COMMITTEE CHAIRPERSON'S OVERVIEW OF CHANGES MADE BY THE 2025 DRAFT REVISION TO THE 2015 EYEWITNESS IDENTIFICATION INSTRUCTION

The Supreme Judicial Court's Standing Committee on Eyewitness Identification proposes revisions to the Model Jury Instructions on Eyewitness Identification, 473 Mass. 1051 (2015) ("2015 instruction"). The number of proposed plain language changes makes a legal blackline impracticable. To facilitate review, the committee chair's[1] summary of the current proposed revisions ("2025 revision") follows:

Introduction: By deleting references to abstract science and using plain language, this passage is now 20% shorter. The revision seeks to explain the general fallibility of perception and memory in familiar terms.

1: At the Time of the Event:

This mandatory instruction makes two changes to the 2015 instruction entitled: "1. Opportunity to view the event." First, consideration of the witness's eyesight is moved into this section. Second, the revision moves the cross-racial identification instruction (essentially unchanged) into this section, because the instruction is mandatory unless counsel agree that it does not apply. Excluding these two changes, the word count is roughly identical to paragraph number 1 of the 2015 version.

The remaining 2015 instructions entitled "2. Characteristics of the witness" are now case-specific instructions and appear (with revisions) in INSERT A – OTHER PERCEPTION ISSUES, as, to be given only if the evidence warrants.

INSERT A – OTHER PERCEPTION ISSUES:

Several of the case-specific instructions in Insert A rewrite and supplement certain 2015 instructions by using plain language and explaining why the particular factor affects perception. This insert follows the advice of the research and legal commentary that judges should give jurors reasons to follow the court's eyewitness identification instructions.

In particular, the amended instructions for weapon effect, stress and familiarity explain why each of these factors matters in a way that should be clearer and more persuasive to jurors. The weapon effect instruction adds the following explanation: "Any danger from a weapon may command the witness's attention," which may help the jury understand the remainder of this instruction.

[1] The full committee has seen this summary but has not taken any vote upon it.

The stress instruction gives more precise guidance than the 2015 instruction. The statement in 2015 - "High levels of stress may reduce a person's ability to make an accurate identification" - is not strictly correct in all circumstances, as the 2025 footnotes demonstrate. The 2025 revision adds: "Some people assume that stress can improve perception, but it's not that simple. Moderate stress might help a witness focus, but very high levels of stress can reduce a person's ability to perceive details of an event accurately."

The revised familiarity instruction asks whether the eyewitness knew the person "well" based upon certain prior relationships that are inherently close, instead of simply listing certain relationships without regard to the actual degree of familiarity.

The single, adaptable instruction for intoxication, fatigue, illness and injury now begins with language that focuses the jury's inquiry on whether the condition actually altered the witness's perception or memory, instead of simply listing each condition, as the 2015 instruction did.

The instructions for "disguise" and "distinctive face" make only plain-language changes to the 2015 instruction.

2. At the Time of the Identification:

This portion of the 2025 revision amends paragraphs 4-7 of the 2015 Instruction by rephrasing former paragraph 4 ("Passage of Time") in plain language without substantive change and by incorporating recent research into changes to paragraphs 5 (Expressed Certainty), 6 (Exposure to Outside Information) and 7 (Identification Procedures). Given the effect of outside information on expressed certainty, it makes logical sense to reverse the order of former paragraphs 5 and 6.

a. Passage of Time.

This instruction rephrases paragraph 4 of the 2015 instruction in plain language and adds the sentence, supported by consensus research, that memory "may even change over time."

b. Exposure to Outside Information.

This instruction moves and recasts paragraph 6 of the 2015 instruction. Its initial paragraph sets forth some principles that the judge must address in all cases. That paragraph also adds a new definition. It states that "Information received after the event can be 'suggestive,' meaning that it may alter a witness's memory, influence them to identify a particular person, or otherwise affect the accuracy or independence of the witness's identification testimony." The 2015 instruction did not explain what the court meant by "suggestive."

The 2025 revision then adds 5 case-specific instructions to give if the evidence warrants. These instructions cover the two sources of outside information covered in one sentence of the 2015

instruction. They also add references to common situations, including exposure to social media content and input or encouragement by the police or anyone else.

Using plain language, the final paragraph retains the caution about suggestive police conduct from the 2015 instruction.

c. Expressed certainty.

The 2025 revision rephrases and revises paragraph 5 of the 2015 instruction and is now case-specific, to be given "if there was an in-court identification or other direct or circumstantial evidence of the witness's confidence level." The committee stressed that any in-court identification necessarily raises questions about the witness's confidence level, whether stated out loud or only implicitly (such as by demeanor, tone of voice or word choice).

The topic of expressed certainty presented the most challenges for the committee. The committee spent much time and effort evaluating whether the consensus science warrants a more robust statement about the relationship between witness certainty and factual accuracy. Witness confidence likely plays an outsized role in jury evaluation of eyewitness's accuracy, but most people do not appreciate the complexities of this topic. Having concluded that no near-consensus yet exists on this point, however, the committee focused on ensuring that the 2025 revision addressed the specific criticisms of the 2015 expressed certainty instruction in the legal commentary, while giving juries the necessary tools and appropriate cautions, in view of the complexities in this area.

Among other things, the 2025 revision adds the following language, based on the research cited in the footnotes: "Many of us assume, incorrectly, that a confident witness is usually accurate. Research shows that witnesses can make mistakes no matter how confident they are." The 2025 revision also asks in all cases whether the police conducted a non-suggestive procedure, with a case-specific caution if there is evidence of suggestion during the procedure.

The 2025 revision adds a number of case-specific instructions, to be given if warranted by evidence about the period from the time of the events (or first identification) until the expression of confidence, including any evidence of suggestion, absence of any recording of earlier confidence levels or significant passage of time. This reflects the 2025 revision's increased emphasis on the eyewitness' first identification (or earlier identifications) *relative to later identifications*, without suggesting that the first identification is necessarily accurate. The eyewitness' first identification has two research-supported benefits when compared to later identification(s); in the witness's first identification, memory has had less time to fade and there is less risk that the witness has had exposure to outside information.

Significantly, the 2025 revision adds a mandatory instruction to be given whenever an identifying eyewitness makes an in-court identification. That instruction points out that an in-

court identification is always suggestive and advises the jury to consider any lower degree of confidence expressed at the time of events or during the first identification.

d. Identification Procedures

Showups: The instruction on showups eliminates the reference to passage of time in the 2015 instruction. For one thing, the 2015 instruction leaves the jury to speculate, without quantitative guidance, on how quickly a showup should occur to avoid the allegedly added suggestiveness. The footnoted authorities supporting that instruction use time periods as short as 24 hours, 2 hours or fewer than 30 minutes, and one even notes the "highly speculative" nature of any quantification, "given the minimal amount of data available." It seems very unlikely that juror would take the 2015 instruction as referring to the passage of a just 30 minutes or a few hours, as opposed to "time" more generally. Second, any beneficial effect of a prompt lineup would result from the freshness of memory, not a reduction in suggestiveness. Earlier instructions already address the influence of time on memory sufficiently. Linking the two concepts here is likely to confuse the jury and understate the suggestiveness problem.

Lineups and Photo Arrays: The committee recommends several revisions to increase "the efficacy of the Instruction in providing guidance to jurors" on evaluation of lineups and photo arrays.

The revised instruction on lineups and photo arrays sets forth three specific police protocols that affect accuracy, as supported by the research cited in the footnotes. The three protocols are: pre-procedure advisements, double-blind administration and avoiding suggestive information. The cited authorities in the 2025 footnotes definitively establish the correlation between these three protocols and error reduction. Indeed, the Supreme Judicial Court has endorsed protocols for advisements to witnesses and has characterized double-blind administration as "the better practice." See 2015 Instruction, footnote 4, citing Commonwealth v. Silva-Santiago, 453 Mass. 782, 795-797 (2019). The third protocol - the need to avoid suggestive information - is obvious, practicable and consistent with the "outside information" research captured in paragraph 6 of the 2015 instruction (paragraph 2.b of 2025 revision).

To promote juror understanding and consistency in instructions, the 2025 revision substitutes instructions on these three specific protocols and proposes deletion of the general reference in the 2015 instruction to "protocols established or recommended by the Supreme Judicial Court." Given the mandatory nature of the 2015 model instruction, the committee has concerns that, out of caution or for lack of an alternative, judges may well be using this quoted language verbatim. Doing so leaves room for confusion and achieves no apparent benefit. Jurors almost certainly do not understand a reference to SJC protocols as such, unless they improperly investigate or think they know the SJC's protocols. On the other hand, judges who eliminate the

SJC protocol language without substituting their own instruction about protocols, as allowed by 2015 Instruction, footnote 4, will deprive their juries of useful guidance and will not be consistent with instructions given by other trial judges in comparable cases. Where clear answers exist in the science, instructions on this point should not turn on the preferences of individual trial judges. Indeed, the New Jersey instructions instruct on, among other things, the three protocols included in the 2025 revision. See N.J. Instruction "Identification out of court – Identification only", pp. 7-8 (7/19/12), available at: (https://www.njcourts.gov/sites/default/files/charges/idoutct.pdf?cb=5b9183a5).

The argument in 2015 against instructing on the three specific protocols did not concern accuracy, which is the key question both for the jury at trial and in the research. Rather, it turned upon the possible impracticability of a particular protocol in a particular situation. See 2015 instruction, footnote 4, quoting Silva-Santiago, 453 Mass. at 797 ("We have yet to conclude that an identification procedure is unnecessarily suggestive unless it is administered by a law enforcement officer who does not know the identity of the suspect [double-blind procedure], recognizing that it may not be practicable in all situations. At the same time, we acknowledge that it is the better practice [compared to a non-blind procedure] because it eliminates the risk of conscious or unconscious suggestion"). While practicality can be highly relevant in resolving a suppression motion or an evidentiary objection, an argument based upon practicality is a non-sequitur when the jury decides whether a police procedure potentially injected bias or outside information into an eyewitness identification. If a procedure tends to inject bias, the jury should know that.

The 2025 revision also deletes the reference in the 2015 instruction to "protocols established or recommended . . . by the law enforcement agency conducting the identification procedure." While that language helpfully permits supplementation of SJC-recommended protocols, it creates other problems. For one thing, it may give an appearance that the trial judge endorses whatever the particular law enforcement agency used for protocols, which may or not be warranted, depending upon what those protocols are. In addition, the research establishes the value of pre-procedure advisements, double-blind administration and avoiding suggestive information regardless of individual police department policies.

The 2025 revision retains the footnotes to the 2015 instruction advising trial judges that they may take notice of SJC or specific police department protocols, in which case the judge should instruct about the protocols' specific content.

Multiple viewings: New language in the 2025 revisions addresses the potential increase in witness confidence through multiple viewings of the defendant. The revisions also add a case-specific point: the multiple viewing problem occurs during an in-court identification.

Additional changes: The 2025 revisions shorten part 7 of the 2015 instructions by eliminating several sentences that do not appear helpful and may, in some ways, be inadvisable. The sentences instructing that showups are more suggestive than lineups (and, conversely, that lineups are less suggestive) may be true in most (not all) cases, but the jury is left to speculate how suggestive an alternative procedure (line up or photo array) would be except in the rare trial where there is evidence that both methods actually occurred. The 2025 revision also eliminates, as redundant and unnecessary, the reference to "all of the factors I have already described about a witness's perception and memory."

3. *Prior Non-identification or Inconsistent Identification*: The 2025 revision adopts neutral language, because a prior non-identification is not a "failure" if the later identification is wrong. The comparable New Jersey instruction, for instance, simply uses the phrase "did not identify." See N.J. Instruction "Identification out of court – Identification only", p. 2 - factor 2 (Prior Description of Perpetrator) (7/19/12), available at: (https://www.njcourts.gov/sites/default/files/charges/idoutct.pdf?cb=5b9183a5).

4. *Totality of Evidence*: The 2025 revision retains the first and third sentence of the 2015 instruction, but deletes the second sentence in the interest of brevity and in recognition of the fact that it is not only the presence, but also the absence of evidence that matters in a criminal case.

Douglas H. Wilkins
Massachusetts Superior Court (ret.)
Chair, Supreme Judicial Court Standing Committee
On Eyewitness Identification

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