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October 1, 2020

Clerk Francis V. Kenneally
Supreme Judicial Court for the Commonwealth
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Re: *Commonwealth v. Ramon Valle*, FAR-27742
Letter from Amici in Support of Granting Further Appellate Review

Dear Clerk Kenneally:

On behalf of the Boston College Innocence Program, The Exoneration Project, the Massachusetts Association of Criminal Defense Lawyers, and the New England Innocence Project, the undersigned submit this letter to urge the Court to allow the pending Application for Further Appellate Review in *Commonwealth v. Valle*, FAR-27742 (the “Application”). Granting Mr. Valle’s request for further review will allow this Court to remedy a significant individual injustice and to provide guidance to lower courts on how to properly evaluate post-conviction challenges of convictions that rest entirely on uncorroborated eyewitness identification evidence.

Mr. Valle was convicted in 2015 of three counts of Home Invasion and three counts of Assault with a Dangerous Weapon, and he received a sentence of 20-22 years in state prison. His conviction was based entirely on cross-racial identifications by two eyewitnesses who had been drinking heavily, did not know the intruders, encountered them only briefly under poor lighting conditions, and were questioned jointly by police before making an initial joint identification. Mr. Valle – who was employed as a caretaker for a quadriplegic resident of the building – presented an affirmative alibi at trial, and there was no physical or forensic evidence to corroborate the identifications.

As post-conviction counsel demonstrated at the evidentiary hearing on her first new trial motion, the identifications of Mr. Valle featured multiple factors that scientific research and DNA exoneration cases have shown to be closely associated with misidentification, and that this Court has already recognized are unfamiliar to the average juror. Yet trial counsel failed to secure expert assistance in explaining these factors to the jury, and the trial judge compounded this harm by inviting jurors to rely on their “common sense” in evaluating the eyewitness evidence and omitting key provisions of the *Gomes* instruction aimed at addressing *gaps* in juror knowledge about the sources of eyewitness error. Moreover, post-conviction evidence developed through investigation

and expert consultation revealed additional weaknesses in the reliability of the eyewitness evidence, including – most significantly – new evidence that one of the two eyewitnesses who identified Mr. Valle suffered from untreated schizophrenia as well as cognitive impairments that together affect a witness’s attention, perception, memory, and susceptibility to suggestion.¹

Further appellate review is necessary to address the Appeals Court’s conclusory treatment, in an unpublished 1:28 decision prepared without the benefit of oral argument, of the full confluence of errors that deprived the jury of the necessary tools to evaluate the reliability of the eyewitness evidence. Mr. Valle’s appeal starkly raises the question of whether justice may not have been done where a defendant whose conviction was based entirely on uncorroborated eyewitness identification testimony was deprived of a fair opportunity to challenge that testimony due to a confluence of errors by defense counsel and the trial court. *Commonwealth v. Epps*, 474 Mass. 743 (2016). The Appeals Court’s decision on Mr. Valle’s appeal conceded a substantial list of shortcomings by defense counsel in her handling of the eyewitness testimony and also acknowledged several potential errors by the trial judge. Nevertheless, the Court evaluated these errors in a vacuum and asserted that none of them individually satisfied the relevant legal standards under the traditional “lattice-work” of grounds for securing relief under Rule 30. In doing so, the Appeals Court utterly failed to consider the combined effect of all of these errors, nor did it determine whether that *confluence* of errors deprived Mr. Valle of a substantial ground of defense and thereby created a substantial risk of a miscarriage of justice. *Commonwealth v. Rosario*, 477 Mass. 69, 78 (2017). See also *Commonwealth v. Ellis*, 479 Mass. 459 (2016) (affirming trial court’s holistic analysis of impact of newly discovered and previously known evidence on totality of case).

Misidentification and Wrongful Convictions

The experiences of those who were wrongly convicted based at least in part on eyewitness misidentification offer important context to Mr. Valle’s case. To date, 375 individuals in the United States have been exonerated by post-conviction DNA testing; 69 percent of these cases involved mistaken eyewitness evidence, making misidentification the leading contributing cause of wrongful convictions exposed through DNA evidence.² The National Registry of Exonerations has identified at least 450 additional non-DNA-based exonerations involving eyewitness misidentification. Many of these exonerations involved factors present in this case, including witnesses who only viewed the culprit for seconds, under poor lighting conditions; when the culprit

¹ See, e.g., Chen, Y., Norton, D., Ongur, D., Heckers, S., *Inefficient Face Detection in Schizophrenia*, *Schizophrenia Bulletin*, Vol. 34, No. 2, 367-374 (2008); Monica Calkins, Ruben Gur, J. Daniel Ragland, Raquel Gur, *Face Recognition Memory Deficits and Visual Objection Memory Performance in Patients With Schizophrenia and Their Relatives*, *Am. J. Psychiatry* 162:10 (October 2005), 1963; Raquel Gur, Bruce Turetsky, et al., *Visual Attention Circuitry in Schizophrenia Investigated With Oddball Event-Related Functional Magnetic-Resonance Imaging*, *Am. J. Psychiatry* 164:3 (March 2007), 442; M.L. Phillips, A.S. David, *Facial Processing in Schizophrenia and Delusional Misidentification: cognitive neuropsychiatric Approaches*, *Schizophrenia Research* 17 (1995), 109-114.

² *How Eyewitness Misidentification Can Send Innocent People to Prison*, Innocence Project (Apr. 15, 2020), <https://www.innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/>.

had a weapon, was of a different race than the witnesses, was wearing a disguise (hood), and lacked distinctive features; and when the witnesses were shown a suspect repeatedly by the police. Like the vast majority of DNA exoneration cases involving misidentification, Mr. Valle's case involved (1) viewing conditions that are not conducive to the formation of a reliable memory and (2) suggestive and repetitive identification procedures that are known to further erode the reliability of an identification.³

DNA exonerations also demonstrate just how powerful eyewitness identification evidence is for jurors, who often credit even unreliable eyewitnesses over other, more reliable, forms of evidence. In fact, researchers have shown that identifications are comparable to, or more influential than, "physical evidence, character evidence, alibis, polygraph evidence, and even sometimes confession evidence."⁴ That is because jurors are typically unfamiliar with many of the factors that have been shown to undermine the reliability of an identification,⁵ including many of those at issue here. Extensive surveys of lay understanding of eyewitness issues show a "discrepancy between lay understanding of factors affecting eyewitness accuracy and what decades of empirical research has reliably demonstrated to be true" and that "jurors...exhibit important limitations in their knowledge of eyewitness issues, their knowledge diverges significantly from expert opinion, and it is not high in overall accuracy."⁶ Even when jurors do understand some of the factors relevant to eyewitness identifications, their application of those factors to the evidence tends to be challenging and counterintuitive.⁷

It is also well established that traditional trial strategies such as cross-examination are generally ineffective at exposing the risks of misidentification – or worse, can be *damaging* to the defendant – because mistaken eyewitnesses sincerely believe that they are being truthful,⁸ are

³ Brandon Garrett, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG*, 64 (2011).

⁴ Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, *HANDBOOK OF EYEWITNESS PSYCHOL.: VOLUME 2, MEMORY FOR PEOPLE* 501, 505 (Rod C.L. Lindsay et al. eds., 2007) (citations omitted).

⁵ See, e.g., *Young v. Conway*, 715 F.3d 79, 81 (2d Cir. 2013) ("Many of these factors are counterintuitive and therefore cannot be deduced by the application of the 'common sense' that juries are customarily instructed to employ."); *State v. Guilbert*, 49 A.3d 705, 723 (Conn. 2012) ("Although these findings are widely accepted by scientists, they are largely unfamiliar to the average person, and, in fact, many of the findings are counterintuitive.").

⁶ Sarah L. Desmarais & J. Don Read, *After 30 Years, What Do We Know about What Jurors Know? A Meta-Analytic Review of Lay Knowledge Regarding Eyewitness Factors*, 30 *L. & Hum. Behav.* 200 (2011).

⁷ Roy S. Malpass et al., *The Need for Expert Psychological Testimony on Eyewitness Identification*, *AM. PSYCHOL.-LAW SOC. SERIES: EXP. TESTIMONY ON THE PSYCHOL. OF EYEWITNESS ID.* 3, 9 (Cutler ed., 2009).

⁸ See *Flowers v. State*, 158 So. 3d 1009, 1078 (Miss. 2014) (Dickinson, J., dissenting) ("A skillful attorney may utilize cross-examination to expose contradictions in a witness's testimony. But no attorney-of even the greatest skill-can cross-examine a witness in such a way to expose that the witness did not see what the witness actually believes he saw. And that is exactly the purpose of expert eyewitness-identification testimony.").

usually unfamiliar with or unaware of the factors that can affect their own reliability,⁹ and frequently profess high confidence in their identifications despite being inaccurate.¹⁰

The above research, which this Court relied on in *Commonwealth v. Gomes*, 470 Mass. 352, 365-66 (2015), illustrates why trial counsel's failure to secure expert assistance – and the judge's instruction inviting jurors to rely on their common sense – greatly exacerbated the risk of a miscarriage of justice. It also reveals the fallacy of trial counsel's stated justification for not consulting with an expert: that she “decided not to consult an expert because she did not believe that doing so would substantially add to the defendant's alibi defense.” Memo at 20.

The eyewitness identifications

A confluence of factors bearing on the reliability of encoding, storage, and retrieval of eyewitness memory in Mr. Valle's case compellingly point to the conclusion that justice was not done. These factors include:

- Short duration of event¹¹
- Poor lighting¹²
- High stress event¹³
- Weapon focus¹⁴
- Other-race perpetrator¹⁵

⁹ See Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727 (2007).

¹⁰ See, e.g., *State v. Clopton*, 223 P.3d 1103, 1110 (Utah 2009) (because “eyewitnesses may express almost absolute certainty about identifications that are inaccurate, research shows the effectiveness of cross-examination is badly hampered”).

¹¹ *Gomes*, 470 Mass. at 380; Bornstein, B. H., Deffenbacher, K. A., Penrod, S. D., & McGorty, E. K. *Effects of exposure time and cognitive operations on facial identification accuracy: A meta-analysis of two variables associated with initial memory strength*, 18 Psychol., Crime & L. 473 (2012).

¹² *Gomes*, 470 Mass. at 380; De Jong, M. D., Wagenaar, W. A., Wolters, G., & Verstijnen, I. M., *Familiar face recognition as a function of distance and illumination: A practical tool for use in the courtroom*, 11(1) Psychol., Crime & L. 87 (2005).

¹³ *Gomes*, 470 Mass. at 381-382, citing *Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices* 29 (July 25, 2013); Deffenbacher, K. A., Bornstein, B. H., Penrod, S. D., & McGorty, E. K., *A meta-analytic review of the effects of high stress on eyewitness memory*, 28 L. & Hum. Behav. 687 (2004); Morgan, C. A., Hazlett, G., Doran, A., Garrett, S., Hoyt, G., Thomas, P., et al., *Accuracy of eyewitness memory for persons encountered during exposure to highly intense stress*, 27 International J. of Law & Psychol. 265–279 (2004).

¹⁴ *Gomes*, 470 Mass. at 381 (instructing jurors to consider that “the visible presence of a weapon may reduce the reliability of an identification if the crime is of short duration”); Fawcett, J. M., Russell, E. J., Peace, K. A., & Christie, J., *Of guns and geese: A meta-analytic review of the ‘weapon focus’ literature*, 19 Psychol., Crime & Law 33 (2013).

¹⁵ *Gomes*, 470 Mass. at 382 (instructing jurors to consider that “people of all races may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race”); Meissner, C. A., & Brigham, J. C., *Thirty years of investigating the other-race effect in memory for faces: A meta-*

- Perpetrator wearing hoodie/disguise¹⁶
- Eyewitnesses steadily drinking on night of incident¹⁷
- One eyewitness suffered from untreated schizophrenia and cognitive impairments¹⁸
- Joint questioning of eyewitnesses by police as well as joint viewing of Mr. Valle¹⁹
- Reliance on multiple show-up identification procedures.²⁰

Seemingly the most persuasive evidence against Mr. Valle was the fact that not one, but *two* separate eyewitnesses identified him in court. Significantly, misidentification by more than one person is not an anomaly; in fact, in DNA exoneration cases where eyewitness identification was at issue, 32% involved misidentification of the same person by more than one eyewitness.²¹ Without an expert, Mr. Valle was unable to explain how suggestiveness could produce multiple *incorrect* identifications of the same person. Specifically, if a single eyewitness participates in a suggestive identification procedure that is biased towards the suspect, that increases the chances that that eyewitness will choose the suspect. Similarly, if multiple eyewitnesses participate in suggestive procedures, each witness would be steered toward the same person. While the fact of multiple positive identifications seems to suggest a stronger probability of guilt, this is only true if the identifications are nonsuggestive and independent of each other. In this case, however, both identifications were undermined by extreme suggestiveness, including joint questioning of eyewitnesses and repeated show-up procedures even after witnesses initially failed to identify Mr. Valle.

It is also well established that jurors have a particularly difficult time evaluating the significance of multiple eyewitness identifications. Without guidance from an expert, jurors may well develop a mistaken impression that the only way for multiple eyewitnesses to come to the same conclusion is if their identifications are accurate. However, as noted above, misidentification of an innocent suspect by multiple witnesses is not at all uncommon. Indeed, the cases in which individuals were exonerated by DNA after being misidentified by multiple eyewitnesses

analytic review, 7 Psychol., Pub. Pol. & L. 3 (2001); Sporer, S. L. *Recognizing faces of other ethnic groups: An integration of theories*, 7 Psychol., Pub. Pol. & L. 36 (2001).

¹⁶ *Gomes*, 470 Mass. at 380 (instructing jurors to consider whether offender’s features were disguised or “obscured in some way.”); see *id.* at 380 n.5 (noting that “items that conceal a perpetrator’s hair or hairline,” such as hats and hoods, “also impair a witness’s ability to make an accurate identification.”) (internal citation omitted); Mansour, J., K., Beaudry, J. L., Bertrand, M. I., Kalmet, N., Melsom, E. I., & Lindsay, R. C. L., *Impact of disguise on identification decisions and confidence with simultaneous and sequential lineups*, 36 L. & Hum. Behav. 513 (2012).

¹⁷ *Gomes*, 470 Mass. at 382; Dysart, J. E., Lindsay, R. C. L., MacDonald, T. K., & Wicke, C., *The intoxicated witness: effects of alcohol on identification accuracy from showups*, 87(1) J. of App. Psychol. 170 (2002).

¹⁸ *Gomes*, 470 Mass. at 381-382 (instructing jurors to consider characteristics of the witness). See also *supra* at n. 1

¹⁹ *Gomes*, 470 Mass. at 384; Eisen, M. L., Gabbert, F., Ying, R., & Williams, J. “*I Think He Had A Tattoo On His Neck*”: How Co-Witness Discussions About A Perpetrator’s Description Can Affect Eyewitness Identification Decisions, 6 J. of Applied Research in Memory and Cognition 274 (2017); Wells, G. L., Kovera, M. B., Douglass, A. B., Brewer, N., Meissner, C. A., & Wixted, J. T. *Policy and procedure recommendations for the collection and preservation of eyewitness identification evidence*, 44 L. & Hum. Behav. 3 (2020).

²⁰ *Gomes*, 470 Mass. at 386-387, 388.

²¹ <https://www.innocenceproject.org/dna-exonerations-in-the-united-states>.

conclusively demonstrate that “consistent identification evidence” does not safeguard or “corroborate” the identification:

- **Dennis Maher** was convicted in 1984 of sexual assaults on three different women in Lowell and Ayer, Massachusetts. Mr. Maher was ultimately misidentified by five separate eyewitnesses (including the three victims) before DNA evidence conclusively established his innocence and led to his exoneration. He spent 19 years in prison for crimes he did not commit.²²
- **Ronnie Qualls** was twice tried and convicted based on testimony from three eyewitnesses who identified him as the lone gunman who shot two brothers at point blank range in the back seat of a car. After serving over 25 years in prison, Mr. Qualls was exonerated in 2020 based on DNA evidence showing that tiny droplets of blood shed by one of the victims was found on clothing worn by the man who had previously been identified as the actual killer.²³
- **Kirk Bloodsworth** was convicted of rape and murder and sentenced to death row when *five* eyewitnesses testified that they saw him with the young victim the day she was assaulted and murdered. Two of those witnesses could not identify him from a lineup but did identify him after seeing him on television once he was charged. While the evidence seemed to strongly point to his guilt, Mr. Bloodsworth was exonerated when DNA testing from the victim’s clothing and body conclusively established his innocence.²⁴
- **Kenneth York** was convicted of forcible rape and sentenced to life in prison when *three* eyewitnesses identified him. The victim and her two neighbors identified Mr. York from a photo array. However, the victim only identified Mr. York after first identifying another individual in an earlier array. Mr. York was eventually exonerated by DNA testing of the rape kit.²⁵

It also bears noting that, in one recent *non-DNA* based Massachusetts exoneration, the defendant – Frederick Clay – was likewise misidentified by two independent eyewitnesses. There, as in Mr. Valle’s case, the jury credited the identification testimony of the two eyewitnesses over that of Mr. Clay’s alibi witnesses, even though Mr. Clay did not match the description of the perpetrator and despite the lack of corroborating physical or forensic evidence. Mr. Clay spent nearly 38 years in prison before being exonerated.²⁶

²² <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3404> (last visited Sept. 30, 2020).

²³ <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5804> (last visited Sept. 30, 2020).

²⁴ <https://www.innocenceproject.org/cases/kirk-bloodsworth/> (last visited April 22, 2020).

²⁵ <https://www.innocenceproject.org/cases/kenneth-york/> (last visited April 22, 2020).

²⁶ <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5187> (last visited Sept. 29, 2020).

Errors by defense counsel and the trial court

As this Court has recognized, virtually none of the relevant eyewitness identification factors in this case are commonly known by jurors. Yet – as described in greater detail below – not only did trial counsel fail to consult with or present expert testimony to explain the significance of these factors, but the judge’s instructions explicitly invited jurors to rely on their “common sense” about how memory works. The confluence of all of these factors, in a case where eyewitness identification evidence was the only evidence against Mr. Valle, raises serious doubt about the justice of the conviction.

First, as the Appeals Court found, defense counsel missed several topics that she should have addressed on cross-examination of eyewitnesses, including:

- Their “descriptions of the intruders’ clothes and head coverings”;
- “[O]ther potential estimator variables” (which, as noted above, include weapon focus, cross-racial factors);²⁷
- The possibility of unconscious transference;
- Exposure to the police speaking with Mr. Valle prior to the joint identification; and
- L.M.’s greater certainty about the identity of the first male who entered the apartment, as compared to her certainty that Mr. Valle was the second perpetrator.

Memo at 22, n.7, 24. The Appeals Court also acknowledged numerous deficits in trial counsel’s pre-trial investigation and trial performance, including her:

- Reliance on the co-defendant’s investigator, which prevented her from “uncovering information vital to a potential misidentification defense,” Memo at 23;
- Failure to interview the eyewitnesses prior to trial, and thus never learned of L.M.’s schizophrenia diagnosis and vision problems, Memo at 24;
- Failure to exclude police testimony recounting L.M.’s statement of certainty, Memo at 25; and
- Failure to object to inaccurate, “potentially misleading” testimony implying that Mr. Valle was identified as a shooter, Memo at 25-26.

Additionally, the Appeals Court acknowledged that the trial judge instructed jurors to rely on “common sense and general life experience,” and *omitted* those portions of *Gomes* instructing jurors to consider, when evaluating the reliability of the ID:

- The effects of exposure to multiple identification procedures and identifications made by others;
- The effects of exposure to other potential sources of influence;

²⁷ See *supra* at 4-5.

- Whether police adhered to best practices in their handling of the eyewitness identification interviews and procedures.

Memo at 27-28.

Despite reciting the numerous errors in Mr. Valle's trial, the Appeals Court failed to consider the cumulative impact of those errors on the justice of the conviction. Had the Appeals Court considered the confluence of factors present in this case, it would have concluded that justice was not done.

The systemic problem of conclusory unpublished decisions by the Appeals Court

This Court's preference for "one appeal" is well-known. Statistics on the allowance of DAR applications and ALOFARs make that clear. But this preference is fraught when a criminal defendant's appeal receives short shrift from the Appeals Court in an unpublished opinion pursuant to Rule 1:28. This is such a case.

As noted above, the Appeals Court affirmed Mr. Valle's convictions – and the resultant state prison sentence in excess of two decades – in an unpublished opinion that was authored without even the benefit of oral argument. That opinion completely omitted several aspects of Mr. Valle's appellate argument, rendering it an unreliable measure of justice. In addition, the opinion failed to consider whether the *combined* effect of the above litany of individual errors and judicial shortcomings may have cumulatively deprived Mr. Valle of a substantial opportunity to challenge the eyewitness testimony that alone comprised the Commonwealth's case.

In short, the stakes in this case are far too high to rely on an incomplete unpublished opinion to decide whether Mr. Valle received due process and whether the combined effect of all of the errors described here created a substantial risk of a miscarriage of justice. This Court should grant further appellate review in order to resolve these critically important issues, and to provide necessary guidance to lower courts about the proper application of the confluence of factors test laid out in *Epps* and *Rosario*.

Respectfully submitted:

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