No. 86119-6

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRYAN ALLEN,

Petitioner.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND WASHINGTON DEFENDER ASSOCIATION

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I. IDENTITY AND INTEREST OF AMICI

The identity and interest of amici curiae are set out fully in the accompanying Motion for Leave to File Brief of Amici Curiae.

II. INTRODUCTION

> At the core of our system of criminal justice is the 'twofold aim . . . that guilt shall not escape or innocence suffer.' *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935). In the context of eyewitness identification evidence, that means that . . . juries must receive thorough instructions tailored to the facts of the case to be able to evaluate the identification evidence they hear.
>
> —Chief Justice Stuart Rabner on behalf of the unanimous New Jersey Supreme Court, August 24, 2011, *State v. Henderson*, 27 A.3d 872, 928 (N.J. 2011).

Eyewitness misidentification is the leading cause of wrongful convictions in the United States. *See, e.g., State v. Delgado*, 902 A.2d 888, 895 (N.J. 2006) ("Misidentification is widely recognized as the single greatest cause of wrongful convictions in this country."); *State v. Dubose*, 699 N.W.2d 582, 592 (Wis. 2005) (same). Modern science and the release of hundreds of wrongfully convicted prisoners confirm that "eyewitness testimony is often hopelessly unreliable." *Dubose*, 699 N.W.2d at 592. *See also Perry v. New Hampshire*, No. 10-8974, --- U.S. ---, slip op. at 15 (Jan. 11, 2012) ("Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification.") (Sotomayor, J., dissenting).

Yet, despite the confirmed shortcomings of identification evidence,

courts and juries misperceive eyewitness testimony as inherently reliable when, in fact, the opposite is true. *State v. Henderson*, 27 A.3d 872, 889 (N.J. 2011) ("[T]here is almost *nothing more convincing* to a jury than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'" (quoting *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting))). Courts presume that "jurors are able to detect liars from truth tellers," but most eyewitnesses, testifying sincerely and therefore without a dishonest demeanor, "think they are telling the truth even when their testimony is inaccurate." *Henderson*, 27 A.3d at 889. Jurors generally overestimate eyewitness accuracy and fail to understand the factors that affect it. Eyewitness experiments demonstrate that "jurors believe eyewitnesses, even when they are wrong, and find eyewitness identification testimony so persuasive that it may well color their view of all of the other evidence in the case." Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 Val. U. L. Rev. 109, 135 (2006).[1]

To begin to address these grave shortcomings, the Washington Supreme Court, in addition to permitting expert testimony,[2] should require that trial courts charge juries with an accurate, balanced cautionary

[1] The pattern holds in Washington. In 2010, at least three defendants—Ted Bradford, Larry Davis, and Alan Northrop—convicted on the basis of erroneous eyewitness evidence were exonerated through evidence of innocence. Innocence Project Northwest Clinic, http://www.law.washington.edu/Clinics/IPNW/.

[2] *See State v. Cheatham*, 150 Wn.2d 626, 649, 81 P.3d 830 (2003).

instruction regarding the reliability of eyewitness identifications. *See, e.g.*, *Henderson*, 27 A.3d at 924 ("[W]e direct that enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case."). Several jurisdictions mandate the use of cautionary instructions when eyewitness testimony is at issue, and courts throughout the country have encouraged their use.

A mandatory jury instruction on eyewitness testimony is fully consistent with the Washington Constitution. An instruction cautioning juries about this particular category of evidence is not an impermissible comment on a matter of fact in evidence, nor does it convey to the jury a judge's particular opinion of the case. *See* Const. art. IV, § 16. Rather, it simply instructs juries about the potential infirmities of this particular class of evidence, thus guarding against the lay tendency to erroneously believe in the inherent reliability of such testimony, a belief science now confirms is incorrect.

Amici therefore urge that a cautionary instruction be given in *any* case where eyewitness testimony is offered. Amici likewise ask this Court to vacate the conviction of the Petitioner, Mr. Allen, and remand for retrial where the jury is properly charged.[3]

[3] In cases where cross-racial identification is at issue, the jury should be given an instruction similar to the second proposed instruction offered at Mr. Allen's trial. *See State v. Allen*, 161 Wn. App. 727, 733, 255 P.3d 784, *review granted*, 172 Wn.2d 1014, 262 P.3d 63 (2011). As to a more general eyewitness jury instruction, amici request that this Court direct the Washington Pattern Instructions Committee to prepare an appropriate instruction within 90 days of the Court's decision in this case, for review and implementation by the Court. *See Henderson*, 27 A.3d at 925–26 (directing the same to its state committees).

III. ARGUMENT

A. Modern Science Demonstrates the Need for Additional Safeguards regarding Eyewitness Identification.

In August 2011, the New Jersey Supreme Court issued a landmark decision concerning identification evidence. *Henderson*, 27 A.3d 872. The court conducted an extensive and thorough review of the topic, appointing a special master who presided over a hearing that probed the testimony of seven experts, analyzed hundreds of scientific studies, and produced more than 2,000 pages of transcripts. *Id.* at 877, 916. The results, adopted unanimously by the court, were powerful:

> In the thirty-four years since the United States Supreme Court announced a test for the admission of eyewitness identification evidence, . . . a vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory. It also calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications.
>
> . . . .
>
> We are convinced from the scientific evidence in the record that memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications. . . .
>
> In the end, we conclude that the current standard for assessing eyewitness identification evidence does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. *It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate.*

Id. at 877–78 (emphasis added and citations omitted).

The New Jersey Supreme Court concluded that two principal steps were necessary to remedy the problem: (1) rigorous pretrial review of

identifications using modern standards, to determine if suggestiveness renders the identification unreliable and therefore inadmissible, and (2) "enhanced jury charges on eyewitness identification for trial judges to use. . . . To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability." *Id.* at 878.

A legion of empirical studies over the last three decades has shown that the accuracy of eyewitness identification is affected by several factors, many of which courts and juries have previously either disregarded or mistakenly disbelieved. These factors include (1) blind lineup administration, (2) preidentification instructions, (3) lineup construction, (4) feedback avoidance, (5) multiple viewings, (6) simultaneous v. sequential lineups, (7) composite sketches, (8) showups, (9) stress, (10) weapon focus, (11) duration, (12) distance and lighting, (13) witness characteristics, (14) perpetrator characteristics, (15) race bias, (16) private actors, and (17) speed of identification. *Id.* at 920–22.

Contemporary studies also refute the commonly held notion that memory is like a video recording that can be replayed on command. "Human memory is far more complex." *Id.* at 894. Memory is a constructive, dynamic, and selective process, consisting of three stages: acquisition, retention, and retrieval. *Id.* "At each of these stages, the information ultimately offered as 'memory' can be distorted, contaminated and even falsely imagined. The witness does not perceive all that a videotape would disclose, but rather gets the gist of things and constructs a memory on bits of information and what seems plausible." Report of the

Special Master 10, *State v. Henderson*, 27 A.3d 872 (N.J. 2011) (No. A-8-08) (internal citations and quotation marks omitted).[4]

Modern research further reveals that the factors courts have traditionally used to evaluate the reliability of eyewitness identification are not only inconclusive but also misleading. For example, applying the long-used *Manson v. Brathwaite* test, Washington state and federal courts have for over thirty years evaluated identification reliability by considering, among other factors, the eyewitness's level of certainty at the time of confrontation. *See, e.g.*, *State v. Fortun-Cebada*, 158 Wn. App. 158, 170, 241 P.3d 800 (2010). But the scientific record confirms—contrary to conventional wisdom and Washington precedent—that little or no correlation exists between a witness's certainty and the accuracy of the identification. *See, e.g.*, Brian L. Cutler & Steven D. Penrod, *Mistaken Identifications: The Eyewitness*, Psychology and the Law 94–96 (1995); Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything about Their Relationship?*, 4 Law & Hum. Behav. 243, 258 (1980) ("The judicial system should cease and desist from a reliance on eyewitness confidence as an index of eyewitness accuracy.").

Indeed, it is clear from the abundant, consistent, dependable, and thorough social-science research that Washington's standard for evaluating eyewitness identifications is outdated and unreliable, in large part because it depends on the misconception that the fallibility of

[4] The Report of the Special Master is available at http://www.judiciary.state.nj.us/pressrel/2010/pr100621a.htm.

identifications and the factors necessary to evaluate that fallibility are well within the juror's common knowledge. They are not.

B. Jurors and Courts Overestimate Eyewitness Testimony.

Juries do not intuitively know or understand what science now teaches about perception and memory as it relates to eyewitness identification. *See, e.g.*, Report of the Special Master, *supra*, at 48 ("Studies examining whether and to what extent jurors (or potential jurors) know or correctly intuit the findings reported in the eyewitness identification literature report that laypersons are largely unfamiliar with those findings and often hold beliefs to the contrary."); *Bomas v. State*, 987 A.2d 98, 112 (Md. 2010) ("We appreciate that scientific advances have revealed (and may continue to reveal) a novel or greater understanding of the mechanics of memory that may not be intuitive to a layperson."); *United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006) ("Thus, while science has firmly established the inherent unreliability of human perception and memory, this reality is outside the jury's common knowledge, and often contradicts jurors' commonsense understandings." (internal citations and quotation marks omitted)).

Scientific studies confirm that jurors are overwhelmingly unable to correctly distinguish between accurate and inaccurate eyewitness testimony. Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 284–85 (2003). In experiments with subject-jurors, the subjects tended to overestimate the accuracy of eyewitness testimony. *Id.* at 284. These studies also show that poor witnessing

conditions and other flaws in eyewitness testimony have little effect on jurors, who consistently overbelieve eyewitnesses. *Id.*

Other studies verify that jurors do "not evaluate eyewitness memory in a manner consistent with psychological theory and findings." Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185, 190 (1990); *see also* Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 Applied Cognitive Psychol. 115, 118–21 (2006) (finding that juror responses differed from expert responses on 87 percent of the issues and more than half of jurors did not agree on the effects of the accuracy-confidence relationship, weapon focus, and cross-race bias).

As a leading example of juror misunderstanding, scientific studies demonstrate that jurors give the *most* weight to a witness's confidence in making an accurate identification. *See, e.g.*, Cutler, *Juror Sensitivity*, *supra*, at 185 (finding that eyewitness confidence "was the most powerful predictor of verdicts," regardless of other variables). Yet there is little or no correlation between witness confidence and identification accuracy. *See supra* Part III.A; *United States v. Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009) ("'An important body of psychological research undermines the lay intuition that confident memories of salient experiences are accurate and do not fade with time unless a person's memory has some pathological impairment.'" (quoting *Krist v. Eli Lilli & Co.*, 897 F.2d 293, 296 (7th Cir. 1990))).

A juror's desire to believe a confident eyewitness is so strong that jurors will ignore other factors known to genuinely influence accuracy. *Henderson*, 27 A.3d at 910 ("Although many may believe that witnesses to a highly stressful, threatening event will 'never forget a face' because of their intense focus at the time, the research suggests that is not necessarily so."). But despite jurors' mistaken overreliance on witness confidence, the current legal framework "presume[s] that jurors are able to detect liars from truth tellers." *Id.* at 889. We now know that this is inaccurate and that jurors need proper tools to better evaluate eyewitness testimony.

Washington Court of Appeals cases illustrate the problem. These decisions assumed—incorrectly—that jurors have the knowledge to properly assess identifications. *See State v. Nordlund*, No. 26859-1-II, 2002 WL 31081997, at *2, 113 Wn. App. 1033 (Sept. 13, 2002) (affirming exclusion of expert testimony because the subject of eyewitness identification was "within the common understanding of the jury"); *State v. Hernandez*, 58 Wn. App. 793, 803–4, 794 P.2d 1327 (1990) (affirming exclusion of expert testimony because the subject of eyewitness identification is "often better left to the jury" and it "addresses an issue of which the jury already is generally aware" (internal citations and quotation marks omitted)). Similar errors persist regarding the erroneous belief that witness confidence correlates to identification accuracy. *See State v.*

Calhoun, Nos. 34941-8-II, 34983-3-II, 2008 WL 77389, at *6, 142 Wn. App. 1022 (Jan. 8, 2008) (affirming reliability finding in part because "the witness was very confident of his identification"); *State v. Brown*, 128 Wn. App. 307, 313, 116 P.3d 400 (2005) (affirming reliability finding in part because "[a]t the time of identification, Mr. Smith was confident Mr. Brown was the suspect he had seen earlier"); *State v. Ramires*, 109 Wn. App. 749, 762, 37 P.3d 343 (2002) (same).

Since scientific research and recent Washington cases reveal that jurors are not aware of the factors that cause erroneous eyewitness identification, a change from the prior practice of refusing cautionary instructions on eyewitness identification is needed. Jurors have preconceived, mistaken presumptions about the reliability of eyewitness identifications. Trial courts reinforce those misconceptions by remaining silent. The Washington Supreme Court should take immediate steps to address these deficiencies and require trial courts to charge juries with appropriate instructions regarding the reliability of eyewitness identifications.

C. Several Jurisdictions Mandate or Encourage that Trial Courts Instruct the Jury on Eyewitness Identification.

The Washington Supreme Court should follow its sister courts and require that trial courts charge juries with an appropriate instruction when eyewitness testimony is at issue. *See, e.g., United States v. Tipton*, 11 F.3d

602, 606 (6th Cir. 1993) ("Although the Sixth Circuit has held that giving the *Telfaire* instruction is a matter of discretion for the trial court, it has, at the same time, stressed that it needs to be given when the issue of identity is crucial . . . .") (internal citations and quotation marks omitted)); *People v. Palmer*, 203 Cal. Rptr. 474, 480 (Cal. Ct. App. 1984) ("Because of the very positiveness with which eyewitness identifications are presented they are often given undue weight by jurors, against which even a combination of cross-examination and summation of counsel cannot protect a defendant from the dangers of misidentification in the absence of instructions such as those denied here."); *State v. Ledbetter*, 881 A.2d 290, 318 (Conn. 2005) (requiring the use of a jury instruction in cases where the identification procedure did not include a warning to the witness that the suspect might not be present in the lineup); *Commonwealth v. Pressley*, 457 N.E.2d 1119, 1121 (Mass. 1983) ("Fairness to a defendant compels the trial judge to give an instruction on the possibility of an honest but mistaken identification when the facts permit it and when the defendant requests it."); *Henderson*, 27 A.3d at 924 ("[W]hen identification is at issue in a case, trial courts will continue to provide appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification." (internal citation and quotation marks omitted)); *State v. Ramirez*, 817 P.2d 774, 780 (Utah 1991) ("[I]f requested, a cautionary instruction about the weaknesses of eyewitness identification must be given whenever such an identification is a central issue in a case." (internal citation and quotation

marks omitted)).

These cases demonstrate that giving a balanced cautionary instruction promotes the reliability of the criminal justice process and does not harm the governmental interests at stake; at the same time an instruction helps reduce the serious harm of wrongful convictions. Indeed, in an opinion issued just this week, the United States Supreme Court cited jury instructions for eyewitness testimony as an integral part of the safeguards necessary to ensure that a conviction based on such testimony does not violate constitutional due process. *Perry*, No. 10-8974, --- U.S. ---, maj. op. at 16 (Jan. 11, 2012) ("Eyewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising identification evidence."); *id.* at 16 n.7 (collecting eyewitness instructions from twenty-six jurisdictions).

Courts that have refrained from requiring an appropriate jury instruction have nonetheless permitted or recommended their use. *United States v. Hall*, 165 F.3d 1095, 1107 (7th Cir. 1999) ("[T]he district court properly gave the jury an instruction on the reliability of eyewitness identification to aid the jury in evaluating the eyewitness identification testimony introduced at trial."); *United States v. Rincon*, 28 F.3d 921, 925 (9th Cir. 1994) (suggesting that the use of cautionary instructions, which address many of the factors about which an expert would testify, is an alternative way of educating jurors about the problems arising from eyewitness identifications); *United States v. Gray*, 958 F.2d 9, 12 (1st Cir. 1992) (affirming trial court's use of identification instruction); *Brodes v.*

State, 614 S.E.2d 766, 769 & n.6 (Ga. 2005) ("Georgia has decided that a jury instruction on eyewitness identification should be given when testimony warrants . . . ."); *State v. Hunt*, 69 P.3d 571, 577 (Kan. 2003) ("[W]hen requested or where such identification is a central issue in a case, a cautionary instruction regarding eyewitness identification should be given."); *Bomas v. State*, 987 A.2d 98, 113 (Md. 2010) (encouraging court use of an updated jury instruction on eyewitness identification); *State v. Ferguson*, 804 N.W.2d 586, 609 (Minn. 2011) (Anderson, J., concurring) (encouraging the trial court on remand to review the New Jersey Supreme Court's *Henderson* opinion and carefully consider the use of a jury instruction); *State v. Hibl*, 714 N.W.2d 194, 206 (Wis. 2006) (same).

Jury instructions, in addition to expert testimony, offer a number of advantages to courts: "[T]hey are focused and concise, authoritative (in that juries hear them from the trial judge, not a witness called by one side), and cost-free; they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury's role or opining on an eyewitness' credibility." *Henderson*, 27 A.3d at 925. Moreover, social-science research confirms that cross-examination alone is an ineffective safeguard. *See* Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 Psychol. Pub. Pol'y & L. 909, 923–25 (1995) (concluding that cross-examination generally fails to increase jurors' sensitivity to the factors that affect eyewitness accuracy). Because mistaken eyewitnesses will genuinely believe their identification

and testify honestly though mistakenly, traditional impeachment methods inadequately ferret out the truth. *See* O'Toole, *supra*, at 135 ("[B]ecause the use of suggestive procedures and unreliable identifications almost always occur with eyewitnesses who honestly believe their own mistaken identification, cross-examination is nearly useless.").

Consistent with this law and the accompanying science, this Court should require courts to instruct juries regarding the reliability of eyewitness testimony whenever such testimony is offered at trial.

D. Jury Instructions on Eyewitness Identification Comply with the Washington Constitution.

The Washington Constitution, Article IV, Section 16, provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Section 16 serves the important, but narrow, purpose of preventing the judge from revealing to the jury his or her opinion on the facts of the case or the evidence submitted. *See State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) ("A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement.").

This Court has remarked that Section 16 is principally concerned with instructions that encourage a jury to impermissibly adopt the judge's view of the evidence. *See Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 38, 864 P.2d 921 (1993) ("[A]n impermissible comment . . . is one which conveys to the jury a judge's personal attitudes

toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed or disbelieved the particular testimony in question." (internal citation and quotation marks omitted)). Consistent with its emphasis on instructions or comments that reflect the judge's particular view of the evidence, "[t]he touchstone of [Section 16] error is whether or not the feelings of the trial court as to the truth value of the testimony of a witness have been communicated to the jury." *State v. Trickel*, 16 Wn. App. 18, 25, 553 P.2d 139 (1976).

A mandatory instruction regarding the reliability of eyewitness testimony is not an impermissible comment by the judge on his or her attitude about the case or the evidence tendered. *See Lane*, 125 Wn.2d at 838. Rather, an instruction on the nature of eyewitness testimony falls squarely within the category of instructions that this Court has recognized as necessary to inform juries about the unreliable nature of a particular "class" of evidence. *See State v. Carothers*, 84 Wn.2d 256, 267, 525 P.2d 731 (1974) ("*Carothers II*"), *clarified by State v. Harris*, 102 Wn.2d 148, 152-53, 685 P.2d 584 (1984).

1. Section 16 permits instructions concerning the nature or reliability of particular categories of evidence.

Section 16 does not, of course, prohibit a trial court from appropriately instructing a jury. An instruction that cautions the jury about the reliability or nature of a particular class of evidence therefore does not run afoul of Section 16. *See Carothers II*, 84 Wn.2d at 269 (approving, over Section 16 challenge, jury instruction regarding accomplice

testimony); *State v. Ito*, 129 Wash. 402, 405, 225 P. 63 (1924) (approving instruction regarding circumstantial evidence); WPIC 5.01 cmt. (3d ed. 2008) ("WPIC 5.01 is proper whenever the instruction is requested by a party and there is circumstantial evidence in the case. The instruction does not constitute an impermissible comment on the evidence." (citing *State v. Tucker*, 32 Wn. App. 83, 645 P.2d 711 (1982))); *see also id.* WPIC 6.51 ("To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness.") (model instruction regarding expert testimony approved for use in criminal cases).

Likewise, a jury instruction that accurately states the law does not violate Section 16, even if the instruction could be potentially construed as commenting on facts presented in a given case. *See Christensen v. Munsen*, 123 Wn.2d 234, 248–49, 867 P.2d 626 (1994) (holding that in medical malpractice action, instruction that poor medical outcome "is not, in itself, evidence of negligence" does not constitute improper comment on the evidence) ("An instruction which does no more than accurately state the law pertaining to an issue does not constitute an impermissible comment on the evidence by the trial judge under Const. art. 4, § 16.").

This Court's analysis in *Carothers II* is instructive in delineating between permissible instructions on categories of evidence on the one hand and impermissible instructions attacking the specific evidence tendered on the other. In *Carothers*, the Court of Appeals had stated its disapproval for an instruction concerning the reliability of accomplice

testimony. *State v. Carothers*, 9 Wn. App. 691, 698, 514 P.2d 170 (1973) ("[W]e are of the opinion that [jury instructions concerning accomplice testimony] are a comment upon witness credibility and as such are constitutionally impermissible."). This Court rejected that reasoning and held that an instruction concerning the reliability of accomplice testimony does not violate Section 16:

> An instruction to view the testimony of an accomplice with caution is an indication not of the judge's attitude toward the testimony of a particular witness, but of the attitude of the courts generally toward the testimony of witnesses of this type. It is an attitude which has been garnered from many years of observation of the prosecutorial process. The courts have an expertise upon this subject which the ordinary citizen cannot be expected to have.

Carothers II, 84 Wn.2d at 267–68. Notably, this Court in *Carothers II* observed that an instruction on accomplice testimony was particularly necessary because an "ordinary citizen cannot be expected to have" the expertise necessary to view such evidence properly absent the instruction. *Id*.

This Court went on to explain that a cautionary instruction concerning accomplice testimony does not offend Section 16, because it goes to the "class" of the testimony offered, not the reliability of a specific witness or piece of evidence per se: "[T]he court does not give the jury its evaluation of the particular witness before it. Rather, *it instructs the jury about the provisions of a rule of law applicable to the class* to which the

witness belongs." *Id.* at 269 (emphasis added).[5]

2. An instruction concerning the reliability of eyewitness testimony does not violate Section 16.

An instruction concerning the reliability of eyewitness testimony falls squarely within the category of instructions approved by this Court in *Carothers II*, which are those that caution the jury regarding the infirmities of a particular "class" of evidence. 84 Wn.2d at 269. First, science has confirmed and numerous courts have recognized that jurors are unaware of the infirmities of eyewitness identification. *See infra* Part III.B. Without a cautionary instruction "the ordinary citizen cannot be expected" to know or understand just how fallible human memory, and as a consequence eyewitness testimony, truly is. *Carothers II*, 84 Wn.2d at 268; *see also Brownlee*, 454 F.3d at 142 (unreliability of eyewitness identification beyond the ken of the lay juror). Second, a properly worded instruction on eyewitness identification does not comment on the credibility of a specific witness or witnesses. It merely cautions juries to evaluate this "class" of evidence in light of its potential unreliability, which is the specific rationale relied on by this Court in *Carothers II*. 84 Wn.2d at 267–68 ("An instruction to view the testimony of an accomplice with caution is an indication not of the judge's attitude toward the testimony of a particular

[5] This Court has subsequently held that an instruction regarding the reliability of accomplice testimony is permitted in all cases and it is always the "better practice" to given such an instruction, but only required where the testimony is the sole inculpatory evidence. *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989). This Court's constitutional holding in *Carothers II*—that an instruction concerning accomplice liability does not violate Section 16—remained undisturbed in *Harris*.

witness, but of the attitude of the courts generally toward the testimony of witnesses of this type.").

Although this Court has not expressly considered whether a jury instruction concerning eyewitness testimony represents improper commentary on the evidence in violation of Section 16,[6] balanced cautionary instructions have been authorized in Washington for a long time. As noted by the court below, however, some Washington appellate courts have found eyewitness cautionary instructions to constitute an impermissible comment on the evidence. *Allen,* 161 Wn. App. at 739–40 (citing cases). The rationale for rejecting an instruction in these cases was that doing so impermissibly conveys the trial judge's opinion on the "credibility" of the witness providing the eyewitness testimony. *See State v. Hall*, 40 Wn. App. 162, 167, 697 P.2d 597 (1985) ("The instruction has been considered a comment on the credibility of the identification witnesses.").

The "credibility" rationale in these cases is deeply flawed and reveals misunderstanding concerning the infirmities of eyewitness testimony that science now confirms. The insight of this science is not that eyewitnesses are more likely to be liars. Rather, the science confirms that even when the eyewitness believes that his or her own testimony is

[6] This Court has, in dicta, discussed the propriety of a jury instruction regarding cross-racial eyewitness identification. *See State v. Laureano*, 101 Wn.2d 745, 751, 768, 682 P.2d 889 (1984). This language is not dispositive of the issue of jury instructions concerning eyewitness testimony generally, and for reasons discussed in the Amicus Brief filed by the Fred T. Korematsu Center for Law and Equality, rests on grounds subsequently discredited by science. *See* Korematsu Center Br., Section III.C.

truthful—and in that sense is testifying "credibly"—the memory itself is fallible and for that reason eyewitness testimony is unreliable. *Henderson*, 27 A.3d at 878; *see supra* Part III.A. Thus, these cases present no reasoned basis to disallow an instruction regarding eyewitness reliability, particularly in light of the recognition in Washington Supreme Court jurisprudence that certain categories of evidence are so wanting in reliability that an instruction is needed.

IV. CONCLUSION

"At stake is the very integrity of the criminal justice system and the courts' ability to conduct fair trials." *Henderson*, 27 A.3d at 879. Each time an innocent person is convicted from false eyewitness identification, the real perpetrator escapes justice. The Washington Supreme Court should require trial courts to give a cautionary instruction on eyewitness identification evidence in all cases involving such evidence, including where cross-racial identification is involved, as here.

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CERTIFICATE OF SERVICE

I, Charles C. Sipos, attorney for Amicus Curiae American Civil Liberties Union of Washington Foundation, certify that on January 13, 2012, I personally served to each of the following persons a copy of the document on which this certification appears:

Susan Wilk (susan@washapp.org) (via email)	Counsel for Petitioner
Deborah Dwyer (deborah.dwyer@kingcounty.gov) (via email)	Counsel for Respondent

Signed at Seattle, Washington, this 13th day of January, 2012.

_/s/ Charles C. Sipos_____
Charles C. Sipos