IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 181569

TIMOTHY JOSAAHN WATSON,

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 120,000 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 190 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*, 572 U.S. 701, 712, 723 (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, including in this Court. *See, e.g.*, *Payne v. Commonwealth*, 292 Va. 855 (2016); *Perry v. New Hampshire*, 565 U.S. 228, 243-245 (2012); *Garner v. People*, 436 P.3d 1107 (Colo. 2019); *People v. Boone*, 91 N.E.3d 1194 (N.Y. App. Ct. 2017); *People v. Thomas*, 902 N.W.2d 885 (Mich. 2017)

(order); *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 Timothy Watson on charges of first-degree murder, robbery, conspiracy to commit robbery, and use of a firearm in the commission of a robbery. Joint Appendix (JA) 167. The case stemmed from the robbery of Joseph Jackson and Paul Abbey and the murder of Abbey by three men in a parking lot. *Id.* at 167-168.

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[1] The written consent of both parties accompanies this brief. *See* Va. S. Ct. R. 5:30(c)(iii). 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.

Jackson's identification of Watson as one of the assailants was a key issue at trial. Jackson initially identified Watson in a photo lineup, but indicated that he was "not sure." JA 169. At the preliminary hearing, however, Jackson expressed certainty that Watson was one of the assailants. *Id.*

At trial, Watson requested the following instruction relevant here:

> You should evaluate the testimony of an eyewitness who identified the defendant as the person he saw involved in the crime in the same manner as you would for any other witness, including any biases or motives to lie.
>
> Additionally, even if you believe the witness was trying to tell the truth, you must still decide whether the witness was accurate about the identification or instead made an honest mistake. In weighing such testimony, you may consider the following:
>
> You may consider whether the witness had an adequate opportunity to observe the person involved in the crime. Circumstances you may consider include the amount of time the witness had to observe the person involved in the crime; the distance between the witness and the person involved in the crime; lighting conditions; obstructions; how closely the witness was paying attention to the person involved in the crime; whether the witness knew a crime was being committed; the extent to which the person's features were visible and undisguised; whether a weapon was present that may have affected the attention of the witness, and any other circumstances you believe are important.
>
> You may consider whether the witness had the ability to observe the person involved in the crime. Circumstances you may consider include the witness's intelligence; whether the

witness was stressed or frightened, fatigued, injured, or under the influence of drugs or alcohol at the time he made the observations; and any other circumstances you believe are important.

You may consider whether the witness's identification of the defendant was the product of the witness's own memory or to what extent it was or may have been the result of outside influences. Circumstances you may consider include whether the witness ever gave a description of the person who was involved in the crime and, if so, how that description compares to the defendant; whether the witness knew or had seen the defendant prior to witnessing the crime; the amount of time that passed between the crime and the witness's later identification of the defendant; whether the witness made the identification after being exposed to any outside influences or information, which may include any opinions, descriptions, or identifications given by others, photographs, newspaper accounts, televised or online news stories, or any other outside information or influences; whether the witness was ever presented with the defendant and failed to identify the defendant as the person who was involved in the crime or previously identified a different individual as the person who was involved in the crime, whether the witness was able to identify other participants in the crime, and any other circumstances you believe are important.

In weighing the witness's identification, you may consider whether the procedures used by law enforcement had any influence on the witness's identification. For example, you may consider the manner in which photographs were selected and presented to the witness, or comments made by the police to the witness.

The witness who testified about the identification of the person was involved in the crime does not have to be certain that the identification he made is correct. A witness may be unsure and still be correct in his identification. On the other

> hand, a witness's confidence in his identification does not mean that the identification is accurate.
>
> This instruction is not intended to direct you to give more or less weight to the eyewitness identification evidence. It is your duty to determine what weight to give to that evidence.

JA 182-183. The trial court rejected this instruction. *Id.* at 182. The jury convicted Watson of first-degree murder, robbery, conspiracy to commit robbery, and use of a firearm in the commission of a robbery, and Watson appealed. *Id.* at 167.

The court of appeals, through a single-judge ruling, held that the trial court had not erred in rejecting the instruction quoted above. JA 183-184. The court deemed the instruction duplicative of the instructions given and concluded that the proposed instruction "would have improperly focused the jury's attention on the factors outlined in the proposed instruction." *Id.* at 184 (citing *Payne*, 292 Va. at 871). Watson requested consideration by a three-judge panel, but that request was denied. JA 189.

ISSUE PRESENTED

This brief addresses the second issue on which this Court granted review: whether "[t]he court of appeals erred in affirming the trial court's denial of appellant's proffered jury instructions regarding eyewitness identification testimony because the instruction was an accurate statement of law and supported by ample evidence." Pet. 4 (capitalization altered).

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). 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. "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.

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 & Law, 338, 338 (1997). For instance, multiple studies demonstrate the high rates at which eyewitnesses, during line-up procedures, identify "fillers"—i.e., people who the police know are

not the perpetrator. *See, e.g.*, Horry et al., *Predictors of Eyewitness Identification Decisions From Video Lineups in England: A Field Study*, 36 Law & Hum. Behav. 257 (2012) (finding that over 25 percent of witnesses selected an innocent filler). 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) (alteration in original) (quotation marks omitted). 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.* (quotation marks omitted).

These insights are not new. Indeed, this Court noted over a decade ago 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 earlier, for example, the U.S. Supreme Court observed 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, 69 percent of DNA exonerations involve eyewitness misidentification. *DNA Exonerations in the United States*, www.innocenceproject.org/dna-exonerations-in-the-united-states/ (visited June 18, 2019). 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 nearly 60 percent of the five hundred wrongful convictions studied); *see also* Cutler & Penrod, *Mistaken Identification: The Eyewitness, Psychology and The Law* 3, 8 (1995). Virginia is not exempt from this phenomenon: Ten of thirteen DNA exonerations in Virginia involved erroneous eyewitness misidentifications.

Virginia Department of Criminal Justice Services, *Model Policy on Eyewitness Identification* 1 (Mar. 19, 2014).

To mitigate the threat of erroneous convictions caused by mistaken identifications, model jury instructions on eyewitness identification have been adopted in over twenty states and in most federal courts of appeals. *See, e.g.*, *Perry*, 565 U.S. at 246 & n.7 (discussing the "many federal and state courts" that have adopted model jury instructions on eyewitness identification). 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—or the problem of wrongful convictions 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 the inability

of other safeguards of the adversary system in most cases to counter the prejudicial effect of false identifications.

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

In rejecting Watson's proposed jury instruction quoted earlier, the court of appeals reasoned that the instruction was adequately covered by, and thus duplicative with, the instructions the trial judge did give. JA 184. APA submits that that is not correct. In particular, unlike the instruction Watson requested, the instructions that were given did not tell jurors, in evaluating the reliability of eyewitness identifications, to consider "whether the witness was stressed or frightened, fatigued, injured, or under the influence of drugs or alcohol," or "whether the witness made the identification after being exposed to any … photographs." *Id.* at 182-183. As discussed below, psychological research demonstrates that those factors do bear on eyewitness reliability.

A. Psychological Research Supports The Instruction Requested Here

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

As noted, the eyewitness who identified Watson as his assailant at the preliminary hearing had previously been shown Watson's photograph

as part of a photo array. JA 169. That is important because 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 fifty years ago, for example, the U.S. Supreme Court explained 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. Research has shown that 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. Bull. 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 eyewitnesses to simulated crimes who were exposed to photographs of suspects before participating in a lineup were significantly more likely to misidentify 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: Retroactive Interference, Mugshot Commitment, Source Confusions, and Unconscious Transference*, 30 Law & Hum. Behav. 287,

299 (2006). Moreover, in a meta-analysis of four previous studies involving "[i]dentification of a mugshot image as that of the target and the subsequent appearance of that image or person at the lineup," the overall proportion of correct identifications was reduced from 55 percent to 32 percent. *See id*. at 298; *see also* Brown et al., *Memory for Faces and the Circumstances of Encounter*, 62 J. Applied Psychol. 311, 313-315 (1977).[2]

Research thus supports the conclusion that participation in multiple identification procedures reduces the reliability of an identification in any of the later procedures. That reduced reliability is particularly salient here, where Jackson initially identified Watson's photo but indicated he was "not sure," before ultimately identifying Watson in person. JA 169. As explained in the literature, "identification from mugshots of … [an] innocent person … interferes … with a witness's memory representation of the actual target." Deffenbacher, 30 Law & Hum. Behav. at 298. This research fully supports the instruction Watson requested, which would have apprised jurors that they could take into consideration "whether the witness made

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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: Interference, Transference, and Commitment Effects*, 86 J. Applied Psychol. 1280, 1283 (2001) (no statistically significant "transference" where witnesses were exposed to an average of 534 photographs). That is not the situation in this case.

the identification after being exposed to any outside influences or information, which may include any … photographs." JA 183. That instruction was particularly warranted given that at trial, the Commonwealth specifically relied on the identification of Watson that Jackson made after Jackson had been exposed to Watson's photograph. *See id.* at 169.

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

Psychological research likewise supports the conclusion—reflected in Watson's requested instruction—that the level of stress an eyewitness experienced 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. Law &

Psychiatry 265, 274 (2004); *see also* Shields et al., *The Effects of Acute Stress on Episodic Memory: A Meta-Analysis and Integrative Review*, 143 Psychol. Bull. 636 (2017) (finding, via a meta-analysis of 113 memory studies, that stress during "encoding" of memories typically impaired memory).

This research fully supports Watson's proffered instruction, which would have informed jurors that they could consider "whether the witness was stressed or frightened." JA 182. The instruction has obvious application here, where there was evidence that Jackson was held at gunpoint and even shot during the course of the robbery. *Id.* at 168.

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

In rejecting the instructions at issue here, the court of appeals alluded to other tools of the adversary system—closing arguments, for example—as being adequate safeguards against juries placing undue weight on questionable eyewitness testimony. *See* JA 184. Scientific research and recent experience undermine the notion 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, for example, 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., *The Psychology of Eyewitness Identification* 249 (2012) (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).[3]

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

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[3] 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. One study found, for example, that of 250 wrongful convictions, 190 involved mistaken eyewitness identifications. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 8-9, 48 (2011); *see also* 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).

identifications. Indeed, a number of studies support the view that "expert testimony can make jurors more sensitive to the factors that influence eyewitness accuracy." Lampinen, *supra*, at 253; *accord* Cutler et al., *Expert Testimony and Jury Decision Making: An Empirical Analysis*, 7 Behav. Sci. & Law 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, as this case demonstrates, courts may not admit such evidence, or 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; *see also State v. Guilbert*, 49 A.3d 705, 727 n.27 (Conn. 2012). Thus, despite generally being desirable, expert testimony cannot be the only safeguard against the dangers of unreliable identifications. *See* National Research Council, *Identifying The Culprit: Assessing Eyewitness Identification* 112 (2014) (recommending jury instructions, in addition to expert testimony, "as an alternative means of conveying information regarding" the reliability of eyewitness testimony).

As for the court of appeals' suggestion that counsel's closing arguments could suffice to instruct the jury, 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 closing arguments.

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.

C. The Requested Instruction Is Consistent With *Payne*

This Court has acknowledged the "dangers inherent in eyewitness identification testimony," and has not held "that a court would abuse its discretion by granting [a cautionary] instruction" on eyewitness identification. *Daniels*, 275 Va. at 464-465. The Court also stated, in *Payne v. Commonwealth*, that an instruction that "failed to inform the jury that it could also consider any other circumstances it believed were important in weighing the testimony of the eyewitness" was properly refused because it "could reasonably be construed to contradict Jury

Instruction 1, which correctly informed the jury of its role as judge of the weight of the evidence." 292 Va. at 871.

The court of appeals here compared Watson's proposed instruction to the one in *Payne*, describing it as "extremely detailed" and, citing this Court's description of Payne's proposed instruction as "very specific[],"concluded that this level of detail "would have improperly focused the jury's attention on the enumerated factors." JA 183-184 (alteration in original). That was incorrect. Watson's instruction—which repeats several times that the jury is free to consider "any other circumstances [it] believe[s] are important," *id.* at 182—was carefully crafted to avoid the problem identified in *Payne*. Indeed, Watson did what *Payne* forecast: He "proffered an instruction similar to Payne's, but drafted to avoid the problem of focusing the jury's attention on a limited number of factors." 292 Va. at 872. In light of this difference between the instructions proffered in *Payne* and here, the lower court erred in equating the two.

II. EYEWITNESS-IDENTIFICATION RESEARCH IS RELIABLE

As explained, Watson'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, *supra*, at 13; *see also* Wells, 7 Psychol. Sci. in Pub. Int. 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, *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, *supra*, at 66-67. 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*.; Malpass, *supra*, at 14.

Third, researchers who are members of APA must 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. Over 1,000 peer-reviewed articles have been published on the subject. 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 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., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 177, 179 (2006).

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 18, 2019

Respectfully submitted,

/s/ Brittany C.B. Amadi

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CERTIFICATE OF SERVICE

I certify that this 18th day of June, 2019, 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 3 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.

/s/ Brittany C.B. Amadi
BRITTANY C.B. AMADI (VSB #80078)

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 5,072 words.

/s/ Brittany C.B. Amadi

Dated: June 18, 2019

BRITTANY C.B. AMADI (VSB #80078)

Addendum

Lishinski, Amy C

From: Theisen, Virginia <VTheisen@oag.state.va.us>
Sent: Tuesday, June 18, 2019 7:22 AM
To: Lishinski, Amy C; Jeffrey, Donald
Cc: Amadi, Brittany; Volchok, Daniel
Subject: RE: Watson v. Commonwealth (Va. S. Ct.) -- Request for consent to filing of amicus brief

Follow Up Flag: Follow up
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EXTERNAL SENDER

Dear Ms. Lishinski:

The Commonwealth will consent to the filing of an amicus brief on behalf of the American Psychological Association. As I recall, members of your firm, including Mr. Volchok, filed a such an amicus brief three years ago in the Supreme Court of Virginia in *Payne v. Commonwealth*. I will take a letter to the Supreme Court today noting our consent. With regard to participation *pro hac vice*, I looked at Rule 1A:4 and the application, and it does not appear that opposing counsel must consent to that participation, although your local counsel, the Virginia Beach Public Defender's Office, certainly has responsibilities. The Commonwealth does not object to your participation *pro hac vice*, if you meet the requirements, and will not file any objection to such participation.

Sincerely,

Virginia B. Theisen
Senior Assistant Attorney General/Team Leader
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From: Lishinski, Amy C [mailto:Amy.Lishinski@wilmerhale.com]
Sent: Monday, June 17, 2019 5:51 PM
To: Theisen, Virginia
Cc: Amadi, Brittany; Volchok, Daniel
Subject: Watson v. Commonwealth (Va. S. Ct.) -- Request for consent to filing of amicus brief

Hello Ms. Theisen,

My name is Amy Lishinski, and my colleagues Brittany Amadi and Daniel Volchok and I represent the American Psychological Association, which intends to file an amicus brief with the Virginia Supreme Court in *Timothy Watson v. Commonwealth*. I am writing to request the Commonwealth's consent to our filing. In addition, as Daniel and I are not admitted to the Virginia State Bar, we will be applying for appearances *pro hac vice* and request that you consent to our motion to associate as counsel *pro hac vice*.

Thank you for your consideration,

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Lishinski, Amy C

From: Roger Whitus <rwhitus@vir.idc.virginia.gov>
Sent: Saturday, June 15, 2019 10:44 PM
To: Lishinski, Amy C
Subject: Re: Watson v. Commonwealth (Va. S. Ct.) -- Request for consent to filing of amicus brief

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EXTERNAL SENDER

Fine with us. Glad to have the help.

On Fri, Jun 14, 2019, 10:24 AM Lishinski, Amy C <Amy.Lishinski@wilmerhale.com> wrote:

> Hello Mr. Whitus,
>
> My name is Amy Lishinski, and my colleagues Brittany Amadi and Daniel Volchok and I represent the American Psychological Association, which intends to file an amicus brief with the Virginia Supreme Court in *Timothy Watson v. Commonwealth*. I am writing to request your consent to our filing. In addition, as Daniel and I are not admitted to the Virginia State Bar, we will be applying for appearances *pro hac vice* and request that you consent to our motion to associate as counsel *pro hac vice*.
>
> Finally, if possible, we would appreciate viewing the Joint Appendix in advance of filing, so that we may cite to it in our brief.
>
> Thank you for your consideration,
>
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