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May 20, 2015

Christine P. Burak, Esquire
Legal Counsel to the Chief Justice
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

**Re: Comments on Provisional Jury Instruction Regarding
Eyewitness Identification Evidence**

Dear Attorney Burak,

On behalf of the Boston Bar Association (BBA), I thank you for the opportunity to comment on the provisional jury instruction regarding eyewitness identification evidence. The BBA appreciates and recognizes the efforts put forth by the Supreme Judicial Court (SJC) Rules Committee in drafting the provisional instructions.

The SJC proposed instructions were reviewed and discussed by the Steering Committee of the BBA's Criminal Law Section, which drafted the attached comments. The Criminal Law Section is comprised of a diverse array of practitioners including both prosecutors and defense attorneys. They were able to reach consensus on two main issues highlighted at the start of their comments:

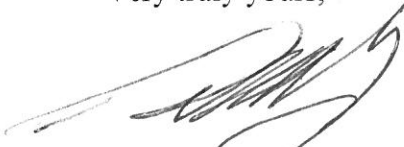
- That an amended jury instruction is appropriate and the provisional instructions generally assist jurors in considering eyewitness identification issues.
- That the proposed instruction is appropriately based on five generally accepted principles regarding eyewitness identification.

Their comments also include a number of non-consensus issues. The comments were reviewed by all BBA Sections and the BBA Council, which approved their submission to the Justices of the SJC.

Please note that the enclosed comments do not constitute or reflect a position of the BBA as a whole, but rather summarize the comments received from the Criminal Law Section. We offer these comments with the hope that they may be useful to the SJC as it considers the provisional eyewitness evidence jury instructions.

Thank you for providing members of the bar with an opportunity to weigh in on this important issue, and please feel free to contact me should you have any questions or concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. Page, Jr.', written in a cursive style.

Richard M. Page, Jr.
Executive Director

Comments of the Boston Bar Association's Criminal Law Section on the Provisional Jury Instruction Regarding Eyewitness Identification Evidence as Included in the Appendix to Commonwealth v. Gomes, 470 Mass. 352 (2015)
(5/20/2015)

The Criminal Section steering committee discussed the issue of eyewitness evidence jury instructions multiple times, reviewing Commonwealth v. Gomes and the provisional jury instruction set out in its appendix. Consideration was also given to the Report and Recommendations of the Supreme Judicial Court (SJC) Study Group on Eyewitness Evidence.

Consensus Comments

The Committee reached consensus on two points:

- An amended jury instruction addressing this issue is appropriate and the provisional instructions generally assist jurors in considering eyewitness identification issues.
- The provisional instruction is appropriately based upon five generally accepted principles regarding eyewitness identification.

Non-Consensus Comments

Several individuals shared substantive comments that are provided below for the benefit of the SJC even though they do not represent a position of the entire Criminal Law Section steering committee -

- The instructions should eliminate the use of the word "suspect"
- In cases involving use of the defendant's photograph, the instruction should include an explanation that police may have obtained the defendant's photograph in a variety of ways or through a variety of sources unrelated to existing police files/records.
- The provisional instruction sets forth some factors a juror "may" consider and some a juror "should" consider. Unless there is some generally accepted reason to distinguish between the factors or how jurors ought to consider them, the instruction should be consistent using either "may" or "should."
- When the effect of a factor on reliability is discussed there may be unintended consequences. For example, the instruction states, "high levels of stress, compared to low or medium levels, can reduce an eyewitness's ability to accurately perceive an event." (page 7). It is conceivable that a juror might interpret the instruction to mean that low or medium levels of stress cannot impact an eyewitness's ability to accurately perceive an event. There may also be a dispute as to the level of stress an eyewitness is under and whether or how that might impact perception of an event. It would be a mistake for a juror to believe that the absence of a factor (stress for example) warrants a presumption of reliability. If possible the instructions should be revised to consider, minimize, or eliminate these unintended consequences.
- The instruction, or any part of the instruction, should only be given at the request of the Defendant.
- The instruction should not reference what "studies" or "research" shows.
- The instruction references "established or recommended procedures" for identification procedures. For this reference to have meaning in a given case, the jury should be provided with the established or recommended procedure that was to be followed in the particular case. Also, the jury should be instructed that a recommended procedure is one where the eyewitness is, at a minimum, given instructions consistent with Commonwealth v. Silva-Santiago.