

MUG SHOTS / FINGERPRINTS / DNA

A witness testified that *[e.g. the police showed the witness a photo of the defendant] [the police accessed the defendant's (DNA) (fingerprints) from a database]* . **If you accept that testimony, you are not to draw any inference against the defendant because the police [had their photograph] [accessed their (fingerprints) (DNA) from a database].**

[Photos:] Police departments have access to pictures for many different reasons and from many different sources, including the Registry of Motor Vehicles and military databases, passports, various licenses and employment records.]

[Fingerprints:] Police departments have access to fingerprints for many different reasons and from many different sources, including, for example, military records, some passport applications, and employment applications.]

[DNA:] Police departments have access to the DNA of many people for many different reasons and from many different sources, including, for example, scientific research, genetic testing and genealogical studies.]

You are not to speculate about the source or reason in this case because it is irrelevant and has no bearing on whether or not the defendant is guilty. The fact that the police may have [had the defendant's picture] [accessed the defendant's (fingerprints) (DNA) from a database] does not mean that the defendant committed this or any other crime.

See *Commonwealth v. Sullivan*, 478 Mass. 369, 375 (2017) (DNA database); *Commonwealth v. Blaney*, 387 Mass. 628, 636, n. 7 (1982) (photographs).

NOTES:

1. Admissibility. “Mugshots may be admitted in evidence where ‘1) the prosecutor shows some need for their introduction, 2) they are offered in a form that does not imply a prior criminal record and 3) the manner of their introduction does not call attention to their source.’” *Commonwealth v. Martin*, 447 Mass. 274, 286 (2006), quoting *Commonwealth v. McAfee*, 430 Mass. 483, 493 (1999).

“Judges and prosecutors should use reasonable means to avoid calling the jury's attention to the source of the photographs used to identify the defendant.” *Commonwealth v. Tuitt*, 393 Mass. 801, 808-809 (1985). See *Commonwealth v. Cruz*, 445 Mass. 589, 594 (2005) (photographs were “sanitized and bore no identification they were mug shots; no identifying marks or height charts were visible”); *Commonwealth v. Blaney*, 387 Mass. 628, 638 (1982) (admission of unsevered double-pose mug shots did not constitute reversible error where judge properly instructed jury, prosecutor made no reference to source of photos and identifying numbers were sanitized); *Commonwealth v. Lockley*, 381 Mass. 156, 166 (1980) (photographs, whether full face, profile, or both should be severed, and identifying marks cut off). Prosecutors are expected to avoid references in testimony to the sources of such photographs. See *Commonwealth v. Perez*, 405 Mass. 339, 344 (1989). Whenever possible, it is best to leave the jury with the impression that such photographs were taken after the defendant's arrest on the current charges. See *Blaney*, 387 Mass. at 639.

2. Proper instruction can minimize negative inference. See *Commonwealth v. Cruz*, 445 Mass. 589, 594 (2005) (judge's cautionary instruction on the source of the photographs served to minimize any negative inferences regarding the defendant's criminal history); *Commonwealth v. DeJesus*, 71 Mass. App. Ct. 799, 805 (2008), citing *Commonwealth v. Kent*, 427 Mass. 754, 757 (1998) (where police officer testified that the array was compiled from individuals who had prior arrests, stronger instruction was required directing the jury to ignore the testimony insofar as it indicated that the defendant had a prior arrest record); *Commonwealth v. Johnson*, 27 Mass. App. Ct. 746, 752 (1989) (instruction that the jury was not to draw an inference adverse to the defendant and that there were many reasons why police departments have photographs of individuals was sufficient to neutralize any prejudice to the jury); *Commonwealth v. Pullum*, 22 Mass. App. Ct. 485, 490 (1986) (finding prejudice mitigated by instruction that “the police . . . may obtain pictures of people . . . who were arrested, and later found not guilty; of people who have applied for identification cards, of people who have applied for hackney licenses, and of people who have applied for a gun permit.”)