the

effect."); see also *Commonwealth v. Vasquez*, 482 Mass. 850, 860 (2019) (explaining that an eyewitness unfamiliar with the suspect would likely be unable to make a visual identification from a poor-quality video). See *Gomes*, 470 Mass. at 380 (Appendix) (citing "[t]he witness's opportunity to view the event" in model instructions). When the video or image is blurry, grainy, distant, or otherwise low-quality, a person's perception is impaired, and statements about what is shown can cause the viewer to misidentify what is depicted—suggestion distorts how the viewer first perceives the image, and the viewer then encodes that distorted perception as truth. See, e.g., Smith, Wilford, Quigley-McBride & Wells, Mistaken Eyewitness Identification Rates Increase When Either Witnessing or Testing Conditions Get Worse, 43 L. & Hum. Behav. 358 (2019). Thus, a video's quality and vantage can make the jury highly susceptible to a prosecutor's suggestion. *Johnson*, 473 Mass. at 601; see *Davis*, 487 Mass. at 469 ("[T]he Commonwealth's suggestions that the jury could identify the defendant based on the video were unreasonable. The video is not high enough resolution and is taken from too far away to be able to discern any features of the shooter's face.").

Finally, failing to give jurors science-based instructions on what to consider in making an identification in these circumstances compounds the error of urging jurors to identify the defendant at all. Jurors should be given instructions modeled

on the advisements given to witnesses in similar show-up settings when being asked to make an identification. See *German*, 483 Mass. at 562.

B. The prosecutor's closing created a substantial risk of a miscarriage of justice by repeatedly asking the jury to do what this Court found improper in **Davis***: to identify the defendant, at the prosecutor's urging, from a distant video that did not depict the person's face or distinguishing features.*

In *Davis*, this Court held that the prosecutor's statements asking jurors to identify the defendant from distant and unclear video were "improper" and "unreasonable." *Davis*, 487 Mass. at 469. However, having reversed Mr. Davis's conviction on other grounds, the Court did not reach the question of whether the prosecutor's statements about identification created a substantial risk of a miscarriage of justice. *Id.* This case now squarely presents the opportunity for this Court to consider that question, with even bolder contaminating statements by the trial prosecutor than exhibited in *Davis*. Considering social science research as this Court has repeatedly done on questions of witness identification, the prosecutor's error here created a substantial risk of a miscarriage of justice and requires reversal.

First, the prosecutor asked the jury to do something inherently fraught with risk of misidentification: an in-court show-up matching task from video by the jury as a collective identifying witness. Research shows that each of these circumstances (a single show-up, an in-court identification, and a matching task of an unfamiliar face from video) creates unnecessary risk of error—and their combined force only

heightens that risk. See Part II.A., *supra*. A jury urged by the prosecutor to identify the defendant from an image, "may develop an artificially inflated level of confidence" in their identification because the defendant is before them in court. See *Collins*, 470 Mass. at 261-263. The danger is that the jury conformed to the prosecutor's suggestions, rather than relying on their own perception. *Crayton*, 470 Mass. at 237.

Second, amplifying concerns about unreliable identifications from matching tasks, the video here was too poor-quality and the person depicted too nondescript for the jury to identify Mr. Brum as the perpetrator beyond a reasonable doubt. This video exhibits the elements this Court explained in *Davis* made the prosecutor's suggestion unreasonable: the video was low-resolution and too distant to discern facial features. *Davis*, 487 Mass. at 469. The prosecutor conceded during opening, "It's at a distance," T7/26:18, and in ruling on a motion in limine, the trial judge described the video's subjects as "a good distance from the camera." R1/126, 133. And as in *Davis*, this video displays a person with no distinguishing features beyond a common hairstyle—a skinny, light-skinned man with short hair, seen in profile. Compare *Davis*, 487 Mass. at 469, with Def. Br. at 50-51; see also T9/79. Yet the prosecutor asked the jury to identify Mr. Brum: "Who do you see in that video? You see Daniel Brum. You can see by his build, his hairline, and his body." T9/140:1-3; *id.* at 136:8-11 ("when you have a beautiful video like this, where you see Mr. Brum

and his skinny build, and his precise hairline, his round hair, his white skin"). Common and generic characteristics in a poor-quality video cannot support a reliable identification of Mr. Brum by the jury.

Third, this was far from a one-off suggestion on the Commonwealth's part. In closing, the Commonwealth *repeatedly* told the jury that it was Mr. Brum in the video, see generally T9/136-141, "suggesting that [his] opinion[] concerning its contents merited greater weight than that of the jurors." *Wardsworth*, 482 Mass. at 477. Social science research confirms that confidence in identification is boosted by repeated questioning. Shaw & McClure, Repeated Postevent Questioning Can Lead to Elevated Levels of Eyewitness Confidence, 20 L. & Hum. Behav. 629 (1996). Repeated suggestion leads to increased recall, which in turn increases confidence in an identification irrespective of its accuracy. *Id.* The Commonwealth's repeated urging to identify Mr. Brum increased the risk of misplaced confidence, suggestion, and ultimately misidentification.

Fourth, the Commonwealth's statements identifying Mr. Brum in the video were made without guiding jury instructions. The jury was left to evaluate the Commonwealth's repeated suggestive identification of Mr. Brum as the perpetrator in the video without the protections required for witnesses in show-up identifications, *German*, 483 Mass. at 562, or even general instructions about eyewitness identification.

And fifth, the Commonwealth relied on the video to the exclusion of other evidence—overstating its clarity in urging the jury to identify Mr. Brum. The Commonwealth's "improper" and "unreasonable" statements in *Davis*, 487 Mass. at 469, are mild compared to the instant case. In *Davis*, the Commonwealth made two suggestive references to the defendant's identity in opening. *Davis*, 487 Mass. at 467-468. The *Davis* Court focused on the prosecutor's opening but not the closing because "The closest the prosecutor came in the closing to asking the jury to identify the defendant based on the video was commenting that the defendant '[h]appens to look like the shooter.'" *Id.* at 468 n.25. "[T[he prosecutor did not state that the jury could identify the defendant based on the video alone. Instead, he merely stated that the defendant's appearance was consistent with the shooter's." *Id.* Here, by contrast, the prosecutor referred to the video as "key evidence," a "beautiful video," and "rock-solid video [that] shows Daniel Brum stabbing Jordan Raposso [sic]." T9/136-141. Further, the prosecutor *did* ask the jury to identify the defendant from the video alone. T9/140 ("[Y]ou could throw Ms. Bizarro's testimony out the window. . . I suggest to you it is Daniel Brum in the video."). In so doing, the prosecutor encouraged the jurors to *ignore* other evidence and find a match. Cf. *German*, 483 Mass. at 562.

Jurors previously unfamiliar with the defendant were invited to participate in a show-up identification process in which the defendant was the only option; that

same show-up identification was preceded by suggestion from an already contaminated lay opinion as well as the inherent suggestiveness of being an in-court identification; the jurors were given *no instructions* on exercising caution for the identification; and the identification was from a video that all parties agreed was not entirely clear and did not show, with any clarity, the perpetrator's facial features. It therefore created a substantial risk of a miscarriage of justice.

III. The Commonwealth should have been estopped from seeking an identification of the defendant directly from the video.

To admit lay opinion testimony on identification, a court must find that the unclear nature of the image renders lay opinion "helpful" to the jury. In other words, as a precondition for admissibility, the image must not be "so unmistakably clear or so hopelessly obscure that the witness is no better-suited than the jury to make the identification." *Pleas,* 49 Mass. App. Ct. at 325.

To admit Ms. Bizarro's lay opinion, the Commonwealth argued, repeatedly, that the video was unclear. For example, at a hearing on motions in limine, the prosecutor described the video as "a bit grainy" and told the judge "[t]he Commonwealth's position is that you can't exactly make out who that person is and say for sure who that person is." T4/8. The prosecutor proffered that "the quality of the video isn't that good . . . I mean it's pretty good, but it's not that great." T4/16-17. The Commonwealth conceded that the video was "not of the clearest and best

quality as that it would lend itself to identification by members of the jury." R1/91. The prosecutor likewise acknowledged in opening, "It's at a distance." T7/26:18.

These characterizations of the video as incapable of independent identification by jurors were shared by others. In ruling on a motion in limine, the trial judge noted that "the subjects seen in the video are a good distance from the camera." R1/126, 133. Detective Cardozo's testimony also implicitly acknowledged that the video was not perfectly clear, as the officer had to view a "clearer" version of the video *not shown to the jury* to make out the license plate on the vehicle. T8/46-53, 55-56.[7] When Mr. Brum's brother was shown the video, T7/64-65; T8/67, he could not identify the perpetrator. Mr. Brum's brother said the video, "wasn't clear enough for [him] to see anything on the video." T7/88. During voir dire, Ms. Bizarro testified "that could be anybody", and it "looks like a random tall white guy." T9/26-27. During trial, she testified she could not identify Mr. Brum because "this is a very poor quality picture/video, very far. It looks like an average tall white man." T9/79.

Having argued that the video was unclear to admit Ms. Bizarro's identification, which then primed the jurors to make that same identification under highly suggestive circumstances, the prosecutor then did an about-face and repeatedly urged the jurors to identify Mr. Brum from what he said was "beautiful

[7] This was improper for all the points the defendant raises, but also illustrates that the video was not sufficiently clear to ask the jury to make an identification.

video." The prosecutor told jurors they could ignore other evidence and just focus on the video to identify Mr. Brum. T9/137:7-16, 140:16-17. This stunning reversal of the Commonwealth's position led to the jurors being contaminated through Ms. Bizarro's lay opinion and then being told they could identify the defendant from a video that did not clearly show the perpetrator's face. The Commonwealth should have been estopped from taking these contradictory positions that increase the likelihood of a wrongful conviction.

The doctrine of judicial estoppel is an equitable rule apt for this court to consider in determining whether the prosecutor imploring the jury to make an identification from the video in closing created a substantial risk of a miscarriage of justice. See *Commonwealth v. DiBenedetto*, 458 Mass. 657, 671 (2011). "The purpose of the doctrine [of judicial estoppel] is to prevent the manipulation of the judicial process by litigants." *Canavan's Case*, 432 Mass. 304, 308 (2000). As an equitable doctrine, judicial estoppel is flexible and "properly invoked whenever a 'party is seeking to use the judicial process in an inconsistent way that courts should not tolerate." *DiBenedetto*, 485 Mass. at 671, quoting *East Cambridge Sav. Bank v. Wheeler*, 422 Mass. 621, 623 (1996). The core elements of judicial estoppel are that (1) the position asserted is directly inconsistent with a position asserted in a prior proceeding and (2) the party succeeded in convincing the court to accept its prior position. *Id.* (citations and quotations omitted).

Here, the prosecutor's statements prior to trial and during closing about whether the video was sufficiently clear to allow the jury to make an identification were "mutually exclusive." *DiBenedetto*, 458 Mass. at 671 (citation and quotation omitted). On the first element, the Commonwealth initially described the video as "not of the clearest and best quality as that it would lend itself to identification by members of the jury." R1/91. However, once Ms. Bizarro recanted her grand jury testimony, the prosecutor flipped his position and made an admittedly exaggerated characterization of the video's quality, highlighting the "beautiful," T9/136, and "rock-solid" video, T9/141.

The second element of judicial estoppel is also satisfied here. The Commonwealth was the proponent of Ms. Bizarro's lay opinion and had to convince the court that her testimony would help the jury. The Commonwealth successfully persuaded the court that the video was not sufficiently clear for the jury to make an identification on their own—and on this basis, the court admitted Ms. Bizarro's lay opinion. Only after her identification was admitted and tainted the jury did the Commonwealth argue in closing that the video was of such high quality that the jurors could—indeed, should—identify Mr. Brum directly from it beyond a reasonable doubt. The Commonwealth should have been precluded from taking these contradictory positions—especially where identification was the critical issue in the case, see *Wardsworth*, 482 Mass. at 476-477.

CONCLUSION

This conviction was built without a reliable evidentiary foundation. The introduction of unreliable lay opinion testimony and the prosecutor's closing argument urging a highly suggestive identification from video surveillance, taken together, or separately, require reversal.

Respectfully submitted,

/s/ Katharine Naples-Mitchell
Katharine Naples-Mitchell, BBO 704239
Eliza Lockhart-Jenks, BBO 691044
Criminal Justice Institute at
Harvard Law School
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 496-8143
knaplesmitchell@law.harvard.edu
elockhartjenks@law.harvard.edu

On the brief: Suzanne Van Arsdall

Radha Natarajan, BBO 658052
New England Innocence Project
1035 Cambridge Street, Suite 28A
Cambridge, MA 02141
617-945-0762
rnatarajan@newenglandinnocence.org

Chauncey B. Wood, BBO 600354
Massachusetts Association of Criminal
Defense Lawyers
50 Congress Street, Suite 600
Boston, MA 02109
(617) 248-1806
cwood@woodnathanson.com

Anton Robinson (*on the brief*)
Innocence Project
40 Worth Street, Suite 701
New York, NY 10013
(212) 364-5974
arobinson@innocenceproject.org

March 23, 2023

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to those specified in Rule 16(k), 17, and 20. It complies with the type-volume limitation of Rule 20(2)(C) because it contains 7,491 non-excluded words. It complies with the type-style requirements of Rule 20 because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Katharine Naples-Mitchell
Katharine Naples-Mitchell, BBO 704239
Criminal Justice Institute at
Harvard Law School
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 496-8143
knaplesmitchell@law.harvard.edu

CERTIFICATE OF SERVICE

Pursuant to Massachusetts Appellate Rule of Procedure 13(2), I certify that on March 23, 2023, I have made service of this brief upon the attorneys of record for each party via the Electronic Filing System.

/s/ Katharine Naples-Mitchell
Katharine Naples-Mitchell, BBO 704239
Criminal Justice Institute at
Harvard Law School
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 496-8143
knaplesmitchell@law.harvard.edu