IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 151524

DEANTE LAMAR PAYNE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR AMICUS CURIAE THE AMERICAN PSYCHOLOGICAL ASSOCIATION

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INTEREST OF AMICUS CURIAE

The American Psychological Association (APA) is the leading association of psychologists in the United States. A nonprofit scientific and professional organization, APA has approximately 135,000 members and affiliates. Among APA's purposes are to increase and disseminate knowledge regarding human behavior; to advance psychology as a science and profession; and to foster the application of psychological learning to important human concerns, thereby promoting health, education, and welfare.

APA has filed more than 170 amicus briefs in state and federal courts nationwide. These briefs have been cited frequently by courts, including the U.S. Supreme Court. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015); *Hall v. Florida*, 134 S. Ct. 1986, 1994-1995, 2000-2001 (2014); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). APA has recently filed amicus briefs in cases addressing eyewitness-identification issues. *See, e.g.*, *Perry v. New Hampshire*, 132 S. Ct. 716 (2012); *Commonwealth v. Gomes*, 22 N.E.3d 897 (Mass. 2015); *Commonwealth v. Johnson*, 22 N.E.3d 155 (Mass. 2015); *Commonwealth*

v. Walker, 92 A.3d 766 (Pa. 2014); *State v. Artis*, 101 A.3d 915 (Conn. 2014).

APA has a rigorous approval process for amicus briefs, the touchstone of which is an assessment of whether a case is one in which there is sufficient scientific research, data, and literature relevant to one or more questions before the court so that APA can usefully contribute to the court's understanding and resolution of that question. APA regards this case as presenting such questions.[1]

STATEMENT OF THE CASE

The Commonwealth brought this case against defendant Deante Payne on charges of robbery and use of a firearm in the commission of a robbery. JA 1-4, 536. The case stemmed from the robbery of Phillip Via at gunpoint and knifepoint by two people who accosted him in a laundry room. JA 537-538. The Commonwealth's theory was that Payne was the assailant holding the gun. JA 538.

The trial turned principally on Via's identification of Payne as one of the assailants. *See* JA 319 (Commonwealth stating at trial that "this whole

[1] The written consent of both parties accompanies this brief. *See* Va. S. Ct. R. 5:30. No counsel for a party authored this brief in whole or in part, and no one other than amicus, its members, and its counsel funded the preparation or submission of this brief. Undersigned counsel state that Wilmer Cutler Pickering Hale and Dorr LLP has not previously represented the defendant-appellant in this or any related proceeding.

case is about the identification of the defendant ….”). At trial, Payne requested the following instruction relevant here:

> The Court instructs the jury that one of the disputed issues in this case is the identification of the defendant as the person who committed the offense(s) charged in the indictment. The Commonwealth has the burden of proving this issue beyond a reasonable doubt.
>
> In considering whether the Commonwealth has proven beyond a reasonable doubt that the defendant was the person who committed the offense(s) charged in the indictment, you may consider the following with regard to an identification witness’s testimony:
>
> (1) the witness’s opportunity to observe the person(s) committing the crime, which includes the amount of time of the observation and the physical conditions such as lighting, distance, or obstructions present at the time of the observation;
>
> (2) the witness’s degree of attention at the time of the observation, whether the witness was under stress, fear or similar situations, and whether the witness had occasion to see or know the person in the past;
>
> (3) whether the witness gave a description of the person after the crime and if so, the accuracy of such description and the length of time after the offense that the description was given; and
>
> (4) whether the witness made any subsequent identification of the person after the offense, the circumstances surrounding such subsequent identification, the witness’s level of certainty at such subsequent identification, and the time between the offense and the subsequent identification.

JA 526. The trial court rejected this instruction, although it gave the first two sentences alone as a standalone instruction (No. 4). JA 543 n.3. The

jury convicted Payne of robbery and use of a firearm in the commission of a robbery, and Payne appealed. JA 536.

The court of appeals held that the trial court had not erred in rejecting the instruction quoted above. JA 536. The court deemed the instruction duplicative of the instructions given, and concluded that the proposed instruction was "an improper commentary on the evidence." JA 552.

STATEMENT OF FACTS

In 2011, Phillip Via responded to an online classified advertisement for the sale of a used laptop computer. JA 215. He exchanged text messages with an unknown person, agreeing to meet that person at an apartment complex. JA 215-219. When Via arrived at the parking lot, it was dark outside. JA 239. A person came out to his car and informed him that the laptop battery was dead and was recharging, and asked Via if he wanted to go inside the apartment to look at it. JA 242. Via agreed and followed the person into a laundry room. JA 219. Once Via entered, a second man grabbed him and placed a knife to his side. JA 219-220. The two men told Via to "give it up" and said "we know you've got it on you." JA 221. The men searched Via and found his cell phone. *Id*. At one point, the first man pulled out a gun, pointing it at Via. *Id*. The men eventually left with Via's cell phone. JA 222-223.

Detective Keshia Saul of the Roanoke County Police Department visited Deante Payne to interview him about the incident, and Payne readily acknowledged that he had posted the classified advertisement on behalf of his cousin Dustin. JA 297-300, 305. Payne also suggested that a person named "Boonie" (later determined to be Mark Rosser) might have been involved in the incident. JA 303-304. According to an email later authored by Detective Saul, Payne looks like Rosser. JA 341, 494.

About two months after the incident, Via was shown a photo lineup by the police. JA 304-305. The lineup included a photograph of Payne, but not one of Rosser. JA 99-100; JA 305. Via identified Payne as an assailant in the robbery. JA 305.

About four weeks after the lineup, Via identified Payne as one of his assailants at a court hearing involving Payne's cousin. JA 234-235, 172-173. Another several months later, Via participated in a second photo lineup that included the same photograph of Payne that Via had identified previously, along with a photograph of Rosser. JA 120-121, 306-307, 342. Via selected the photograph of Payne again. JA 120-121, 307.

At trial, Via identified Payne as he sat with his defense counsel. JA 218.

ISSUES PRESENTED

This brief addresses the first issue on which this Court granted review: whether "The Court of Appeals Erred in Upholding the Trial Court[']s Denial of Payne's Instruction Regarding Eyewitness Identifications." JA 562. More specifically, this brief addresses subpart A (which read in relevant part: "The Court of Appeals Erred in Ruling that the Jury Instructions Given Fully and Fairly Addressed the Evidence and that the Proffered Instruction Was Duplicative") and subpart C (which read in relevant part: "The Court of Appeals Erred in Ruling that the Jury Instruction on Eyewitness Identification Was Confusing, an Impermissible Commentary on the Evidence, and that It Invaded the Province of the Jury"). *Id*.

STANDARD OF REVIEW

This Court reviews jury instructions "to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." *Lawlor v. Commonwealth*, 285 Va. 187, 228 (2013) (internal quotation marks omitted). While a trial court's decision to refuse a jury instruction is reviewed for abuse of discretion, *Stockton v. Commonwealth*, 227 Va. 124, 145 (1984), the question "'whether a jury instruction accurately states the relevant law is a question of law that [this Court]

review[s] de novo,'" *Lawlor*, 285 Va. at 228 (internal quotation marks omitted). "'When reviewing a trial court's refusal to give a proffered jury instruction, [this Court] view[s] the evidence in the light most favorable to the proponent of the instruction." *Id*. at 228-229 (internal quotation marks omitted).

ARGUMENT

Eyewitness testimony is a critical part of the criminal justice system's truth-seeking process. Indeed, accurate eyewitness identifications can provide important evidence of guilt or innocence. But "both archival studies and psychological research suggest that eyewitnesses are frequently mistaken in their identifications." Devenport et al., *Eyewitness Identification Evidence*, 3 Psychol. Pub. Pol'y & L. 338, 338 (1997). And because eyewitness identification is so powerful with jurors, "eyewitness [m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country." *State v. Henderson*, 27 A.3d 872, 885 (N.J. 2011) (internal quotation marks omitted) (alteration in original). Misidentification thus "present[s] what is conceivably the greatest single threat to the achievement of our ideal that no innocent [person] shall be punished." *Id.* (internal quotation marks omitted).

These are not new insights. Indeed, this Court has noted that "[c]ourts have long recognized dangers inherent in eyewitness identification testimony." *Daniels v. Commonwealth*, 275 Va. 460, 464 (2008). That observation was correct. Decades ago, for example, the U.S. Supreme Court noted that "identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967).

Recent times have, however, brought significant new data to support the conclusion that erroneous eyewitness identifications lead to innocent people being convicted and imprisoned. According to the Innocence Project, for instance, over 70 percent of DNA exonerations involve eyewitness misidentification. *DNA Exonerations in the United States*, www.innocenceproject.org/dna-exonerations-in-the-united-states/ (visited June 20, 2016). Another study similarly found that, of the first 200 cases of post-conviction DNA exonerations, nearly 80 percent included at least one eyewitness who mistakenly identified the innocent defendant. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 76 tbl. 2 (2008). Overall,

inaccurate eyewitness identifications are believed to account for more than half of wrongful convictions in the United States. *See, e.g.*, Huff, *Wrongful Conviction: Societal Tolerance of Injustice*, 4 Res. in Soc. Probs. & Pub. Pol'y 99, 101-103 (1987) (stating that a study implicated mistaken eyewitness identifications as the cause of more than 60 percent of the five hundred wrongful convictions studied); Cutler & Penrod, *Mistaken Identification* 3, 8 (1995). Virginia is not exempt from this phenomenon: Ten of thirteen DNA exonerations in Virginia involved erroneous eyewitness misidentifications. Virginia Dep't of Crim. Justice Servs, *Model Policy on Eyewitness Identification* 1 (Mar. 19, 2014).

Moreover, although the unreliability of eyewitness identifications is well known in the scientific community and among many lawyers, it is not understood by lay juries. To the contrary, as elaborated below, empirical research has shown that juries greatly overestimate the accuracy of eyewitness identifications, and more specifically do not understand which factors bear on the reliability of such identifications.

To mitigate the threat of erroneous convictions caused by mistaken identifications, and by lay jurors' well-established lack of appreciation for the limitations of eyewitness identifications, model jury instructions on eyewitness identification have now been adopted in over twenty states and

in most federal courts of appeals. JA 546 n.8, 547 n.9. The adoption of such instructions is an acknowledgment that traditional generic instructions about the burden of proof beyond a reasonable doubt, and about the jury's role in assessing credibility, have not redressed over-reliance on questionable eyewitness identification evidence—and the conviction of the innocent on that basis.

In considering the issues presented here, APA submits that this Court should take account of the extensive body of psychological research dedicated to eyewitness identifications—research that, as discussed below, is highly reliable. That research supports the importance of instructions sought but denied here relating to the circumstances of subsequent identifications and the presence of stress and fear in the witness. The value of eyewitness-identification instructions is underscored by research showing that jurors continue to lack an adequate understanding of factors that make identifications more or less susceptible to error, and by the inability of other safeguards of the adversary system in most cases to counter the prejudicial effect of false identifications. Finally, APA urges this court to reject the ruling by the Court of Appeals that the proffered instructions were an impermissible commentary on the evidence. Such a ruling would improperly close the door to the use in Virginia of the kinds of

eyewitness identification instructions that have now become widely used in state and federal jurisdictions, and that play an important part in helping ensure that juries assess the evidence with the benefit of current scientific understanding of the limits on its reliability.

I. THE COURT OF APPEALS ERRED IN RULING THAT THE JURY INSTRUCTIONS FULLY AND FAIRLY ADDRESSED THE EVIDENCE

In rejecting Payne's proposed jury instruction quoted earlier, the court of appeals reasoned that the instruction was adequately covered by the instructions the trial judge did give, and thus was duplicative. JA 551. The APA submits that that is not correct.

For example, unlike the instruction Payne requested, the instructions that were given did not address—as factors relevant to eyewitness reliability—"whether the witness was under stress, fear or similar situations," or "whether the witness made any subsequent identification of the person after the offense, [and] the circumstances surrounding such subsequent identification." JA 526. As discussed below, psychological research demonstrates that those factors do bear on reliability. It also demonstrates that—contrary to the apparent view of the court of appeals here—the impact of many factors on eyewitness reliability is not "within the lay knowledge of the jurors." *See* JA 553.

A. Psychological Research Supports The Relevant Instruction Requested Here

1. Presentation of a suspect in one identification procedure contaminates selection of that suspect in a subsequent procedure

Courts have long recognized that exposing an eyewitness to a person's image or likeness (a photograph, for example) increases the risk that the witness will misidentify that person as the culprit in the future. Over forty years ago, for example, the U.S. Supreme Court observed that, after seeing a photograph of a suspect, a "witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." *Simmons v. United States*, 390 U.S. 377, 383-384 (1968) (citing Wall, *Eye-Witness Identification in Criminal Cases* 68-70 (1965)). Sister state high courts have reached the same conclusion: The Oregon Supreme Court, for example, has stated that "[w]hether or not the witness selects the suspect in an initial identification procedure, the procedure increases the witness's familiarity with the suspect's face" in subsequent identification. *State v. Lawson*, 291 P.3d 673, 687 (Or. 2012).

These courts' conclusions were well-founded. As research has shown, the presentation of a suspect in one identification procedure contaminates any selection of that suspect by the same witness in a later

procedure. In particular, there is no way to know whether the identification of the suspect in a later procedure is a product of the witness's original memory for the perpetrator or instead reflects the witness's familiarity with the suspect from the prior procedure. In psychological terms, the identification of a suspect from the subsequent procedure may represent a "source-monitoring error." *See* Johnson et al., *Source Monitoring*, 114 Psychol. Bulletin 3, 11-12 (1993). Source monitoring refers to the process of making attributions about our memories, and source-monitoring errors refer to mistaken attributions about our memories. Thus, in a subsequent identification test, a witness may incorrectly attribute the source of her memory to having viewed the actual perpetrator during the crime, rather than having seen the suspect in the prior identification test. *See id.*

Psychological research has documented this phenomenon. For example, one "meta-analysis" (an analysis of data from a cross-section of prior studies) that synthesized seventeen previous studies found that eye-witnesses to simulated crimes who were exposed to photographs of suspects before participating in a lineup were significantly more likely to mistakenly identify as the culprit someone whom they had seen in a photograph, as compared to those who participated in the lineup without first viewing the photographs (37 percent to 15 percent). *See* Deffenbacher

et al., *Mugshot Exposure Effects*, 30 Law & Hum. Behav. 287, 299 (2006). Moreover, in a meta-analysis of fifteen previous studies, the presentation of photographs prior to the lineups reduced the overall proportion of correct identifications from 50 percent to 43 percent. *See id*. at 296; *see also* Brown et al., *Memory for Faces and the Circumstances of Encounter*, 62 J. of Applied Psychol. 311, 313-315 (1977).[2]

Research thus supports the conclusion that participation in multiple identification procedures reduces the reliability of any identification in one of the later procedures. That reduced reliability is particularly salient here, where there was a second suspect who looked like Payne but had been omitted from the initial identification procedure. JA 494; JA 99-100; JA 317-324.[3] That research fully supports the instruction Payne requested, which would have apprised jurors that they could take into consideration "the circumstances surrounding [a] subsequent identification," such as

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[2] Research shows that these effects tend to disappear when a witness is presented with a very large number of photographs. *See* Dysart et al., *Mug Shot Exposure Prior to Lineup Identification*, 86 J. Applied Psychol. 1280, 1283 (2001) (no statistically significant "transference" where witnesses were exposed to an average of 534 photographs).

[3] The Commonwealth specifically relied on identifications of Payne that Via made *after* Via had already been exposed to the photograph of Payne. *See* JA 467 ("Ladies and gentleman, Mr. Via has identified the defendant not once, not twice, not three times, but four times. … That is proof beyond a reasonable doubt that the defendant was involved in this offense….").

when the witness viewed a photograph of the defendant prior to three subsequent identifications of the defendant as the culprit.

2. Witness stress decreases the ability of an eyewitness to recognize the perpetrator

Psychological research likewise supports the conclusion that the level of stress experienced by an eyewitness at the time of his or her exposure to the perpetrator of a crime can affect the reliability of a subsequent identification. One meta-analysis, for example, found "clear support for the hypothesis that heightened stress has a negative impact on eyewitness identification accuracy." Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687, 694 (2004) (examining 27 prior studies). Another study, involving participants at military-survival schools who were exposed to genuine stress, similarly found "robust evidence that eyewitness memory for persons encountered during events that are … highly stressful[] … may be subject to substantial error." Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J. L. & Psychiatry 265, 274 (2004).

This research fully supports Payne's proffered instruction, which would have informed jurors that they could consider "whether the witness was under stress, fear or similar situations." The instruction has obvious

application here, where there was evidence that one perpetrator had held a knife to Via's side while the other pointed a gun at him. The instructions actually given to the jury, by contrast, did not address the topic at all.

B. Many Principles of Eyewitness Identification Are Typically Not Within The Common Knowledge of the Jurors

The court of appeals appears to have believed that jurors sufficiently understand the eyewitness-identification principles in Payne's proffered instruction. In fact, research shows that most jurors are unaware of many if not most of the widely accepted findings regarding the reliability of eyewitness identifications.

Over the last three decades, several studies have assessed jurors' understanding of the factors that adversely influence an eyewitness's accuracy. *See* Benton et al., *Eyewitness Memory Is Still Not Common Sense*, 20 Applied Cognitive Psychol. 115 (2006); Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 177, 191-205 (2006). These studies have consistently concluded that jurors misunderstand the reliability of eyewitness identifications. Jurors' misconceptions about eyewitness accuracy have proved resilient over time, even in the face of the recent wave of high-profile exonerations. *See generally* Lampinen et al., *The Psychology of Eyewitness Identification* 242-244 (2012) (noting the

conclusion of several surveys studies on juror knowledge that "[j]urors, unlike judges, know very little about the many factors that affect eyewitness memory.").

Those misconceptions, moreover, extend to issues involved here. In a 2006 study that involved approximately 1,000 potential jurors, for example, subjects were asked whether they thought that the fact that "a crime is violent"—a question related to stress and a factor present in this case—tends to make "an eyewitness' memory about the details of the crime more reliable, less reliable or [would have] no effect." Schmechel et al., *supra*, at 194, 197. The results showed that "[o]nly three out of ten potential jurors correctly understood that event violence tends to make an eyewitness' memory for details less reliable." *Id.* at 197; *see also id*. at 204 (the poll "shows that significant numbers of jurors (often substantial majorities) do not understand concepts like weapons focus [and] the effects of stress").

In short, the court of appeals' evident view that the proffered instruction was unnecessary here because jurors understood the relevant points is not supported by psychological research.

C. Other Tools of the Adversary System Do Not Adequately Address the Problem of Faulty Eyewitness Identification

In rejecting the instructions at issue, the court of appeals alluded to other tools of the adversary system—such as cross-examination and closing arguments—as safeguards to prevent juries from placing undue weight on questionable eyewitness testimony. *See* JA 546 n.7, 560. Scientific research and recent experience undermine the assertion that these alternatives are adequate to address the danger of inaccurate eyewitness identification.

As an initial matter, research has long shown that jurors systematically "over-believe" eyewitness identifications. In a 1983 study, researchers presented individuals with a variety of crime scenarios derived from previous empirical studies, and asked the individuals to predict the accuracy rate of eyewitness identifications observed in the studies. *See* Brigham & Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19, 22-24 (1983). On average, nearly 84 percent of respondents over-estimated the accuracy rates. *See id*. at 28. The magnitude of the over-estimation, moreover, was significant. For example, the respondents estimated an average accuracy rate of 71 percent for a highly unreliable scenario in which only 12.5 percent of eyewitnesses had made a correct identification.

See id. at 24. Even when unreliable eyewitness identification is admitted, therefore, juries are likely to believe it.

Cross-examination, though an essential part of the truth-seeking process, is not sufficient to address this problem. Empirical data on cross-examination indicate that it is not an effective way to counter unreliable eyewitness testimony. *See* Lampinen et al., *supra*, at 249 (citing Leippe, *The Case For Expert Testimony About Eyewitness Memory,* 1 Psychol. Pub. Policy & Law 909 (1995)). This is in part because what most affects jurors' assessment of an eyewitness identification is the witness's confidence. *See* Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185, 185 (1990); Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. Applied Psychol. 79, 83 (1981). And cross-examination is often ineffective with an honest but mistaken witness who is very confident. *See, e.g.*, Lampinen, *supra*, at 250 ("[T]he goal of cross-examination is to attack the credibility of the witness[, which] leads to a focus on factors ... such as witness demeanor and trivial inconsistencies."). As another state high court put it, "[c]ross-examination will often expose a lie or half-truth, but may be far less effective when witnesses, although mistaken, believe that what they say is true." *State v. Clopten*, 223 P.3d

1103, 1110 (Utah 2009); *see also* Rahaim & Brodsky, *Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 7 Law & Psych. Rev. 1, 7 (1982).[4]

Expert testimony is likewise insufficient, though for a different reason. It is true that expert testimony can help juries better understand eyewitness identifications (and its limits), and thus reduces the prejudice of inaccurate identifications. Indeed, a number of studies support the view that expert testimony can make jurors more sensitive to the factors that influence eyewitness accuracy. *See* Lampinen, *supra*, at 253; Cutler et al., *Expert Testimony and Jury Decision Making: An Empirical Analysis*, 7 Behav. Sci. & L. 215 (1989); Devenport et al., *How Effective Are the Cross-Examination and Expert Testimony Safeguards? Jurors' Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures*, 87 J. Applied Psychol. 1042 (2002). APA has thus urged courts to allow such testimony. But courts may not admit such evidence in some cases, or—as in the

[4] The fact that wrongful convictions identified in recent years have frequently involved a mistaken identification further indicates that cross-examination alone is insufficient to deal with the problem of mistaken identifications. *See, e.g.*, Garrett, *Convicting the Innocent* 8-9, 48 (2011) (of 250 wrongful convictions, 190 involved mistaken eyewitness identifications); *accord* Gross et al., *Exonerations in the United States, 1989-2012, Report by the National Registry of Exonerations* 40 tbl.13 (2012) (mistaken witness identifications in 43 percent of exoneration cases).

present case—may not afford an indigent defendant funds to hire such an expert. Jury instructions, by contrast, are "concise" and "cost-free." *Henderson*, 27 A.3d at 925; *State v. Guilbert*, 49 A.3d 705, 727 n.27 (Conn. 2012) (internal quotation marks omitted). Thus, despite generally being desirable, expert testimony cannot be the only safeguard against the dangers of unreliable identifications.

Furthermore, key portions of the instructions at issue here would have told the jurors about particular factors that they were entitled—as a matter of law—to consider during their deliberations. Information about what the law permits jurors to consider is more appropriately conveyed in jury instructions than in expert testimony.

In sum, given the limitations of other tools of the adversary process at sensitizing jurors to the complexities and limitations of eyewitness evidence, the truth-seeking function of the criminal trial is best served by adopting an approach that allows vigorous cross-examination and admissible expert testimony alongside, but not in lieu of, thorough jury instructions.

D. The Requested Instruction Is Consistent With *Daniels*

This Court's most recent decision addressing eyewitness-identification jury instructions is *Daniels v. Commonwealth*. 275 Va. 460

(2008). There, the Court acknowledged the "dangers inherent in eyewitness identification testimony," and noted that the Court has not opined "that a court would abuse its discretion by granting [a cautionary] instruction [on eyewitness identification]." *Id*. at 464-465.

The court of appeals here noted, however, that in *Daniels*, this Court ultimately concluded that the trial court had not erred in refusing the instruction proposed. *See* JA 547-548. That is true, but does not support the court of appeals' ruling. In *Daniels*, this Court rejected a proposed instruction that the jury "should also consider the circumstances under which the witness later made the identification," reasoning that "there was no suggestion of improper procedures by the police in conducting the lineups or photo arrays." 275 Va. at 466-467. In other words, the Court concluded that the evidence in the case did not support the instruction—not that the instruction could never be given. Here, by contrast, the circumstances of the identification procedures are very much at issue.

II. THE COURT OF APPEALS ERRED IN RULING THAT PAYNE'S PROPOSED JURY INSTRUCTION WAS AN IMPERMISSIBLE COMMENTARY ON THE EVIDENCE THAT INVADED THE PROVINCE OF THE JURY

The court of appeals ruled that Payne's proposed instruction was an impermissible commentary on the evidence. JA 552. The court did not specify which portion of the instruction was impermissible commentary;

rather, the court apparently condemned the entire portion of the instruction that informed the jury "what you may consider…with regard to an identification witness's testimony." The court ruled that such instructions were impermissible as a matter of law, because they were supposedly "statements of scientific knowledge" and "single[d] out for emphasis a part of the evidence." JA 549. That argument fails for two reasons.

First, the instruction could not have placed any more "emphasis" on the eyewitness identification than it already had. Via's identification was central to the prosecution's case—to the point that the prosecutor stated to the court that "this whole case is about the identification of the defendant." JA 319. The question here is thus not whether the instruction would have given undue prominence to one part of the evidence, but rather whether the jurors would be given important guidance regarding the "part of the evidence" that was at the heart of the case.

Second, Payne's proffered instruction would have told jurors about factors they were entitled to *consider*. Jurors would not have been required to give any particular amount of weight—or indeed any weight at all—to those factors. The instruction thus would not have usurped or invaded the jury's province as the sole finder of fact. Instead, it would have provided

them information relevant to their role as fact-finders; what they did with that information remained entirely in their hands.

If affirmed by this Court, the court of appeals' view would effectively close the door on the kind of eyewitness-identification jury instructions that the U.S. Supreme Court has approvingly placed among the "safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability." *Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012).[5]

The lower court's ruling would likewise foreclose use of the instruction drafted by the Model Jury Instruction Committee and introduced in the "Note on Eyewitness Identification" in the Virginia Model Jury Instructions. Va. Model Jury Instr.—Crim., 2.800, Note on Eyewitness Identification (2014 replacement ed.). Like Payne's proposed instruction, those instructions inform a jury that "[i]n weighing [eyewitness] testimony, you may consider" several particular factors. *Id*. Those include "whether the witness had an adequate opportunity to observe the person" (including issues of "distance," "lighting" and "obstructions"); "whether the witness was stressed or frightened"; and "whether the witness's identification of the

[5] While the court noted by way of introduction that it agreed with the trial judge that the proposed instruction "might confuse the jury," JA 543, the court did not make juror confusion part of its analysis or reasoning in the opinion, and indeed never returned to the topic at all.

defendant…may have been the result of outside influences." Again, these mirror the instructions Payne sought. *See* JA 542-543 (Payne instruction's stating that the jury "may consider" "the witness's opportunity to observe the person(s) committing the crime" (including "lighting, distance, or obstructions"), "whether the witness was under stress, fear, or similar situations," and "the circumstances surrounding [a] subsequent identification" of the person "after the offense"). To whatever extent Payne's instructions "single[d] out for emphasis a part of the evidence" or were "statements of scientific knowledge," the Committee's instructions do precisely the same. So, too, do the model eyewitness jury instructions in other state and federal jurisdictions.[6]

The court of appeals also discussed the role of the jury in assessing credibility, suggesting that embracing Payne's instruction would lead to a system in which "[t]he law … no longer relies on juries to make credibility determinations." JA 549-550. But that conflates eyewitnesses' *credibility* with eyewitness *reliability*. A witness may hold an honest but mistaken

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[6] *See, e.g.*, *United States v. Holley*, 502 F.2d 273, 275, 277-278 (4th Cir. 1974) (including as an Appendix the *Telfaire* model instruction, of which Payne's proffered instruction is a variant, and stating that "[p]rospectively, we shall view with grave concern the failure to give the substantial equivalent of such an instruction."); Model Crim. Jury Instr. No. 4.15 (3d Cir. 2015) (reciting similar considerations to Payne's proffered instruction).

belief that has been influenced, for example, by an improper identification procedure. In such a case, the honest witness would likely appear credible, but the identification may not be reliable in light of the improper influence. The factors addressed by the proffered instruction are directed to reliability factors and would not invade a jury's credibility determination. *See Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (listing reliability factors, including several also appearing in Payne's instruction).

In short, the court of appeals' concerns regarding the instruction were not warranted.

III. EYEWITNESS-IDENTIFICATION RESEARCH IS RELIABLE

As explained, Payne's proffered jury instruction on eyewitness-identification is supported by psychological research. That is relevant, and should be given great weight by this Court, because that body of research is highly reliable. This reliability stems principally from three factors.

First, the methods used by researchers reflect best practices in scientific psychological research. "[L]ike all scien[tists] … , psychologists rely upon basic principles of scientific inquiry that ensure the reliability and validity of their findings." Malpass et al., *The Need for Expert Psychological Testimony on Eyewitness Identification*, *in Expert Testimony on the Psychology of Eyewitness Identification* 3, 11 (Cutler ed. 2009). In

particular, psychologists form hypotheses based on prevailing theories and available data, and then test those hypotheses through experiments or review of archival sources. *See id*. at 11-14. The testing process typically involves experiments in which researchers expose a controlled set of subjects to different videotaped or staged crimes and then test the accuracy of the subjects' identification skills. *See, e.g.*, Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. in Pub. Int. 45, 49-50 (2006). This approach is widely considered to yield "the most robust findings." Malpass et al., *supra*, at 13; *see also* Wells et al., *supra*, at 49. The next step—analysis of the results produced by the experiments—is equally sound: It normally involves inferential statistical methods, which have been "developed and accepted by researchers over a period of more than a century." Malpass et al., *supra*, at 14.

Second, studies in this field are typically subject to two layers of peer review, first at the funding stage and then at the publication stage. *See* Cutler & Penrod, *Mistaken Identification* 66-67 (1995). The high standards and low acceptance rates that apply at both stages provide an additional check on the methodological soundness of the research. *See id*. at 66-67; Malpass et al., *supra*, at 14.

Third, most psychological researchers are members of APA, which requires them to abide by its Ethical Principles and Code of Conduct. The code forbids psychologists from fabricating data or making false or deceptive statements. *See* APA Standard 8.10(a). It also imposes more affirmative duties, including the obligation to share the data they use with any competent professional seeking to validate their work. *See id*. at 8.14(a). Nor is the code the only source of an ethical check on research. Universities at which much psychological research is conducted typically require that it be reviewed in advance by internal ethics boards. *See, e.g.*, Meyer, *Regulating the Production of Knowledge: Research Risk-Benefit Analysis and the Heterogeneity Problem*, 65 Admin. L. Rev. 237, 243-250 (2013). And many journals that publish the research require statements of compliance with ethical standards. *See, e.g.*, APA Certification of Compliance with APA Ethical Principles, *available at* http://www.apa.org/pubs/authors/ethics02.pdf) (requirement applies to APA journals).

Further evidence regarding the reliability of psychological research on eyewitness identifications is the level of consensus in the field as to core findings of that research. In a 1989 study, for example, researchers surveyed psychologists who had published in the field. *See* Kassin et al., *The "General Acceptance" of Psychological Research on Eyewitness*

Testimony, A Survey of the Experts, 44 Am. Psychologist 1089, 1090 (1989). This survey showed general agreement among experts that at least nine variables had been reliably been shown to influence eyewitness accuracy. *See id*. at 1093, 1094 & tbl. 4. A follow-up survey conducted in 2001 confirmed the 1989 results. *See* Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research, A New Survey of the Experts*, 56 Am. Psychologist 405, 410, 413 tbl. 5 (2001). More recent results confirm this consensus. *See* Hosch et al., *Expert Psychology Testimony on Eyewitness Identification: Consensus Among Experts?*, *in Expert Testimony on the Psychology of Eyewitness Identification* 143, 152 (Cutler ed. 2009) (according to a 2008 study cited therein, "the level of general acceptance in the field is higher than it was in 2001"). Simply put, "relative to other scientific research that enters courtrooms, the lack of controversy in the field of eyewitness identification is remarkable." Schmechel et al., *supra*, at 179.

Psychological research on eyewitness identifications is highly reliable. In addressing the questions here, this Court should thus give great weight to the relevant findings of that research, as discussed in the preceding sections.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: June 22, 2016

Respectfully submitted,

/s/ Brittany C.B. Amadi

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CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of June, 2016, electronic and paper copies of the foregoing were served by electronic mail and first-class mail, respectively, on:

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I further certify that I have caused to be filed 10 printed copies of the foregoing with the Clerk of this Court and I have filed an electronic PDF version of the foregoing with the Clerk via the Virginia Appellate Courts eBriefs System.

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RULE 5:26 CERTIFICATE

Pursuant to Virginia Supreme Court Rule 5:26(h), I hereby certify that the foregoing brief complies with the type-volume limitation set forth in Virginia Supreme Court Rule 5:26(b). Exclusive of the exempted portions of the brief, the brief contains 6,153 words.

/s/ Brittany C.B. Amadi

Dated: June 22, 2016

Brittany C.B. Amadi (VSB #80078)

ADDENDUM

From: Ashwell, Erin
To: Polley, John
Cc: Volchok, Daniel; Amadi, Brittany; ahouchens@shg-law.com; Friedman, Frank
Subject: American Psychological Association
Date: Wednesday, June 08, 2016 3:37:38 PM

Mr. Polley:

On behalf of Deante Lamar Payne, we consent to the American Psychological Association's request to file as an amicus curiae in Deante Lamar Payne v. Commonwealth of Virginia, Record No. 15124.

Thank you,

Erin Ashwell
Aaron Houchens
Frank Friedman

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From:	Theisen, Virginia
To:	Volchok, Daniel; Ashwell, Erin
Cc:	Judge, Michael; Bryant, Linda L.; Molzhon, Karen G.
Subject:	RE: Commonwealth v. Deante Payne (Va. S. Ct.) -- Request for consent to filing of amicus brief
Date:	Thursday, June 16, 2016 10:13:12 AM

Dear Mr. Volchok:

The Commonwealth consents to the filing of the amicus brief in *Payne v. Commonwealth.* I will send a letter to the Clerk of the Virginia Supreme Court so advising.

Sincerely,

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Senior Assistant Attorney General/Team Leader
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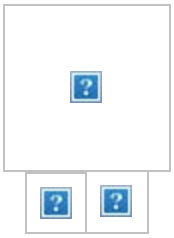
Please note our address has changed.



From: Volchok, Daniel [mailto:Daniel.Volchok@wilmerhale.com]
Sent: Thursday, June 16, 2016 10:02 AM
To: Theisen, Virginia
Subject: Commonwealth v. Deante Payne (Va. S. Ct.) -- Request for consent to filing of amicus brief

Hi Virginia, my name is Daniel Volchok and I represent the American Psychological Association, which intends to file an amicus brief with the Virginia Supreme Court in *Commonwealth v. Deante Payne*. I am writing to request the Commonwealth's consent to our filing.

Thank you for your consideration.

Daniel

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