

Model eyewitness identification instruction (2024) [1]

The Commonwealth must prove beyond a reasonable doubt that [DFT = defendant's name] is the person who committed [or participated in] the alleged crime[s]. If it fails to do so, you must find DFT not guilty. You should base this decision upon all of the evidence and any reasonable inferences you draw from it.

If an eyewitness identified DFT, you should examine their identifications with care. You should ask yourselves two basic questions.

- First, as with any witness: was the witness honestly trying to tell the truth?
- Second, even if the witness honestly believed that their identification was correct, you still must ask: might they have made an honest mistake?²

People can observe an event and accurately identify the people involved later, but experience and research show that people sometimes make honest mistakes when doing that. Often, errors happen without the witness being aware of it.

¹ This instruction should be given in any case in which the jury heard eyewitness evidence that positively identified the defendant and in which the identification of the defendant as the person who committed or participated in the alleged crime[s] is contested. Where there is no positive identification but a partial identification of the defendant, as discussed in Commonwealth v. Franklin, 465 Mass. 895, 911-912 (2013), this instruction or "some variation" of it should be given upon request.

² See Commonwealth v. Gomes, 470 Mass. 352, 369-372 (2015); Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices 15 (July 25, 2013), <http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf> [http://perma.cc/WY4M-YNZN] (Study Group Report), quoting Report of the Special Master, State vs. Henderson, N.J. Supreme Ct., No. A-8-08, at 9 (June 10, 2010) (Special Master's Report) ("The central precept is that memory does not function like a videotape, accurately and thoroughly capturing and reproducing a person, scene or event. . . . Memory is, rather, a constructive, dynamic and selective process"); State v. Henderson, 208 N.J. 208, 245 (2011); State v. Lawson, 352 Or. 724, 771 (2012) (Appendix). See also E.F. Loftus et al., *Eyewitness Testimony: Civil and Criminal* § 2-2, at 22 (6th ed. 2019 & 2022 Supp.) (Loftus et al.).

Honest mistakes occur because our minds do not work like a video recorder. Our surroundings contain more information than we can take in at once. Also, we cannot store all that information accurately in our memory, no matter how hard we try. In addition, over time, many things can change a witness's memory and affect the accuracy of their identification testimony. So, we cannot just replay a "mental recording" to remember what happened. Perception and memory are much more complicated.³

To help you decide whether an eyewitness's identification is accurate, I am going to discuss a number of things that can affect the accuracy of an eyewitness's initial observations and their memory of the events.

1. At the Time of the Event - Observing the Person and "Storing" the Memory

First, you should evaluate the circumstances at the time of the event.⁴
For example, you should ask:

³ See Study Group Report, supra at 16, quoting Henderson, 208 N.J. at 245 (three stages involved in forming memory: "acquisition – 'the perception of the original event'; retention – 'the period of time that passes between the event and the eventual recollection of a particular piece of information'; and retrieval – 'the stage during which a person recalls stored information'").

For a detailed discussion of the three stages of memory and how those stages may be affected, see Study Group Report, supra at 15-17; National Research Council of the National Academies, *Identifying the Culprit: Assessing Eyewitness Identification* 59-69 (2014) (National Academies) ("Encoding, storage, and remembering are not passive, static processes that record, retain, and divulge their contents in an informational vacuum, unaffected by outside influences"). See also State v. Guilbert, 306 Conn. 218, 235-237 (2012); Henderson, supra at 247; Loftus et al., supra at § 2-2, at 22 (General Theory of Memory), § 4-1 to § 4-8 (How Memory Works).

⁴ See Fradella, *A Synthesis of the Science and Law Relating to Eyewitness Misidentifications and Recommendations for How Police and Courts Can Reduce Wrongful Convictions Based on Them*, 47 *Seattle U. L. Rev.* 1, 22-24 (2023) (Fradella) (discussing research on perception); D. Reisberg, *The Science of Perception and Memory: A Pragmatic Guide for the Justice System* 51-52 (2014) (witnesses may not accurately remember details, such as length of time and distance, when describing conditions of initial observation). See also Lawson, 352 Or. at 744 (information that

- What opportunity did the witness have to observe and remember the event?
- For how long were they able to see the person [or hear the person, etc.]?
- How far away was the witness from the person?
- What were the lighting conditions [or conditions for hearing, etc.]?
- How good or bad was the witness's eyesight [or hearing, etc.]?
- How much attention did the witness pay to the person's face [other identifying characteristic] at the time?

[ADD UNLESS ALL PARTIES AGREE THAT THERE WAS NO CROSS-RACIAL IDENTIFICATION]

- Did the witness and the person appear to be from different races [or ethnic backgrounds]? If so, you should consider that a witness may have more difficulty accurately identifying someone of a different race [or ethnicity] than someone of their own race [or ethnic background].⁵

witness receives after viewing event may falsely inflate witness's "recollections concerning the quality of [his or her] opportunity to view a perpetrator and an event").

⁵ **Race:** See Study Group Report, supra at 31 ("A witness may have more difficulty identifying a person of a different race or ethnicity"); Loftus et al., supra at § 5-6, at 113-16 (Cross-Race Identification); Kassir, Hosch, & Memon, On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts, 56 Am. Psych. 405, 407-412 (2001) (Kassir et al.) (in 2001 survey, ninety percent of experts agree that principle that "[e]yewitnesses are more accurate when identifying members of their own race than members of other races" is reliable enough to be presented in court); Meissner & Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, 7 Psych., Pub. Pol'y, & L. 3, 15 (2001) (meta-analysis of thirty-nine research articles concluding that participants were "1.4 times more likely to correctly identify a previously viewed own-race face when compared with performance on other-race faces" and "1.56 times more likely to falsely identify a novel other-race face when compared with performance on own-race faces"); Wells & Olson, Eyewitness Testimony, 54 Ann. Rev. Psych. 277, 280-281 (2003) (Wells & Olson). See also Commonwealth v. Zimmerman, 441 Mass. 146, 154-155 (2004) (Cordy, J., concurring); State v. Cabagbag, 127 Haw. 302, 310-311 (2012); People v. Boone, 30 N.Y.3d 521, 535-536 (2017); Lawson, 352 Or. at 775 (Appendix); National Academies, supra at 96, citing Grimsley, Innocence Project, What Wrongful Convictions Teach Us about Racial Inequality, Innocence Blog (Sept. 26, 2012, 2:30 P.M.), <http://www.innocence>

INSERT A – OTHER PERCEPTION ISSUES

<Add if there is direct or circumstantial evidence of any of the following factors>

[WEAPON EFFECT]

- Did the witness [see] [perceive] [believe they saw] a weapon? Any danger from a weapon may command the witness's attention. If the event only lasted a short time, the witness may have little or no opportunity to focus on things beyond the weapon. But, if the event lasted longer, the witness may have enough time to focus on other things, including the person's face.⁶

[project.org/Content/What Wrongful Convictions Teach Us About Racial Inequality.php](http://perma.cc/KX2J-XECN) [http://perma.cc/KX2J-XECN] ("Recent analyses revealed that cross-racial [mis]identification was present in 42 percent of the cases in which an erroneous eyewitness identification was made").

Ethnicity: In Commonwealth v. Bastaldo, 472 Mass. 16, 28-29 (2015), the court concluded that there is "not yet a near consensus in the relevant scientific community that people are generally less accurate at recognizing the face of someone of a different ethnicity than the face of someone of their own ethnicity" (emphasis added). However, there are studies that "support the conclusion that people are better at recognizing the faces of persons of the same ethnicity than a different ethnicity." Id. at 28. See Gross, Own-Ethnicity Bias in the Recognition of Black, East Asian, Hispanic and White Faces, 31(2) Basic & Applied Social Psych. 128, 132 (2009) (study revealed that white participants recognized white faces better than they recognized Hispanic, Asian, and Black faces, but found no significant difference between Hispanic participants' recognition of white faces and Hispanic faces); Platz & Hosch, Cross-Racial/Ethnic Eyewitness Identification: A Field Study, 18 J. Applied Soc. Psych. 972, 979, 981-982 (1988) (Mexican-American and white convenience store clerks better recognized customers of their own group than customers of other group). See also Chiroro, Tredoux, Radaelli, & Meissner, Recognizing Faces Across Continents: The Effect of Within-Race Variations on the Own-Race Bias in Face Recognition, 15(6) Psychonomic Bull. & Rev. 1089, 1091 (2008) (white South African participants better recognized white South African faces than white North American faces, and Black South African participants better recognized Black South African faces than Black North American faces).

⁶ See Study Group Report, supra at 130 ("A weapon can distract the witness and take the witness's attention away from the perpetrator's face, particularly if the weapon is directed at the witness. As a result, if the crime is of short duration, the presence of a visible weapon may reduce the accuracy of an identification. In longer events, this distraction may decrease as the witness adapts to the presence of the weapon and focuses on other details"); Guilbert, 306 Conn. at 253; Lawson, 352 Or. at 771-73

[DISGUIISING OR OBSCURING THE ALLEGED OFFENDER'S FACE]

- Did something cover all or some of the person's facial features? For example, a hat, mask, or sunglasses may affect the witness's ability to identify the person accurately.⁷

(Appendix); Loftus et al., supra at § 5-2, at 105-06 (Weapon Presence). See also Kassin et al, supra at 407-412 (in 2001 survey, eighty-seven percent of experts agree that principle that "[t]he presence of a weapon impairs an eyewitness's ability to accurately identify the perpetrator's face" is reliable enough to be presented in court); Maass & Köhnken, Eyewitness Identification: Simulating the "Weapon Effect," 13 L. & Hum. Behav. 397, 405-406 (1989); Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 L. & Hum. Behav. 413, 415-417 (1992) (meta-analysis finding "weapon-absent condition[s] generated significantly more accurate descriptions of the perpetrator than did the weapon-present condition"); id. at 421 ("To not consider a weapon's effect on eyewitness performance is to ignore relevant information. The weapon effect does reliably occur, particularly in crimes of short duration in which a threatening weapon is visible"); Wells & Quinlivan, Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 L. & Hum. Behav. 1, 11 (2009) (Wells & Quinlivan). But see National Academies, supra at 93-94 (recent meta-analysis "indicated that the effect of a weapon on accuracy is slight in actual crimes, slightly larger in laboratory studies, and largest for simulations").

⁷ See Study Group Report, supra at 30, quoting Lawson, 352 Or. at 775 (Appendix) ("[S]tudies confirm that the use of a disguise negatively affects later identification accuracy. In addition to accoutrements like masks and sunglasses, studies show that hats, hoods, and other items that conceal a perpetrator's hair or hairline also impair a witness's ability to make an accurate identification"); Henderson, 208 N.J. at 266 ("Disguises and changes in facial features can affect a witness's ability to remember and identify a perpetrator"); State v. Clopten, 2009 UT 84, ¶ 15 ("[A]ccuracy is significantly affected by factors such as the amount of time the culprit was in view, lighting conditions, use of a disguise, distinctiveness of the culprit's appearance, and the presence of a weapon or other distractions"); Wells & Olson, supra at 281 ("Simple disguises, even those as minor as covering the hair, result in significant impairment of eyewitness identification"). See also Cutler, A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy, 4 Cardozo Pub. L. Pol'y & Ethics J. 327, 332 (2006) ("In data from over 1300 eyewitnesses, the percentage of correct judgments on identification tests was lower among eyewitnesses who viewed perpetrators wearing hats [44%] than among eyewitnesses who viewed perpetrators whose hair and hairlines were visible [57%]"); Mansour et al., Impact of Disguise on Identification Decisions and Confidence with Simultaneous and Sequential

[ALLEGED OFFENDER'S DISTINCTIVE FACE OR FEATURE]

- Did the person have a distinctive face or feature?⁸

[EYEWITNESS UNDER STRESS]

- Was the witness under stress? 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.⁹

[EYEWITNESS PHYSICAL OR MENTAL CONDITION]

Lineups, 36 L. & Hum. Behav., 513, 516 (2012) (accuracy affected the most by sunglasses).

⁸ See Study Group Report, supra at 30-31, quoting Lawson, 352 Or. at 774 (Appendix) ("Witnesses are better at remembering and identifying individuals with distinctive features than they are those possessing average features"); Clopton, 2009 UT 84, ¶ 15; Wells & Olson, supra at 281 ("Distinctive faces are much more likely to be accurately recognized than nondistinctive faces" but "what makes a face distinctive is not entirely clear"). See also Shapiro & Penrod, Meta-Analysis of Facial Identification Studies, 100 Psych. Bull. 139, 140, 145 (1986) (meta-analysis finding that distinctive targets were "easier to recognize than ordinary looking targets").

⁹ See Gomes, 470 Mass. at 372-373; Study Group Report, supra at 29, quoting Special Master's Report, supra at 43 (while moderate levels of stress might improve accuracy, "eyewitness under high stress is less likely to make a reliable identification of the perpetrator"); Lawson, 352 Or. at 769 (Appendix); Loftus et al., supra at § 5-7, at 116-119 (Stress and Fear). See also Deffenbacher et al., A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, 28 L. & Hum. Behav. 687, 699 (2004) (finding "considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details"); Morgan et al., Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, 27 Int'l J. L. & Psychiatry 265, 272-274 (2004); Pezdek & Reisberg, Psychological Myths about Evidence in the Legal System: How Should Researchers Respond?, 11 J. Applied Res. in Memory & Cognition 143, 145-46 (2022) (high stress does not improve memory accuracy). But see Study Group Report, supra, quoting Henderson, 208 N.J. at 262 ("There is no precise measure for what constitutes 'high' stress, which must be assessed based on the facts presented in individual cases").

- Did any condition affect the witness's ability to perceive and remember accurately, such as **<instruct only on conditions raised by the evidence>** tiredness, sleep-deprivation, an injury, illness or consumption of alcohol or drugs.¹⁰ If so, to what degree?

[IDENTIFICATION OF A FAMILY MEMBER, FRIEND, OR LONGTIME ACQUAINTANCE]

- Did the witness know the person well because they were family members, friends, or longtime acquaintances?¹¹

2. At the Time of the Identification

¹⁰ See Buckhout, Psychology and Eyewitness Identification, 2 Law & Psychol. Rev. 75, 79-80 (1976) ("human senses function much less efficiently when the body has become fatigued or injured, when the person is advanced in age, or when the person has subjected himself to overuse of alcohol, depressant or stimulant drugs, or hallucinogenic drugs"); Carlson, Carlson, & Fitzsimmons, The Sleepy Eyewitness: Self-Reported Sleep Predicts Eyewitness Memory, 12 J. Applied Res. in Memory & Cognition 513 (2023); Loftus et al., supra at § 5-11, at 124-128 (alcohol and drug use).

¹¹ See Study Group Report, supra at 135 (recommending instruction stating, "If the witness had seen the defendant before the incident, you should consider how many times the witness had seen the defendant and under what circumstances). See also Pezdek & Stolzenberg, Are Individuals' Familiarity Judgments Diagnostic of Prior Contact?, 20 Psych. Crime & L. 302, 306 (2014) (twenty-three percent of study participants misidentified subjects with unfamiliar faces as familiar, and only forty-two percent correctly identified familiar face as familiar); Read, The Availability Heuristic in Person Identification: The Sometimes Misleading Consequences of Enhanced Contextual Information, 9 Applied Cognitive Psych. 91, 94-100 (1995). See generally Coleman et al., Don't I Know You?: The Effect of Prior Acquaintance/Familiarity on Witness Identification, Champion, Apr. 2012, at 52, 53 ("To a degree," increased interaction time may produce "marginally more accurate identifications," but increased interaction time may also generate more incorrect identifications); Schwartz, Memory for People: Integration of Face, Voice, Name, and Biographical Information, in SAGE Handbook of Applied Memory 9 (2014) ("familiarity exists on a continuum from very familiar [your spouse's face] to moderately familiar [the face of the person who works downstairs] to completely unfamiliar [a person you have never met]. Unfortunately, little research directly addresses the continuum from [familiar] to unfamiliar"); Vallano et al., Familiar Eyewitness Identifications: The Current State of Affairs, 25 Psych., Pub. Pol'y, & L. 128 (2019) (Vallano et al.).

You also should focus on the time when the witness made the identification – particularly the time of the witness’s first identification:

a. **Passage of time:** You should ask: How much time passed between the event and the identification? Generally, memory is most accurate immediately after the event and begins to fade soon thereafter. It may even change over time.¹²

b. **Exposure to outside information.** You should consider what information came to the witness’s attention between the event and [the] [each] identification,¹³ [including any in-court identification or testimony]. 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.¹⁴ This can happen even if no one intends to

¹² See Study Group Report, supra at 31-32, quoting Lawson, 352 Or. at 778 (Appendix) (“The more time that elapses between an initial observation and a later identification procedure [a period referred to in eyewitness identification research as a ‘retention interval’] . . . the less reliable the later recollection will be. . . . [D]ecay rates are exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time”); National Academies, supra at 15 (“For eyewitness identification to take place, perceived information must be encoded in memory, stored, and subsequently retrieved. As time passes, memories become less stable”); Loftus et al., supra at § 4-6, at 84-87 (Forgetting).

¹³ See Gomes, 470 Mass. at 373-374; Study Group Report, supra at 21-22; Special Master’s Report, supra at 30-31 (“An extensive body of studies demonstrates that the memories of witnesses for events and faces, and witnesses’ confidence in their memories, are highly malleable and can readily be altered by information received by witnesses both before and after an identification procedure”); Lawson, 352 Or. at 786 (Appendix) (“The way in which eyewitnesses are questioned or converse about an event can alter their memory of the event”); Loftus et al., supra at § 4-7[a], at 90-97 (Contamination and Postevent Information); Vallano et al., supra at 128; Wells et al., Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence, 44 L. & Hum. Behav. 3, 9-10 (2020) (contamination by media and other witnesses) (Wells et al.).

¹⁴ See Study Group Report, supra at 140, quoting Wells & Quinlivan, supra at 6 (“From the perspective of psychological science, a procedure is suggestive if it induces pressure on the eyewitness to make a lineup identification [a suggestion by commission], fails to relieve pressures on the witness to make a lineup selection [a suggestion by omission], cues the witness as to which person is the suspect, or cues the witness that the identification response was correct or incorrect”). See also note 37,

influence the witness and even if the witness does not realize that any information has influenced or changed their memory.¹⁵ Suggestive information can also alter the witness's memory about how well they could view the person and can affect their testimony in court on that issue.¹⁶

<ADD IN WHOLE OR IN APPLICABLE PART, IF THERE WAS DIRECT OR CIRCUMSTANTIAL EVIDENCE OF EXPOSURE TO PARTICULAR TYPES OF OUTSIDE INFORMATION>

For instance, you should consider what happened before the witness identified the person:

- Did the witness learn about any identifications or descriptions that other people gave?¹⁷

infra, quoting Study Group Report, supra at 22-23, and National Academies, supra at 91-92.

¹⁵ See Study Group Report, supra at 117, 136 n.4, citing Principles of Neural Science, Box 62-1, at 1239 (Kandel, Schwartz, & Jessell eds., 2000). See also Clark, Marshall, & Rosenthal, Lineup Administrator Influences on Eyewitness Identification Decisions, 15 J. Experimental Psych.: Applied 63, 72 (2009) ("Most witnesses appeared to be unaware of the influence" of lineup administrator in staged experiment).

¹⁶ See Study Group Report, supra at 22, quoting Henderson, 208 N.J. at 255 (post-identification feedback "affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness[s] report of how he or she viewed an event"); Special Master's Report, supra at 33 ("A number of studies have demonstrated that witnesses' confidence in their identifications, and their memories of events and faces, are readily tainted by information that they receive after the identification procedure"); Steblay, Wells, & Douglass, The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications, 20 Psych., Pub. Pol'y, & L. 1, 11 (2014) (Steblay, Wells, & Douglass) ("Confirming feedback significantly inflates eyewitness reports on an array of testimony-relevant measures, including attention to and view of the crime event, ease and speed of identification, and certainty of the identification decision"). See also Commonwealth v. Collins, 470 Mass. 255, 263 (2014) ("Where confirmatory feedback artificially inflates an eyewitness's level of confidence in his or her identification, there is also a substantial risk that the eyewitness's memory of the crime at trial will 'improve'").

¹⁷ See Eisen et al., I Think He Had a Tattoo on His Neck: How Co-witness Discussions about a Perpetrator's Description Can Affect Eyewitness Identification Decisions, 6 J. Applied Res. in Memory & Cognition 274, 281 (2017) ("when an outside source suggests to a witness that a perpetrator has a unique feature, this can affect the co-

- Did the witness see or learn about any photographs, videos, social media or other media accounts, or any other information about the events?¹⁸
- Did the police (or someone else) provide any input or encouragement to the witness about a particular person?¹⁹

witness's memory for the perpetrator, and, in turn, impact that witness's ability to make accurate identification decisions when viewing subsequent lineups"); Zajac & Henderson, Don't It Make My Brown Eyes Blue: Co-witness Misinformation about a Target's Appearance Can Impair Target-Absent Line-Up Performance, 17 Memory 266, 268, 277 (2009); Hope et al., With a Little Help from My Friends: The Role of Co-witness Relationships in Susceptibility to Misinformation, 127 Acta Psychologica 476, 481-482 (2008) ("Results indicated that, in line with previous research, all co-witness dyads were susceptible to misinformation from their co-witness and, as a consequence, produced less accurate recall accounts than participants who did not interact with another witness"; participants were more likely to incorporate misinformation obtained from co-witness participants when co-witness was acquaintance or someone they liked); Paterson & Kemp, Comparing Methods of Encountering Post-Event Information: The Power of Co-witness Suggestion, 20 Applied Cognitive Psych. 1083, 1096 (2006) (Paterson & Kemp) (indirect or direct transfer of co-witness information has powerful influence on memory; participants in co-witness discussion condition consistently reported more misinformation than controls and were more likely to believe misleading post-event information; misled participants were often highly confident in their incorrect answers); Wells et al., supra at 9-10 (dangers of witnesses contaminating each other).

¹⁸ See Havard et al., From Witness to Web Sleuth: Does Citizen Enquiry on Social Media Affect Formal Eyewitness Identification Procedures?, 38 J. Police & Crim. Psych. 309, 313-316 (2023) (in some circumstances, social media searches negatively affect eyewitness identification accuracy in target-absent lineups, but not necessarily in target-present lineups); Kleider-Offutt, Stevens, & Capodanno, He Did It! Or Did I Just See Him on Twitter? Social Media Influence on Eyewitness Identification, 30 Memory 493, 500-502 (2022) (viewing photos of perpetrator on social media increased both likelihood of accurate identifications and witness confidence, but seeing foils reduced accuracy and confidence); Paterson & Kemp, supra at 1097 ("increased confidence levels suggest that participants in the . . . media report condition[] are more likely to believe the misleading post-event information to be true when in fact it is not"), supra at 1096.

¹⁹ See Greathouse & Kovera, Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification, 33 L. & Hum. Behav. 70, 79 (2009) (photo array administrators [comprising student study participants] who knew the identity of the suspect were more likely to exhibit verbal and nonverbal cues that pressured witnesses to choose a photograph than double-blind administrators; "diagnosticity of identifications of the suspect under double-blind administrations was

- Did anything else occur that might have influenced the witness to choose a particular person?

If any of these things happened before the witness made an identification, you should scrutinize that identification carefully.²⁰

You should scrutinize with great care any identification that a person made after suggestive conduct by the police or others, even if no one intended or realized that the witness might be influenced. Suggestive conduct or statements do not have to be intentional, and the person doing the "suggesting" may not realize that they are doing anything suggestive.

<ADD IF THERE WAS EVIDENCE OF A LATER, DIFFERENT STATEMENT ABOUT IDENTIFICATION> If the witness says one thing before or at the initial identification and later says something new or different, you should scrutinize the later statement carefully. You should consider whether suggestion from any source may have altered the witness's later memory or identification.²¹

c. Expressed certainty. <ADD IF THERE WAS AN IN-COURT IDENTIFICATION OR OTHER DIRECT OR CIRCUMSTANTIAL EVIDENCE OF THE WITNESS'S CONFIDENCE LEVEL> Sometimes witnesses are confident that they have accurately identified the person involved in the event. Many of us assume, incorrectly, that a confident

twice that obtained under single-blind administrations, indicating that identifications of the suspect obtained when the administrator does not know the identity of the suspect in the photo array provide better information about the true guilt of the identified suspect").

²⁰ See Study Group Report, supra at 22, quoting Lawson, 352 Or. at 788 (Appendix) ("the danger of confirming feedback [whether from law enforcement, other witnesses, or the media] lies in its tendency to increase the appearance of reliability without increasing reliability itself"); Henderson, 208 N.J. at 253 ("Confirmatory or post-identification feedback presents the same risks. It occurs when police signal to eyewitnesses that they correctly identified the suspect"); Lawson, supra at 777-778 (Appendix); Hope et al., supra at 481; Skagerberg, Co-witness Feedback in Line-ups, 21 Applied Cognitive Psych. 489, 494 (2007) ("post-identification feedback does not have to be presented by the experimenter or an authoritative figure [e.g., police officer] in order to affect a witness'[s] subsequent crime-related judgments").

²¹ See notes 17-18, supra.

witness is usually accurate.²² Research shows that witnesses can make mistakes no matter how confident they are.²³ So, you must scrutinize any

²² “More pointed instructions focused on the reasons why courtroom confidence of eyewitnesses should not be relied upon have been found more effective.” Albright & Garrett, *The Law and Science of Eyewitness Evidence*, 102 B.U. L. Rev. 511, 557-558 (2022) (Albright & Garrett) (discussing State model instructions, including Massachusetts Model Instructions on Eyewitness Identification [Massachusetts Supreme Judicial Court (2015)]). See also Papailiou, Yokum, & Robertson, *The Novel New Jersey Eyewitness Instruction Induces Skepticism but Not Sensitivity*, 10 PLoS ONE, no. 12, Dec. 2015, at 1, 2.

²³ See Gomes, 470 Mass. at 370-371; Study Group Report, supra at 19; Lawson, 352 Or. at 777 (Appendix) (“Despite widespread reliance by judges and juries on the certainty of an eyewitness’s identification, studies show that, under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy”); Clopten, 2009 UT 84, ¶ 15. See also Commonwealth v. Cruz, 445 Mass. 589, 597-600 (2005); Commonwealth v. Santoli, 424 Mass. 837, 845-846 (1997); Commonwealth v. Jones, 423 Mass. 99, 110 n.9 (1996).

As of 2024, there is no consensus on whether and when high or low confidence levels may correlate with accuracy in the field (as opposed to pristine laboratory conditions), although there is a near consensus that exposure to information can alter confidence and, even in a research setting, can disrupt any relationship between confidence and accuracy. See, e.g., Loftus et al., supra at § 1-6[a], at 14-16, & 2022 Supp. at 4-4 (Current Controversies: Confidence-Accuracy Relationship); Semmler et al., *The Role of Estimator Variables in Eyewitness Identification*, 24 J. Experimental Psych.: Applied 400, 406-407 (2018) (“In all cases, regardless of whether the estimator variable was favorable or not, low confidence was associated with relatively low accuracy and high confidence was associated with very high accuracy”); Wixted et al., *Initial Eyewitness Confidence Reliably Predicts Eyewitness Identification Accuracy*, 70 Am. Psych. 515, 521 (2015) (“it seems reasonable to infer that high-confidence suspect IDs in the police department field studies are also highly accurate and that low-confidence suspect IDs less accurate [though perhaps still informative]”). But see Giacona, Lampinen, & Anastasi, *Estimator Variables Can Matter Even for High-Confidence Lineup Identifications Made under Pristine Conditions*, 45 L. & Hum. Behav. 256, 264 (2021) (“high-confidence suspect identification accuracy is significantly lower” when “estimator variables are deficient in multiple ways” compared to “when estimator variables are optimal”); Spearing & Wade, *Providing Eyewitness Confidence Judgments During Versus After Eyewitness Interviews Does Not Affect the Confidence—Accuracy Relationship*, 11 J. Applied Res. in Memory & Cognition 54, 62-63 (2022) (“exposure to misinformation can have substantial, detrimental effects to the value of witnesses’ confidence ratings”).

statement of confidence carefully.²⁴ Any statement of confidence might actually reflect outside influences, instead of what the witness actually saw [heard].²⁵

<In all cases:> You should consider whether the police undertook a non-suggestive identification procedure.

²⁴ "It is well established that an eyewitness may be permitted to testify as to his or her level of certainty, and the weight of this evidence is for the jury." Commonwealth v. German, 483 Mass. 553, 565 (2019), citing Bastaldo, 472 Mass. at 32 n.25. While this instruction may assist the jury in distinguishing reliable identifications from unreliable ones, we have found no research suggesting that the instruction will correct for the tendency of juries to rely unduly on expressions or nonverbal indications of confidence. Nor does the instruction diminish the trial judge's authority and responsibility to determine whether to allow evidence of witness confidence at trial, after weighing the potential prejudice from an expression of confidence against the probative value of such evidence. See Mass. G. Evid. § 403 (2024). The trial judge may consult the professional literature cited in the footnotes of this instruction to inform that determination.

²⁵ See Study Group Report, supra at 21-22; Henderson, 208 N.J. at 255; Lawson, 352 Or. at 744. See generally Douglass & Steblay, Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect, 20 Applied Cognitive Psych. 859, 863-865 (2006) (participants who received confirming feedback "expressed significantly more retrospective confidence in their decision compared with participants who received no feedback"); National Academies, supra at 92-93 ("Research has . . . shown that . . . if an eyewitness hears information or misinformation from another person before law enforcement involvement, his or her recollection of the event and confidence in the identification can be altered"); Smalarz & Wells, Do Multiple Doses of Feedback Have Cumulative Effects on Eyewitness Confidence?, 9 J. Applied Res. in Memory & Cognition 508, 514 (2020) ("witnesses who received confirming feedback from the co-witness were more confident in their identifications"); Wells & Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. Applied Psych. 360, 366-367 (1998) (witnesses receiving confirming feedback reported "a better view of the culprit, a greater ability to make out details of the face, greater attention to the event, [and] a stronger basis for making an identification" compared to witnesses receiving no feedback); Wells & Bradfield, Distortions in Eyewitnesses' Recollections: Can the Postidentification-Feedback Effect Be Moderated?, 10 Psych. Sci. 138, 140-143 (1999) (Distortions).

<Add if there is direct or circumstantial evidence of a suggestive procedure:> A suggestive procedure could lead a witness to be confident in their identification even when the identification may not be accurate.

<Add if there was no written or recorded record of the witness' earlier confidence level> Outside influences may also alter the witness's memory of how confident they were at the time of an earlier identification.²⁶

<Add if significant time passed between the events and expression of confidence> Also, confidence levels can change. As time passes since the events [or since the witness first identified the person], their confidence level may increase or decrease for reasons that have nothing to do with the accuracy of the identification.²⁷

<in all cases:> For all these reasons, if you consider a witness's confidence level, please make sure to evaluate it carefully and only in the context of all the evidence you saw and heard.

²⁶ Steblay, Wells, & Douglass, supra at 11 ("Confirming feedback significantly inflates eyewitness reports on an array of testimony-relevant measures, including attention to and view of the crime event, ease and speed of identification, and certainty of the identification decision"). See Distortions, supra at 138 ("The idea that confirming feedback would lead to confidence inflation is not surprising. What is surprising, however, is that confirming feedback that is given after the identification leads eyewitnesses to misremember how confident they were at the time of the identification"); Henderson, 208 N.J. at 254 ("to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness'[s] own words" before any possible influence from any extraneous information, known as feedback, that confirms witness's identification); Lawson, 352 Or. at 745 ("Retrospective self-reports of certainty are highly susceptible to suggestive procedures and confirming feedback, a factor that further limits the utility of the certainty variable"). See also Commonwealth v. Crayton, 470 Mass. 228, 239 (2014) ("Social science research has shown that a witness's level of confidence in an identification is not a reliable predictor of the accuracy of the identification, especially where the level of confidence is inflated by [an identification procedure's] suggestiveness"); Wells et al., supra at 21-23 (importance of obtaining immediate confidence statement).

²⁷ See note 12, supra. See also Brewer & Palmer, Eyewitness Identification Tests, 15 Legal & Crim. Psych. 77, 89 (2011) ("Confidence inflation produced by confirming feedback clearly can turn a hesitant witness – who might say he was 75% confident at the time of making the identification when his memory was relatively strong – into an extremely confident one – expressing say 90-100% confidence – at some later date when his memory is likely to be weaker").

<ADD IF THE COURT ALLOWS AN IN-COURT IDENTIFICATION>²⁸

An in-court identification is always suggestive²⁹ because the witness obviously can see who is on trial. That knowledge could influence the witness's confidence and accuracy.³⁰ If you do consider the witness's in-

²⁸ Crayton, 470 Mass. at 237, citing Study Group Report, supra at 19 ("We agree that a jury may be better able to assess a witness's level of confidence during an in-court identification than through evidence of a showup, but we do not agree that this means that a jury are better able to evaluate the accuracy of an in-court identification. Social science research has shown that a witness's level of confidence in an identification is not a reliable predictor of the accuracy of the identification, especially where the level of confidence is inflated by its suggestiveness"). The jury will not hear an in-court identification unless the judge has found that the witness made an unequivocal positive identification procedure or that there was "good reason" for admitting the in-court identification without a prior identification procedure. See Commonwealth v. Dew, 478 Mass. 304, 314 (2017); Crayton, 470 Mass. at 242; Commonwealth v. Yang, 98 Mass. App. Ct. 446, 448 (2020) (eighty percent certainty is not unequivocal). Because reliability remains a pure jury question at trial, this instruction attempts to focus the jury on reasons why court room confidence of eyewitnesses may not reliably indicate accuracy. See Albright & Garrett, supra at 557-558 (reporting that Massachusetts jury instructions on eyewitness identification "have not been found effective in mock jury studies" and advising that "[m]ore pointed instructions focusing on the reasons why courtroom confidence of eyewitnesses should not be relied upon have been found more effective"). However, this instruction will not necessarily overcome "undue prejudice" objections (Mass. G. Evid. § 403) to admissibility of an in-court identification in a particular case, given the inherent suggestiveness and intrinsic jury appeal of an in-court identification. To date, research suggests that jurors place great weight on the court room confidence of an eyewitness. See Garrett et al., Factoring the Role of Eyewitness Evidence in the Courtroom, 17 J. Empirical Legal Stud. 556, 570-72 (2020) (detailing findings of mock juror survey regarding weight given to confidence of eyewitnesses).

²⁹ Wells et al., supra at 27 ("In terms of suggestiveness, the in-court identification is arguably even more suggestive than a typical showup because it is clear to the witness that the defendant has already been indicted").

³⁰ Greenspan & Loftus, Eyewitness Confidence Malleability: Misinformation as Post-identification Feedback, 44 L. & Hum. Behav. 194, 200, 203 (2020) ("Participants who received misinformation feedback that their confidence was higher than they originally reported later reported remembering more confidence in their identification. . . . Repeated questioning can lead to confidence inflation"); Wixted & Wells, The Relationship Between Eyewitness Confidence and Identification Accuracy: A New

court identification and confidence level, please do so very carefully, especially if the witness was less confident at the time of the events or at the time they first identified the person.

d. Identification procedures

<ADD IF THERE WAS EVIDENCE OF A SHOWUP> A witness may identify a person during a so-called “showup,” in which the police show only one person to a witness. A showup is always suggestive because, in a showup, the witness sees only one individual and may believe that the police consider that individual to be a potential suspect.³¹ You may also consider whether any additional circumstances added to the showup’s suggestiveness in a way that may have affected the accuracy of the witness’s identification.³²

Synthesis, 18 Psych. Sci. Pub. Int. 10, 19 (2017) (“Courts routinely permit witnesses to state their confidence at pretrial hearings or at trial, well after they might have undergone serious confidence inflation from repeated identifications, coaching, confirmatory feedback, and so on. The confidence of the witness at the time of a preliminary hearing or at trial is not a pristine assessment of confidence”).

³¹ See Study Group Report, supra at 26, citing Special Master's Report, supra at 29 (showups carry their own risks of misidentification “due to the fact that only one person is presented to the witness”); Lawson, 352 Or. at 742-743 (“A ‘showup’ is a procedure in which police officers present an eyewitness with a single suspect for identification, often [but not necessarily] conducted in the field shortly after a crime has taken place. Police showups are generally regarded as inherently suggestive -- and therefore less reliable than properly administered lineup identifications -- because the witness is always aware of whom police officers have targeted as a suspect”); Dysart & Lindsay, Show-up Identifications: Suggestive Technique or Reliable Method?, in 2 Handbook of Eyewitness Psychology 141 (2007) (“Overall, show-ups [fare] poorly when compared with line-ups. Correct identification rates are equal and false identification rates are about two to three times as high with show-ups compared with line-ups”). See also Commonwealth v. Silva-Santiago, 453 Mass. 782, 797 (2009); Commonwealth v. Martin, 447 Mass. 274, 279 (2006) (“One-on-one identifications are generally disfavored because they are viewed as inherently suggestive”). See generally Per Sjöberg, The Show-Up Identification Procedure: A Literature Review, 4 Open J. Soc. Sci. 86 (2016); Wells et al., supra at 26-28 (recommendations and research about showups).

³² The parties may request instructions on additional principles, including facts of which the court may take judicial notice. See Model Jury Instructions on Eyewitness Identification, 473 Mass. 1051, 1057 n.4 (2015).

Before the showup, an officer should advise the witness that the person involved in the event may or may not be the person they are about to see, and that the investigation will continue whether or not they identify anyone.³³ If the police did not do so, you should evaluate the identification with even greater care.

<ADD IF THERE WAS EVIDENCE OF A LINEUP OR PHOTO ARRAY>

An identification may occur during a so-called ["lineup"] ["photo array"], in which the police show several [individuals] [photos] to a witness. It is for you to decide whether the [photo array] [lineup] in this case was a fair test of the witness's memory.³⁴

Consider all the [photographs in the photo array] [individuals in the lineup], not just [that of] the defendant. The other [photos] [individuals] should fit the description of the person involved in the event as provided by one or more witnesses. No one should stand out from the rest.³⁵

³³ See Rakoff & Loftus, The Intractability of Inaccurate Eyewitness Identification, 147 Daedalus, no. 4, 2018, at 90, 94 ("the eyewitness should be instructed that the perpetrator may or may not be in the lineup or photo array, and that the investigation will continue regardless of whether an identification is made [thus reducing any subtle pressure on the eyewitness to make an identification]"); Schuster, Police Lineups: Making Eyewitness Identification More Reliable, 258 Nat'l Inst. Just. J. 2, 3 (2007) ("Research on prelineup instructions...revealed that [explaining that the suspect may or may not be present in the lineup] reduced mistaken identification rates in lineups where the suspect was absent").

³⁴ See note 32, supra.

³⁵ See Silva-Santiago, 453 Mass. at 795, quoting Commonwealth v. Melvin, 399 Mass. 201, 207 n.10 (1987) ("we 'disapprove of an array of photographs which distinguishes one suspect from all the others on the basis of some physical characteristic'"); Wells & Olson, supra at 287 ("Ideally, lineup fillers would be chosen so that an innocent suspect is not mistakenly identified merely from 'standing out,' and so that a culprit does not escape identification merely from blending in"). See also Henderson, 208 N.J. at 251; Lawson, 352 Or. at 781 (Appendix); Malpass, Tredoux, & McQuiston-Surrett, Lineup Construction and Lineup Fairness, in 2 Handbook of Eyewitness Psychology 156 (2007) ("Decades of empirical research suggest that mistaken eyewitness identifications are more likely to occur when the suspect stands out in a lineup").

Before showing [the photo array] [the lineup], an officer should advise the witness that the person involved in the event may or may not be in the [group of photos] [lineup] and that the investigation will continue whether or not they identify a person.³⁶ The officer who shows the [photo array] [lineup] to a witness should not know who, if anyone, is a suspect.³⁷ This

³⁶ See note 33, supra. See also Wells et al., supra at 21 ("it should be made quite clear to the witness that the culprit may or may not be in the lineup and that they do not have to select any of the lineup members. In other words, responses such as not present or none of these are quite appropriate. A reminder that the witness does not have to choose anyone from the lineup is important. A large percentage of witnesses are under the impression that the culprit is present and their task is to identify him").

³⁷ Wells et al., supra at 14 ("Lineups should be conducted using a double-blind procedure [i.e., neither the administrator nor the witness should know who the suspect is in the lineup] or an equally effective method of preventing the lineup administrator from inadvertently influencing the witness. . . . Double-blind testing, in which the lineup administrator does not know which person is the suspect and which are merely fillers [i.e., a blind administrator], is the best way of ensuring that any information that administrators have about which lineup member is the suspect will not influence the witnesses' behavior, including any identification decision they might make or their confidence in that decision"). See Study Group Report, supra at 22-23, quoting Lawson, 352 Or. at 779 (Appendix) ("research shows that lineup administrators who know the identity of the suspect often consciously or unconsciously suggest that information to the witness"); National Academies, supra at 91-92 ("Law enforcement's maintenance of neutral pre-identification communications -- relative to the identification of a suspect -- is seen as vital to ensuring that the eyewitness is not subjected to conscious or unconscious verbal or behavioral cues that could influence the eyewitness' identification"). See also Silva-Santiago, 453 Mass. at 797 ("we acknowledge that [a double-blind procedure] is the better practice [compared to a non-blind procedure] because it eliminates the risk of conscious or unconscious suggestion"); Study Group Report, supra at 88 ("When showing a photo array or conducting a lineup, the police must use a technique that will ensure that no investigator present will know when the witness is viewing the suspect. The preference is that the police have an officer who does not know who the suspect is administer the array or lineup"); Guilbert, 306 Conn. at 237-238 (courts across country accept that "identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure"); Henderson, 208 N.J. at 249 ("The consequences are clear: a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect"); National Academies, supra at 27 ("As an alternative to a double-blind array, some departments use 'blinded' procedures. A blinded procedure prevents an officer from knowing when the witness is viewing a photo of the suspect, but can be conducted by the investigating officer"); id. at 107 ("The committee [appointed by the National Academy of Sciences] recommends blind (double-blind or blinded)

reduces the chance that the witness will receive any subconscious or unintended cues from that officer. The police should not provide any information to the witness that may influence the identification. If the police did not follow any of those protocols, you should evaluate the identification with particular care.

[ADD IF THERE WAS EVIDENCE OF MULTIPLE VIEWINGS OF THE DEFENDANT BY THE SAME WITNESS] You should consider whether the witness viewed the defendant in multiple identification procedures or events. Multiple viewings of the same person can alter a witness's identification and confidence without increasing accuracy. When a witness views the same person more than once, [including through an in-court identification,] it may be hard to know whether an identification comes from the witness's observation of the original event, or from the witness's observation of the person at some other time.³⁸

administration of both photo arrays and live lineups and the adoption of clear, written policies and training on photo array and live lineup administration. Police should use blind procedures to avoid the unintentional or intentional exchange of information that might bias an eyewitness").

³⁸ See Gomes, 470 Mass. at 375-376; Study Group Report, supra at 25, quoting Special Master's Report, supra at 27-28 ("The problem is that successive views of the same person create uncertainty as to whether an ultimate identification is based on memory of the original observation or memory from an earlier identification procedure"); Henderson, 208 N.J. at 255; Deffenbacher, Bornstein, & Penrod, Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 L. & Hum. Behav. 287, 306 (2006) (Deffenbacher, Bornstein, & Penrod) ("prior mugshot exposure decreases accuracy at a subsequent lineup, both in terms of reductions in rates for hits and correct rejections as well as in terms of increases in the rate for false alarms"); Wixted et al., Test a Witness's Memory of a Suspect Only Once, 22 Psych. Sci. Pub. Int. 1S, 2S (2021) (no later test provides more reliable information than first test because memory is malleable and act of testing can contaminate witness's memory).

In Gomes, 470 Mass. at 376 n.37, quoting Study Group Report, supra at 31, we noted that support for the phenomenon of "unconscious transference," which occurs "when a witness confuses a person seen at or near the crime scene with the actual perpetrator," was not as conclusive as the support for mugshot exposure. Unconscious transference nevertheless has substantial support and is relevant to the issue of multiple viewings of a person identified. See Study Group Report, supra, quoting Special Master's Report, supra at 46 ("The familiar person is at greater risk of being identified as the perpetrator simply because of his or her presence at the scene. . . . This 'bystander error' most

3. Prior Non-Identification or Inconsistent Identification <if applicable>

You should also consider whether during any identification procedure, the witness did not identify DFT or made an identification that was inconsistent with the identification that the witness made [at the trial] [later].

4. Totality of the Evidence

Finally, you should evaluate the accuracy of a witness's identification in light of all the evidence in this case.

If, after considering all these things, you have a reasonable doubt whether DFT is the person who committed [or participated in] the alleged crime[s], you must find DFT not guilty.

Note on the 2025 Revision

The 2025 revision reflects scientific developments since 2015 in the areas of eyewitness identification and efficacy of eyewitness identification jury instructions. The 2025 revision uses plainer language, provides more reasons for jurors to follow the science and reduces the length of the instructions by eliminating unnecessary words and making some instructions contingent upon the facts and issues involved in the trial at

commonly occurs when the observed event is complex, i.e., involving multiple persons and actions, but can also occur when the familiarity arises from an entirely unrelated exposure"); Guilbert, 306 Conn. at 253- 254 ("the accuracy of an eyewitness identification may be undermined by an unconscious transference, which occurs when a person seen in one context is confused with a person seen in another"); Lawson, 352 Or. at 785-786 ("Yet another facet of the multiple viewing problem is the phenomenon of unconscious transference. Studies have found that witnesses who, prior to an identification procedure, have incidentally but innocently encountered a suspect may unconsciously transfer the familiar suspect to the role of criminal perpetrator in their memory"). See also Deffenbacher, Bornstein, & Penrod, supra at 301, 304-305 (although negative impact of unconscious transference was less pronounced than that of mugshot exposure, both types of errors considered "products of the same basic transference design"); Ross et al., Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person, 79 J. Applied Psych. 918, 923 (1994) (witnesses in experiment who viewed bystander in staged robbery "were nearly three times more likely to misidentify the bystander than were control subjects" who did not view bystander).

hand. These changes attempt to address concerns raised by researchers regarding model eyewitness identification jury instructions, including the Model Jury Instructions on Eyewitness Identification, 473 Mass. 1051 (2015). The research suggests that judges could educate jurors more effectively "on the strengths and weaknesses of eyewitness testimony, especially given the great weight jurors place on the courtroom confidence of an eyewitness," Albright & Garrett, *The Law and Science of Eyewitness Evidence*, 102 B.U. L. Rev. 511, 557 (2022), and should give "reason-based jury instructions" to improve jurors' ability to discriminate between reliable and unreliable eyewitness identifications. Garrett et. al, *Sensitizing Jurors to Eyewitness Confidence Using "Reason-Based" Judicial Instructions*, 12 J. Applied Res. in Memory & Cognition 141 (2023). See also Fradella, *A Synthesis of the Science and Law Relating to Eyewitness Misidentifications and Recommendations for How Police and Courts Can Reduce Wrongful Convictions Based on Them*, 49 Seattle U. L. Rev. 1, 71 n.405, 112-114 (2023).

The 2025 revisions include updated, research-based revisions to the instructions on evaluating eyewitness statements of confidence, eyewitness familiarity with the person they identify, and the influence on eyewitness identifications of exposing the witness to outside information. The revisions also include new or revised model instructions on evaluating police identification procedures (showup, lineup, and in-court identifications). Finally, the footnotes to the 2025 revisions cite updated research.

Original 2015 Numbered Footnotes

[1] This instruction should be given in any case in which the jury heard eyewitness evidence that positively identified the defendant and in which the identification of the defendant as the person who committed or participated in the alleged crime[s] is contested. Where there is no positive identification but a partial identification of the defendant, as discussed in **Commonwealth v. Franklin**, 465 Mass. 895, 910-912 (2013), this instruction or "some variation" of it should be given upon request.

[2] The trial judge has discretion to add a reference to ethnicity in the instruction, as follows: "If the witness and the person identified appear to be of different races or ethnicities, you should consider that people may have greater difficulty in accurately identifying someone of a different race

or ethnicity than someone of their own race or ethnicity." See **Commonwealth v. Bastaldo**, 472 Mass. 16, 29-30 (2015).

[3] Upon request, the judge should also give an instruction about the source of the defendant's photograph within the array: "You have heard that the police showed the witness a number of photographs. The police have photographs of people from a variety of sources, including the Registry of Motor Vehicles. You should not make any negative inference from the fact that the police had a photograph of the defendant."

[4] The trial judge may take judicial notice of police protocols regarding eyewitness identification that have been established or recommended by the Supreme Judicial Court, and include in the instruction those established or recommended protocols that are relevant to the evidence in the case. See **Commonwealth v. Walker**, 460 Mass. 590, 604 (2011) ("Unless there are exigent or extraordinary circumstances, the police should not show an eyewitness a photographic array . . . that contains fewer than five fillers for every suspect photograph We expect police to follow our guidance to avoid this needless risk"); **Commonwealth v. Silva-Santiago**, 453 Mass. 782, 797-798 (2009) ("What is practicable in nearly all circumstances is a protocol to be employed before a photographic array is provided to an eyewitness, making clear to the eyewitness, at a minimum that: he will be asked to view a set of photographs; the alleged wrongdoer may or may not be in the photographs depicted in the array; it is just as important to clear a person from suspicion as to identify a person as the wrongdoer; individuals depicted in the photographs may not appear exactly as they did on the date of the incident because features such as weight and head and facial hair are subject to change; regardless of whether an identification is made, the investigation will continue; and the procedure requires the administrator to ask the witness to state, in his or her own words, how certain he or she is of any identification"); *id.* at 798 ("We decline at this time to hold that the absence of any protocol or comparable warnings to the eyewitnesses requires that the identifications be found inadmissible, but we expect such protocols to be used in the future"); *id.* 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"). If the Legislature were

to establish police protocols by statute, the judge should instruct the jury that they may consider protocols established by the Legislature. The judge also may take judicial notice of those protocols and include them in the instruction.

[5] The trial judge also may include established or recommended procedures where the evidence shows that they were established or recommended by the law enforcement agency conducting the investigation at the time of the identification procedure.