

August 13, 2009

BY HAND

Clerk's Office
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square, Suite 1300
Boston, MA 02108-1707

Re: **Commonwealth of Massachusetts v. Watson**
(SJC No. 10363)

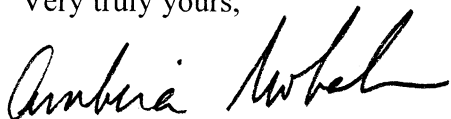
Dear Sir/Madam:

Enclosed for filing and docketing in the above-referenced action, please find:

- (1) Amicus curiae New England Innocence Project's Motion for Permission to Late File Brief of Amicus Curiae (original and 7 copies); and
- (2) Amicus Curiae Brief of the New England Innocence (original and 17 copies).

Kindly acknowledge receipt of the foregoing documents by date-stamping the file-stamp copies enclosed for that purpose and returning the same to the waiting messenger. Thank you for your assistance in this matter.

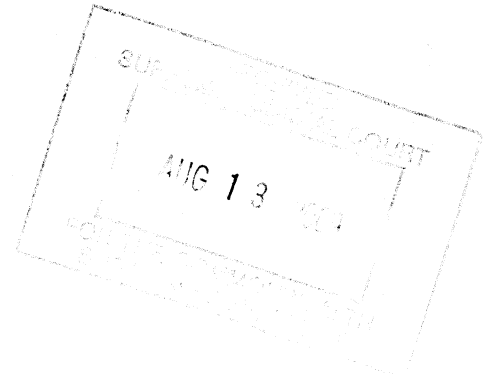
Very truly yours,



Ambica Mohabir

Enclosures

cc: Counsel of Record (w/encl.)



COPY

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH OF MASSACHUSETTS,

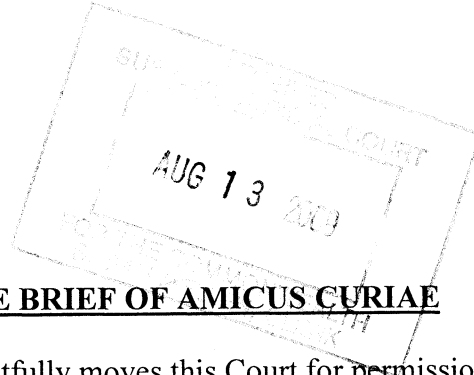
Appellee,

v.

BRANDON WATSON,

Appellant.

SJC No. 10363



MOTION FOR PERMISSION TO LATE FILE BRIEF OF AMICUS CURIAE

New England Innocence Project (“NEIP”) respectfully moves this Court for permission to late file a brief in the above-styled matter as *amicus curiae*. In support of this motion, NEIP would show that the matter is set for Oral Argument on September 9, 2009, that this Court has sought Amicus briefs in this matter, that granting this motion still permits nearly one month to review the filing, and that neither of the parties in interest will be prejudiced by permitting this late filing.

Dated: August 13, 2009

Respectfully submitted,

The New England Innocence Project

David M. Siegel
BBO No. 635136
Professor of Law
New England Law
154 Stuart Street
Boston, MA 02116
T: 617.422.7270

Ambica Mohabir
BBO No. 671700
GOODWIN PROCTER LLP
Exchange Place
Boston, Massachusetts 02109
T: 617.570.1000

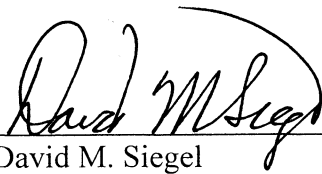
CERTIFICATE OF SERVICE

I, David M. Siegel, hereby certify that on August 13, 2009, I caused a true and correct copy of the forgoing Motion for Permission to Late File Brief of Amicus Curiae to be served by first-class mail upon counsel for appellee and appellant in this action:

William M. Bennett
Dianne M. Dillon
Jane Davidson Montori
Hall of Justice
50 State Street
Springfield, MA 01103

And

Richard L. Goldman
Post Office Box 60478
Florence, MA 01062



David M. Siegel

COPY

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Hampden County

SJC No. 10363

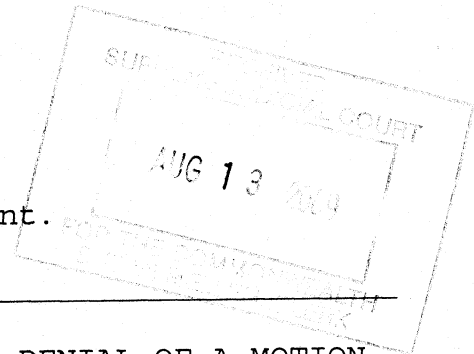
COMMONWEALTH OF MASSACHUSETTS,

Appellee,

v.

BRANDON WATSON,

Defendant-Appellant.



ON APPEAL FROM A JUDGMENT AND THE DENIAL OF A MOTION
FOR A NEW TRIAL BY THE HAMPDEN COUNTY SUPERIOR COURT

AMICUS CURIAE BRIEF OF THE NEW ENGLAND INNOCENCE
PROJECT

David M. Siegel
BBO No. 635136
Professor of Law
New England Law
154 Stuart Street
Boston, MA 02116
T: 617.422.7270

Ambica Mohabir
BBO No. 671700
GOODWIN PROCTER LLP
Exchange Place
Boston, Massachusetts 02109
T: 617.570.1000

August 13, 2009

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... iii

INTEREST OF THE AMICUS CURIAE.....1

STATEMENT OF FACTS AND STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....1

ARGUMENT2

I. Police Procedures that Disregard
Demonstrated Best Practices for Eyewitness
Identifications Undermine Their Accuracy and
Demand the Effective Remedy of Cautionary
Jury Instructions.2

A. Empirical Research Demonstrates that
Giving Biased Instructions to a Lineup
Eyewitness Increases the Rate of
Misidentifications.5

B. Law Enforcement Across the Country Has
Recognized that Nonbiased Witness
Instructions Should Be Used for
Identification Procedures.12

C. A Cautionary Jury Instruction Is a
Necessary Incentive because Empirical
Research Shows Massachusetts Law
Enforcement Compliance with Best
Practices for Identification Procedures
Is Inconsistent and Unreliable.14

D. Cautionary Jury Instructions Are an
Effective Means of Changing Incentives
for Law Enforcement, without Dictating
Procedures.18

II. EXPERT TESTIMONY SHOULD BE ADMISSIBLE AS A
REMEDY WHEN POLICE FAIL TO WARN A WITNESS
THAT A SUSPECT MAY OR MAY NOT BE PRESENT IN
AN EYEWITNESS IDENTIFICATION PROCEDURE OR
INDICATE THAT A SUSPECT IS PRESENT IN THE
PROCEDURE.....20

A. Jurors Need Expert Testimony to
Understand the Factors, Especially
Counterintuitive Ones, Affecting the

Reliability of Eyewitness Identifications, and Cross-examination is No Substitute.....	21
1. Many Factors Affecting the Reliability of Eyewitness Testimony are Beyond the Common Knowledge of the Average Juror.....	22
2. Having Found Eyewitness Identifications Within Jurors' Common Understanding Yet Valuably Aided by Expert Testimony, this Court Should Acknowledge the Weight of Scientific Evidence.....	25
B. Cross-examination Is Not Sufficient to Educate Jurors on the Factors Affecting the Reliability of Eyewitness Identifications.....	26
CONCLUSION.....	29

TABLE OF AUTHORITIES

State Cases

Commonwealth v. Ashley,
427 Mass. 620, 624 (1998) 25

Commonwealth v. Bly,
448 Mass. 473, 496 (2007) 25

Commonwealth v. Clunes,
73 Mass. App. Ct. 1102 (2008) 17

Commonwealth v. Cosenza,
No. 05-P-849, 2006 WL 871016 (Mass. App. Ct.
Apr. 5, 2006) 25

Commonwealth v. Cruz,
445 Mass. 589 (2005) 19

Commonwealth v. DiGiambattista,
442 Mass. 423 (2004) 18

Commonwealth v. Francis,
390 Mass. 89 (1983) 20, 21, 25

Commonwealth v. Hyatt,
419 Mass. 815 (1995) 11

Commonwealth v. Moffett,
383 Mass. 201 (1981) 4

Commonwealth v. Santoli,
424 Mass. 837 (1997) 25

Commonwealth v. Silva-Santiago,
453 Mass. 782 (2009) 5, 26

Commonwealth v. Zimmerman,
441 Mass. 146 (2004) 26

Federal Cases

United States v. Mathis,
264 F.3d 321 (3d Cir. 2001) 27

United States v. Rodriguez-Felix,
450 F.3d 1117 (10th Cir. 2006) 27