COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC Docket No. SJC-12257
Appeals Court Docket No. 2016-P-1372

_____

MICHAEL J. WOLFE
Appellant

v.

COMMONWEALTH
Appellee

_____

On Direct Appellate Review from a Judgment on a Verdict
in the Marlborough Division of Middlesex County District Court
for the Commonwealth of Massachusetts

_____

AMICUS BRIEF OF SUFFOLK DEFENDERS PROGRAM, COMMITTEE OF PUBLIC COUNSEL SERVICES, AND MASSACHUSETTS ASSOCATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF MICHAEL J. WOLFE

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Dated: April 18, 2017

QUESTION CERTIFIED

Whether the Appeals Court's holding in *Commonwealth* v. *Downs*, 53 Mass. App. Ct. 195 (2001) (concluding that there was no error in instructing the jury, in prosecution for operating under the influence of alcohol, that they were not to consider absence of evidence of breathalyzer test results), is incorrect and should be overruled.

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INTEREST OF AMICI

Suffolk Defenders Program is part of Suffolk University Law School's clinical programs and operates under the supervision of Professor Christopher Dearborn. The clinic handles between 60 and 90 cases annually, with approximately eight students per year practicing under SJC Rule 3:03. The clinic represents individuals charged with both misdemeanors and concurrent-jurisdictional felonies predominately arising out of the Boston Municipal Court Central Division. Clients have included multiple individuals charged with operating under the influence of alcohol (OUI) in violation of G. L. c. 90 § 24(a)(1). Professor Dearborn's research and scholarship has focused on the greater procedural protections afforded criminal defendants under the Massachusetts Declaration of Rights, specifically art. 12, than under the United States Constitution.

The Committee for Public Counsel Services (CPCS) provides counsel to indigent defendants in all criminal cases in Massachusetts state courts. G. L. c. 211D, § 5. These cases include thousands of OUI prosecutions annually, in most of which the defendant must decide on the spot whether to submit to a

breathalyzer test or exercise his constitutional right to refuse. CPCS thus has an interest in preventing the erosion of the right against self-incrimination in these cases.

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated association representing more than a thousand experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices 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 justice 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 justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

Amici believe this case raises a critical issue in interpreting art. 12 in a fashion that adequately protects the rights of the accused. Amici's hope is to present this Court with an overview and analysis of

the social science supporting the conclusion that *Commonwealth* v. *Downs,* 53 Mass. App. Ct. 195 (2001), was wrongly decided, and that, in most circumstances, an instruction like the one given in *Downs* is anathema to the letter and spirit of art. 12.

ARGUMENT

I. THE JURY INSTRUCTION ENDORSED BY *DOWNS* TRENCHES ON THE ARTICLE TWELVE RIGHT OF AN OUI DEFENDANT WHO REFUSED THE BREATHALYZER NOT TO BE "COMPELLED TO FURNISH EVIDENCE AGAINST HIMSELF"; THE INSTRUCTION SHOULD THEREFORE NEVER BE GIVEN UNLESS REQUESTED BY THE DEFENDANT OR UNLESS IT IS PERFECTLY CLEAR THAT THE JURY IS SPECULATING ABOUT THE ABSENCE OF BREATHALYZER EVIDENCE.

The instruction approved by the Appeals Court in *Commonwealth* v. *Downs,* 53 Mass. App. Ct. 195 (2001), presumes that jurors in OUI cases will *always* speculate improperly if they have not been presented with breathalyzer evidence. Accordingly, the instruction deliberately focuses the jury's attention on the absence of that evidence, and then tells them -- forcefully and repeatedly -- not to think about it.[1]

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[1] The instruction approved in *Downs*:

> You are not to mention or consider in anyway [sic] whatsoever, either for or against either side, that there is no evidence of a breathalyzer. Do not consider that in any way. Do not mention it. And put it completely out of your mind.

Commonwealth v. *Downs*, 53 Mass. App. Ct. at 198.

But this presumption of speculation is itself speculative. Moreover, jurors know full well that breathalyzer evidence can only be obtained from the person of the defendant -- and only if the defendant cooperates. In thus ensuring that the "polar bear" enters the jury room,[2] the *Downs* instruction, like the instruction declared unconstitutional in *Commonwealth* v. *Zevitas*, 418 Mass. 677 (1984), "tend[s] to have the same effect as the admission of refusal evidence." *Id.* at 683.

Article 12 of the Declaration of Rights provides, in part, that no person shall "be compelled to accuse, or furnish evidence against himself." Twenty-five years ago, this Court made clear that this specific language, which has no analog in the Fifth Amendment, protects OUI defendants in Massachusetts from conviction on the basis of breathalyzer refusal evidence. *Opinion of the Justices*, 412 Mass. 1201, 1209-1211 (1992). "By the narrowest construction,"

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[2] FYODOR DOSTOEVSKY, WINTER NOTES ON SUMMER IMPRESSIONS VI, 8 (1863) ("Try this on yourself: try not to think of a polar bear, and you'll see that the cursed animal comes to mind every minute") (translated by Ms. Smychkovich). See also FYODOR DOSTOEVSKY, WINTER NOTES ON SUMMER IMPRESSIONS 112 (R. L. Renfield trans., Criterion Books 1955) (1863).

art. 12 prohibits compelling an accused to furnish evidence against himself, *"in any manner."* *Id*. at 1210, quoting *Emery's Case*, 107 Mass. 172, 181 (1871) (emphasis added by *Opinion of the Justices*). Therefore, contrary to *Downs*, see 53 Mass. App. Ct. at 199-200, the fact that a putatively limiting instruction does not explicitly mention the defendant's right to refuse is not dispositive: if the instruction might reasonably have the effect of placing an OUI defendant in the proverbial "Catch-22," see *Opinion of the Justices*, 412 Mass. at 1211, then it runs afoul of art. 12.[3] *Zevitas*, 418 Mass. at 683.

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[3] The instruction in the case at bar, which went well beyond what *Downs* endorsed, surely had the prohibited effect:

> *Now, you may have noticed that there was no evidence of any breath test, blood test, or field sobriety test introduced in this case*. You are not to mention or consider in any way whatsoever during your deliberations either for or against either side that there was no such evidence introduced in this case. Do not consider it in any way at all. Do not mention it at all during your deliberations. Put it completely out of your minds.

(T. 166) (emphasis added).

Wolfe was thus compelled to take the test and risk producing self-incriminating real evidence, or refuse the test at the cost of having the judge make sure the jury was cognizant of the fact that, "in this case," real evidence of impairment that could only

There will be refusal cases where evidence that a breathalyzer test was available is unavoidably presented at trial, in which case the defendant might reasonably seek a *Downs*-like instruction as the lesser of two evils.[4] However, in the absence of concrete evidence of improper speculation (for example, in the form of a question from the jury), a judge should not, over objection, invite the very speculation which the instruction is purportedly intended to prevent.

A. This Court has Consistently Held that the More Specific Language of Art. 12 Provides Greater Protection Against Self-Incrimination than the Fifth Amendment.

The language of art. 12 of the Massachusetts Declaration of Rights differs from that of the Fifth Amendment. Article 12 includes the phrase, "[n]o subject shall . . . be compelled to accuse, *or furnish evidence* against himself." Mass. Const. art. 12 (emphasis added). The exact wording of the text was

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have been obtained from the person of Wolfe himself was -- for reasons left enticingly unexplained -- not "introduced."

[4] For example, it is not uncommon for an OUI trial to include admissible videotape evidence depicting the defendant during booking. Breathalyzers are typically kept in the booking area, and thus sometimes make an unavoidable appearance in the booking video. A defendant who refused might reasonably ask for a *Downs*-like instruction in such a case.

debated at the Constitutional Convention of 1780. See *Commonwealth* v. *Mavredakis*, 430 Mass. 848, 859 (2000) (emphasizing, in context of art. 12, that all words "must be presumed to have been chosen advisedly").

This Court has recognized that the linguistic differences between art. 12 and the Fifth Amendment must be taken into account when interpreting the level of protection afforded by each. "[T]he words of art. 12, 'or furnish evidence against himself,' may be presumed to be intended to add something to the significance of the preceding language, '[n]o subject shall be . . . compelled to accuse . . . himself.'" *Attorney General* v. *Colleton*, 387 Mass. 790, 796 (1982). As a result, this Court has consistently interpreted art. 12 as providing more comprehensive protection for defendants than its federal counterpart. See, e.g., *Commonwealth* v. *Conkey*, 430 Mass. 139, 142 n.3 (1999) (reiterating that evidence of refusal to submit to blood alcohol tests inadmissible at trial under art. 12, but not under Fifth Amendment); *Commonwealth* v. *Amirault*, 424 Mass. 618, 660-665 (1997) (allowing Massachusetts defendants to confront accusers "face to face" pursuant to art. 12, unlike Sixth Amendment confrontation right);

Commonwealth v. *Mavredakis*, 430 Mass. 848, 859 (2000) (finding art. 12 violation where police did not inform suspect his attorney was trying to contact him during interrogation, despite Supreme Court holding same scenario does not violate Fifth Amendment); *Commonwealth* v. *Martin*, 444 Mass. 213, 215 (2005) (holding Supreme Court's construction of *Miranda* "no longer adequate to safeguard the parallel but broader protection afforded Massachusetts citizens by art. 12").

B. *Downs* Veers Sharply Away from this Court's Richly Developed History of Art. 12 Refusal Law.

The Appeals Court's conclusion in *Downs* that instructing a jury regarding a lack of breathalyzer results does not violate a defendant's art. 12 right against self-incrimination, 53 Mass. App. Ct. at 200, is at odds with this Court's jurisprudence interpreting the broad scope of art. 12. The mandate that no person shall "be compelled to accuse, or furnish evidence against himself" carries with it two requirements: first, the evidence in question must be testimonial, and second, it must have been "compelled" by a state actor. *Conkey*, 430 Mass. at 142-143. As such, art. 12 does not protect the accused from the

compelled production of physical evidence such as fingerprints or breathalyzer tests, because such evidence is non-testimonial. See *id.* On the other hand, this Court has held that evidence of conduct that is admitted to show consciousness of guilt "is always testimonial because it tends to demonstrate that the defendant knew he was guilty." *Id.* at 142. Because the action of refusing to give a fingerprint or blow into a breathalyzer displays consciousness of guilt, it is testimonial, and therefore (if compelled by a state actor) inadmissible. *Id.* *See also* *Commonwealth* v. *Hughes*, 380 Mass. 583, 587-596 (1980) (Kaplan, J.) (vacating order compelling defendant to furnish pistol he was alleged to have used to commit charged assault: the conclusion that such an order is unconstitutional, see *id*. at 596, "were it not dictated, as we think it is, by the Fifth Amendment, would in our view be required by the rather clearer terms of the Constitution of the Commonwealth"), citing *Emery's Case*, 107 Mass. at 181.

A defendant's art. 12 right not to be compelled to furnish evidence against himself is well established in Massachusetts, and this Court has consistently rejected the admission of refusal

evidence in many factual scenarios. For example, in *Commonwealth* v. *Lydon*, this Court held that evidence showing that a defendant refused to have his hands swabbed for gun powder at the police station was inadmissible at trial. 413 Mass. 309, 315 (1992), *overruled on other grounds by Commonwealth* v. *Britt*, 465 Mass. 87 (2013). In *Commonwealth* v. *Hinckley*, the defendant was charged with breaking and entering into, and stealing a safe from, a landfill. 422 Mass. 261, 262 (1996). At trial, a police officer testified that the defendant refused to turn over his sneakers to police to determine if the sneakers matched the shoe prints found at the landfill. *Id*. at 263. This Court reversed the conviction, holding that admitting evidence of the defendant's refusal violated his art. 12 rights. *Id*. at 264. Similarly, in *Commonwealth* v. *Conkey*, this Court held the defendant's refusal to submit to fingerprint testing was inadmissible at trial. 430 Mass. at 143. And, in *Commonwealth* v. *McGrail*, this Court established that a defendant's refusal to take a field sobriety test requested by police is inadmissible at trial. 419 Mass. 774, 780 (1995).

Most relevant, over twenty years ago, this Court established that the admission of evidence of refusal to take a breathalyzer test violates a defendant's constitutional rights under art. 12. See *Opinion of the Justices*, 412 Mass. at 1209-1211 (equating refusal evidence to statement, "I have had so much to drink that I know or at least suspect that I am unable to pass the test"). This Court reasoned that allowing such evidence into trial would place the defendant in a "Catch-22" situation: "take the test and perhaps produce potentially incriminating real evidence; refuse and have adverse testimonial evidence used against him at trial." *Id.* at 1211.

Jury instructions that refer explicitly to the right to refuse a breathalyzer are unconstitutional because they curtail a defendant's art. 12 right against self-incrimination in the same way as refusal evidence itself. See *Zevitas*, 418 Mass. at 683 (holding jury instructions had "the same effect as the admission of refusal evidence"). The instruction at issue in *Zevitas* did not directly tell the jury that the defendant had refused a breathalyzer. *Id.* However, instructions that allude to the right to refuse may nonetheless create the inference that such

a refusal took place. *Id.* Although the instruction at issue in *Zevitas* warned the jury not to speculate or draw inferences about why there was no evidence of breathalyzer test results, this Court held such a limitation to be insufficient to protect a defendant's constitutional rights:

> [W]e cannot fairly conclude that the judge's admonition against speculation and inferences based on the information he had given the jury dissuaded the jury from concluding that the defendant had refused to submit to a blood alcohol test and using that evidence against him in violation of his art. 12 rights.

Id. at 684. See and compare *In re Grand Jury Investigation*, 470 Mass. 399, 409 (2015) (unlike the prohibition against searches and seizures that are "unreasonable," the privilege against self-incrimination admits "no balancing of State-defendant interests" and does not "yield[] to 'reasonable' intrusions") (citation omitted).

C. In Effect, *Downs* Induces the Very Speculation It Seeks to Prevent.

Downs holds that the jury in an OUI refusal case may permissibly have its attention focused on the absence of breathalyzer evidence so long as the judge does not directly contravene *Zevitas* by referring explicitly to the right to refuse. *Downs* takes for

granted that jurors will in fact speculate about the absence of breathalyzer test evidence in such cases. *Downs*, 53 Mass. App. Ct. at 199. Based on this assumption, the Appeals Court reasons that, "without some form of a limiting instruction concerning the breathalyzer, a jury very well could rely upon their common knowledge and engage in the same speculation invited by the erroneous instruction [at issue in *Zevitas*]." *Id.*

But the assumed speculation underlying the *Downs* scenario is actually three-fold: first, the jury must speculate that a breathalyzer was or could have been attempted or offered. Then, it must speculate that the defendant refused. Finally, it must speculate that the defendant did so for fear of furnishing incriminating evidence against himself. By its terms, the *Downs* instruction seeks to address only the first link in this chain. But in doing so, the instruction cannot avoid aggravating the risk of speculation with respect to the reason that no breathalyzer test evidence was introduced -- most obviously because the defendant had refused.

In thus inviting the very speculation it purports to prevent, the *Downs* instruction "tend[s] to have the

same effect as the admission of refusal evidence," in derogation of the art. 12 guarantee that the accused not be "compelled to . . . furnish evidence against himself." *Zevitas*, 418 Mass. at 663. This places the defendant in a "Catch-22" situation similar to that discussed in *Opinion of the Justices*, as well as its progeny: the defendant must choose between furnishing evidence against himself by submitting to a breathalyzer, or refusing the breathalyzer at the risk that the judge will highlight its incriminating absence to the jury right before they deliberate. See *Opinion of the Justices*, 412 Mass. at 1211; *Lydon*, 413 Mass. at 315; *McGrail*, 419 Mass. at 780.

II. SOCIAL SCIENCE RESEARCH SUPPORTS OVERRULING *DOWNS*.

Scientific data demonstrates that drawing attention to a particular piece of evidence and then telling the jury not to consider that evidence causes inconsistent and flawed results. Based on his experience in "other cases," *Downs*, 53 Mass. App. Ct. at 198 n.1., the judge in *Downs* sought to prevent jurors from impermissibly speculating about the absence of a breathalyzer test. However, the data suggests that, by bringing that fact to the forefront of the jury's attention -- right before deliberation -

- the *Downs* instruction likely adds to speculation regarding the breathalyzer and the possible reasons for its absence.

Limiting instructions are meant to narrow a juror's focus on only the evidence properly presented to them during trial. However, the "effectiveness of instructions to disregard evidence has historically been met with skepticism." See Eichhorn, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS. 341, 342 (1989). See, e.g., *Commonwealth* v. *Scott*, 408 Mass. 811, 836 (1990) (underscoring reality that even "well-intended" limiting instructions may require that jurors perform "'a mental gymnastic which is beyond, not only their power, but anybody's else'"), quoting *Nash* v. *United States*, 54 F.2d 1006, 1007 (2d Cir. 1932), *cert. denied*, 285 U.S. 556 (1932); *Commonwealth* v. *DiMarzo*, 364 Mass. 669, 681 (1974) (Hennessey, J., concurring) ("'The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction'"), quoting *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

On one hand, the trial judge must communicate to jurors the impropriety of considering inadmissible evidence when reaching their verdict. See Demaine, *In Search of an Anti-Elephant: Confronting the Human Inability to Forget Inadmissible Evidence*, 16 GEO. MASON L. REV. 99, 105 (2008). On the other, drawing attention to the evidence makes it more salient and, thus, less forgettable. See *id.* Of necessity, the law generally "presume[s]" that jurors obey an instruction that they not consider some matter. *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987). But this presumption "is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Id*. The unfortunate reality is that it is much easier to erase inadmissible evidence from a trial record than from jurors' minds. See Demaine, *supra* at 104-05; see also *People* v. *Garreau*, 27 Ill.2d 388, 391 (1963) ("[T]he prejudicial effect of an improper argument cannot always be erased from the minds of the jurors by an admonishment from the court"). Further, the research suggests that limiting instructions like

that endorsed by *Downs* likely leave the jury confused as they enter deliberations. See Demaine, *supra* at 104-105.

A. Empirical Research Shows Limiting Instructions Do Not Effectively Limit Improper Speculation.

Empirical research demonstrates that limiting instructions are unsuccessful at controlling a juror's cognitive processes. These studies show that juries are influenced by matters that judges have declared to be off limits.[5]

Many limiting instruction studies have focused on information regarding a defendant's criminal record. See Doob & Kirshenbaum, *Some Empirical Evidence on the Effects of s. 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L. Q. 88 (1973); Hans & Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L. Q. 235 (1976). In 1973, Doob and Kirshenbaum created a hypothetical burglary

[5] The *Downs* instruction refers to evidence that was not presented, whereas the social science deals with the effects of limiting instructions on evidence that was presented. This distinction does not detract from the relevance of the social science: the peculiar flaw of the *Downs* instruction is that the instruction itself introduces the problematic "evidence" at issue and then seeks to cure the problem by ordering the jury not to think about it. The research demonstrates that such curative instructions are ineffective and confusing.

case where they informed half of the participants that the defendant had a prior record, and then provided them with a limiting instruction. See Doob & Kirshenbaum, *supra* at 91. Participants who heard the prior conviction record were more likely to find the defendant guilty, even with a limiting instruction. See *id.* at 93-94.

In 1976, a similar experiment allowed the jury to deliberate after hearing impermissible evidence along with a limiting instruction. See Hans & Doob, *supra* at 239-240. Even after conferring with other jurors during deliberation, participants who received prior record information were four times more likely to convict. See *id.* at 241. Simply providing a limiting instruction likely has little effect because it is almost impossible for jurors to forget evidence for one purpose, while remembering it for another. See Eichhorn, *supra* at 345; Doob & Kirshenbaum, *supra* at 91; Hans & Doob, *supra* at 241. Once a jury hears inadmissible evidence, it forms conceptions that cannot be erased through limiting instructions. See Eichhorn, *supra* at 345.

In less serious offenses or cases with faint evidence, limiting instructions are found to be even

less effective. See Lieberman & Arndt, *Understanding the Limits of Limiting Instructions*, 6 PSYCHOL. PUB. POL'Y & L. 667, 687, 693 (2000) (finding inadmissible evidence presented to jury had a greater effect in less serious crimes). Therefore, if a case turns on only a few key pieces of evidence, a jury is more likely to consider inadmissible evidence to the detriment of the defendant. This makes alluding to inadmissible evidence even more dangerous in OUI cases where (as in *Downs* itself, see 53 Mass. App. Ct. at 196) evidence of impairment may be conflicting or limited.

B. Certain Psychological Responses of Jurors to Limiting Instructions Are Likely Responsible For Flawed Decisions.

Not only does empirical research demonstrate the inefficacy of limiting instructions, but the psychological reactions of jurors to instructions that tell them how to think (or not think) about inadmissible evidence also lead to poor jury performance. There are two theories that seek to explain this poor performance: reactance theory and conflict theory. See Eichhorn, *supra* at 346, 347. The reactance theory asserts that when an individual is deprived of the freedom to choose an option, the

forbidden option becomes more attractive than it had originally appeared. See Eichhorn, *supra* at 346. The conflict theory posits that jurors who are instructed to ignore apparently convincing evidence are placed in a "moral dilemma," *Id.* at 347, and experience significant conflict because they are faced with two undesirable options: ignore the judge's charge, or reach an apparently unjust verdict. See *id.* Whether viewed through the lens of either the reactance theory or the conflict theory, the jury is told to perform Learned Hand's impossible "mental gymnastic." *Nash* v. *United States*, 54 F.2d at 1007.

When a jury's freedom of deliberation is "threatened,"[6] they reevaluate this freedom in light of the "threatening instruction." See SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL 35, 96 (1981). "Reactance" comes into play following a limiting instruction because the instruction creates a "forbidden option" for the jurors. See *id.* at 94. Jurors are likely to feel that they should be the ones

[6] For example, after underscoring that "there was no evidence of any breath test, blood test, or field sobriety test introduced in this case," the judge in the case at bar forcefully demanded, "Do not mention it at all during your deliberations." (T. 166).

to determine the relevance of evidence, especially if limiting instructions run counter to a more global conception of justice. See *id.* Thus, the jury's reactance will be aroused following a limiting instruction, see Eichhorn, *supra* at 346 (limiting instructions arouse jurors' reactance); BREHM & BREHM, *supra* at 96, and they may attempt to reestablish their freedom of deliberation by using the forbidden option to reach their decision. See Eichhorn, *supra* at 346.

The conflict theory explains how instructions that the jury ignore or forget apparently convincing evidence places jurors in a moral dilemma which leads to undesirable results.[7] See Lieberman & Arndt, *supra*, 693 (jury can be placed in moral dilemma following judge's instructions); Eichhorn, *supra* at 347. When a judge's charge highlights evidence that is inadmissible or has not been presented at trial, it creates conflict in a juror's mind. See Borgida & Park, *The Entrapment Defense: Juror Comprehension and*

[7] The instructions in question here draw attention to breathalyzer test "evidence" that was not "introduced in this case" (T. 166), suggesting that probative evidence of impairment existed but that the jury was not permitted to consider it. Compare *Zevitas,* 418 Mass. at 682 (striking down instructions highlighting evidence that had not "been offered").

Decision Making, 12 LAW & HUM. BEHAV. 19, 32 (1988) (describing conflicts which create frustration, anger, and deterioration of performance); see also LEON FESTINGER, CONFLICT, DECISION, AND DISSONANCE, 21 (1964). The resulting confusion may generate inconsistent or flawed decisions. See Eichhorn, *supra* at 348. Under this conflict theory, limiting instructions are rarely effective at minimizing the importance of a piece of evidence. See Demaine, *supra* at 104 (noting nearly impossible to erase information from juror's mind).

Both the reactance theory and the conflict theory support the conclusion that by instructing the jury to put the lack of breathalyzer results "completely out of their mind," judges are effectively shining a spotlight on the very thing they are attempting to conceal. Not only do scientific studies demonstrate that this causes flawed and inconsistent results, but such instructions lead the jury to speculate in a way that violates a defendant's art. 12 rights against self-incrimination.

III. *DOWNS* SHOULD BE OVERRULED INSOFAR AS IT ALLOWS JUDGES TO DELIVER -- OVER A DEFENDANT'S OBJECTION -- INSTRUCTIONS THAT CAUSE JURIES TO UNCONSTITUTIONALLY SPECULATE.

This is the first opportunity this Court has taken to address *Downs'* corrosion of the art. 12

principles articulated in *Zevitas*.[8] As this Court has previously emphasized:

> No aspect of the charge to the jury requires more care and precise expression than that used with reference to the right of a defendant in a criminal case to remain silent and not be compelled to incriminate himself, as provided in art. 12 of the Declaration of Rights of the Massachusetts Constitution and the Fifth Amendment to the Constitution of the United States. Even an unintended suggestion that might induce the jury to draw an unfavorable inference is error.

Commonwealth v. *Sneed*, 376 Mass. 867, 871 (1978).

The existing jury instructions are sufficient to prevent impermissible speculation in this context. In every trial, judges already deliver the standard instruction that the jury should only consider evidence that is in front of them. Massachusetts Model Jury Instruction 2.220 ("You are to decide what the facts are solely from the evidence admitted in this case, and not from suspicion or conjecture").

The *Downs* instruction assumes speculation before any arises, thereby attempting to preemptively cure a problem that does not, and may never, exist. In the absence of any evidence that the jury is in fact

[8] In amici's experience, judges rarely give a *Downs* instruction over objection, which is presumably why *Downs* itself has been on the books for so long.

speculating about the absence of a breathalyzer, the judge should not invite the "polar bear" into the jury room. See n.2, *ante*. Just as jurors should not speculate regarding matters not in evidence, judges should not speculate regarding jurors' speculation about matters not in evidence.

In the context of self-incrimination, judges have to be extra careful. "The instructions must thoroughly protect the defendant against any . . . intimation . . . that the defendant is invoking constitutional rights to conceal or deceive." *Sneed*, 376 Mass. at 871. "Even an unintended suggestion that might induce the jury to draw an unfavorable inference is error." *Id*. In order to fully protect a defendant's constitutional rights, the *Downs* instruction should never be given over a defendant's objection. See *Commonwealth* v. *Powers*, 9 Mass. App. Ct. 771, 774 (1980) ("[A]bsent a request by the defendant or other special circumstances any reference to the privilege against self-incrimination should be omitted from the charge").

CONCLUSION

For the foregoing reasons, this Court should overrule *Downs*. Jury instructions referring to the absence of breathalyzer results inevitably invite unconstitutional speculation as to the reason for that absence and should therefore not be given over a defendant's objection.

Respectfully submitted,

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Dated: April 18, 2017

CERTIFICATE OF COMPLIANCE
PURSUANT TO MASS. R. A. P. 16(K)

We hereby certify that the foregoing brief complies with the rules that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

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Dated: April 18, 2017

CERTIFICATE OF SERVICE

We hereby certify that we have today, April 18, 2017, delivered to the Clerk of this Court, one original and seventeen copies of the within and foregoing amicus brief, and two copies each to each of the following via first class U.S. mail:

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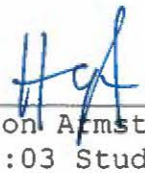

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