Boston College Law Review

Volume 62
Issue 8 *Symposium: Essays in Honor of Chief Justice Ralph D. Gants*

Article 10

11-29-2021

Reflections on a Revolution: How Chief Justice Gants Made Massachusetts a Leader in Eyewitness Identification Law

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REFLECTIONS ON A REVOLUTION: HOW CHIEF JUSTICE GANTS MADE MASSACHUSETTS A LEADER IN EYEWITNESS IDENTIFICATION LAW

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Abstract: Radha Natarajan and Erik Doughty reflect on the revolutionary contributions Chief Justice Ralph D. Gants made to eyewitness identification law in Massachusetts. From convening the Study Group on Eyewitness Evidence to authoring several seminal eyewitness identification cases, Chief Justice Gants's contributions represented a seismic shift in how eyewitness evidence would be treated in Massachusetts. That sea change, which included rewriting jury instructions, restricting in-court identifications, and reexamining how to assess eyewitness reliability, developed from a rigorous fidelity to scientific development. This foray into the scientific study behind eyewitness identifications has created a template for tackling other complex issues in the criminal legal system including racial disparities, implicit bias, and credibility determinations, and provides a model for other jurisdictions to follow.

I. ACCOMPLICES IN CHIEF JUSTICE GANTS'S PURSUIT OF LASTING EYEWITNESS IDENTIFICATION REFORM

A. A Common Goal
(by Radha Natarajan)

By the time Chief Justice Gants,[1] alongside a unanimous Court, decided to convene a Study Group on Eyewitness Evidence to consider the science and law of eyewitness identification in Massachusetts, I had been immersed in these issues for the better part of a decade.[2] Like others, Chief Justice Gants and I had both been led to the same place through the recognition that eyewit-

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[1] We use the title of Chief Justice throughout this article even though Chief Justice Gants authored some of the decisions cited when he was an Associate Justice of the Supreme Judicial Court. He was appointed to the Supreme Judicial Court on January 29, 2009, and he was elevated to Chief Justice on July 28, 2014.

[2] Commonwealth v. Walker, 953 N.E.2d 195, 208 n.16 (Mass. 2011).

ness misidentification was one of the leading causes of wrongful convictions. Indeed, there was not a systemic issue in the criminal legal system that Chief Justice Gants could ignore. Because of that, my own path—as a Roxbury Defender[3] and wrongful convictions advocate—and his—as a leader and radical thinker about justice—crossed at multiple junctures.

There were a number of important criminal law issues—racial disparities throughout the system, rules changes on plea bargaining that exacerbated power imbalances, and building toward an end to mandatory minimum sentencing—that brought us together into the same spaces. Nonetheless, there was no effort that we undertook together that was as sustained as the one he led to bring eyewitness identification law in line with scientific research. Although it makes sense that such a huge shift—tethering the law to science rather than "common sense"—required a longstanding (even permanent) commitment, it also could be considered at odds with Chief Justice Gants's characteristic (and admirable) sense of urgency about all things related to justice.

My formal entrance to this issue was in 2003 with the research and writing of a law school Note on cross-racial identifications.[4] Immediately thereafter, as a public defender in Massachusetts, I chafed at the state of the law on eyewitness identification and worked on amplifying within the bar what I had learned about the science. Chief Justice Gants's formal appearance in this area might be traced back to his decision in *Commonwealth v. Silva-Santiago*.[5] He had previously adjudicated (with less attention), however, eyewitness identification cases as a Superior Court judge.

For Chief Justice Gants, like for me, the challenge of addressing eyewitness misidentifications was not simply a matter of intellectual integrity. It was deeply personal. We had both seen the harms suffered by those wrongfully convicted by eyewitness misidentification.[6] Those experiences shaped and stayed with us. In addition, because of our selective attention to this issue, we began to notice and memorialize where eyewitness misidentifications occurred in our own lives—outside the courtroom and its catastrophic consequences. The appreciation that eyewitness misidentifications were ubiquitous because of

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[3] *See generally* Roderick L. Ireland, *The Roxbury Defenders Committee: Reflections on the Early Years*, 95 MASS. L. REV. 153 (2013).

[4] Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821, 1821–23 (2003).

[5] *See* Commonwealth v. Silva-Santiago, 906 N.E.2d 299, 313 (Mass. 2009) (reversing the defendant's murder conviction based on prejudicial errors made by the prosecutor in closing argument), *abrogated in part by* Commonwealth v. Moore, 109 N.E.3d 484 (Mass. 2018) (refining *Silva-Santiago*'s articulation of standard for admitting evidence regarding adequacy of police investigation).

[6] Bobby Joe Leaster's case was significant for us both. *See Bobby Joe Leaster*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=188 [https://perma.cc/JKY6-TY8Z] (describing the exoneration of Bobby Joe Leaster after he was misidentified through a show-up identification).

the nature of human memory and the existence of available remedies—or at least harm-reduction strategies—made this issue an obvious one on which to focus. Despite its various complex implications—police protocols, admissibility of eyewitness evidence, and jury instructions—Chief Justice Gants never failed to see and directly confront the breadth of the issue. As a result, his vision to steer in a new direction the very large ship of Massachusetts eyewitness law, anchored down by decades of precedent, was successful, even if unintentionally incomplete. I am grateful beyond words that I walked many steps with him toward that vision.

B. The Right Time and Place
(by Erik Doughty)

In the summer of 2014, at one of our first meetings, my co-clerk Chris and I struggled with how to address Chief Justice Gants, a consequence of our greenness and his new title. My first attempt at a question went something like, "Um, Mr. Chief Gants Justice . . . ." For our benefit more than his own, he said that we could call him "Chief" or "Judge," and he had no preference between the two. He only asked that we not call him "Justice." It sounded much too formal and lofty, and he would always think of himself as a Judge from his years on the Superior Court. It was the first of countless moments during the clerkship when he lifted our spirits and quieted our fears with humor and humility.

When the Chief assigned my first case—a challenge to the existing model jury instruction on eyewitness identification evidence—I was quietly distressed. I had graduated from law school only a few months earlier, and I knew nothing about eyewitness identification, evidence, or jury instructions. I soon discovered, however, that one of Chief Justice Gants's many superpowers was his ability to empower the people around him. Without deadlines or reservations, he allowed me to fully immerse myself in the science and law of eyewitness identification (and to rack up a dizzying number of interlibrary loan requests for social science journals in the process). His door was always open to talk through ideas. I can picture him now, leaning back in his chair and extending his arms with outstretched fingers as if physically wrestling with the issue presented. Then he would lean in, listening intently to my muddled question, his nose twitching with inquisitive energy. Just when I think I have lost him, as I had surely lost myself long ago, he would casually offer a single suggestion (usually in just a few words) that unscrambled the static.

Whereas Radha and Chief Justice Gants found each other through criminal justice reform, I found criminal justice reform through Chief Justice Gants. During the clerkship, he wrote five decisions on issues of eyewitness identification. Those decisions built upon the foundation that he had laid years earlier

for reexamining the law in light of the science of memory and perception. By incorporating science into the law, the Chief overhauled the model jury instructions and rules of evidence to be more balanced, helpful to juries, and protective against the risk of wrongful convictions. Chief Justice Gants believed the work of the Court was not only to analyze legal issues, but to solve problems in the legal system that impacted people. And if you cared about this work and were ready to do the work, even someone like me with so little experience or knowledge could join him. I have had no greater privilege or honor than a spot on the Chief's team as he reformed the law of eyewitness identification.

II. A New Approach: The Study Group on Eyewitness Evidence (2011–2013)

(by Radha Natarajan)

The approach Chief Justice Gants took to reconsidering how Massachusetts courts should treat eyewitness identification evidence was neither ordinary nor inevitable. There are other courts that have considered the causes of wrongful conviction and injustice within the criminal legal system, but the process spearheaded by Chief Justice Gants was uncommon if not unique. When he convened the Study Group on Eyewitness Evidence (Study Group) ten years ago, a few states had already made changes to eyewitness practice and procedure, the most notable of which was New Jersey.[7] New Jersey's changes were accomplished primarily through court hearings and court cases. Chief Justice Gants could easily have taken this route as well, since this was the forum already available to him and opportunities had already presented themselves with two important cases, *Commonwealth v. Silva-Santiago* and *Commonwealth v. Walker*.[8]

In *Silva-Santiago*, the Court reversed a murder conviction because of prosecutorial errors made during closing argument.[9] Although the appellant had not preserved that issue, he *had* specifically asked the Court to consider various arguments related to the identification evidence.[10] The Court was asked to exclude eyewitness evidence as a consequence of the police not following best practices when administering identification procedures. In that case, the officers used non-blind, unrecorded, simultaneous photo arrays without providing the eyewitnesses with any advisements about the procedure. Although he acknowledged the importance of best practices, Chief Justice Gants, writing for the Court, did not reverse the conviction because of those flaws in the identification procedures. Instead, the Court discussed the issues, indicat-

[7] State v. Henderson, 27 A.3d 872, 918–19 (N.J. 2011).
[8] Commonwealth v. Walker, 953 N.E.2d 195 (Mass. 2011); *Silva-Santiago*, 906 N.E.2d at 299.
[9] 906 N.E.2d at 320.
[10] *Id.* at 309–11.

ing that it "expect[ed] such protocols to be used in the future,"[11] but offered no relief to Mr. Silva-Santiago on that basis. This lackluster response was characteristic of how courts had often treated eyewitness evidence, including evidence that could have led to a wrongful conviction. Indeed, on retrial, Mr. Silva-Santiago was acquitted and is now listed with others wrongfully convicted in the National Registry of Exonerations.[12] In *Walker*, the Court declined to reverse the appellant's murder conviction.[13] Still, Chief Justice Gants, writing for the Court, did discuss in some detail the eyewitness identification arguments raised by the case.[14] There, the evidence was challenged on appeal because the appellant was identified through a simultaneous all-suspect array in which no advisements were given to the eyewitness. In addition, the appellant challenged the reliability of the identification, apart from any suggestiveness in the procedure. Although the Court declined to provide relief to Mr. Walker, Chief Justice Gants used the arguments raised in this case to announce the creation of the Study Group:

> Because eyewitness identification is the greatest source of wrongful convictions but also an invaluable law enforcement tool in obtaining accurate convictions, and because the research regarding eyewitness identification procedures is complex and evolving, we shall convene a study committee to consider how we can best deter unnecessarily suggestive procedures and whether existing model jury instructions provide adequate guidance to juries in evaluating eyewitness testimony.[15]

With these two cases as backdrops, Chief Justice Gants could have issued decisions that would have changed the Commonwealth's approach to eyewitness identification evidence in significant respects. So, why create a Study Group instead? Having participated in the Study Group, and with an understanding of what other states had done, I had the opportunity (much later) to ask Chief Justice Gants that question: Why did he choose to create a Study Group instead of simply adopting what had been done in other states? After all, the science that provided the foundation for those changes elsewhere did not differ by jurisdiction. Indeed, as the global pandemic has illustrated with excruciating clarity, neither borders nor denial could change the reality of science.

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[11] *Id.* at 312.

[12] *Jesus Silva-Santiago*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4285 [https://perma.cc/U6TG-G8JM].

[13] 953 N.E.2d at 199–200.

[14] *Id.* at 204–12.

[15] *Id.* at 208 n.16.

Chief Justice Gants's response to me was—unsurprisingly—both insightful and masterfully strategic. He recognized that creating transformational change—which is what it would take to reduce wrongful convictions based on misidentification evidence—would require more than one or two court decisions. It would require a sea change, at least in the criminal law, in how we think about the intersection of the law and science. It would require rigorous study. It would require many different people to come together, outside the confines of a single case, to think broadly and comprehensively toward a common vision. To make real change, it required a movement urged by many people, not only a decision by the highest court.

There are not too many examples of this kind of democratization within the judicial system, where an appointed judge (especially an indisputably brilliant one) seeks the input and perspective of so many others in the development of the law. Chief Justice Gants, however, was well known for bringing people in, not shutting them out. He enjoyed amicus briefs and welcomed expertise outside the parties. He believed in building consensus both on the court and in this work. When it came to eyewitness identifications, he both recognized the need for this approach and the value of individuals in various—often adversarial—positions being asked to work toward a collective decision. The Study Group members took this role incredibly seriously and ultimately met even Chief Justice Gants's high expectations.

The Study Group's composition, process, and commitment were important to carrying out Chief Justice Gants's vision, which did not foretell the ultimate recommendations the group should make but required a thorough, intellectually honest process. As in all groups, composition was critical to the success of the endeavor. In this case, it required wide representation, including from judges in various courts who hear eyewitness identification cases, defense attorneys and prosecutors who defend against and rely on eyewitness evidence, police officers who administer identification procedures, and academics who have stepped back to understand the issue from a different vantage point. The most important part of the process was the first step, which focused on collective education. Each member of the Study Group had to delve deeply into the science—something that was not intuitive for most people in the law—in order to build a common foundation of understanding. That common foundation consisted of the principles for which there was significant agreement within the scientific community. The consensus recommendations of the Study Group, which encompassed more areas than its original mandate of developing jury instructions, were based on the expertise of its members as well as a fidelity to the science. The Study Group was an entirely voluntary enterprise by its members over a two-year period, requiring dedication to the ultimate goal of improving the way Massachusetts handles eyewitness evidence. The commitment of the Study Group was essential to the final product—a 175-

page report to the Justices (the Report) detailing the science and recommendations for significant change.[16]

Study committees of the legislative variety are often seen as a graveyard for ideas that are too edgy or do not gain traction for other reasons. Chief Justice Gants did not believe in graveyards for ideas, especially the edgy ones, and he did not intend for the Report to end up on a shelf to be ignored. Instead, he first sought even more perspectives by soliciting public comments on the Report. This generated tremendous feedback from the Bench and Bar, with several expressing the view that the recommendations were too radical. This was because those outside the Study Group had not gone through the collective education process that had led to recommendations based on science rather than precedent. The Study Group, after all, was not tied to the status quo, an incremental view of change, or precedent; its only loyalties were to scientific evidence and increasing justice. After the Study Group, bar associations, public defenders, prosecutors, police departments, judges, and the public all had a chance to weigh in on the question of how Massachusetts would treat eyewitness identification evidence, it was the Supreme Judicial Court's turn, with Chief Justice Gants at its center. Although the Court may have had a tepid response to this issue prior to the Report, it was evident that the Report's issuance and reactions thereto created the impetus for dramatic changes.

III. Following the Science to Change the Law (2014–2015)
(by Erik Doughty)

One year after the Report was published, on July 28, 2014, Chief Justice Gants was sworn in as the Chief Justice, and it did not take long for a case to squarely raise the issues addressed in the Report. On September 2, 2014, the first day of oral arguments, the Court heard four cases concerning eyewitness identification evidence. In the first of many post-argument huddles, the Chief told my co-clerk and me that he typically would have two opinions to write in a given month. Needless to say, the Chief informed us (with some sympathy) that he would write all four eyewitness identification cases. Three of those cases ultimately became precedent-setting decisions and monumental steps toward overhauling Massachusetts's treatment of eyewitness identification evidence.

[16] *See generally* Supreme Jud. Ct. Study Grp. on Eyewitness Evidence, Report and Recommendations to the Justices (2013), https://www.mass.gov/doc/supreme-judicial-court-study-group-on-eyewitness-evidence-report-and-recommendations-to-the/download [https://perma.cc/CVJ7-QNJK].

A. A Radical Shift in Courtroom Procedure for In-Court Eyewitness Identifications

Two of the cases heard that opening day in September, *Commonwealth v. Crayton* and *Commonwealth v. Collins*, asked the Court to reexamine the admissibility of in-court identifications.[17] An in-court identification typically occurs in the courtroom when the prosecutor asks an eyewitness to identify for the jury the defendant sitting at counsel's table. It is powerful evidence and often an iconic moment during trial. Indeed, many would consider in-court identifications to be trial procedure canon and their acceptance self-explanatory. As Chief Justice Gants recognized, however, in-court identifications are inherently suggestive:

> [W]here the prosecutor asks the eyewitness if the person who committed the crime is in the courtroom, the eyewitness knows that the defendant has been charged and is being tried for that crime. The presence of the defendant in the courtroom is likely to be understood by the eyewitness as confirmation that the prosecutor, as a result of the criminal investigation, believes that the defendant is the person whom the eyewitness saw commit the crime.[18]

They are comparable to out-of-court "showup identifications"—where a police officer presents a single individual to an eyewitness for identification rather than as part of a lineup—which were long considered suggestive and "generally disfavored."[19]

Relying on the Report, *Crayton* declared a new rule that would treat first-time in-court identifications (i.e., where the eyewitness had not previously identified the defendant in an out-of-court procedure) as "in-court showup[s]" and would admit them only where there was "good reason" to do so.[20] This new rule was crucial to closing a loophole for the admission of first-time in-court identifications. Previously, Massachusetts had a rule of *per se* exclusion of unnecessarily suggestive out-of-court identifications, but an in-court identification was excluded only where it was tainted by an impermissibly suggestive out-of-court identification.[21] Where there was no prior out-of-court identification, there was no clear basis for challenging it. Although first-time "in-court identifications may be more suggestive than showups," they were admitted as a matter of course prior to *Crayton*.[22]

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[17] Commonwealth v. Crayton, 21 N.E.3d 157, 161 (Mass. 2014); Commonwealth v. Collins, 21 N.E.3d 528, 530 (Mass. 2014).

[18] *Crayton*, 21 N.E.3d at 166.

[19] *Id.* at 165–66 (quoting Commonwealth v. Martin, 850 N.E.2d 555, 560 (Mass. 2006)).

[20] *Id.* at 168–69.

[21] *See id.*

[22] *Id.* at 166–67.

Crayton not only closed the loophole for the unchecked admission of first-time in-court identifications, it also reallocated the burden to present or suppress this type of evidence. (Chief Justice Gants had a sixth sense for homing in on subtle imbalances and impracticalities at the periphery of a case). The defendant generally had the burden to move to suppress, but the Chief discerned that this made little sense if only the prosecutor knew whether a first-time in-court identification would be elicited. *Crayton* shifted the burden to the prosecutor to move *in limine* to admit the identification.[23]

In the companion case, *Collins*, the *Crayton* rule requiring "good reason" for admission was extended from first-time in-court identifications to in-court identifications following an out-of-court identification where a witness had "made something less than an unequivocal positive identification of the defendant during a nonsuggestive identification procedure."[24] An in-court identification following a less-than-unequivocal positive identification posed a slightly different danger in that the jury might overlook "or minimize the earlier failure to make a positive identification" and thus "give undue weight to the unnecessarily suggestive in-court identification."[25] Relying on the Report, the Chief broke with past precedent that simply left it to defense counsel on cross-examination to diminish the weight of the in-court identification.[26] Judges in other states have since followed the path set forth in *Crayton* and *Collins* for subjecting in-court identifications to a higher level of scrutiny.[27]

B. Overhauling the Model Jury Instruction on Eyewitness Identification

The third major case from the September session was *Commonwealth v. Gomes*.[28] The issue presented was whether a trial judge should have granted a request for an eyewitness identification jury instruction based on a recently adopted model instruction in New Jersey.[29] Unlike the traditional Massachu-

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[23] *See id.* at 170–71.

[24] Commonwealth v. Collins, 21 N.E.3d 528, 534, 536 (Mass. 2014).

[25] *Id.* at 534.

[26] *Id.* at 536. ("[C]ross-examination cannot always be expected to reveal an inaccurate in-court identification where 'most jurors are unaware of the weak correlation between confidence and accuracy and of witness susceptibility to 'manipulation by suggestive procedures or confirming feedback.'" (quoting SUPREME JUD. CT. STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 16, at 20) (citation omitted)).

[27] *See, e.g.*, Garner v. People, 436 P.3d 1107, 1122 (Colo. 2019) (Hart, J., dissenting) (citing *Crayton* and *Collins* in concluding that the "characteristics of an in-court identification—its suggestiveness, fallibility, persuasiveness, and imperviousness to cross-examination—make first-time in-court identifications exactly the kind of identification procedure that is 'conduc[ive] to irreparable mistaken identification'" (alteration in original) (quoting Neil v. Biggers, 409 U.S. 188, 196 (1972))); State v. Dickson, 141 A.3d 810, 835 (Conn. 2016) (citing *Crayton* and *Collins* to provide guidance for first-time identifications).

[28] 22 N.E.3d 897 (Mass. 2015).

[29] *Id.* at 902.

setts instruction, New Jersey's new model discussed settled principles of eyewitness identification and human memory that had emerged over decades of research.[30] Massachusetts's model (known as the *Rodriguez* instruction) was adopted nearly forty years before *Gomes*, and several federal and state courts used comparable models.[31] The *Rodriguez* instruction provided a general list of factors for the jury to consider, for example, the opportunity the witness had to observe the person committing the crime, the length of time between the crime and the identification, and the circumstances surrounding any identification procedure.[32] It provided, however, little to no instruction as to how those factors affect the accuracy of an identification. Nor did it address the many scientific principles that forty years of research had shown can impact the reliability of an identification, or may otherwise conflict with a common sense understanding of how memory and perception work.

Gomes could have been a summary order of no precedential significance. On the only issue squarely before the Court—whether the judge abused his discretion in denying the request for New Jersey's instruction—the Court affirmed.[33] Given the Chief's years of leadership on issues of eyewitness identification, though, it was perhaps unsurprising when he evoked *Walker* and the Report and pronounced, "[I]t is now time to do what we declared we were willing to do with respect to eyewitness identification jury instructions."[34]

Indeed, *Gomes* overhauled the Massachusetts model instruction to incorporate principles and factors that had gained acceptance in the scientific community.[35] But just as important as the new instruction itself was *how* Chief Justice Gants implemented these changes. He did not write *Gomes* as the final word on eyewitness identification jury instructions, but as the *next chapter*. For instance, when the Court adopted the *Rodriguez* instruction, the instruction was appended to the *Rodriguez* opinion and declared the model instruction in a footnote.[36] The Chief could have done the same, but he chose a different path.

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[30] *Id.* at 903.

[31] Commonwealth v. Rodriguez, 391 N.E.2d 889, 879–98 (Mass. 1979); *see, e.g.*, United States v. Telfaire, 469 F.2d 552, 559 (D.C. Cir. 1972); PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 3.12 (2012 ed.), http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_criminal_jury_instr.pdf [https://perma.cc/FDY9-CFMP]; MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 4.11 (2010 ed.), https://www.ce9.uscourts.gov/jury-instructions/node/487 [https://perma.cc/C8AN-K4UR]; VT. BAR ASS'N, VERMONT MODEL CRIMINAL JURY INSTRUCTIONS CR05-601 (2003), http://www.vtjuryinstructions.org/criminal/MS05-601.htm [https://perma.cc/9LMM-DTEG]; WV CRIM. L. RSCH. CTR., WEST VIRGINIA CRIMINAL JURY INSTRUCTIONS § 5.05 (6th ed. 2003), http://www.lb7.uscourts.gov/wvajury.pdf [https://perma.cc/HZ6Z-CEY4].

[32] *Gomes*, 22 N.E.3d at 906.

[33] *Id.* at 904–05.

[34] *Id.* at 905.

[35] *Id.* at 910–17.

[36] *See Rodriguez*, 391 N.E.2d at 893, 897–98, 897 n.1.

The instruction appended to *Gomes* was characterized as "provisional" and the Court "invite[d] [public] comments regarding its content and clarity."[37] The call for public comments was not an empty gesture either. The Chief carefully read each of the numerous submissions from the public when he later led the effort to transform the provisional instruction into the model.

Chief Justice Gants also appreciated the importance of not only improving the model jury instruction but of providing a framework through which the model could evolve with the research and science.[38] *Gomes* clarified the legal standard—"a near consensus in the relevant scientific community"—for determining whether a scientific principle of eyewitness identification was appropriate for inclusion in a jury instruction.[39] The Study Group and others recommended the Court take judicial notice of the scientific principles of human memory and perception. But Chief Justice Gants foresaw that judicially noticeable facts may be disregarded by the jury, and applying judicial notice to craft a jury instruction may limit the instruction's impact. The "near consensus" standard ensured that the established principles set forth in the jury instruction were treated like instructions of law, while also providing a basis for parties to challenge, supplement, and modify the model instruction in light of scientific developments or expert testimony.

Only a few months after the release of *Gomes*, the Court itself modified the provisional instruction as it related to cross-racial eyewitness identification. In *Commonwealth v. Bastaldo*, Chief Justice Gants explored the social science supporting the existence of the cross-race effect, "that people are generally less accurate at identifying members of other races than they are at identifying members of their own race."[40] Although the existence of the cross-race effect was clear, the definition of race in this context was not. After careful review of the science, and guided by the Chief's sensitivity to the complications involved with judges ruling on the race of people involved in an identification, the Court directed that a cross-racial instruction shall be given in all cases where the model eyewitness identification instruction applies, unless both sides agree to waive it.[41] Thus, Chief Justice Gants adopted an elegant, simple solution to avoid a procedure with limitless complexities.

He also anticipated that the Court would need help keeping pace with the science. Along with the release of the *Gomes* opinion, Chief Justice Gants formed the Standing Committee on Eyewitness Identification (the Standing Committee) to apprise the Court of developments in the law and science of

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[37] *Gomes*, 22 N.E.3d at 900–01, 916–17.

[38] *See id.* at 911 ("[W]e acknowledge the possibility that, as the science evolves, we may need to revise our new model instruction's description of a principle." (footnote omitted)).

[39] *See id.* at 909.

[40] 32 N.E.3d 873, 880 (Mass. 2015).

[41] *Id.* at 883.

eyewitness identification and to recommend revisions to the model instruction as necessary.[42] Like the Study Group that preceded it, the Standing Committee was composed of a diverse spectrum of stakeholders and interested parties: trial judges, prosecutors, defense attorneys, law school professors, and law enforcement officers. The Standing Committee engaged in thoughtful debate and discussion about how to improve the provisional instruction, to make it simpler to understand, scientifically accurate, and balanced. After months of collaboration, the Standing Committee reached agreement on a proposed revised instruction. Chief Justice Gants, who led the Court's effort to prepare a model instruction after *Gomes*, afforded significant weight to the work of the Standing Committee. He deeply valued the perspective of a diverse group of people working together to reach a consensus.

In November 2015, four years after the Chief first convened the Study Group, the Court issued the official model jury instruction on eyewitness identification.[43] The model's language was streamlined and more plainly worded compared to the provisional instruction. It added a preliminary or contemporaneous instruction on eyewitness identification evidence to be given early in the trial so that the jury could be attuned to the issues of eyewitness identification from the outset of the case.[44] The model also benefited from the Standing Committee's proposal and public comments from other trial judges, defense attorneys, practitioners, bar association and professional groups, and nonprofit organizations.[45] Chief Justice Gants understood that the model instruction alone would not create the sea change needed to solve the myriad challenges in evaluating eyewitness identification evidence.[46] But what the Chief accomplished in overhauling the model instruction cannot be fully appreciated by looking only at the new instruction's text. The model instruction was also important for its downstream impact on other aspects of the criminal legal system. It changed the baseline understanding of the science and the law of eyewitness identification for trial judges, law enforcement officers, and the bar, providing a path toward more careful administration of identification procedures, more effective cross-examination and challenges to the evidence, and more informed rulings from the bench. After *Gomes*, though the work was not nearly done, there was also no turning back.

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[42] *Gomes*, 22 N.E.3d at 911 n.25.

[43] *See generally* MASS. SUPREME JUD. CT., STATEMENT, MODEL JURY INSTRUCTIONS ON EYEWITNESS IDENTIFICATION (2015), https://www.mass.gov/doc/model-jury-instructions-on-eyewitness-identification-november-16-2015/download [https://perma.cc/K8T9-R6WX] [hereinafter MASS MODEL JURY INSTRUCTIONS ON EYEWITNESS IDENTIFICATION].

[44] *Id.* at 1–2.

[45] *See id*.

[46] *See Gomes*, 22 N.E.3d at 917 (describing the new model instruction as "at least one source of reliable information in cases where expert testimony is not offered").

IV. The Legacy of Chief Justice Gants's Science-Based Approach

A. Beyond the First Term

In his first term leading the Supreme Judicial Court, Chief Justice Gants had already made an impact on in-court identifications and eyewitness identification jury instructions. Both were accomplished through the vehicle of court decisions, but not in a vacuum. They had the important foundation of the Study Group's research and recommendations as well as the support of others who had weighed in through comments. Neither change was minor, nor were they isolated. The significant lesson from these cases—that the law on eyewitness identification should be informed by scientific research—is one that permeated beyond Chief Justice Gants's first term as Chief and one that will likely be an enduring part of his legacy.

In his second term, Chief Justice Gants authored *Commonwealth v. Johnson*, yet another foundational decision in the Massachusetts eyewitness identification canon.[47] Although *Crayton*, *Collins*, and *Gomes/Bastaldo* addressed issues that occur during trial, *Johnson* focused on the reliability of out-of-court identifications that typically occur in the investigative phase of a criminal case.[48] As background, there are at least two ways that a person accused of a crime in Massachusetts can argue that, though they have been identified by a witness, the identification should not be used against them. Under the Massachusetts Declaration of Rights, if an identification was so unnecessarily suggestive and conducive to irreparable misidentification that it deprives someone of due process, then it must be excluded.[49] Importantly, this constitutional standard requires that the suggestiveness was caused by a state actor as the law typically excludes evidence in order to deter official misconduct.[50]

Identification evidence, however, can also be excluded in Massachusetts based on "[c]ommon law principles of fairness," as is detailed in *Commonwealth v. Jones*.[51] This avenue recognizes that where suggestiveness may have contaminated an identification, the source of that suggestiveness (state action or not) should not determine whether it can be used against someone who faces a loss of their freedom. Although this ground had been available to people accused of crimes since 1996, it was not well known and it was seldom used.

The *Johnson* case provided an opportunity both to reaffirm and redefine when identification evidence violates common law principles of fairness. This was necessary because the *Jones* case was not widely appreciated and was de-

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[47] 45 N.E.3d 83 (Mass. 2016).

[48] *Id.* at 86.

[49] *Id.* at 88.

[50] *Id.*

[51] 666 N.E.2d 994, 1001 (Mass. 1996) (introducing criteria for excluding identification evidence based on common law principles of fairness).

cided without the benefit of the scientific research that bears on it. In the *Johnson* case, the victim walked in on a stranger in his apartment. The victim confronted the man and the two briefly tussled. The stranger then ran out of the apartment. Based on the brief interaction, the victim could only describe the man as a light-skinned Black man wearing a gray, hooded sweatshirt. Before participating in any identification procedure with the police, the victim's cousin showed the victim a photo of a man the cousin thought could be the intruder. In addition to sharing the photo of only one person, the cousin had informed the victim that the man in the photo looked like the man who had broken into his own apartment merely a day before the victim's apartment was entered. Based on this one photo and suggestive information, the victim told the police that he could identify the intruder as Mr. Johnson.[52] Although there was no state action that had led to this identification, the suggestiveness inherent in this "procedure" still needed to be scrutinized.

Chief Justice Gants, writing for the Court, clarified through the lens of scientific research how trial courts should adjudicate claims that an identification violated common law principles of fairness. Specifically, the court must weigh the danger of unfair prejudice (how any suggestiveness that inflated the witness's confidence or altered a witness's perception of their memory might make it more difficult for a jury to assess accuracy) against the probative value of the identification (by considering the strength of the witness's memory). If the suggestiveness that led to the identification, considered in the context of the scientific factors that affect memory accuracy, render the identification unreliable, it cannot be used against the person accused.[53]

The *Johnson* decision has had a particularly significant impact in recent years because even as Massachusetts law enforcement has made strides to reduce suggestiveness in identification procedures, individuals have taken it upon themselves to investigate cases through social media or other suggestive processes. Given the proliferation of technology, the *Johnson* decision has enabled litigants and judges to consider *all* identifications, not only those administered by law enforcement. In other words, *Johnson* provides a powerful tool to prevent wrongful convictions.

Beyond this decision, Chief Justice Gants continued to leverage scientific research to understand and decide eyewitness cases that came before the court. In *Commonwealth v. Thomas*, Chief Justice Gants delved into the novel issue of the suggestive identification of an inanimate object by affirming the motion judge's exclusion of the identification of a gun.[54] Specifically, Chief Justice Gants found the identification of the gun was unreliable where the witness had

[52] *Johnson*, 45 N.E.3d at 86–88.
[53] *Id.* at 90–92.
[54] 68 N.E.3d 1161, 1173 (Mass. 2017).

a limited view of the gun used during the crime, the initial description of the gun was vague, she was shown one photograph of the gun seized and only afterwards, provided further detail on the gun's appearance, and her confidence was inflated by the detectives' "confirmatory statements."[55] Not only did Chief Justice Gants apply scientific principles of perception and memory, and the malleability of memory, to this context, he urged police departments to develop protocols to reduce suggestiveness where a witness needs to identify an inanimate object.[56] He never wasted an opportunity to make recommendations even if they were not in the form of a court order.

Finally, even when he was not writing for the Court, Chief Justice Gants was a persistent proponent of science in this area of the law. In *Commonwealth v. Dew*, the Court confronted the standard for admitting an in-court identification that was preceded by an unequivocally positive (but inherently suggestive) showup.[57] Although the Court's majority considered this case to be an application of *Collins*, Chief Justice Gants recognized that the danger of an in-court identification following a suggestive out-of-court procedure was distinct. He wrote a vital concurrence, relying on the Report and other scientific sources to identify the danger, which was less severe than the *Collins* situation, but "still substantial."[58] "Allowing an in-court identification in addition to a showup identification creates a risk that the jury will gloss over these particular aspects of the showup identification and simply accept the subsequent in-court identification."[59] Chief Justice Gants also challenged the majority's *Johnson* balancing analysis, which attributed significant probative value to an in-court identification merely because it "corroborate[d] other evidence":

> By this standard, a Ouija board has probative value if it points to the guilt of a defendant because it corroborates the other compelling evidence of his guilt. The probative value of evidence must be evaluated on whether it fairly *adds* to the weight of the other evidence, not simply on whether it is consistent with that evidence.[60]

The Chief's concurrence provided valuable guidance for grappling with the risks posed by an in-court identification following a suggestive out-of-court procedure, which cannot be discerned from *Crayton*, *Collins*, or the majority opinion in *Dew*. Although he preferred consensus, Chief Justice Gants never shied away from honest disagreement, especially when it came to an issue about which he cared so deeply.

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[55] *Id.* at 1173–74.
[56] *Id.* at 1175.
[57] 85 N.E.3d 22, 33 (Mass. 2017) (Gants, C.J., concurring).
[58] *Id.* at 36.
[59] *Id.*
[60] *Id.* at 37.

B. Beyond Eyewitness Identification

Chief Justice Gants was proud that Massachusetts became a leader in its approach to eyewitness identification evidence. He was particularly proud of the process it took to get there: bringing many people together in intense study and being faithful to the science. Indeed, he wrote a law review article about it (at a time when his schedule was impossibly packed) so that judges and attorneys in other jurisdictions could learn from the progress made in Massachusetts.[61] He believed in that process so much that he made an effort to replicate it with other issues beyond eyewitness identification.

Returning to the Standing Committee, Chief Justice Gants tasked its members with researching "near consensus" scientific principles on three areas and incorporating that research within accessible, proposed model jury instructions. The three areas he identified for study included general memory of witnesses, beyond the specific context of eyewitness identification; credibility of witnesses; and implicit bias. Each of these areas are relevant in nearly all trials, but the model jury instructions on each issue (like the one used before *Gomes* for eyewitness identification) had been constructed *without* adherence to scientific principles.[62]

Chief Justice Gants depended on research in other ways as well. Appreciating the significant racial disparities in sentencing in the Commonwealth, he sought the assistance of a research team at the Criminal Justice Policy Program at Harvard Law School to dissect the available data and report their findings to the Court. He was unafraid to confront evidence even where the evidence revealed ugly truths. He was interested in being held personally accountable and wanted the Court and other institutions to be held accountable as well. He knew that such accountability was necessary for change and that denial and complacency would yield no progress. He consistently applied these principles and values, in the context of eyewitness misidentifications and in many other areas that threatened justice.

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[61] *See* Ralph D. Gants & Erik N. Doughty, *Where Science Conflicts with Common Sense: Eyewitness Identification Reform in Massachusetts*, 79 ALB. L. REV. 1617 (2015–2016).

[62] As of this writing, the Standing Committee has drafted proposed language, congruent with scientific research, on each of these areas and has presented those to the Supreme Judicial Court. On September 29, 2021, the Supreme Judicial Court adopted the recommendation of the Standing Committee and issued a Model Jury Instruction on Implicit Bias. *Supreme Judicial Court Model Jury Instructions on Implicit Bias*, MASS.GOV, https://www.mass.gov/info-details/supreme-judicial-court-model-jury-instructions-on-implicit-bias [https://perma.cc/LXS2-BFKG]. While announcing the new model instruction, Chief Justice Budd acknowledged the work of the Standing Committee and specifically asked it to "continue to review the applicable *research*, and recommend revisions as needed or warranted." *Id.* (emphasis added). In this way, though under different leadership, the Supreme Judicial Court has signaled its intent to continue making our jury instructions, and thus our law, more responsive to scientific developments. Although Chief Justice Gants cannot be here to see the fruits of this labor, it was his initiative that made it possible.

Conclusion

Chief Justice Gants brought so many people together, including the two of us, to be co-conspirators with him on a long journey toward more justice. The efforts he made toward reducing wrongful convictions based on eyewitness misidentifications was nothing short of revolutionary. We never expected to lose him so soon, though perhaps any moment would have been too soon for someone so courageous and kind. One of his greatest accomplishments as a leader, however, was empowering others to harness their intellect and passion toward change. We know that his lessons, those he embedded in his decisions and those he shared with others, will not be lost. We carry his work forward to honor our commitments to our communities and to his memory.