

SUPREME JUDICIAL COURT STUDY  
GROUP ON EYEWITNESS EVIDENCE

REPORT AND RECOMMENDATIONS  
TO THE JUSTICES

Respectfully submitted,

July 25, 2013

## Supreme Judicial Court Study Group on Eyewitness Evidence

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## I. EXECUTIVE SUMMARY

Introduction. "Because eyewitness identification is the greatest source of wrongful convictions but also an invaluable law enforcement tool in obtaining accurate convictions, and because the research regarding eyewitness identification procedures is complex and evolving,"<sup>1</sup> in the fall of 2011, the Justices of the Supreme Judicial Court convened the Study Group on Eyewitness Identification (Study Group) to "offer guidance as to how our courts can most effectively deter unnecessarily suggestive identification procedures and minimize the risk of a wrongful conviction."<sup>2</sup> The Honorable Robert J. Kane, Associate Justice of the Superior Court Department, was appointed Chair of the Study Group, and its members are judges, prosecutors, defenders, law enforcement personnel, and academics experienced in matters of criminal law and procedure.

The Study Group undertook its work mainly in three subcommittees. The Police Practices Subcommittee explored whether the Supreme Judicial Court should require police protocols in eyewitness identification procedures beyond those required in Commonwealth v. Walker, 460 Mass. 590, 603-604 (2011), and Commonwealth v. Silva-Santiago, 453 Mass. 782, 798 (2009), and what consequences are appropriate for the failure of police to adhere to these protocols. The Hearing Subcommittee examined whether pretrial evidentiary hearings should be conducted where the reliability of a pretrial identification is challenged for reasons other than an unnecessarily suggestive identification procedure caused by police and private conduct, and, if so, what remedy, if any, is appropriate. The Jury Instructions Subcommittee considered whether existing model jury instructions adequately assist juries in evaluating eyewitness testimony and, if not, what instructions would better assist juries and whether revised jury instructions would reduce the need for expert testimony.

The Science. The scientific research on memory and eyewitness identification has both grown and matured over the past thirty years; there is now general scientific consensus on many areas affecting eyewitness identification, consensus that requires a change in the way courts, counsel, and police deal with the evidence. Scientists generally agree that "[m]emory does not operate like a videotape" but rather is a "constructive, dynamic, and selective process." G. Gaulkin, Report of the Special Master, State v. Henderson, New

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<sup>1</sup> Commonwealth v. Walker, 460 Mass. 590, 604 n.16 (2011).

<sup>2</sup> Letter from Chief Justice Roderick L. Ireland to Superior Court Chief Justice Barbara J. Rouse dated October 17, 2011. See Appendix A.

Jersey Supreme Court, Docket No. A-8-08 (June 10, 2010), at 9. Memory operates in stages and is affected by both system and estimator variables. "System variables" are those factors that the criminal justice system can influence, typically involving the actions of police (e.g., feedback and methods of eliciting the initial identification). "Estimator variables" are those factors that are inherent in the event -- such as the environmental conditions at the time and the characteristics of the witness and the perpetrator -- over which the criminal justice system has no control but that may have a substantial effect on the reliability of the identification.

Police departments, courts, prosecutors, the defense bar, and legal scholars have all begun to assess the implications of the science of memory and eyewitness identification for the criminal justice system. Although these groups might differ in the particulars, there is resounding agreement that eyewitness practices and procedures should reflect the findings of science, and that all involved in the criminal justice system, including jurors, should be educated about the often counterintuitive ways in which memory works.

In crafting its recommendations, the Study Group reviewed key scientific research, law review articles, the emerging case law, statutes, and police practices nationwide, among other authorities. The Study Group also had the benefit of meeting with Professor Steven Penrod, a well-known expert on eyewitness identification evidence, and of communications from two other experts interested in our work. We also benefitted greatly from two recent cases, State v. Henderson, 208 N. J. 208 (2011), and State v. Lawson, 352 Or. 724 (2012), which took thoughtful, comprehensive, and ultimately very different approaches to conforming the law of eyewitness identification with the science.

Recommendation 1: Judicial Notice of Legislative Facts. As a foundational matter, and in order to implement the recommendations of the Study Group, we recommend that the Court take judicial notice as legislative facts of the modern psychological principles regarding eyewitness memory set out in State v. Lawson, 352 Or. 724, 769-789 (2012).

Recommendation 2: Best Practices for Massachusetts Police Departments. Police departments in Massachusetts have a variety of different practices and protocols concerning eyewitness identification. The Police Practices Subcommittee was of the view that uniform statewide procedures should be adopted to ensure that all Massachusetts police departments employ best practices on eyewitness identification procedures. The Police Practices Subcommittee used the results of their comprehensive review of the scientific evidence on eyewitness identification as a foundation to draft a clearer, more concise, and more comprehensive set of eyewitness identification protocols than those presently required under Massachusetts law, with the intention that these best practices be adopted by all Massachusetts police departments. The best practices address general eyewitness identification practices, showups, and photo arrays and lineups. The Police Practices Subcommittee also identified a number of specific police best practices, failure to adhere to

which carries a likelihood of tainting an eyewitness identification. The Police Practices Subcommittee's recommendations are submitted by the Study Group with the strong recommendation that, if the protocols are endorsed, police agencies conduct comprehensive, mandatory training on the reformed eyewitness identification practices and the science behind these best practices, even in those departments that have begun to embrace the use of the best practices in this area. Uniform adoption of and training in the recommended best practices is critical to ensuring accurate identifications and preventing wrongful convictions that result from suggestive identification procedures.

Recommendation 3: Protocols for Pretrial Hearing. The Hearing Subcommittee began by considering whether Commonwealth v. Jones, 423 Mass. 99 (1996), provides the basis for an expanded pretrial judicial inquiry into the reliability of eyewitness evidence and an expanded array of remedies beyond the available for identifications involving suggestive police practices. As noted in Jones, *id.*, citing Neil v. Biggers, 409 U.S. 410 (1972): "It is the likelihood of misidentification which violates a defendant's right to due process." Jones, *supra* at 108. The focus should be on ensuring that reliable evidence is presented to the fact finder whether or not misconduct is implicated.<sup>3</sup>

The Hearing Subcommittee undertook an exhaustive review of the relevant case law in Massachusetts and elsewhere and of the relevant science, and considered, among other things, how new hearing procedures would mesh with new police protocols and new jury instructions/judicial notice. The subcommittee also considered the need to safeguard the rights of defendants in a manner that does not misallocate judicial resources.

The subcommittee concluded that the trial judge in a Massachusetts criminal matter should play a more active role in pretrial hearings as to whether and to what extent eyewitness identification evidence should be admitted at trial. The subcommittee also concluded that, in fulfilling this role, the judge should be able to draw on a choice of remedies beyond the exclusionary option. After considering the different models of pretrial procedures set out in Henderson, *supra*, and Lawson, *supra*, the subcommittee took what it believed to be the best of both approaches in its recommendations for a "Massachusetts model."

Recommendation 4: Eyewitness Identification Jury Instructions. After reviewing the scientific and legal authorities, as well as the work of the Police Practices Subcommittee and the Hearing Subcommittee, the Jury Instructions Subcommittee concluded that the current Massachusetts jury instructions with regard to eyewitness

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<sup>3</sup> A recent analysis of the first 250 DNA exonerations has revealed that over 75 % involved mistaken eyewitness identification. See Garrett, *Eyewitnesses and Exclusion*, 45 *Vand. L. Rev.* 451, 453-454 (2012).



testimony are inadequate.<sup>4</sup> Accordingly, the Jury Instructions Subcommittee drafted a detailed set of revised jury instructions on eyewitness memory that are designed to educate jurors, in plain language, in order that they might be better equipped to assess eyewitness evidence. Training of judges and attorneys will be essential to enable the bench and the bar to implement the revised instructions. In addition, the instructions should be periodically reviewed to reflect changes in the science of eyewitness identification. Although several scholars are studying the impact of jury instructions or juror deliberations, the Study Group believes that at the very least the revised instructions will contribute to the Court's goal of reducing the number of wrongful convictions while obtaining accurate convictions.

Notwithstanding the pretrial procedures and jury instructions, a majority of the Study Group recommends that they are not a substitute for expert testimony on eyewitness identification.<sup>5</sup>

Recommendation 5: Education and Continued Review. If the recommendations are adopted in whole or in substantial part, the Study Group recommends that the Supreme Judicial Court create a Standing Committee or Committees on Eyewitness Identification in order to develop professional training for judges and lawyers on the new procedures, to ascertain the effect that adopted recommendations will have on criminal adjudications, and to monitor developments in the science that may require modification of eyewitness identification procedures and protocols from time to time. The Chair and members of the Study Group stand ready to assist the Court in these efforts.

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<sup>4</sup> Massachusetts's instructions, like the instructions of many other State and Federal courts, are based on the model instruction in United States v. Telfaire, 469 F.2d 552, 559-559 (D.C. Cir. 1972), which the Supreme Judicial Court adopted in Commonwealth v. Rodriguez, 378 Mass. 296, 310 (1979), and modified in Commonwealth v. Cuffie, 414 Mass. 632, 640 (1993), and Commonwealth v. Santoli, 424 Mass. 837, 845 (1997) (omitting language about witness's confidence). The supplemental charge on good faith or honest mistake in identification is set forth in Commonwealth v. Pressley, 390 Mass. 617, 620 (1983).

<sup>5</sup> The Study Group decided by a vote of 7-5 to endorse a motion that the final report "remove any language that implies that the Study Group agrees that improved jury instructions, judicial notice of scientific research, or 'enhanced identification procedures' might lessen or obviate the need for expert testimony on how memory works . . . or 'reduc[e] the need for eyewitness expert testimony in many cases.'" The Study Group also decided by a vote of 8 to 4 to endorse a motion that the final report "note that the Study Group has concluded in agreement with the Connecticut Supreme Court in [State v. Guilbert [306 Conn. 218 (2012)], that general instructions do not substitute for expert testimony [or judicially noticed modern scientific principles]."

Conclusion. The Study Group's recommendations on police practices, hearing protocols, and jury instructions should be viewed as interdependent rather than separate. All of these recommendations are dependent on and should be governed by the scientific understandings set out in Recommendation 1 on judicial notice. In our opinion, the scientifically grounded recommendations set out in this report, which are geared toward reducing juror confusion and increasing judicial involvement in implementing procedures and remedies, will, if adopted, result in fewer wrongful convictions, as well as an increase in appropriate convictions, in cases that turn on eyewitness identification. And because the recommendations will lead to greater clarity and consistency in the analysis of the admissibility of eyewitness identification evidence, the recommendations, if adopted, will enhance public trust in fair and evenhanded justice in our courts.

## INTRODUCTION

The Supreme Judicial Court Study Group on Eyewitness Identification (Study Group) respectfully submits its Report and Recommendations to the Justices. The Court has "long recognized that '[e]yewitness identification of a person whom the witness had never seen before the crime or other incident presents a substantial risk of misidentification and increases the chance of a conviction of an innocent defendant.'"<sup>6</sup> "Because eyewitness identification is the greatest source of wrongful convictions but also an invaluable law enforcement tool in obtaining accurate convictions, and because the research regarding eyewitness identification procedures is complex and evolving,"<sup>7</sup> in the fall of 2011, the Justices convened the Study Group for the purpose of "offer[ing] guidance as to how our courts can most effectively deter unnecessarily suggestive identification procedures and minimize the risk of a wrongful conviction."<sup>8</sup> The Honorable Robert J. Kane, Associate Justice of the Superior Court Department, was appointed Chair of the Study Group, and its members are judges, prosecutors, defenders, law enforcement personnel, and academics experienced in matters of criminal law and procedure.

Most of the Study Group's work was done in subcommittees. Judge Kane assigned each Study Group member to one of three subcommittees: the Police Practices Subcommittee, the Hearing Subcommittee, or the Jury Instructions Subcommittee. Each

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<sup>6</sup> Commonwealth v. Silva-Santiago, 453 Mass. 782, 796 (2009), quoting Commonwealth v. Jones, 423 Mass. 99, 109 (1996). See Commonwealth v. Johnson, 420 Mass. 458, 465 (1995) ("mistaken identification is believed widely to be the primary cause of erroneous convictions").

<sup>7</sup> Commonwealth v. Walker, 460 Mass. 590, 604 n.11 (2011).

<sup>8</sup> Letter from Chief Justice Roderick L. Ireland to Superior Court Chief Justice Barbara J. Rouse dated October 17, 2011. See Appendix A.

subcommittee was responsible for surveying relevant Massachusetts practices; surveying the practices of other States, national trends, academic research, and, if appropriate, national best practices; identifying and accounting for the effect of relevant variables, such as the type of identification procedure (e.g., photographic array, in-court identification) and the extent of the witness's prior familiarity with the subject; coordinating activities where appropriate with other subcommittees; formulating conclusions and recommendations for Massachusetts that, among other things, take cognizance of overall benefits and drawbacks of each proposed approach, the impact on court workloads, and the challenges of representing poor defendants; and reporting to the entire Study Group. Subcommittee recommendations were reviewed, refined, and subsequently approved in plenary meetings of the Study Group.

Fortunately, the Study Group was convened at a time when the law and science of eyewitness evidence has begun to converge. Data compiled by the Innocence Project and similar organizations have established without doubt that eyewitness misidentification may account for as many as seventy-five per cent or more of all wrongful convictions.<sup>9</sup> Thirty years of scientific research on memory and eyewitness identification have led to general consensus on many, although by no means all, important issues concerning how memory works. Because many of the key scientific findings contradict conventional wisdom about how and how much we remember, legal scholars have begun to explore the implications of

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<sup>9</sup> See Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification* 3 (Benjamin N. Cardozo School of Law, Yeshiva University, n.d.).

the new science for criminal law and procedure.<sup>10</sup> State legislatures and state Supreme Courts have also been influenced by the new science to reexamine their laws on eyewitness evidence,<sup>11</sup> although some courts, including the United States Supreme Court, continue to rely on precedent grounded in the conventional wisdom. Meanwhile, police departments are revising their standard operating procedures and guidelines in light of burgeoning research on pretrial eyewitness identification and interrogation procedures.<sup>12</sup> Such is the forward momentum on the convergence of science and law in the area of eyewitness memory that, even as the Study Group sought to finalize its research and recommendations, new developments in science and the law caused us, more than once, to revisit and revise what we (thought we) had decided.

The intensive, multi-faceted, national focus on issues of eyewitness misidentification has created an opportunity for law enforcement and the criminal justice system to forge new approaches to eyewitness identification. But in an area of criminal law so complex and consequential, differences of opinion inevitably arise. While there was

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<sup>10</sup> See, e.g., Epstein, *Irreparable Misidentifications and Reliability: Reassessing the Threshold for Admissibility of Eyewitness Identification*, 58 *Vill. L. Rev.* 69 (2013); Garrett, *Eyewitnesses and Exclusion*, 65 *Vand. L. Rev.* 451 (2012); Rabner, *Evaluating Eyewitness Identification Evidence in the 21st Century*, 87 *N. Y. U. L. Rev.* 1249 (2012); Thompson, *Daubert Gatekeeping for Eyewitness Identification*, 65 *S.M.U. L. Rev.* 593 (2012); Doyle, *No Confidence: A Step Toward Accuracy in Eyewitness Trials*, *Champion*, Feb. 22, 1998, at 12.

<sup>11</sup> See *State v. Lawson*, 352 Or. 724, 740 (2012), *State v. Henderson*, 208 N. J. 208, 245 (2011); Md. Code, Pub. Safety § 3-506 (requiring law enforcement agencies in Maryland to "adopt written policies relating to eyewitness identification that comply with the United States Department of Justice standards on obtaining accurate eyewitness identification"); N.C. Gen. Stat. Ann. § 15A-284.52 (*Eyewitness Identification Reform Act*). But see *Perry v. New Hampshire*, 132 S. Ct. 716 (2012); *United States v. Jones*, 689 F.3d 12 (1st Cir. 2012).

<sup>12</sup> See Recommendation 2, *infra*.

unanimous agreement among Study Group members that the science of memory required significant revision of Massachusetts practice regarding eyewitness testimony, individual members sometimes found themselves at odds in their assessments of the scope of the challenge and the appropriate reforms. As a result, discussions were open, frank, lively, thorough, and often impassioned. Reaching consensus, wherever possible, was the overriding goal, but where Study Group members believed an alternative view of a finding or recommendation should prevail, we have noted these dissenting views.

The Study Group offers five specific recommendations that, in its view, will, if adopted, advance the Court's goal to minimize the number of wrongful convictions. As its **first recommendation**, the Study Group recommends that the Court take judicial notice as legislative facts of the science of memory as set out in Lawson, 352 Or. at 769-789. See also Henderson, *supra*. Our further recommendations, reflecting the science as summarized in Lawson, are based on the understanding that issues involving eyewitness identification occur in progression, with each action affecting a subsequent choice. The eyewitness identification procedure starts with police departments. At present in Massachusetts, over 200 police departments follow a uniform set of best practices for collecting and preserving eyewitness identification evidence. Other Massachusetts police departments, however, do not; indeed some departments have no written policy on the issue. Yet as the Police Practices Subcommittee reports, *infra*, a well-trained department whose members "use[] research-based techniques can decrease the likelihood of misidentification and preserve the witness' ability to recognize the offender later." Accordingly, our **second recommendation** is that all Massachusetts police departments follow a uniform set of protocols on eyewitness identification that represent current best practices in the field, and

that police officers be trained not only to understand the protocols but also to understand the science behind them. They should be trained in how following or failing to follow the protocols will affect whether and to what extent the eyewitness identification comes before the jury.

The science of memory and eyewitness identification and the formulation of best police practices informed the work and the conclusions of the Hearing Subcommittee. At present, trial judges faced with challenges to the admission of eyewitness testimony have only the remedy of exclusion at their disposal: if the eyewitness out-of-court identification was so unnecessarily suggestive that it was conducive to irreparable misidentification, the evidence will be suppressed; if not, it will be admitted.<sup>13</sup> But scientific research has shown that factors outside the control of the police ("estimator variables") as well as factors within their control ("system variables") bear on the question of reliability; this suggests that remedies apart from exclusion may be appropriate in certain circumstances where an eyewitness identification is unreliable, but for reasons unrelated to police conduct. Our **third recommendation** is to give trial judges greater flexibility in fashioning nuanced remedies responsive to specific problems in eyewitness identification evidence where exclusion is not constitutionally compelled.<sup>14</sup>

We have also concluded that, in identification cases, jurors, no less than police officers, attorneys, and judges, must be educated about how memory works and the factors to be accounted for when considering reliability. Following the lead of courts in New

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<sup>13</sup> See, e.g., Commonwealth v. Johnson, supra at 461-465 (rejecting proposed modification of "per se" rule of exclusion).

<sup>14</sup> See Recommendation 3, infra.

Jersey, Connecticut, and Oregon, we have fashioned an extensive set of jury instructions on eyewitness evidence that can be tailored to case-specific circumstances. Our **fourth recommendation** is that the reformulated jury instructions be adopted.

In the view of the Study Group, the scientifically grounded set of recommendations set out in this report, if adopted, will result in fewer wrongful convictions, as well as an increase in appropriate convictions, in cases that turn on eyewitness identification. These recommendations are geared toward reducing juror confusion and increasing judicial involvement in implementing procedures and remedies that reduce the risk of wrongful convictions.

And because the recommendations will lead to greater clarity and consistency in consideration of eyewitness identification evidence in criminal trials and greater reliability of eyewitness identification evidence, the recommendations, if adopted, will enhance public trust in fair and evenhanded justice in our courts. Our State and Federal Constitutions "creat[e] a judicial department with awesome powers over the life, liberty, and property of every citizen."<sup>15</sup> Butressing the likelihood that only the offender is punished and only the non-offender acquitted is both a legal principle and a moral imperative.<sup>16</sup> We are deeply honored that the Justices have asked us to contribute to this endeavor.

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<sup>15</sup> O'Coin's, Inc. v. Treas. of Worcester County, 362 Mass. 507, 510 (1972). See also In re Andrew, 449 Mass. 587, 593 (2007) ("Use of the highest standard of proof . . . carries symbolic importance. By requiring the government to meet this burden, we establish the moral force of law when it is used to deprive an individual of his liberty. . . That such a standard is the closest we can come to ensuring a correct outcome when the stakes are so high illustrates our societal commitment to giving defendants the benefit of the doubt in the face of the government's awesome power to convict") (citations omitted).

<sup>16</sup> In re Andrew, *supra*.



We add two notes of caution, both related to our **fifth recommendation**, for ongoing education and review. First, the recommendations in this report, if adopted in whole or in part, would represent significant changes in Massachusetts criminal procedure. For these changes to succeed, both the bench and the bar will need to be educated about the rationale behind the reforms as well as their implementation. The Study Group strongly recommends that the Justices, in consultation with the Chief Justice of the Trial Court, the Chief Justices of the Trial Court Departments hearing criminal matters, bar leaders, and others, convene a standing Education Committee on Eyewitness Evidence to develop educational seminars and trainings on an ongoing basis to address eyewitness evidence procedures and protocols. Several judicial and legal organizations in Massachusetts have enthusiastically offered to help develop and host such educational programs, and several Study Group members have indicated that they are willing to participate in or even lead such efforts. Judge Kane would be pleased to discuss this subject further with the Justices at their convenience.

Second, this report is not intended as a definitive statement on the science of eyewitness identification, or on the police practices and criminal procedures most appropriate in light of the science. Much remains unknown about how memory works and how jurors perceive eyewitness testimony. While the recommendations in this report may guide the Court in light of the scientific research as it stands today, individual recommendations may need to be modified or discarded in light of the evolving scientific research. As a matter of justice, our courts must be able to respond to the science as it evolves rather than "catch up" to advances in research after years of inaction. For this reason, the Study Group recommends that the Justices establish a Standing Committee on

Eyewitness Evidence (perhaps including the Education Committee discussed above) that will periodically meet to assess the evolving science and law of eyewitness identification and make appropriate recommendations to the Justices in light of their findings. Again, many members of the Study Group stand ready to assist the Justices in this effort.

The Study Group is deeply grateful for the support and encouragement of Chief Justice Roderick L. Ireland and of the Justices of the Supreme Judicial Court throughout our work. Chief Justice of the Trial Court Robert A. Mulligan, Chief Justice Barbara J. Rouse of the Superior Court Department, former Chief Justice Lynda M. Connolly and Interim Chief Justice Paul F. LoConto of the District Court Department, Chief Justice Charles R. Johnson of the Boston Municipal Court Department, and Chief Justice Michael F. Edgerton of the Juvenile Court Department generously allowed the judicial members of the Study Group relief from other duties to delve wholeheartedly into this work. Attorney General Martha M. Coakley, Inspector General Glenn A. Cunha, Hampden County District Attorney Mark G. Mastroianni, Middlesex County District Attorney Gerard T. Leone, and Chief Counsel of the Committee for Public Counsel Services, Anthony Benedetti, Esq., were equally generous with the time of their respective senior staff counsel.

The Study Group benefitted enormously from the opportunity to hear from and discuss scientific evidence concerning eyewitness identification with Professor Steven D. Penrod. We extend our sincere thanks to Professor Penrod, and to the Flaschner Judicial Institute and Executive Director Robert J. Brink, Esq., for making the meeting with Professor Penrod possible.

The Study Group would be remiss without acknowledging its considerable debt to the Hon. Geoffrey Galkin, the Justices of the New Jersey Supreme Court, and the Justices

of the Oregon Supreme Court. Their pioneering analyses of eyewitness identification greatly influenced our discussions and recommendations, and their encyclopedic review of the science facilitated our own investigation.

The Study Group thanks John Salsberg, Esq., and Det. Lt. William J. Powers, MSP (ret.), for their valuable assistance on the Police Practices Subcommittee, and the New England Innocence Project for its valuable work on the eyewitness identification policy assessment project described herein, which informed the Police Practices Subcommittee's work. We thank law students Emily MacArthur, Kristopher K. Aleksov, Julia Walsh, and Erika Page for their helpful research, and intern Christina Hernandez for her valuable editorial assistance.

## OVERVIEW OF THE SCIENCE AND ITS IMPLICATIONS

### A. The Stages of Memory

Social science research in the area of eyewitness identification of strangers conducted over the past thirty years has produced over 2,000 published studies. See G. Gaulkin, Report of the Special Master, State v. Henderson, New Jersey Supreme Court, Docket No. A-8-08 (June 10, 2010), at 9 (Special Master's Report).<sup>17</sup> "The study of eyewitness identification relies in the first instance on precepts drawn from the broader studies of human memory." Id. "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." Id. See also Commonwealth v. Kater, 388 Mass. 519, 527-528 (1983) ("Memory is said not to be like a videotape, which accurately records every perception and needs merely to be played back").<sup>18</sup>

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<sup>17</sup> The Report of the Special Master to the New Jersey Supreme Court in State v. Henderson, 208 N. J. 208 (2011), was written after the Special Master heard ten days of testimony from seven experts in the field of eyewitness identification and considered 200 published scientific studies, articles, and books, which were submitted to the court. State v. Henderson, 208 N. J. at 243 (2012). "More than twenty-five meta-analyses were presented at the hearing." Id. According to one expert's testimony, the research presented to the Special Master "represents the 'gold standard' in terms of the applicability of social science research to the law." State v. Henderson, 208 N. J. at 283. Because the Special Master's report contains extensive and detailed findings on the current state of the science of eyewitness identification, a summary of the significant scientific conclusions is contained herein.

<sup>18</sup> The problematic nature of eyewitness evidence was not lost on judges in former times. See, e.g., Whynk v. Second Ave. R.R. Co., 43 N.Y.S. 1023, 1025 (1897) (contradictory eyewitness testimony as to circumstances of accident "does not necessarily show that either of the witnesses was designedly untruthful, but it does show how easily

Three stages are involved in forming a memory: "acquisition –'the perception of the original event'; retention [or storage] –'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.'" State v. Henderson, 208 N. J. 208, 245 (2011) (Henderson), quoting E.F. Loftus, *Eyewitness Testimony* 21 (2d ed. 1996). See also Special Master's Report at 9-10. Scientific research has demonstrated that because specific factors, or variables, affect memory at its different stages, they can influence the accuracy of identifications. See State v. Guilbert, 306 Conn. 218, 235-236 (2012) (Guilbert); Henderson, 208 N. J. at 247. The scientific literature has divided these variables into two groups: "system variables" are those factors that the criminal justice system can influence; and "estimator variables" are those factors that are inherent in the event -- such as the environmental conditions at the time and the characteristics of the witness and the perpetrator -- over which the criminal justice system has no control. See Guilbert, 306 Conn. at 236 n.11. See State v. Lawson, 352 Or. 724, 740 (2012) (Lawson); Special Master's Report at 11-12; Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 *J. Personality & Soc. Psychol.* 1546, 1546 (1978).

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eyewitnesses of any occurrence occupying so brief a period as that elapsing in this case may be mistaken as to a vital detail of the affair"); State v. Rome, 64 Conn. 329, 30 A. 57, 58 (1894) (quoting without ruling on judge's instruction to jury that, "I am sure that your own common sense will lead you to a conclusion that, when a satisfactory inference of guilt is based mainly on the circumstance of the one testimony of the one eyewitness, there is more danger of error -- more danger of mistake -- than when an equally satisfactory inference of guilt is based upon several important circumstances showing the guilt of the accused"); and Miller v. Cotten, 5 Ga. 341, 349 (1848) (Lumpkin, J.) ("I would sooner trust the smallest slip of paper for truth, than the strongest and most reflective memory, ever bestowed on mortal man").

Both types of variables "can affect and dilute eyewitness memory." Henderson, 208 N. J. at 234.

These variables have been determined through three types of scientific studies. "First, archival studies, which are relatively few in number, examine police and court records of past investigations and prosecutions. Second, field experiments and studies, also relatively few, are based on direct observation of 'real life' events as they occur. Third, and the vast majority . . . are 'laboratory' studies that report controlled experiments designed and conducted by academic researchers to isolate and manipulate particular variables for study." Special Master's Report at 12. See Henderson, 208 N. J. at 242-243 (describing research methods). "An important and much cited subset of the literature is comprised of meta-analyses, which evaluate the methodologies and findings of multiple published reports of experiments in a given area of inquiry." Special Master's Report at 12. "[B]ecause of their breadth, meta-analyses are generally regarded as offering the most reliable statements of the scientific findings." Id. at 13. But it should be noted that "many questions about memory and the psychology of eyewitness identifications remain unanswered. And eyewitness research remains probabilistic, meaning that science cannot say whether an identification in an actual case is accurate or not. Instead, science has sought to answer, in the aggregate, which identification procedures and external variables are tied to an increased risk of misidentification." Henderson, 208 N. J. at 245.

The scientific studies have produced a consensus among experts about the system and estimator variables that have been shown to affect the reliability of eyewitness identification. See Kassin et al., On the "General Acceptance" of Eyewitness Testimony Research: A Survey of the Experts, 56 Am. Psychol. 405, 407-411 (2001). Recently,

courts have recognized these variables and have incorporated them into their eyewitness identification jurisprudence. See Lawson, 352 Or. at 724, 740 ("Based on our extensive review of the current scientific research and literature, we conclude that the scientific knowledge and empirical research concerning eyewitness perception and memory has progressed sufficiently to warrant taking judicial notice of the data contained in those various sources as legislative facts that we may consult for assistance in determining the effectiveness of our existing test for the admission of eyewitness identification evidence"); Guilbert, 306 Conn. at 253 (enumerating eight concepts that satisfy test for admissibility of scientific evidence) (further citation omitted); Henderson, 208 N. J. at 247-272 (listing eight system variables and ten estimator variables that are based on what the court deemed to be reliable scientific studies generally accepted in the scientific community). The Special Master in Henderson described the science regarding these variables as "reliable, definitive and unquestionably fit for the courtroom." Special Master's Report at 72-73.

"Although the[] findings [regarding the variables] are widely accepted by scientists, they are largely unfamiliar to the average person and, in fact, many of the findings are counterintuitive." Guilbert, 306 Conn. at 239. See also Henderson, 208 N. J. at 274 (juror surveys and mock-jury studies, while not definitive, "reveal generally that people do not intuitively understand all of the relevant scientific findings"). In order to assist juries in understanding the variables that can affect the reliability of eyewitness identification, the Study Group recommends that the Court take judicial notice of the underlying science. See Lawson, 352 Or. at 340, 369-389. The Study Group developed model jury instructions, which incorporate descriptions of system and estimator variables. These variables also

informed the Study Group's report on police practices and hearings. The system and estimator variables and their scientific foundations will be discussed in turn.

**B. System Variables**

**1. Witness confidence.** Social science research demonstrates that little correlation exists between witness confidence and the accuracy of the identification. See Lawson, 352 Or. at 777 ("Studies show that, under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy"); Guilbert, 306 Conn. at 253 ("there is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy"). "A number of meta-analyses show . . . that witnesses' pre-identification confidence in their ability to make an identification has no correlation to the accuracy of the identifications they then make." Special Master's Report at 34. See, e.g., Cutler and Penrod, *Forensically Relevant Moderators of the Relation Between Eyewitness Identification Accuracy and Confidence*, 74 *J. Applied Psychol.* 650, 652 (1989) (meta-analysis showing that eyewitness confidence in ability to make an identification before viewing a lineup does not correlate with accuracy). And "confidence expressed immediately after making an identification has only a low correlation to the accuracy of the identification." Special Master's Report, supra. "The studies do show that witnesses expressing post-identification high confidence (e.g., 90-100%) are in fact highly accurate (e.g., 90%), but only a small fraction of witnesses report such levels of confidence and even 10% of them make incorrect identifications." Id. at 34-35.<sup>19</sup> "The studies

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<sup>19</sup> See, e.g., Brewer and Wells, *The Confidence-Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target-Absent Base Rates*, 12 *J. Experimental Psychol.: Applied* 11, 15 (2006); Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in*



conclude . . . that a witness's self-report of confidence, whether given before or after an identification, is not a reliable indicator of accuracy." Special Master's Report at 35.

"[W]itness certainty, although a poor indicator of identification accuracy in most cases, nevertheless has substantial potential to influence jurors. Studies show that eyewitness confidence is the single most influential factor in juror determinations regarding the accuracy of an eyewitness identification." Lawson, 352 Or. at 778.<sup>20</sup> But, as one study showed, most jurors are unaware of the weak correlation between confidence and accuracy and of witness susceptibility to "manipulation by suggestive procedures or confirming feedback." Lawson, supra, citing Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 *Applied Cognitive Psychol.* 115, 120 (2006) (finding that 38 % of jurors surveyed correctly understood the relationship between accuracy and confidence and 50 % recognized that witness confidence can be manipulated).<sup>21</sup> Another study concluded that mock-jurors were unaware of the effect of certain system and estimator variables and that witness confidence was the most important factor in the mock-jurors' assessment of the accuracy of the

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*Eyewitness Identification Studies*, 118 *Psychol. Bull.* 315, 315-319, 322 (1995); see also Wells and Olson, *Eyewitness Testimony*, 54 *Ann. Rev. Psychol.* 277, 283-284 (2003) (describing studies and noting complexity of issue).

<sup>20</sup> See, e.g., Leippe et al., *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions*, 33 *L. & Hum. Behav.* 194, 194 (2009); Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 *J. Applied Psychol.* 440, 446 (1979).

<sup>21</sup> See also Read and Desmarais, "Expert Psychology Testimony on Eyewitness Identification: A Matter of Common Sense?," in *Expert Testimony on the Psychology of Eyewitness Identification* 115, 120-127 (B.L. Cutler ed., 2009).

identification. See Henderson, 208 N. J. at 273-274, citing Cutler et al., Juror Sensitivity to Eyewitness Identification Evidence, 14 L. & Hum. Behav. 185, 186-190 (1990).

2. **Feedback.** Because witness confidence is significant to jurors and because "[a]n 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," social scientists have identified ways to reduce this extraneous influential information, which is called "feedback." Special Master's Report at 30-31. See Guilbert, 306 Conn. at 253. So-called "cognitive interview" techniques during a pre-identification interview, including the elimination of leading or suggestive questions, can decrease the possibility of influencing a witness's memory. Special Master's Report at 32. See Lawson, 352 Or. at 786-787 ("Studies show that the use of suggestive wording and leading questions tend to result in answers that more closely fit the expectation embedded in the question"), citing Loftus and Zanni, Eyewitness Testimony: The Influence of the Wording of a Question, 5 Bull. Psychonomic Soc'y 86 (1975). See also Loftus, Leading Questions and the Eyewitness Report, 7 Cognitive Psychol. 560, 566 (1975). In addition, "[w]hen a witness is permitted to discuss the event with other witnesses or views another witness's identification decision, the witness may alter his or her own memory or identification decision to conform to that of the cowitness." Lawson, 352 Or. at 788, citing Skagerberg, Co-Witness Feedback in Lineups, 21 Applied Cognitive Psychol. 489 (2007). For example, if witnesses are together after the crime, one witness can affect the memory of the other by asking, "Did you see a scar under his eye?"

"Confirmatory or post-identification feedback" also may taint the witness's memory. Henderson, 208 N. J. at 253. See Guilbert, 306 Conn. at 253. This feedback "occurs when police signal to eyewitnesses that they correctly identified the suspect." Id. That confirmation "affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness' report of how he or she viewed an event." See Henderson, 208 N. J. at 255.<sup>22</sup> "[T]he 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." Lawson, 352 Or. at 788 (emphasis added). See also Henderson, 208 N. J. at 268-271.

The system variables, which are described below, are designed to increase the accuracy of identifications.

3. **Blind administration.** One social scientist who testified before the Special Master characterized double-blind lineup or photo array administration as "the single most important characteristic that should apply to eyewitness identification." Special Master's Report at 19. "Double-blind administrators do not know who the actual suspect is. Blind[ed] administrators are aware of that information but shield themselves from knowing where the suspect is located in the lineup or photo array." Henderson, 208 N. J. at 248 (brackets added). Blinded or double-blind administration of the identification procedure promotes reliability because "research shows that lineup administrators who know the

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<sup>22</sup> See Wells and Bradfield, Distortions in Eyewitnesses' Recollections: Can the Postidentification-Feedback Effect Be Moderated?, 10 Psychol. Sci. 138 (1999); see also Douglass and Steblay, Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect, 20 Applied Cognitive Psychol. 859, 865-866 (2006); Wells and Bradfield, "Good, You Identified the Suspect,": Feedback to Eyewitness Distorts Their Reports of the Witnessing Experience, 83 J. Applied Psychol. 360 (1998).

identity of the suspect often consciously or unconsciously suggest that information to the witness." Lawson, 352 Or. at 779.<sup>23</sup>

**4. Construction of the lineup or photo array.** "Properly constructed lineups test a witness' memory and decrease the chance that a witness is simply guessing."

Henderson, 208 N. J. at 251. A fair lineup or photo array is one in which:

- (a) the suspect's appearance or clothing does not stand out; that is, the suspect or suspect's photo looks like the others in the lineup or array, see Lawson, 352 Or. at 781; Henderson, 208 N. J. at 251; Malpass et al., Lineup Construction and Lineup Fairness, in 2 *The Handbook of Eyewitness Psychology: Memory for People* 155, 156 (R.C.L. Lindsay et al. eds., 2007);
- (b) there are at least five fillers, see Commonwealth v. Walker, 460 Mass. at 604; accord Lawson, 352 Or. at 781; Henderson, 208 N. J. at 251;
- (c) there is only one suspect, see Commonwealth v. Walker, *supra*; Henderson, *supra*; Lawson, *supra*.

**5. Instructions to the witness.** Before the administrator conducts a lineup, a showup, or a photo array, he or she should instruct the witness in accordance with

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<sup>23</sup> See Clark et al., Lineup Administrator Influences on Eyewitness Identification Decisions, 15 *J. Experimental Psychol.: Applied* 63, 66-73 (2009); Greathouse and Kovera, Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification, 33 *L. & Hum. Behav.* 70, 71 (2009); Haw and Fisher, Effects of Administrator -Witness Contact on Eyewitness Identification Accuracy, 89 *J. Applied Psychol.* 1106, 1110 (2004) (summarizing other studies' findings).

Commonwealth v. Silva-Santiago, 453 Mass. at 797-798<sup>24</sup>; accord Henderson, 208 N. J. at 897 (collecting research).

6. **Sequential v. simultaneous lineups and photo arrays.** "Some studies demonstrate. . . that witnesses permitted to view all the subjects together [in a simultaneous lineup or photo array] have a tendency to make a 'relative judgment' – choosing the person or photograph that most closely resembles the perpetrator from among other subjects – as opposed to making an 'absolute judgment' – comparing each subject to their memory of the perpetrator and deciding whether that subject is the perpetrator or not." Lawson, 352 Or. at 782. The research that was available to the Henderson Special Master was inconclusive on whether sequential lineups or photo arrays produce fewer misidentifications than simultaneous ones.<sup>25</sup> As a result, the Henderson and Lawson courts did not state a preference for sequential or simultaneous organization of the array. See Lawson, 352 Or. at 782-783; Henderson, 208 N. J. at 257-258. But the American Judicature Society's field study in four police departments, which was published in 2011 and not available to the Special Master, found that double-blind sequential procedures reduce the number of misidentifications. See G. Wells, N. Steblay and J. Dysart, A Test of the Simultaneous v. Sequential Lineup Methods, An Initial Report of the AJS Eyewitness Identification Field

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<sup>24</sup> The Study Group's recommendations require instructions more extensive than that required under Silva-Santiago, supra at 797-798. See Recommendation 4, infra.

<sup>25</sup> Compare Steblay et al., Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison, 25 L. & Hum. Behav. 459, 463-464 (2001) (showing a moderate trend toward fewer misidentifications in sequential lineups versus simultaneous ones) with McQuiston-Surrett et al., Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory, 12 Psychol. Pub. Pol'y, & L. 137, 143-151 (2006); and Malpass et al., Public Policy and Sequential Lineups, 14 Legal & Criminological Psychol. 1 (2009) (differences in sequential versus simultaneous lineups or photo arrays may be due to other factors).

Studies (2011) , available [www.ajs.org/wc/pdfs/EWID\\_PrintFriendly.pdf](http://www.ajs.org/wc/pdfs/EWID_PrintFriendly.pdf) (last visited March 11, 2013). See also Guilbert, 306 Conn. at 253 ("an identification may be less reliable in the absence of a double-blind sequential identification procedure").

7. **Multiple identification procedures.** "The administration of multiple lineup procedures to a single witness also can undermine the reliability of resulting identifications." Special Master's Report at 27. "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." Id. at 27-28. See Lawson, 352 Or. at 784.

"Research has shown that innocent persons misidentified in an initial procedure are more likely to be misidentified in a later procedure." Special Master's Report at 28. "Multiple identification procedures that involve more than one viewing of the same suspect . . . can create a risk of 'mugshot exposure' and 'mugshot commitment.' Mugshot exposure is when a witness initially views a set of photos and makes no identification, but then selects someone – who had been depicted in the earlier photos – at a later identification procedure." Henderson, 208 N. J. at 255. See Deffenbacher et al, Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 L. & Hum. Behav. 287, 299 (2006). "Mugshot commitment occurs when a witness identifies a photo that is then included in a later lineup [or photo array] procedure. Studies have shown that once witnesses identify an innocent person from a mugshot, 'a significant number' then 'reaffirm[] their false identification' in a later lineup [or photo array] – even if the actual target is present." Henderson, 208 N. J. at 256, quoting Koehnken et al., Forensic Applications of Lineup Research, in Psychological

Issues in Eyewitness Identification 205, 219 (S.L. Sporer et al., eds., 1996). "A similar problem occurs when a witness is asked to participate in multiple identification procedures" -- lineups or photo arrays -- and views the suspect in those procedures. Lawson, 352 Or. at 785. See also Ross et al., Unconscious Transference and Mistaken Identity: When a Witness Identifies a Familiar but Innocent Person, 79 Applied Psychol. 918, 929 (1994). "As a result, law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once." Henderson, 208 N. J. at 256.

**8. Showups.** "A showup is an identification procedure in which a single suspect is presented to a witness. . . . There appears to be no dispute within either the law enforcement or scientific communities that the showup is a useful – and necessary – technique when used in appropriate circumstances. But it does carry its own risks of misidentification" due to the fact that only one person is presented to the witness. Special Master's Report at 29. See Lawson, 352 Or. at 783. See also Commonwealth v. Martin, 447 Mass. 274, 279 (2006) ("One-on-one identifications are generally disfavored because they are viewed as inherently suggestive").<sup>26</sup> But despite these shortcomings, "[t]he research shows, in fact, that the risk of misidentification is not heightened if a showup is conducted immediately after the witnessed event, ideally within two hours: the benefits of a fresh memory seem to balance the risks of undue suggestion." Special Master's Report, supra. See State v. Lawson, 352 Or. at 783; State v. Henderson, 208 N. J. at 259-260. See

<sup>26</sup> See Dysart et al., Show-Ups: The Critical Issue of Clothing Bias, 20 Applied Cognitive Psychol. 1009 (2006) (studies indicating a high risk of misidentification in showups where the innocent suspect's clothing is similar to the perpetrator's); Steblay et al., Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison, 27 L. & Hum. Behav. 523, 533 (2003) (meta-analysis indicating that more innocent suspects were identified in a showup than in a lineup when the innocent suspect closely resembled the perpetrator).

also Commonwealth v. Martin, 447 Mass. 274, 280 (2006), quoting Commonwealth v. Bowden, 379 Mass. 472, 479 (1980), quoting Commonwealth v. Barnett, 371 Mass. 87, 92 (1976), cert. denied, 429 U.S. 1049 (1977) ("[S]howups of suspects to eyewitnesses of crimes have been regularly held permissible when conducted by the police promptly after the criminal event"). See Yarmey et al., Accuracy of Eyewitness Identification in Showups and Lineups, 20 L. & Hum. Behav. 459, 464 (1996) (study showing that showup conducted immediately after a crime produced the same error rate as lineup conducted in same time frame; a delay of two hours increased the misidentification rate in a showup to 58 % versus 14 % for a lineup). Importantly, showup administrators should deliver the same instructions to witnesses that they give for lineups and photo arrays. See Henderson, 208 N. J. at 261.

C. **Estimator Variables**

1. **Distance and lighting.** "More recent studies specifically addressing the ability to identify faces at particular distances have demonstrated that, even with 20/20 vision and excellent lighting conditions, face perception begins to diminish at 25 feet, nears zero at about 110 feet, and faces are essentially unrecognizable at 134 feet." Special Master's Report at 45. See Lawson, 352 Or. at 773. Poor lighting conditions can diminish the accuracy of an identification. See Henderson, 208 N. J. at 264. "Research has also shown that people have difficulty estimating distances." Id., citing Lindsay et al., How Variations in Distance Affect Eyewitness Reports and Identification Accuracy, 32 L. & Hum. Behav. 533 (2008).

2. **Duration of the event.** "[W]hile there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an



accurate identification than a more prolonged exposure." Special Master's Report at 44. See Bornstein et al., Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: A Meta-Analysis of Two Variables Associated with Initial Memory Strength, 18 Psychol., Crime & L. 473 (2012). "However, it is impossible to determine conclusively that any particular duration of exposure is too short to make an accurate identification, nor so long as to entirely eliminate the possibility of mistaken identification." Lawson, 352 Or. at 772. "[W]itnesses consistently tend to overestimate short durations, particularly where much was going on or the event was particularly stressful." Special Master's Report at 44. See also Loftus, et al., Time Went by So Slowly: Overestimation of Event Duration by Males and Females, 1 Applied Cognitive Psychol. 3 (1987); Yarmey, Retrospective Duration Estimations for Variant and Invariant Events in Field Situations, 14 Applied Cognitive Psychol. 45 (2000).

3. **Condition and characteristics of the witness.** "[S]ome common variables that affect the ability to perceive and remember include visual acuity, physical and mental condition (illness, injury, intoxication, or fatigue), and age." Lawson, 352 Or. at 773. See also Henderson, 208 N. J. at 265. But the research is inconclusive on specific age as a factor in the reliability of identifications. See Henderson, 208 N. J. at 265-266.

A related variable is the witness's degree of attention to the perpetrator. "In assessing eyewitness reliability, it is important to consider not only what was within the witness's view, but also on what the witness was actually focusing his or her attention." Lawson, 352 Or. at 770-771. "A person's capacity for processing information is finite, and the more attention paid to one aspect of an event decreases the amount of attention available for other aspects." Id., citing Wells and Quinlivan, Suggestive Identification

Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 L. & Hum. Behav. 1, 10-11 (2009).

4. **Stress.** "The scientific literature reports that, while moderate levels of stress improve cognitive processing and might improve accuracy . . . , an eyewitness under high stress is less likely to make a reliable identification of the perpetrator." Special Master's Report at 43.<sup>27</sup> See Lawson, 352 Or. at 769 (same); Guilbert, 306 Conn. at 253 (same). "There is no precise measure for what constitutes 'high' stress, which must be assessed based on the facts presented in individual cases." Henderson, 208 N. J. at 262.

5. **Weapon focus.** "When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. 'Weapon focus' can thus impair a witness's ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration." Henderson, 208 N. J. at 262-263. See Lawson, 352 Or. at 771-772 (same); Guilbert, 306 Conn. at 253 (same). "[T]he longer the duration, the more time the witness has to adapt to the presence of a weapon and focus on other details." Henderson, 208 N. J. at 263.<sup>28</sup>

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<sup>27</sup> 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) (a meta-analysis of 27 independent studies conducted on the effect of stress and identification accuracy showed that, while 59 % of the 1,727 participants made correct identifications in low-stress settings, only 39 % of high-stress witnesses' identifications were correct); Morgan III et al., Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, 27 Int'l. J. L. & Psychiatry 265 (2004).

<sup>28</sup> See, e.g., Maas and Kohnken, Eyewitness Identification: Simulating the 'Weapon Effect', 13 L. and Hum. Behav. 397, 401-402 (1989); Pickel, Remembering and Identifying Menacing Perpetrators: Exposure to Violence and the Weapon Focus Effect, in 2 The Handbook of Eyewitness Psychology: Memory for People 339 (R.C.L. Lindsay et al., eds., 2007); and Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 L. & Hum. Behav. 413, 417 (1992).

6. **Alcohol.** "Studies demonstrate . . . that intoxicated witnesses are more likely to misidentify an innocent suspect than their sober counterparts." Lawson, 352 Or. at 773-774. See Henderson, 208 N. J. at 265. See also Dysart et al., The Intoxicated Witness: Effects of Alcohol on Identification Accuracy from Showups, 87 J. Applied Psychol. 170, 174 (2002).

7. **Disguise worn by perpetrator.** "[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." Lawson, 352 Or. at 775. See Special Master's Report at 47 ("Disguises (e.g., hats, sunglasses, masks) are confounding to witnesses and reduce the accuracy of identifications"). 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) (summarizing results of six studies showing that identification accuracy dropped from 57 % to 44 % when perpetrators' hair and hairline cues were masked). "If facial features are altered between the time of the event and the identification procedure – if, for example, the culprit grows a beard – the accuracy of an identification may decrease." Henderson, 208 N. J. at 266. See Patterson and Baddeley, When Face Recognition Fails, 3 J. Experimental Psychol: Hum. Learning & Memory 406, 410, 414 (1977).

8. **Distinctive feature.** "Witnesses are better at remembering and identifying individuals with distinctive features than they are those possessing average features."

Lawson, 352 Or. at 774. See Special Master's Report at 47 (same). See also Shapiro and Penrod, Meta-Analysis of Facial Identification Studies, 100 Psychol. Bull. 139 (1986).

**9. Cross-racial/cross ethnic identification.** A witness may have more difficulty identifying a person of a different race or ethnicity. See State v. Lawson, 352 Or. at 775 ("Studies also indicate that witnesses are significantly better at identifying members of their own race than those of other races"); Guilbert, 306 Conn. at 253; Henderson, 208 N. J. at 267. See also Meissner and Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, 7 Psychol, Pub. Pol'y, & L. 3, 15-16, 18-21 (2001).

**10. Unconscious transference.** "Th[e] process, known as 'unconscious transference,' can . . . occur when a witness confuses a person seen at or near the crime scene with the actual perpetrator." Special Master's Report 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 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." Id. See Guilbert, 306 Conn. at 253-254 ("the accuracy of an eyewitness identification may be undermined by an unconscious transference, which occurs when what a person sees in one context is confused what with a person sees in another").

**11. Memory decay.** "Memories fade with time." Henderson, 208 N. J. at 267. "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') – or even a subsequent attempt to recall the initial observation – 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." Lawson, 352 Or. at 778, citing Deffenbacher, Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation, 14 J. Experimental Psychol.: Applied 139, 148 (2008). See Guilbert, 306 Conn. at 25 ("memory diminishes most rapidly in the hours immediately following an event and less dramatically in the days and weeks thereafter"). See also Krafka and Penrod, Reinstatement of Context in a Field Experiment on Eyewitness Identification, 49 J. Personality & Soc. Psychol. 65 (1985) (finding substantial misidentification in target-absent arrays from two to twenty-four hours after event). Memory never improves. See Henderson, 208 N. J. at 267. But researchers cannot say exactly "when a person's recall becomes unreliable." Id.

## **REPORT OF THE POLICE PRACTICES SUBCOMMITTEE**<sup>29</sup>

### **Charter**

The Police Practices Subcommittee was asked to study and make recommendations on law enforcement best practices in eyewitness identification procedures, including, among other things, identifying and addressing prevalent barriers to the adoption of law enforcement best practices and how such practices might be implemented and maintained. The members of the Police Practices Subcommittee agreed that the other two subcommittees would necessarily need to base their work on the scientific research and findings to date, and take into account the protocols and policies to be proposed for use by the Commonwealth's law enforcement agencies. For this reason, the Police Practices Subcommittee determined that it should complete its work quickly, so that the other two subcommittees could use its conclusions and recommendations in completing their work.

The Police Practices Subcommittee was comprised of a judge, an assistant district attorney, an assistant attorney general, and a police officer. It was assisted by two advisors: an experienced defense attorney and a retired state police officer who is also an attorney. Several meetings were held and were attended by the subcommittee members and the advisors. Initial discussions centered around the subcommittee's mission; the impact of eyewitness misidentifications on witnesses, victims, the police, and the criminal justice

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<sup>29</sup> Hon. Jay Blitzman, Chief William Brooks, III, and Hon. Michael Fabbri. The Police Practices Subcommittee expresses its deep gratitude to "de facto" subcommittee members John Salsberg, Esq., and Det. Lt. William J. Powers, MSP (ret.), for their invaluable insights and advice, and to Christopher Walsh, Esq., for his many contributions as a member of the subcommittee.

system; and the state of police policy and training in the eyewitness identification arena. Those discussions evolved into discussions about the need for reform in those Massachusetts police departments that had not yet adopted best practices with respect to eyewitness identification. A common theme throughout the subcommittee's deliberations was the need for police training in addition to policy reform. The Police Practices Subcommittee also met with the other subcommittees to discuss and consider the interplay of proposed police protocols on the pretrial and trial process.

### **Development of Recommendations**

Subcommittee members believed that they could best serve the Study Group's objectives by undertaking an extensive review of the scientific research on eyewitness identification and by using that research as a foundation to draft a clearer, more concise, and more comprehensive set of eyewitness identification protocols than those presently required under Massachusetts law, with the intention that these best practices be adopted by all Massachusetts police departments. We call these new protocols "best practices." Subcommittee members saw the development of standard best practices as crucial to ensuring accurate identifications and preventing wrongful convictions that result from suggestive identification procedures.

For instance, scientists recommend that a witness viewing a photographic array be informed that, among other things, the offender may not be in the array. Many Massachusetts police departments presently require that their officers read instructions from forms containing this information to eyewitnesses, or in the case of showups, from laminated cards. The instructions -- or advisements as they are sometimes called -- are one important and significant step that make identification procedures less suggestive and

fairer. Like the "Miranda" card, these forms and cards are simple devices to convey information to eyewitnesses about identification procedures that help ensure that everyday police practices minimize system errors and are consistent throughout the Commonwealth. We recommend the use of such forms and cards as a standard "best practice" to be used by police departments across the Commonwealth. See Recommendation 2, infra.

In addition to developing a set of best practices, the subcommittee sought to learn more about the identification protocols currently used by police departments statewide. In this undertaking, we relied on a project begun by the Massachusetts Chiefs of Police Association (MCOPA) and the New England Innocence Project (NEIP) prior to the Justices' appointment of the Study Group. The MCOPA study contacted Massachusetts police departments by email and asked them to submit their policies on eyewitness identification. NEIP interns then compiled and collated the data. It soon became apparent that some counties, such as Suffolk, Middlesex, Hampden, and Norfolk, had fully embraced eyewitness identification best practices. In other regions of the Commonwealth, responses to the survey were sparse.

In considering best police practices, the subcommittee carefully considered the practical ramifications of potential recommendations. For example, the subcommittee considered requiring that all identification procedures be videotaped. Videotaping identification procedures, we believed, would greatly assist the court in considering the nature and scope of motions to suppress or motions in limine. While such recording is not the norm, the Police Practices Subcommittee concluded that the practice should be incorporated as part of identification protocol where practicable, but stopped short of saying that videotaping should be mandatory. Although many departments presently have



the equipment to videotape station-house defendant and witness interviews, most Massachusetts police agencies do not use the "dash-cam" video systems popular in other parts of the nation, and so they may not at this time have the necessary equipment to videotape showup identifications.

### **Training and Future Challenges**

While police practices are driven by statute and case law, as well as by department policy, the subcommittee believed that the importance of training police officers in this area could not be overstated. Indeed, training is critical not only for police but also for prosecutors, defense counsel, and judges, if the Commonwealth were to adopt the Police Practices Subcommittee's recommended police protocols on eyewitness identification procedures. Trainings would educate officers and others involved in the criminal justice process on the reasoning behind the new protocols and the benefits the protocols have for law enforcement, and give them the knowledge they need to make decisions when faced with unique circumstances. Unfortunately, police training is presently chronically underfunded in Massachusetts; per capita spending is among the lowest in the nation. As a result, state-supported in-service training is nonexistent in most parts of the Commonwealth. This situation will likely make standardized, reform-based instruction difficult to achieve.

The Police Practices Subcommittee is not unmindful of the likely financial and manpower costs associated with achieving widespread eyewitness identification reform among police agencies that have not yet achieved it, as well as for those departments who have begun to embrace the use of the best practices in this area. However, all the members of the subcommittee strongly believe that the tangible benefits that will flow to our criminal

justice system from universal adoption of these best practices will far exceed the costs of "getting there."

## V. REPORT OF THE HEARING SUBCOMMITTEE<sup>30</sup>

### Charter

The Hearing Subcommittee was assigned to research and make recommendations about whether the court in criminal matters should require a hearing on the admissibility of eyewitness testimony where the reliability of a pretrial identification is challenged, apart from those hearings that are constitutionally mandated. If the subcommittee decided to recommend such a hearing, it was assigned to further recommend: (1) in what circumstances the hearings should be required; (2) the scope of the hearing and the type of evidence required; (3) the timing of the hearing; (4) what burdens of proof should pertain; and (5) the appropriate remedies. If the subcommittee determined that such a hearing was not warranted, it was directed to propose best practices for judicial management of cases in which the issue of the admissibility of eyewitness testimony arises both before and during trial.

### Challenges

The subcommittee viewed its Charter, read in the light of Commonwealth v. Walker, 460 Mass. 590 (2011), as an invitation to consider whether Commonwealth v. Jones, 423 Mass. 99 (1996), provides the basis for an expanded pretrial judicial inquiry into the reliability of eyewitness evidence, as well as for an expanded array of remedies beyond constitutionally-mandated exclusion and hearings. In pursuing these central questions, the subcommittee considered, among other things, the extent to which improved jury

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<sup>30</sup> Hon. Rosalind Miller (Chair), Hon. Nancy Gertner, Prof. Rosanna Cavallaro, and Radha Natarajan, Esq.

instructions or judicial notice of scientific research might have an impact on the need for expert testimony on how memory works, particularly with regard to estimator variables; how new hearing procedures would mesh with new police protocols and new jury instructions/judicial notice; and the need to safeguard the rights of defendants in a manner that does not misallocate judicial resources.<sup>31</sup> We were sensitive to the fact that our criminal justice system is not a collection of discrete parts but an environment in which many, often competing, rights and interests must be accommodated, and where changes in one area must preserve the stability of the whole.

### **Massachusetts Law**

Currently, Massachusetts criminal procedure permits pretrial hearings related to identification evidence in three circumstances:

- (1) a Dougan hearing for discovery of the circumstance surrounding any out-of-court identification, see Commonwealth v. Dougan, 377 Mass. 303 (1979);
- (2) a pretrial motion to suppress identification on the grounds that it was unnecessarily suggestive, see Commonwealth v. Cavitt, 460 Mass. 617 (2011); Commonwealth v. Botelho, 369 Mass. 860 (1976);
- (3) a motion in limine to exclude eyewitness identification testimony as more prejudicial than probative, see, e.g., Commonwealth v. Fuentes, 78 Mass. App. Ct. 1111 (2010) (mem.); Commonwealth v. Spencer, 465 Mass. 32, 41-42 (2013).

We first addressed pretrial procedures to suppress. Under Massachusetts law, to prevail on a motion to suppress an eyewitness's out-of-court identification, the defendant must show by a preponderance of the evidence that, in light of the totality of the circumstances, the procedures employed by the police were so unnecessarily suggestive

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<sup>31</sup> A defendant's rights derive from the Constitution, see Manson v. Brathwaite, 432 U.S. 98 (1977); Stovall v. Denno, 388 U.S. 293 (1967), and from the common law, see Commonwealth v. Jones, 423 Mass. 99 (1996).

and conducive to irreparable misidentification as to deny the defendant due process of law. The question is not whether the witness is mistaken, but whether the identification was the product of suggestive police procedures. If the procedure was not impermissibly suggestive, the identification is admissible and the jury is free to weigh the reliability of that evidence as it sees fit. If the eyewitness's out-of-court identification was so unnecessarily suggestive that it was conducive to irreparable misidentification, the evidence is suppressed. See, e.g., Commonwealth v. Walker, 460 Mass. 590, 599 (2011); Commonwealth v. Johnson, 420 Mass. 458, 463-464 (1995). Under the current law, Massachusetts also permits exclusion of the identification where the witness was involved in a highly suggestive confrontation independent of police involvement, see Commonwealth v. Jones, 423 Mass. 99 (1996). Left unclear in the current case law are two categories: (1) where the identification substantially violated certain specific police protocols; and (2) where the identification may well be unreliable not because of police conduct but because of the circumstances of the viewing, e.g., estimator variables. While the focus to date has been almost entirely on police conduct or misconduct (the constitutional due process inquiry), in Commonwealth v. Jones, *supra*, the Court also recognized that, in certain circumstances, "common law principles of fairness dictate that an unreliable identification arising from . . . especially suggestive circumstances . . . should not be admitted." *Id.* at 109-110. See also *id.* at 110 (in certain circumstances neither jury instructions nor cross examination will provide sufficient safeguards against unreliability).<sup>32</sup> The Jones opinion is relatively short and does not elaborate on the matter of unreliable eyewitness testimony more generally.

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<sup>32</sup> In Jones, the eyewitness twice saw the defendant in two highly suggestive pretrial

### **Henderson and Lawson**

Scientific research over the last thirty years, as summarized supra, exposes current Massachusetts procedure as inadequate to reduce the risk of misidentification. First, the holding in Jones -- that certain eyewitness evidence is too unreliable to enter into evidence -- has never been sufficiently developed. Given what scientific research now shows about the impact that certain estimator variables can have on reliability, and in light of persistent myths about how memory works, the holding of Jones can no longer remain just a tantalizing possibility; it must be elaborated. Second, since the science suggests a range of problems with eyewitness identification, we sought to enable the judge to make a measured and tailored response to those problems, even when the facts do not call for suppression.

There was much debate within the subcommittee whether State v. Henderson, 208 N. J. 208 (2011) (Henderson) or State v. Lawson, 352 Or. 724 (2012) (Lawson) should serve as the template for enhanced pretrial hearings. In the process of reviewing the cases and considering options, the subcommittee contacted legal and scientific experts as to their views of an appropriate pretrial procedure.<sup>33</sup> The subcommittee also attempted to gauge the impact of Henderson and Lawson on criminal trials in New Jersey and Oregon, respectively,<sup>34</sup> and to gain an understanding of the approximate number of suppression

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procedures that were not the result of police misconduct.

<sup>33</sup> See letter from Professor Brandon L. Garrett to Judge Nancy Gertner dated December 7, 2012 (Appendix C); letter from Prof. Amy Bradfield Douglass to Judge Robert Kane dated August 22, 2012 (Appendix D); and letter from Prof. Kurt Hugenberg to Judge Robert Kane, n.d. (Appendix E).

<sup>34</sup> The subcommittee attempted to contact prosecutors, defense counsel, bar organizations, and court counsel in these States; when we were able to contact members of these groups, we were told that their organizations were in the early stages of considering the implications of the respective opinions.

hearings concerning eyewitness identification heard in the Massachusetts courts.<sup>35</sup>

Ultimately, on very careful reading and rereading, the majority of the subcommittee saw problems with both the New Jersey and the Oregon cases that we took into account when developing our recommendations.

Henderson. The landmark Henderson case provides the first systematic exploration by a State Supreme Court of the variables affecting eyewitness identification. It both articulates the courts' obligation to incorporate scientific research on memory into consideration of eyewitness identification issues and offers a roadmap for doing so. The subcommittee was persuaded by Henderson that, in order to minimize the risk that unreliable eyewitness identification will lead to wrongful conviction, estimator variables as well as system variables should be subject to pretrial judicial scrutiny in certain limited circumstances. See Recommendation 3. The subcommittee was not persuaded, however, that the model of pretrial judicial gatekeeping adopted by the New Jersey Supreme Court is the most appropriate way to proceed in the Commonwealth.

Briefly, in Henderson, the New Jersey Supreme Court announced a "revised framework" for pretrial challenges to eyewitness identification evidence that "allow[s] all relevant system *and* estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness." Henderson, 208 N. J. at 288

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<sup>35</sup> With the help of law student interns, subcommittee members examined the docket sheets of criminal cases in the Fall River Division of the Superior Court Department and in the Dorchester Division of the Boston Municipal Court Department in an effort to understand how frequently eyewitness evidence was challenged in pretrial proceedings. These efforts proved unfruitful because in almost all cases it was impossible to determine the specific subject of the motion to suppress from the docket sheets and other records we had available to us.

(emphasis in original).<sup>36</sup> The Court observed that "[b]ecause defendants will now be free to explore a broader range of estimator variables at pretrial hearings to assess the reliability of an identification, those hearings will become more intricate. They will routinely involve testimony from both the police and eyewitnesses, and that testimony will likely expand as more substantive areas are explored." Id. at 294.

Some subcommittee members were concerned that the threshold showing required by Henderson -- "some showing of suggestiveness" -- was so over-inclusive as to trigger pretrial evidentiary hearings in a very high percentage of cases involving eyewitness identification. Also, some members were wary that the potentially extensive nature of the hearings would overwhelm the resources of the trial court and significantly hamper the speedy resolution of criminal matters. The Henderson Justices saw their "new framework" as a way to ultimately reduce the likelihood of irreparable misidentification by allowing the pretrial judge to consider estimator as well as system variables once "some showing" of suggestiveness was raised. The subcommittee decided to broaden the opportunities for an evidentiary hearing, but not in the way that the court in Henderson did. While we broadened the kinds of showing that would trigger an evidentiary hearing -- e.g., substantial violations of police protocols, reliability issues apart from police conduct -- we left the

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<sup>36</sup> The defendant bears the initial burden of proving "some evidence of suggestiveness that could lead to a mistaken identification." Henderson, 208 N. J. at 288. If the defendant meets this burden, "the State must then offer proof to show that the proffered eyewitness identification is reliable--accounting for system and estimator variables--subject to the following: the court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless." Id. at 289. If upon weighing the evidence in the totality of circumstances the judge finds that the defendant has ultimately demonstrated "a very substantial likelihood of irreparable misidentification," the court may either suppress the identification or admit it with appropriately tailored jury instructions. Id. In effect, the hearing the Henderson court prescribed was broader than had been the case before the decision.



threshold for showing police suggestiveness to enable a hearing as it was under existing case law.

Lawson. Lawson tackles the issue of eyewitness reliability as a purely evidentiary concern. "A trial court tasked with determining a constitutional claim must necessarily assume that the evidence is otherwise admissible; were it inadmissible on evidentiary grounds, the court would never reach the constitutional question." Lawson, 352 Or. at 747. Cf. Commonwealth v. Spencer, 465 Mass. 32, 41-42 (2013). Under the Lawson approach, "there is no reason to hinder the analysis of eyewitness reliability with purposeless distinctions between suggestiveness and other sources of unreliability."<sup>37</sup> Id. Rather, once eyewitness evidence is challenged under Rule 401, Rule 402, or Rule 403 of the Oregon Rules of Evidence, the question of admissibility comes immediately into play, the proponent of the evidence bears the threshold burden to prove admissibility, and the rules of evidence are the foundation for the judicial determination. In a Lawson-type hearing the option of "fashioning an appropriate intermediate remedy short of exclusion" is committed to the trial judge's sound discretion. Id. at 762.

Lawson issued in the midst of the subcommittee's investigation and caused subcommittee members to rethink their decisions about the bases for challenging

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<sup>37</sup> The Lawson court, like the Henderson court, assumed that its pretrial hearing procedures will not come into play, or only rarely, where only estimator variables are at issue. See Lawson, 352 Or. at 762 ("it is doubtful that issues concerning one or more of the estimator variables that we have identified will, without more, be enough to support an inference of unreliability sufficient to justify the exclusion of the eyewitness identification. In that regard, we anticipate that when the facts of a case reveal only issues regarding estimator variables, defendants will not seek a pretrial ruling on the admission of the eyewitness identification"); Henderson, 208 N. J. at 295 ("when the likely outcome of a hearing is a more focused set of jury charges about estimator variables, not suppression, we question the need for hearings initiated only by estimator variables").

eyewitness identifications, who should bear the burden of proof, and the scope of remedies. Basing determinations about the admissibility of eyewitness evidence on evidentiary rules held particularly strong appeal for some subcommittee members, because judges and lawyers are already conversant in the rules of evidence. Lawson also emphasizes that the judge has great flexibility in the conduct of the hearing, id., at 763, which some subcommittee members found preferable to the more rigidly-prescribed evidentiary hearing protocols set out in Henderson. Lawson's counsel to judges and attorneys to view eyewitness evidence as trace evidence (a position rejected in Henderson),<sup>38</sup> was also appealing to some members of the subcommittee and the Study Group, who felt that the trace evidence analogy most accurately captures the nature of eyewitness evidence and forms the appropriate basis for analyzing reliability.

Ultimately, however, and after extended consideration within the subcommittee and within the Study Group as a whole, it was decided that the evidentiary approach of Lawson, which places the burden of proof of admissibility on the prosecution in all situations, is incompatible with existing Massachusetts due process standards. Massachusetts law at

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<sup>38</sup> Compare Lawson, 352 Or. at 748 ("Because of the alterations to memory that suggestiveness can cause, it is incumbent on courts and law enforcement personnel to treat eyewitness memory just as carefully as they would other forms of trace evidence, like DNA, bloodstains, or fingerprints, the evidentiary value of which can be impaired or destroyed by contamination") with Henderson, 208 N. J. at 295-296 ("We do not adopt the analogy between trace evidence and eyewitness identifications. To be sure, like traces of DNA or drops of blood, memories are part of our being. By necessity, though, the criminal justice system collects and evaluates trace evidence and eyewitness identification evidence differently. Unlike vials of blood, memories cannot be stored in evidence lockers. Instead, we must strive to avoid reinforcement and distortion of eyewitness memories from outside effects, and expose those influences when they are present. But we continue to rely on people as the conduits of their own memories, on attorneys to cross-examine them, and on juries to assess the evidence presented. For that reason, we favor enhanced jury charges to help jurors perform that task").

present places the burden of proving police suggestiveness on the defendant. In addition, the Lawson approach, by treating all sources of reliability alike -- both police suggestiveness and estimator variable problems -- runs the risk of weakening a defendant's due process rights concerning police conduct. With nearly equal weight given to all factors that might affect admissibility, and the burden shifted to law enforcement to prove that a challenged eyewitness identification should be admitted, it is possible that eyewitness identification evidence that would be excluded under Walker and its precedents would be admissible under a Lawson-type analysis.<sup>39</sup> The subcommittee concluded that it was not within its Charter to recommend so drastic a change in Massachusetts law, although of course neither the subcommittee nor the Study Group has foreclosed the possibility that subsequent developments in the science may in the future lead to a different conclusion. Some members of the subcommittee were also concerned about the toll that a Lawson-type approach would exact on our already overburdened criminal justice system; we heard reports from Oregon that defense counsel were being advised, pursuant to Lawson, to raise evidentiary challenges any time eyewitness identification was likely to be an issue at trial.

### **The Massachusetts Approach**

Henderson and Lawson offer conflicting strategies for pretrial adjudication of eyewitness identification issues. In the end, neither proved a satisfactory model in the

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<sup>39</sup> See Lawson, 352 Or. at 746-747: "A constitutional due process analysis might properly consider suggestiveness as a separate pre-requisite to further inquiry because the Due Process Clause is not implicated absent some form of state action, such as the state's use of a suggestive identification procedure. . . As a matter of state evidence law, however, there is no reason to hinder the analysis of eyewitness reliability with purposeless distinctions between suggestiveness and other sources of unreliability."

entirety, and the subcommittee chose to recommend a third alternative, which we dubbed the "Massachusetts" approach. Pursuant to Mass. R. Crim. P. 13, as appearing in 442 Mass. 1516 (2004), the defendant is entitled to an evidentiary pretrial hearing in any of the following circumstances: (i) the defendant makes a preliminary showing of an unnecessarily suggestive identification procedure (the current standard); or (ii) the defendant makes a showing that a witness was involved in a highly suggestive confrontation with the defendant independent of any police involvement, see Commonwealth v. Jones, 423 Mass. 99 (1996); or (iii) that the police failed to follow certain specific best police practices on eyewitness identification in a substantial way in conducting or arranging a pretrial identification procedure;<sup>40</sup> or (iv) when the pretrial eyewitness identification is uncorroborated and the defendant makes a showing of the presence of estimator variables casting doubt on the reliability of the identification.

Modifying the threshold for obtaining a hearing to cover failure to follow certain specific best police practices encourages police officers to employ best practices in gathering and reporting eyewitness identification evidence, and provides a disincentive to ignore the protocols. Modifying the threshold for obtaining a hearing to include cases in which estimator variables complicate uncorroborated eyewitness evidence allows for preliminary judicial scrutiny in circumstances where the risk of irreparably harmful misidentification is arguably the greatest. These changes would represent a substantial advance, in accord with the science, over current Massachusetts procedure. The recommendations encourage judges to hear expert testimony where appropriate, and presume that as the science evolves, the judge may appropriately consider factors other

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<sup>40</sup> See Appendix to Recommendation 3, infra, at 115-116.

than the system and estimator variables identified here and in the jury instructions and police protocols.

The recommendations also adopt the Lawson approach of taking judicial notice of certain scientifically-established facts about eyewitness identification. The subcommittee believes that this approach will significantly reduce the cost and expense of criminal hearings and trials by obviating the need for the parties in each separate case to prove the same established facts.

The subcommittee also endorsed the Lawson approach of adding intermediate remedies to be employed in the judge's sound exercise of discretion; in its recommendations, the subcommittee offers a nonexclusive list of remedies.<sup>41</sup> With regard to expressions of certainty, the recommendations were strongly influenced by the work of Professor Brandon Garrett, which is recommended to the Justices' attention.<sup>42</sup> After vigorous debate about whether to recommend exclusion of all certainty statements, the Study Group decided to recommend that certainty statements be permissible under specific circumstances. With regard to in-court identifications, the subcommittee recommended that in-court identification not be permitted except, in the judge's discretion, on redirect examination, in rebuttal, or in other circumstances where the defendant challenges the witness's ability to make such identification.

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<sup>41</sup> The Henderson court acknowledged in passing that intermediate remedies might be appropriate, but stated that such cases will be rare. 208 N. J. at 298 ("in rare cases, judges may use their discretion to redact parts of identification testimony, consistent with [evidentiary] Rule 403") (brackets added).

<sup>42</sup> Garrett, *Eyewitnesses and Exclusion*, 65 Vand. L. Rev. 451 (2012).

A clarification of the Massachusetts Rules of Criminal Procedures should obviate the need for discovery hearings in most cases, thereby conserving court resources and contributing to speedier resolution of criminal matters. Accordingly, the subcommittee recommends that Mass. R. Crim. P. 14 (a) (1) (A) (viii), as amended, 444 Mass. 1501 (2005), be further amended by replacing the period after "procedures" with a comma and adding thereafter the phrase: "including without limitation a summary of the location, time, and conditions of the identification procedure; a list of all persons present during the identification procedure; and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity, the fairness or accuracy of the identification procedures, or compliance with the certain specific best police practices on eyewitness identification."

#### **Other Issues**

The subcommittee discussed making recommendations regarding the administration of the protocols: specifically, (1) when should the motion on eyewitness evidence be brought, and (2) whether the judge who hears the motion should be the trial judge, and, if not, to what extent the trial judge should be bound by the motion judge's orders regarding remedies. The subcommittee concluded that these were matters of judicial administration outside the scope of the Study Group's charter.

#### **Future Action**

Should the Court approve the recommendations of the Hearing Subcommittee, training for the judiciary and the bar will be essential to a proper understanding and application of the new hearing procedure. The recommendations call on trial judges to take a more active role concerning the admissibility of eyewitness testimony. Yet most trial

judges have had neither the time nor the opportunity to study eyewitness research in detail. Therefore, we feel strongly that judicial training on any recommendations adopted by the Justices be mandatory.<sup>43</sup>

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<sup>43</sup> See generally Sheehan, Making Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions, 52 B.C. L. Rev. 651 (2011).

## **JURY INSTRUCTIONS SUBCOMMITTEE**<sup>44</sup>

### **Charter**

The Supreme Judicial Court charged the Study Group on Eyewitness Identification (Study Group) with determining "whether existing model jury instructions provide adequate guidance to juries in evaluating eyewitness testimony" in view of the results of the social science research that has emerged during the past three decades. Commonwealth v. Walker, 460 Mass. 590, 604 n.16 (2011). Accordingly, the Jury Instruction Subcommittee was tasked with revising the identification jury instructions in order to educate juries on the science of eyewitness identification and to reduce the reliance on expert testimony if, in its view, the subcommittee considered the current model to be inadequate. The Study Group also resolved that any new instructions be easy to understand and account for variations in identification procedures, such as photo arrays and showups, and variations in the circumstances of each case, such as the fact that some perpetrators use weapons. With these considerations in mind, the subcommittee set about its work.

### **Organization**

When the subcommittee first met in early 2012, its initial task was to learn the existing body of scientific knowledge in the field of eyewitness identification. The then-recent Supreme Court of New Jersey decision in State v. Henderson, 208 N. J. 208 (2011) (Henderson), and the Special Master's Report, Geoffrey Gaulkin, P.J.A.D., to the Supreme Court of New Jersey in Henderson (Docket No. A-8-08) ("Special Master's Report"), provided a comprehensive summary of the social science research of memory and

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<sup>44</sup> Hon. Andrew D'Angelo (Chair), James M. Doyle, Esq., Natalie Monroe, Esq., and Jane Montori, Esq.



eyewitness identification. The Special Master issued his report in June 2010 after a ten-day hearing admitting testimony from seven experts in the field of eyewitness identification. In addition, the parties to the hearing, the Attorney General of New Jersey, the respondent, the Innocence Project, and the Association of Criminal Defense Lawyers of New Jersey submitted over 200 published scientific studies, articles, and books for the Special Master's consideration. Because one expert described the material that was presented to the Special Master as "the gold standard in terms of the applicability of social science research to the law" of eyewitness identification, Henderson, 208 N. J. at 283, the jury instruction subcommittee used the Special Master's Report as its principal resource for the science of eyewitness identification. In particular, the Jury Instructions Subcommittee used the Special Master's descriptions of the nature of memory, including its three discrete stages, and of the system and estimator variables that affect the three stages.

The subcommittee relied upon two other cases that were decided during the time it met. In September 2012, the Supreme Court of Connecticut issued its opinion in State v. Guilbert, 306 Conn. 218 (2012) (Guilbert), which used the science reported in Henderson and other cases to amend the court's position on the admissibility of expert testimony on eyewitness identification. Two months later, in State v. Lawson, 352 Or. 724 (2012) (Lawson), the Supreme Court of Oregon used Henderson's findings to revise its test for determining the admissibility of eyewitness identification evidence. The subcommittee used Lawson's Appendix, 352 Or. at 769-789, which was based upon Henderson and the Special Master's Report, as another source of information on the results of the eyewitness identification research as it applies to the law.

In addition to the recent decisions from other jurisdictions and the Special Master's Report, the subcommittee considered scientific journals and law review articles that discussed the efficacy of jury instructions in educating jurors about the factors that influence identification. In particular, the subcommittee reviewed Bornstein and Hamm, *Jury Instructions on Witness Identification*, 48 *Court Rev.* 48 (2012); Marder, *Bringing Jury Instructions into the Twenty-first Century*, 81 *Notre Dame L. Rev.* (2006); and Simonsen, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 *Md. L. Rev.* 1044 (2011). These articles cite many of the major scientific studies on eyewitness identification that the Special Master considered. The subcommittee also consulted several writings that explain how to draft so-called "plain-language" jury instructions. See, e.g., P.M. Tiersma, *Communicating with Juries: How to Draft More Understandable Jury Instructions*, National Center for State Courts, Williamsburg, VA (2006).

### **Origins, Scope, and Structure of Existing Massachusetts Instructions**

Next, the subcommittee considered the existing Massachusetts jury instructions on identification in view of the scientific research. Massachusetts instructions, like the instructions of many other State and Federal courts, are based on the model instruction in United States v. Telfaire, 469 F.2d 552, 559-559 (D.C. Cir. 1972), which the Supreme Judicial Court adopted in Commonwealth v. Rodriguez, 378 Mass. 296, 310 (1979), and modified in Commonwealth v. Cuffie, 414 Mass. 632, 640 (1993), and Commonwealth v. Santoli, 424 Mass. 837, 845 (1997) (omitting language about witness's confidence). The supplemental charge on good faith or honest mistake in identification is set forth in Commonwealth v. Pressley, 390 Mass. 617, 620 (1983).

Although these instructions enumerate several factors that jurors should consider in assessing identification testimony -- the witness's capacity and opportunity to observe the offender, the duration of the event, the distance, the lighting conditions, whether the witness knew the perpetrator, the length of time between the observation and the identification, the nature of the identification procedure, and the witness's credibility -- the subcommittee identified three deficiencies in the current instructions. First, they omit some system and estimator variables that social scientists have proved can influence the accuracy of an identification, such as stress, the perpetrator's use of a weapon, and the racial or ethnic difference between the perpetrator and the witness. Second, the current instructions fail to explain the nexus between eyewitness identification and memory; that is, the jury is not informed that certain system and estimator variables influence memory at its different stages, and therefore affect the reliability of an identification. And third, due to jurors' lack of knowledge of these variables that can affect a witness's memory and confidence and jurors' reliance on witness confidence, it is significant that the current instructions lack any direction to the jury regarding the weak correlation between confidence and the accuracy of an identification.

### **Initial Conclusions**

The subcommittee's decision to revise the Massachusetts jury instructions on identification was based on the obvious lacunae in the current instructions, the wrongful convictions due to misidentifications, and the Supreme Judicial Court's charge to consider whether improved jury instructions can reduce the need for expert testimony. See generally Henderson, 208 N. J. at 296, 298-299 (directing committees to modify the New Jersey jury instructions to reflect the system and estimator variables for which scientists have reached a

consensus); see also Guilbert, 306 Conn. at 257-258 (holding that the court has discretion to determine that "under the specific facts and circumstances presented, focused and informative jury instructions on the fallibility of eyewitness identification evidence of the kind contemplated by . . . Henderson . . . would alone be adequate to aid the jury in evaluating the eyewitness identification at issue").

The subcommittee determined that a description of how memory works would be the instructions' platform. The instructions would explain the system and estimator variables by their impact on the three stages of memory: estimator variables affect the first stage (acquisition); and system variables affect the second and third stages (retention and retrieval). The subcommittee also concluded that the instructions would contain only the system and estimator variables that are generally accepted within the social science community; that is, the variables that are not substantially in dispute. For example, although social scientists have conducted research on age as a factor in the accuracy of identification, the subcommittee did not include age in the instructions because the science is inconclusive on specific age as an estimator variable. In addition, the subcommittee decided that while some instructions, such as the central precepts of memory function, would be delivered in all cases, the trial judge should tailor other portions of the instructions to the evidence in each case. For example, if the perpetrator used a weapon, the supplemental instruction on weapon focus would be included in the charge, and if the identification procedure was a photo array, the instruction on proper photo array procedure would be delivered.

### **Assignments, Review, and Final Product**

The subcommittee was charged to draft instructions that accurately convey the science in language that jurors will understand and that will be fair to both parties. When the subcommittee began to write the revised instructions, no other jurisdictions had identification instructions that incorporated social science research on memory and on the system and estimator variables that were deemed to be indisputable. Because there were no acceptable instructions to use as a pattern, the subcommittee drafted the three main areas of the instructions: memory function; estimator variables; and system variables. During the subcommittee's discussions of these initial drafts, New Jersey issued its proposed revised instructions. These instructions resembled the subcommittee's draft in respect to enumerating the descriptions of variables. But the subcommittee determined that the Massachusetts instructions should contain a more detailed explanation of memory and the impact of variables on memory.

Through emails and at numerous meetings, the subcommittee circulated drafts and revisions of drafts at the rate of at least one per month. The October 2012 version was submitted to the entire Study Group for comments. After the subcommittee incorporated the Study Group's suggestions and the police practices subcommittee's report, the subcommittee met again and finalized the draft that is submitted to the Court.

From the outset of the writing process until the presentation of the final draft, the subcommittee intensely debated several general concepts. One question was whether the science of eyewitness identification was the proper subject of judicial notice in Massachusetts. See Mass. G. Evid. § 201 (2012). The timing of the instructions, in addition to inclusion in the final charge, was another subject of discussion. The subcommittee drafted a short pre-charge for use in identification cases and recommended

that trial judges use their discretion to deliver the pre-charge at other times, i.e., prior to and/or subsequent to an identification witness's testimony. The Study Group considered whether system variables could be or should be assigned to specific stages of memory, as the final version reflects. And although it was suggested that the portion of the instruction on the Commonwealth's burden of proof include the language from Commonwealth v. Cuffie, 414 Mass. at 640 -- "[i]t is not essential that the witness be . . . free from doubt as to the correctness of his [identification]" -- that is not included in the proposed charge.

The subcommittee not only considered the order of paragraphs, the order of sentences within paragraphs, and the order of words within sentences, it debated and carefully chose each individual word of each sentence in order to achieve the goal of delivering correct explanations of the science in language that jurors will understand. For instance, the subcommittee and the entire Study Group disagreed about the term used to describe the third stage of memory. The subcommittee considered "retrieve," "retrieve and reconstruct in our minds," and "assemble an account" before finally determining that "form a memory" most accurately and clearly reflects the science. The words used to describe the rate of memory decay were extensively discussed and carefully chosen. The debate over "concentrate" vs. "focus" and "reliable" vs. "accurate" further exemplifies the subcommittee's meticulous work.

### **The Future**

To date, there are no studies that conclusively prove that revised jury instructions improve jury decision-making. See Bornstein and Hamm, supra at 53. But there is "almost no evidence that . . . modifications [simplifying language, providing written and oral instructions, and including interactive instructions] make mock jurors' decisions *worse*."

Id. (emphasis supplied). One journal article indicates that "modifying instructions would seem to be well worth the effort." Id.

Training of judges and attorneys will be essential in order for the bench and the bar to implement the revised instructions. It is clear that the proposed instructions include scientific concepts that will not be familiar to all those who are involved in litigation and that they may be met by skepticism on the part of some who are not familiar with the science. In addition, the instructions should be periodically reviewed to reflect changes in the science of eyewitness identification.

# RECOMMENDATIONS

## **RECOMMENDATION 1: JUDICIAL NOTICE OF LEGISLATIVE FACTS**

In order to implement the full set of recommendations of the Study Group, the Study Group recommends that the Court take judicial notice as legislative facts of the modern psychological principles regarding eyewitness memory, as set out in State v. Lawson, 352 Or. 724, 769-789 (2012) (internal pagination and citations omitted), which is reproduced in full below.

### I. ESTIMATOR VARIABLES

#### A. *Stress*

High levels of stress or fear can have a negative effect on a witness's ability to make accurate identifications. Although moderate amounts of stress may improve focus in some circumstances, research shows that high levels of stress significantly impair a witness's ability to recognize faces and encode details into memory. *See* Charles A. Morgan III *et al.*, *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J. L. & Psychiatry 265, 275–76 (2004) (so stating). When under high amounts of stress, witnesses are often unable to remember particular details—like facial features or clothing—that are not immediately relevant to the basic survival response triggered by adrenaline and other hormones that are released in highly stressful situations. *Id.*

A meta-analysis [\*] of 27 independent studies conducted on the effects of stress on identification accuracy showed that, while 59 percent of the 1,727 participants correctly identified the target individual in a target-present lineup after a low-stress encounter, only



39 percent did so after high-stress encounters. Kenneth A. Deffenbacher *et al.*, *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 *Law & Hum. Behav.* 687 (2004). In another study, military survival school participants were subjected to two 40-minute interrogations, each by different interrogators, following a 12-hour period of confinement without food and sleep in a mock prisoner of war camp. Morgan, *Accuracy of Eyewitness Memory*, 27 *Int'l J. L. & Psychiatry* 265 (2004). One interrogation was conducted under high-stress conditions, involving physical confrontation, while the other was conducted under low-stress conditions, involving only deceptive questioning. *Id.* When asked the next day to identify their interrogators, only 30 percent of the participants correctly identified their high-stress interrogator, while 60 percent correctly identified their low-stress interrogator. *Id.* The study also noted an associated increase in false identifications—56 percent of the participants falsely identified another person as their high-stress interrogator, compared to 38 percent who did so with regard to their low-stress interrogator. *Id.*

[\*] A meta-analysis is a type of study in which researchers combine and analyze the results of multiple previously published studies on a certain subject in order to evaluate their cumulative findings in a broader context, and over larger sample sizes. Meta-analyses do not involve conducting any new experiments, but are nevertheless highly regarded in the scientific community for their ability to synthesize a large amount of data and illustrate a general consensus in a particular field. See Roy S. Malpass *et al.*, *The Need for Expert Psychological Testimony on Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 14 (B. Cutler ed., 2009) (describing utility of meta-analytic studies).

The negative effect of stress on the reliability of eyewitness identifications contradicts a common misconception that faces seen in highly stressful situations can be "burned into" a witness's memory. Consequently, the amount of stress inflicted on an eyewitness has the

potential to impair a jury's ability to fairly and accurately weigh reliability, because jurors may incorrectly assume that stress *increases* reliability. In addition, stress may also interact with other factors to compound unreliability. Studies demonstrate, for example, that witnesses are more likely to overestimate short durations of time in high-stress situations than in low-stress situations. See Elizabeth F. Loftus *et al.*, *Time Went by so Slowly: Overestimation of Event Duration by Males and Females*, 1 *Applied Cognitive Psychol.* 3 (1987) (so stating).

#### B. *Witness Attention*

In assessing eyewitness reliability, it is important to consider not only what was within the witness's view, but also on what the witness was actually focusing his or her attention. It is a common misconception that a person's memory operates like a videotape, recording an exact copy of everything the person sees. Studies show, however, that memory in fact works much differently. A person's capacity for processing information is finite, and the more attention paid to one aspect of an event decreases the amount of attention available for other aspects. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 *Law & Hum. Behav.* 1, 10–11 (2009).

One commonly encountered example of that fact is the weapon-focus effect. Studies consistently show that the visible presence of a weapon during an encounter negatively affects memory for faces and identification accuracy because witnesses tend to focus their attention on the weapon instead of on the face or appearance of the perpetrator, or on other details of the encounter. See, e.g., Kerri L. Pickel, *Remembering and Identifying Menacing Perpetrators: Exposure to Violence and the Weapon Focus Effect*, in 2 *The Handbook of*

Eyewitness Psychology: Memory for People 339 (R.C.L. Lindsay *et al.* eds., 2007). That diminished attention factor frequently impairs the witness's ability to encode things such as facial details into memory, resulting in decreased accuracy in later identifications.

Although the weapon-focus effect is perhaps the most well-documented illustration regarding the effects of witness distraction, some studies indicate that the effect is not limited to dangerous or threatening objects but, in fact, extends to any object that attracts the witness's attention by virtue of being unusual or out of place in the context in which it is encountered. *See Id.* at 353–54 (discussing experiments involving unusual rather than threatening items). Studies have documented similar impairment of identification performance when witnesses viewed the target holding unusual, but nonthreatening, objects like a stalk of celery or a toy doll. *Id.*

The negative effect of weapon-focus on identification accuracy may be magnified when combined with stress, short exposure times, poor viewing conditions, or longer retention intervals,[\*\*] and may also result in less accurate initial descriptions of the perpetrator. *Id.*; Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 *Law & Hum. Behav.* 413, 417 (1992). In addition, evidence regarding a witness's attention is particularly susceptible to the inflating effects of confirming feedback. Studies demonstrate that witnesses generally do not contemporaneously observe their own degree of attention or other viewing conditions as they observe an event. Gary L. Wells, "*Good, You Identified the Suspect*": *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 *J Applied Psychol.* 360 (1998). Thus, when asked later how closely they were paying attention, witnesses may rely more heavily on external context clues—like confirming feedback—than on independent recollection.

[\*\*] The term "retention interval" refers to the duration of time between the witness's initial observation of the perpetrator and the identification event.

### *C. Duration of Exposure*

Scientific studies indicate that longer durations of exposure (time spent looking at the perpetrator) generally result in more accurate identifications. Brian H. Bornstein *et al.*, *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: A Meta-Analysis of Two Variables Associated with Initial Memory Strength*, 18 *Psychology, Crime & Law* 473 (2012). One meta-analysis shows that the beneficial effect of longer exposure time on accuracy is greatest between the shortest durations, up to approximately 30 seconds. *Id.* In contrast, for durations over 30 seconds, only substantial increases in exposure time produced marked improvement in witness performance. *Id.* However, it is impossible to determine conclusively that any particular duration of exposure is too short to make an accurate identification, nor so long as to entirely eliminate the possibility of a mistaken identification. Indeed, at least one study has noted *decreases* in identification accuracy with longer viewing durations, in cases where the appearance of the person to be identified has changed significantly between the identification and the initial viewing. J. Don Read *et al.*, *Changing Photos of Faces: Effects of Exposure Duration and Photo Similarity on Recognition and the Accuracy-Confidence Relationship*, 16 *Experimental Psychol.: Learning, Memory, and Cognition* 870 (Sept 1990).

Studies also show that witnesses consistently and significantly overestimate short durations of time (generally, durations of 20 minutes or less), especially during highly stimulating, stressful, or unfamiliar events. Loftus, *Time Went by so Slowly*, 1 *Applied Cognitive Psychol.* 3; A. Daniel Yarmey, *Retrospective Duration Estimations for Variant*

*and Invariant Events in Field Situations*, 14 *Applied Cognitive Psychol.* 45 (2000).

#### D. *Environmental Viewing Conditions*

The conditions under which an eyewitness observes an event can significantly affect the eyewitness's ability to perceive and remember facts regarding that event. Although we limit our discussion here to the basic environmental conditions of distance and lighting, we have already noted that any aspect of a viewing environment can potentially impair an eyewitness's ability to clearly view an event or a perpetrator.

Unsurprisingly, studies confirm that visual perception decreases with either distance or diminished lighting. In the case of distance, unlike variables subject to probability determinations, scientists have identified certain dispositive endpoints beyond which humans with normal, unaided vision are physically incapable of discerning facial features. Studies also show that witnesses who receive post-identification feedback confirming the validity of their identification tend to report more favorable initial viewing conditions than witnesses who do not receive such feedback. Wells, *et al.*, "*Good, You Identified the Suspect*": *Feedback to Eyewitnesses Distorts their Reports of the Witnessing Experience*, 83 *Applied Psychol.* 360 (1998).

#### E. *Witness Characteristics and Condition*

An eyewitness's ability to perceive and remember varies with the witness's physical and mental characteristics. Although different witnesses and fact patterns may implicate different variables, some common variables that affect the ability to perceive and remember include visual acuity, physical and mental condition (illness, injury, intoxication, or fatigue), and age. Studies demonstrate, for example, that intoxicated witnesses are more likely to misidentify an innocent suspect than their sober counterparts. *See Jennifer E.*

Dysart *et al.*, *The Intoxicated Witness: Effects of Alcohol on Identification Accuracy from Showups*, 87 *J. Applied Psychol.* 170 (2002) (finding that 78 percent of participants with blood alcohol levels less than .04 percent correctly rejected a showup where the perpetrator was absent, while only 48 percent of participants with higher blood alcohol levels—averaging .09 percent—did so).

Age can also significantly affect the reliability of a witness's identification, memory, and perception. Studies show that children and elderly witnesses are generally less likely to make accurate identifications than adults, especially in target-absent conditions. Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 *Ann. Rev. Psychol.* 277, 280 (2003).

#### F. *Description*

Contrary to a common belief, studies reveal that there is little correlation between a witness's ability to describe a person and the witness's ability to later identify that person. Christian A. Meissner *et al.*, *Person Descriptions as Eyewitness Evidence*, in 2 *The Handbook of Eyewitness Psychology: Memory for People* 3 (R.C.L. Lindsay *et al.*, eds., 2007). Indeed, some studies show a negative effect on identification accuracy after witnesses have attempted to produce a composite of a suspect or provide detailed verbal descriptions of facial features, a development that might result from the different cognitive mechanisms employed to verbally describe faces as opposed to recognizing them. *Id.* Other studies indicate that witnesses who focus on memorizing particular facial features at a viewing rather than on the face as a whole may be able to better describe those features, but tend to perform less accurately in later identification procedures. *Id.*

#### G. *Perpetrator Characteristics—Distinctiveness, Disguise, and Own-Race Bias*

Witnesses are better at remembering and identifying individuals with distinctive features than they are those possessing average features. *See* Peter N. Shapiro & Steven Penrod, *Meta-Analysis of Facial Identification Studies*, 100 *Psychol. Bull.* 139 (1986) (summarizing results of a number of studies on target distinctiveness). However, identification accuracy drops significantly when an individual's facial features have changed since the witness's initial observation. K.E. Patterson & A.D. Baddeley, *When Face Recognition Fails*, 3 *Experimental Psychol.* 406, 410 (1977) (finding that recognition performance dropped by over 50 percent when researchers manipulated the target's facial appearance after the initial opportunity to view by changing hairstyles or adding or removing facial hair). Similarly, studies 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. *See, e.g.*, Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 *Cardozo Pub. L. Pol'y & Ethics J.* 327, 332 (2006) (summarizing cumulative results of six studies showing that identification accuracy dropped from 57 percent to 44 percent when perpetrator hair and hairline cues were masked).

Studies also indicate that witnesses are significantly better at identifying members of their own race than those of other races. *See* Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A MetaAnalytic Review*, 7 *Psychol., Pub. Pol'y, & L.* 3 (2001) (summarizing results of three decades of studies demonstrating effect of own-race bias in eyewitness identifications). Indeed, one

study found that cross-racial identifications were 1.56 times more likely to be incorrect than same-race identifications. Conversely, subjects were 2.2 times more likely to accurately identify a person of their own race than a person of another race. *Id.* at 15–16 (2001).

Despite widespread acceptance of the cross-racial identification effect in the scientific community, fewer than half of jurors surveyed understand the impact of that factor.

Richard S. Schmechel et al., *Beyond the Ken? Testing Juror's Understanding of Eyewitness Reliability Evidence*, 46 *Jurimetrics* 177, 200 (2006).

#### H. *Speed of Identification (Response Latency)*

Accurate identifications generally tend to be made faster than inaccurate identifications. Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 *Psychol. Sci. Pub. Int.* 45, 67–68 (2006). Some researchers posit that faster identifications correlate with accuracy because the automatic cognitive process associated with facial recognition operates faster than the deliberative cognitions used to make relative judgments, a process that is more likely to result in misidentification. *Id.*

The usefulness of that variable is nevertheless limited by the fact that studies have been unable to agree upon the exact boundaries of the effect. *Id.* One study found that the most accurate identifications were made within 10 to 12 seconds. *Id.* (citing David Dunning & Scott Perretta, *Automaticity and Eyewitness Accuracy: A 10–12 Second Rule for Distinguishing Accurate from Inaccurate Positive Identifications*, *Applied Psychol.*, 87, 951–962 (2002)). A later study, however, noted a positive correlation to accuracy with response times ranging from five to 29 seconds, but also found that identifications made faster than those optimal time boundaries were not highly accurate. *Id.* (citing Nathan Weber et al., *Eyewitness Identification Accuracy and Response Latency: The Unruly 10–12*



*Second Rule*, *Experimental Psychol. Applied*, 139–147 (2004)).

It is worth noting that, although identification speeds can be measured objectively by the administrator of the identification procedure, witnesses' self-reports regarding their deliberative process—*i.e.*, how long it took the witness to make an identification, how difficult it was, whether the defendant just "popped out" at them, or whether the witness employed a process of elimination or other relative judgment to arrive at the identification—are not highly reliable. *Id.* As with self-reports concerning many of the other factors previously discussed, witnesses' perception of their own deliberative process can be manipulated by suggestive procedures and confirming feedback. *Id.* Additionally, studies have shown that suggestive identification procedures can result in quicker identifications without any corresponding increase in accuracy. *See, e.g.*, David F. Ross *et al.*, *When Accurate and Inaccurate Eyewitnesses Look the Same: A Limitation of the 'Pop-Out' Effect and the 10- to 12-Second Rule*, 21 *Applied Cognitive Psychol.* 677–90 (2007).

#### I. *Level of Certainty*

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. Regarding *prospective* certainty—the witness's confidence *prior to* the identification procedure in his or her ability to make an identification—a number of meta-analytic studies have found no correlation between certainty and identification accuracy. In contrast, *retrospective* certainty—witness confidence in the accuracy of their identification *after* it has occurred—may have a weak correlation with accuracy. *See* Gary L. Wells & Elizabeth A. Olsen, *Eyewitness Testimony*, 54 *Ann. Rev. Psychol.* 277, 283 (2003) (describing studies). The effect, however appears

only within the small percentage of extremely confident witnesses who rated their certainty at 90 percent or higher, and even those individuals were wrong 10 percent of the time. *Id.*

Research also shows that retrospective self-reports on eyewitness certainty are highly susceptible to suggestive procedures and confirming feedback, a factor that further limits the utility of the certainty variable. Wells, "*Good, You Identified the Suspect*," 83 *J. Applied Psychol.* 360. Witnesses who receive confirming feedback *i.e.*, are told or otherwise made aware that they made a correct identification—report higher levels of retrospective confidence than witnesses who receive either no feedback or disconfirming feedback. *Id.* It appears, moreover, that confirming feedback may inflate confidence to a greater degree in mistaken identifications than in correct identifications. *See, e.g.*, Amy L. Bradfield *et al.*, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 *J. Applied Psychol.* 112, 115 (2002) (reporting that inaccurate witness self-reports increased from an average of 49 percent certain to an average of 67 percent certain after receiving confirming feedback, while the same feedback increased accurate witnesses' certainty only from an average of 80 percent to 85 percent).

Finally, we note that witness certainty, although a poor indicator of identification accuracy in most cases, nevertheless has substantial potential to influence jurors. Studies show that eyewitness confidence is the single most influential factor in juror determinations regarding the accuracy of an eyewitness identification. *See, e.g.*, Gary L. Wells *et al.*, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 *J. Applied Psychol.* 440, 446 (1979); Michael R. Leippe *et al.*, *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory*

*Feedback Under Varying Lineup Conditions*, 33 *Law & Hum. Behav.* 194, 194 (2009) (summarizing prior research). Jurors, however, tend to be unaware of the generally weak relationship between confidence and accuracy, and are also unaware of how susceptible witness certainty is to manipulation by suggestive procedures or confirming feedback. *See, e.g.,* Tanja R. Benton *et al.*, *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 *Applied Cognitive Psychol.* 115, 120 (2006) (finding that only 38 percent of jurors surveyed correctly understood the relationship between accuracy and confidence and only 50 percent of jurors recognized that witnesses' confidence can be manipulated). As a result, jurors consistently tend to overvalue the effect of the certainty variable in determining the accuracy of eyewitness identifications.

#### *J. Memory Decay (Retention Interval)*

It is a well-known fact that memory decays over time. 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")—or even a subsequent attempt to recall the initial observation—the less reliable the later recollection will be. An aspect of memory decay that is less well known, however, is that decay rates are exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time. *See* Kenneth A. Deffenbacher, *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 *J. Experimental Psychol.: Applied* 139, 148 (2008). As a result, the difference in reliability between an identification made 10 minutes after an incident and one made two hours after an incident maybe significantly greater than the difference between an identification made

two weeks after an incident and one made two months after the same incident.

Estimating the effect of memory decay, however, turns in large part on the strength and quality of the initial memory encoded; a witness forgets, over time, only what was encoded into the witness's memory to begin with. Scientists generally agree that memory never improves. *Henderson*, 208 N. J. at 267, 27 A.3d 872. Consequently, memory decay must be viewed in conjunction with other variables that affect the initial encoding of memories, such as cross-racial identification, weapon-focus, degree of attention, distance, lighting, and duration of initial exposure.

## II. SYSTEM VARIABLES

### A. *Blind Administration*

In police lineup identifications, research shows that lineup administrators who know the identity of the suspect often consciously or unconsciously suggest that information to the witness. Steven E. Clark *et al*, *Lineup Administrator Influences on Eyewitness Identification Decisions*, 15 J. Experimental Psychol.: Appl. 63 (2009). In the most obvious cases of improper suggestion, a lineup administrator may tell a witness outright who the putative suspect in a lineup is, or otherwise make other comments suggesting the suspect's identity. However, studies show that, even in the absence of suggestive verbal communication, lineup administrators can nevertheless convey suggestive information to witnesses nonverbally through tone of voice, pauses, demeanor, facial expressions, and body language. Such nonverbal communications may be difficult to detect and prevent. Indeed, studies show that both witnesses and administrators are generally unconscious of the influence that the lineup administrator's behavior has on identification process. *See* Ryauu M. Haw & Ronald P. Fisher, *Effects of Administrator–Witness Contact on*

*Eyewitness Identification Accuracy*, 89 J. Applied Psychol. 1106, 1110 (2004)

(summarizing findings of other studies). That said, however, administrator knowledge significantly affects reliability.

To guard against that influence, experts recommend that all identification procedures be conducted by a "blind" administrator—a person who does not know the identity of the suspect. To realize the full value of blind administration, witnesses should also be advised of that fact in order to prevent them from attempting to infer suggestive information from an administrator's words or conduct.

#### *B. Pre-identification Instructions*

Studies show that the likelihood of misidentification is significantly decreased when witnesses are instructed prior to an identification procedure that a suspect may or may not be in the lineup or photo array, and that it is permissible not to identify anyone. Indeed, one study found that in target-absent[\*\*\*] lineup procedures, witnesses who were warned that the perpetrator might not be in the lineup misidentified a suspect only 33 percent of the time, compared to 78 percent of the witnesses not so instructed. Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. Applied Psychol. 482, 485 (1981). There appears to be little downside to giving such instructions. According to a 2005 meta-analysis, unbiased instructions greatly increased correct suspect rejections in target-absent lineups, but had no appreciable effect on the rate of correct identifications in target-present lineups. Steven E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 Law & Hum. Behav. 395, 397 (2005).

[\*\*\*] "Target-absent" refers to a lineup or photo array that does not contain the suspect. Target-absent lineups occur in actual practice when the police officials mistakenly fix their suspicion on an innocent person. Scientific research on target-absent lineups is particularly relevant to the reliability of identifications because nearly all wrongful convictions based on eyewitness misidentification result from target-absent procedures. That is so because when the target (the actual perpetrator) is present, misidentifications will generally implicate only known-innocent foils, and therefore be immediately recognized as mistakes.

### C. Lineup Construction

An identification procedure is essentially a pseudo-scientific experiment conducted by law enforcement officials to test their hypothesis that a particular suspect is, in fact, the perpetrator that they seek. Wells & Olsen, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 285 (2003). However, like any experiment, the validity of the results depends largely on the careful design and unbiased implementation of the underlying procedures. The purpose behind embedding a suspect in a group of "filler" subjects known to be innocent is to test the witness's memory. If, however, the suspect stands out from the other subjects in any way that might lead the witness to select the suspect based on something other than her own memory, the experiment fails to achieve its purpose.

Experts generally recommend that the subjects used as lineup fillers should be selected first on the basis of their agreement with the witness's description of the perpetrator; if no description of a particular feature is available, then experts recommend that lineup fillers be chosen based on their similarity to the suspect. Roy S. Malpass *et al.*, *Lineup Construction and Lineup Fairness*, in 2 *The Handbook of Eyewitness Psychology: Memory for People* 155, 157–58 (R.C.L. Lindsay *et al.*, eds., 2007); National Institute of Justice, U.S. Dep't of Just., *Eyewitness Evidence: A Guide for Law Enforcement* 29 (1999). If a suspect differs significantly from the witness's description, the lineup fillers should be matched to the

suspect rather than the description in order to prevent the suspect from standing out. *Id.* Suspects should not be displayed in distinctive clothing or in clothing that matches the witness's description unless all of the lineup fillers are also dressed alike; a suspect's distinctive features—scars, tattoos, etc.—should either be concealed or artificially added to all of the lineup fillers. *Id.* Lineups should contain only one suspect and utilize a sufficient number of fillers to minimize the likelihood that a witness will select the suspect based on chance rather than memory. *Id.* Most sources recommend a minimum of five fillers to one suspect. *Id.* Any increase in the number of lineup fillers correspondingly decreases the probability of misidentification occurring by chance alone. Ultimately, if for any reason a suspect disproportionately stands out from the lineup fillers surrounding him or her, then the identification procedure is suggestive—and the reliability of any resulting identification decreases correspondingly.

#### *D. Simultaneous versus Sequential Lineups*

In traditional identification procedures, a number of persons or photographs are displayed simultaneously to an eyewitness. Some studies demonstrate, however, that witnesses permitted to view all the subjects together have a tendency to make a "relative judgment"—choosing the person or photograph that most closely resembles the perpetrator from among the other subjects—as opposed to making an "absolute judgment"—comparing each subject to their memory of the perpetrator and deciding whether that subject is the perpetrator or not. Relative judgments process [sic] have been found to increase the likelihood of misidentification, especially in target-absent lineups. To correct that problem, researchers recommend an alternative lineup procedure in which the witness is presented with each individual person or photograph sequentially. Because the witness views only

one person or photograph at a time, researchers posit that the witness is less able to engage in relative judgment, and thus less likely to misidentify innocent suspects. Nancy Steblay *et al.*, *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 *Law & Hum. Behav.* 459, 463–64 (2001). Studies show a moderate trend toward fewer misidentifications in sequential lineups than in simultaneous lineups. *Id.* at 463–64 (reporting that, in the combined results of 30 experiments collected from 19 previous research papers, 51 percent of witnesses presented with simultaneous target-absent lineups misidentified a person, while only 28 percent did so in sequential lineups).

Other recent studies, however, challenge the validity of that finding, cautioning that the different outcomes in sequential and simultaneous lineups may be attributable to other factors. Specifically, some research shows that sequential lineups may result in *more* misidentifications when not conducted by a blind administrator, and that other factors such as differing methods of witness instruction and questioning may explain the difference in results. Dawn McQuiston–Surrett *et al.*, *Sequential vs. Simultaneous*

[http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=111089&FindType=Y  
&ReferencePositionType=S&SerialNum=0322753368&ReferencePosition=143\[;\]](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=111089&FindType=Y&ReferencePositionType=S&SerialNum=0322753368&ReferencePosition=143[;])

*Lineups: A Review of Methods, Data, and Theory*, 12 *Psychol. Pub. Pol'y & L.* 137, 143–51 (2006); Roy S. Malpass, *et al.*, *Public Policy and Sequential Lineups*, 14 *Legal & Criminological Psychology* 1 (2009).

#### E. *Showups*

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. Showups are widely regarded as inherently suggestive—and therefore less reliable than properly administered lineup identifications—because the witness is always aware of who police officers have targeted as a suspect. Furthermore, unlike lineups, showups have no mechanism to distinguish witnesses who are guessing from those who actually recognize the suspect. In an unbiased lineup, an unreliable witness will often be exposed by a “false positive” response identifying a known innocent subject. By contrast, because showups involve a lone suspect, every witness who guesses will positively identify the suspect, and every positive identification is regarded as a “hit.” For that reason, misidentifications that occur in showups are less likely to be discovered as mistakes.

Despite those shortcomings, some research indicates that, when conducted properly and within a limited time period immediately following an incident, showups can be equally as reliable as lineups. Showups are most likely to be reliable when they occur immediately after viewing a criminal perpetrator in action, ostensibly because the benefits of a fresh memory outweigh the inherent suggestiveness of the procedure. In as little as two hours after an event occurs, however, the likelihood of misidentification in a showup procedure increases dramatically. In one study, the immediate showup identification of an innocent suspect produced a misidentification rate of 18 percent (compared to 16 percent in an immediate lineup); a delay of only two hours increased the misidentification rate to 58 percent (compared to 14 percent in a lineup). David A. Yarmey *et al.*, *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 *Law & Hum. Behav.* 459, 464 (1996).

Studies also demonstrate that showups pose a particularly high risk of misidentification

for innocent suspects who happen to look like the perpetrator. A 2003 meta-analysis found that, when an innocent suspect closely resembled a perpetrator, 23 percent of witnesses misidentified the suspect in a showup, compared to 17 percent of the witnesses presented with the same suspect in a lineup. Nancy Steblay *et al*, *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 *Law & Hum. Behav.* 523, 533 (2003). In addition, witnesses at a showup may be more inclined to base their identifications on clothing rather than on facial features. Studies indicate that showups present an especially high risk of misidentification for suspects wearing clothing similar to that of the perpetrator. Jennifer E. Dysart *et al.*, *Show-Ups: The Critical Issue of Clothing Bias*, 20 *Applied Cognitive Psychology* 1009 (2006).

*F. Multiple Viewings (Mugshot Exposure, Mugshot Commitment, Source Monitoring Errors, Source Confusion)*

Viewing a suspect multiple times throughout the course of an investigation adversely affects the reliability of any identification that follows those viewings. Researchers posit that the negative effect of multiple viewings may result from the witness's inability to discern the source of his or her recognition of the suspect, an occurrence referred to as source confusion or a source monitoring error. Because of the possibility of source confusion, once a witness has viewed the suspect in any context other than the initial incident, it is impossible to determine whether a subsequent identification is based on the observation of the initial incident or on the subsequent viewing of the suspect.

Researchers have identified several specific types of multiple viewing problems that often occur in eyewitness identifications. One, referred to as "mugshot exposure," occurs when police officials have a witness peruse random mugshots on file from previous cases

in an attempt to generate leads. Studies show that prior exposure to an innocent suspect's mugshot increases the likelihood that the witness will subsequently misidentify the suspect as the perpetrator, based on the witness's sense of recognition generated by the previously viewed picture. Kenneth A. Deffenbacher *et al.*, *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 *Law & Hum. Behav.* 287 (2006). The mugshot exposure problem can be exacerbated when the witness actually identifies an innocent person's mugshot as someone who is, or resembles, the perpetrator, resulting in a related effect referred to as "mugshot commitment." When a later identification procedure includes the person whose mugshot the witness previously identified, studies show that witnesses are disproportionately likely to remain "committed" to the person whose mugshot they had previously selected. *Id.*

A similar problem occurs when a witness is asked to participate in multiple identification procedures. Whether or not the witness selects the suspect in an initial identification procedure, the procedure increases the witness's familiarity with the suspect's face. If the witness is later presented with another lineup in which the same suspect appears, the suspect may tend to stand out or appear familiar to the witness as a result of the prior lineup, especially when the suspect is the only person repeated in both lineups. *Henderson*, 208 N. J. at 255–56, 27 A.3d 872; Deffenbacher, *Mugshot Exposure Effects*, 30 *Law & Hum. Behav.* at 299. As with mugshot exposure, the problem is exacerbated if a witness actually identifies a suspect in an initial lineup or photo array. In subsequent identification procedures, such witnesses are likely to simply remain committed to the person that they initially identified rather than reexamine their initial memory of the perpetrator. *Henderson*, 208 N. J. at 256, 27 A.3d 872; *see also* David F. Ross *et al.*,

*Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person*, 79 *Applied Psychol.* 918, 929 (discussing another study that found that 89 percent of subjects who misidentified a person in an initial, target-absent lineup also misidentified the same person in a second lineup—despite the fact that the second lineup also contained the true perpetrator). For those reasons, successive identification procedures can be unreliable as tests of a witness's memory regarding an actual perpetrator, and thus may have little probative value.

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 Ross, Unconscious Transference and Mistaken Identity*, 79 *J. Applied Psychol.* 918. The phenomenon is most problematic when a witness is vaguely familiar with a suspect but unconscious of why that is so. The result, often, is that the witness mistakenly attributes that familiarity to having previously observed the suspect at the crime scene. *See J.D. Read et al., The Unconscious Transference Effect: Are Innocent Bystanders Ever Misidentified?*, 4 *Applied Cognitive Psychol.* 26 (1990) (noting that, to produce unconscious transference errors, a witness's familiarity with the suspect's face must not be "so high as to elicit recall of the misidentified person's correct context or identity").

Although multiple viewings of a suspect always introduce a degree of doubt as to the reliability of an identification, studies suggest that witnesses may be most susceptible to source monitoring errors when their initial memory trace is weakest. *See, e.g., Deffenbacher, Mugshot Exposure Effects*, 30 *Law & Hum. Behav.* at 288 (noting that

"failure of memory for facial source or context is all the more problematic when viewing of the perpetrator has occurred under less than optimal viewing conditions"). Thus, the presence of estimator variables indicating weak initial encoding may magnify the suggestive effects of multiple viewings.

*G. Suggestive Questioning, Cowitness Contamination, and Other Sources of Post-Event Memory Contamination*

The way in which eyewitnesses are questioned or converse about an event can alter their memory of the event. Elizabeth F. Loftus & Guido Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 Bull. Psychonomic Soc'y 86 (1975). Studies show that the use of suggestive wording and leading questions tend to result in answers that more closely fit the expectation embedded in the question. For example, in one study, participants who had viewed a short video of a traffic accident were asked various questions about what they had seen in the video. *Id.* Although there was no broken headlight in the video, participants who were asked "Did you see *the* broken headlight?" were more than twice as likely to answer "Yes" than those who were asked "Did you see *a* broken headlight?" *Id.* (emphasis added).

Witness memory, moreover, can become contaminated by external information or assumptions embedded in questions or otherwise communicated to the witness. In one study, participants were asked, after viewing a short video, to estimate the speed of a car in the video either "when it passed the barn" or without mention of a barn. Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 Cognitive Psychol. 560, 566 (1975). One week later, the participants were asked whether they had seen a barn in the video. *Id.* Although there was no barn in the video, 17 percent of the subjects who had been

asked the question presupposing the existence of a barn reported having seen the barn, compared to two percent of the subjects to whom no barn had been mentioned. *Id.*

Another study found that participants' estimations of a vehicle's speed differed according to whether a question used the words "collided," "bumped," "contacted," "hit," or "smashed" to describe the taped car accident that they viewed. Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 *J. Verbal Learning & Verbal Behav.* 585 (1974). Participants who were asked how fast the cars were going when they "smashed" into each other estimated an average speed of 40.5 miles per hour, whereas participants who were presented with the same question using the word "hit" or "contacted" estimated average speeds of 34.0 and 31.8 miles per hour, respectively. *Id.* at 586. A follow-up experiment found that participants questioned using the word "smashed" were more than twice as likely to erroneously report seeing broken glass in the video as participants questioned using the word "hit" or not questioned at all. *Id.* at 587.

Post-event memory contamination is generally categorized as a system variable because state actors are often the entities engaged in questioning eyewitnesses to crimes. That said, however, witness memory is equally susceptible to contamination by nonstate actors. One common source of third-party memory contamination is cowitness interaction. When a witness is permitted to discuss the event with other witnesses or views another witness's identification decision, the witness may alter his or her own memory or identification decision to conform to that of the cowitness. Elin M. Skagerberg, *Co-Witness Feedback in Line-Ups*, 21 *Applied Cognitive Psychol.* 489 (2007). In one study, half of the participants were shown a sequence of photographs illustrating a theft involving a single person, while

the other half viewed the same theft but with two persons. *Id.* at 490 (discussing another study). When questioned individually, 97 percent of the participants correctly remembered the number of people involved in the theft that they viewed. *Id.* However, after discussing the event with another participant who had viewed the alternate scenario, one of the participants in more than 75 percent of the pairs changed their answer to conform to their partner's recollections. *Id.*

#### H. *Suggestive Feedback and Recording Confidence*

As noted above, post-identification confirming feedback tends to falsely inflate witnesses' confidence in the accuracy of their identifications, as well as their recollections concerning the quality of their opportunity to view a perpetrator and an event. Confirming feedback, by definition, takes place after an identification and thus does not affect the result of the identification itself. It does, however, falsely inflate witness confidence in the reports they tender regarding many of the factors commonly used by courts and jurors to gauge eyewitness reliability. As a result, the danger of confirming feedback lies in its tendency to increase the *appearance* of reliability without increasing reliability itself.

The detrimental effects of post-identification feedback are well-established in the scientific literature. One much-cited study on the effects of post-identification confirming feedback staged an experiment in which witnesses, after making an incorrect identification from a target-absent lineup, were told either, "Good, you identified the suspect," "Actually, the suspect was number \_\_\_\_\_," or given no feedback at all. The witnesses were then asked to answer questions regarding the incident and the identification task. The study found that the witnesses who received confirming feedback were not only more certain in the accuracy of their identification, but also reported having had a better view of the

perpetrator, noticing more details of the perpetrator's face, paying closer attention to the event they witnessed, and making their identifications quicker and with greater ease than participants who were given no feedback or disconfirming feedback. Wells, "*Good, You Identified the Suspect*," 83 *J. Applied Psychology* 360 (1998). A more recent meta-analysis examining the results of 20 experiments involving over 2,400 participants confirmed that studies on this factor have produced "remarkably consistent" effects, and "provide dramatic evidence that post-identification feedback can compromise the integrity of a witness's memory." Amy B. Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 *Applied Cognitive Psychol.* 859, 865–66 (2006).

Witnesses often receive confirming feedback from the administrator of the identification procedure directly after making an identification, but they may also obtain feedback from other sources, such as news accounts identifying the suspect as the perpetrator, conversations with other witnesses, or pretrial witness preparation sessions. Skagerberg, *Co-Witness Feedback in Line-Ups*, 21 *Applied Cognitive Psychol.* 489 (2007). Indeed, eyewitnesses who are subsequently called to testify in criminal proceedings are always subjected to some degree of confirming feedback because they can infer that they identified the right person from the fact that the state is prosecuting the suspect they identified.

To moderate the effect of this factor, researchers recommend that administrators of identification procedures record the witness's certainty statements immediately after an identification has been made, and before the witness is given any feedback. Some studies have reported moderate success in inoculating witnesses against the effects of confirming



feedback by asking the witnesses to reflect or report on their level of certainty prior to being given confirming feedback. Gary L. Wells & Amy L. Bradfield, *Distortions in Eyewitnesses' Recollections: Can the Postidentification–Feedback Effect Be Moderated?*, 10 Psychol. Sci. 138 (1999).

## **RECOMMENDATION 2: BEST PRACTICES FOR MASSACHUSETTS POLICE DEPARTMENTS, WITH COMMENTARY AND MODEL FORMS**

A. **Introduction.** Driven primarily by the overturning of convictions through DNA analysis, police practices in eyewitness identification have evolved greatly since the 1999 release of Eyewitness Evidence by the National Institute of Justice.<sup>45</sup> While eyewitness identifications played a role in approximately 75% of convictions overturned by DNA test results, it is not entirely the fault of police that witnesses sometimes identify the wrong person as the perpetrator. Recognizing a person you may have met only once, and often under less than ideal circumstances, can undoubtedly be difficult.

That said, it is just as clear that procedures used by the police can exacerbate a witness's difficulty in accurately identifying an offender. Beyond the procedures, of course, is the training undergone by police. A well-trained detective who uses research-based techniques can decrease the likelihood of misidentification and preserve the witness's ability to recognize the offender later. The Study Group has formulated its recommendations regarding eyewitness identification procedures for the Commonwealth from these realities and from the carefully considered foundation of scientific information on eyewitness identification.

B. **General Best Practices**

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<sup>45</sup> See United States Department of Justice, Eyewitness Evidence: A Guide for Law Enforcement (1999).

1. Every law enforcement agency should have a written policy on eyewitness identification.
2. Upon response to the scene of a crime, the police should make an effort to prevent eyewitnesses from comparing their recollections of the offender or the incident. The police often accomplish this by promptly separating the witnesses and interviewing each out of the earshot of the others. Witnesses should not participate in identification procedures together. For example, witnesses should not be transported together to view a suspect during a showup or allowed to view a suspect within earshot of each other.
3. Police officers should use caution when they interview eyewitnesses. Specifically, whenever possible, they should avoid the use of leading questions.
4. Prior to asking an eyewitness to identify a suspect, police officers should obtain a detailed description of the offender.
5. Police officers should instruct eyewitnesses using standardized cards or forms to insure that complete and accurate instructions are given. The use of prepared instruction documents also helps the government accurately comply with Rule 14 of the Massachusetts Rules of Criminal Procedure. Model forms are included in this recommendation. See pp. 106-108, infra.
6. Police officers should file a full report on every identification attempt, whether an identification is made or not. Reports should include, at a minimum, the place where the procedure was conducted, who was present, the instructions given to the witness, any comments made to the witness before or after the identification, all comments made by the witness during or following the procedure, including any statement of certainty or confidence in any identification, and, in the case of a photo array, any steps taken to preserve the array. A copy of the array and the forms used and completed during the identification process should be included with the police report.

**C. Best Practices for Showups**

1. Showups are disfavored.<sup>46</sup> However, when they are conducted they should not be conducted more than two hours after the witness's observation of the suspect.
2. When transporting a witness to a showup, officers should attempt to prevent the witness from hearing radio transmissions or other officer-to-officer conversations related to the suspect or their investigation.
3. When conducting a showup, the police should minimize suggestiveness. Showups should not be conducted if the suspect is seated in the rear of a police cruiser, in a cell, or in any other enclosure associated with custody. If the suspect is handcuffed, he should be situated so that the handcuffs are not visible to the witness.
4. During a showup, the police should not tell the witness where the suspect was found or whether he did or said anything suspicious. Also, the police should not allow the witness to learn whether the suspect was found with items associated with the crime, such as the car used or a stolen purse. Once a witness has positively identified the suspect at a showup, the police should not conduct additional showups with the same suspect.
5. The use of composites and sketches and the showing of mug files are disfavored.
6. Officers should avoid multiple identification procedures featuring any one suspect with the same witness.

**D. Best Practices for Photo Arrays and Lineups**

1. When assembling a photo array, officers should ensure they are using a current and accurate photograph of the suspect. In the case of arrays and lineups, they should select fillers based on their similarity to the witness's description of the offender, not to the appearance of the

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<sup>46</sup> See, e.g., Commonwealth v. Storey, 378 Mass. 312, 317 (1979) ("one-on-one confrontations, whether photographic or in person . . . pose particularly serious danger [of] suggestiveness"); Commonwealth v. Torres, 367 Mass. 737, 740 (1975) ("Single person identification procedures are constitutionally suspect"); Commonwealth v. Nolin, 373 Mass. 45, 51 (1977) ("a one-to-one confrontation, whether in person or by photograph, is disfavored").

suspect. However, officers must also ensure that nothing about the suspect or his photo makes him stand out.

2. Photographic arrays and lineups must contain at least five fillers and only one suspect. The police must not repeat fillers with the same witness from one array or lineup to next.
3. 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. With photo arrays, they may use a blinded technique such as the folder shuffle as an alternative.
4. Police officers must conduct photographic arrays and lineups by displaying the suspect and fillers sequentially.
5. Witnesses who ask to see a photo or lineup participant a second time should be shown the entire array or lineup, but no more than for a second time.
6. When an eyewitness identifies a photograph or person, the officer must immediately ask the witness how certain or confident he is of the identification.
7. When an officer is showing a photographic array or lineup to a subsequent witness in the same investigation, officers should shuffle the order so as to ensure that there could be no collusion between the two witnesses.
8. When submitting reports about photo arrays, officers should include copies of any instruction forms and a copy of the array.
9. Whenever practicable, the police should videotape or audiotape a photo array or lineup.

#### **E. Hearing Concerning Specific Best Police Practices**

The best police practices listed below should become standard operating procedures at all Massachusetts law enforcement agencies. Failure to adhere to these specific protocols carries a likelihood of tainting an identification by an eyewitness. A substantial failure in any category should warrant a hearing.

1. Police officers should not take an offender description from one eyewitness in the presence of another eyewitness in a case where the offender is a stranger to the witnesses.
2. A showup should not be conducted more than approximately two hours after the commission of the offense.
3. A showup should not be conducted where the suspect is seated in the rear of a police cruiser or in a cell. If the suspect is handcuffed he should be presented, if practicable, so that the handcuffs are not visible to the witness.
4. If showups are to be conducted with multiple witnesses, they should be conducted in such a way that one witness cannot see or hear the procedure or results of another witness.
5. When assembling a photographic array or line-up:
  - (a) fillers should fit the general description of the offender;
  - (b) to the extent possible, nothing about the suspect or his photo should make him stand out;
  - (c) each photographic array or line-up must contain at least five fillers;
  - (d) each array or line-up should contain only one suspect; and,
  - (e) the police should not repeat fillers with the same witness from one array or line-up to the next.
6. Prior to conducting a show-up, array, or line-up, police officers should instruct the witness that:
  - (a) the alleged wrongdoer may or may not be in the photographs depicted in the array;
  - (b) it is just as important to clear a person from suspicion as to identify a person as the wrongdoer;

- (c) Individuals depicted in the photographs may not appear exactly as they did on the date of the incident because features such as weight, head, and facial hair are subject to change;
  - (d) regardless of whether an identification is made, the investigation will continue; and
  - (e) 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.
7. When showing a photographic array or conducting a line-up, the police should use a technique that will ensure that no one present will know when the witness is viewing the suspect. This may be accomplished by having an officer unfamiliar with the suspect conduct the procedure (double blind) or by using a blinded technique.
8. Police officers should conduct photographic arrays and line-ups by displaying the suspect and fillers to the witness sequentially.
9. When an eyewitness identifies a photograph or person, the officer should immediately ask the witness how certain or confident he or she is of the identification.

### **Commentary**

**Comment A: Interview Techniques.** Some psychologists believe that police officers, or even dispatchers, may impact a witness's memory in the early stage of storage if their inquiries are haphazard, suggestive, or leading. Upon arrival at a crime scene, police officers should attempt to prevent witnesses from talking to each other about what they remember. In some cases, merely asking witnesses not to talk to each other is sufficient. But in others, perhaps where the witnesses know each other, officers may actually need to direct them to sit in separate areas until they can be interviewed.

Some psychologists recommend that police officers use so-called cognitive interview techniques. This process includes establishing rapport prior to the interview and asking the witness to place himself back at the scene of the incident, close his eyes if necessary, and picture the event unfolding. Other aspects of this model include asking the witness to recount every detail they recall, even if it seems insignificant, encouraging the witness to look at the event from different perspectives, and urging the witness to describe what he remembers in various orders. Perhaps the most important component is for the officer to elicit information in an open-ended, non-leading manner. For example, in a case where a witness tells an officer that he saw a red sports car roar away at the time of the robbery, the officer must resist the temptation to ask other witnesses if they saw the red sports car. He should instead ask a neutral question, i.e., "Do you know how the robber left the area?"

**Comment B: Assembling a Photo Array.** Great caution should be taken by the officer in assembling a photo array. A suggestive array can lead to confusion on the part of the witness, selection of an innocent suspect, court hearings, and, in some cases, suppression of identification evidence.

First, the officer must ensure that she is using an accurate photo of the suspect, i.e., current as of the time of the alleged offense. Merely using the suspect's RMV file photo can be risky. In Massachusetts, drivers licenses expire every five years, and drivers can renew every other license online. Thus, a license photo can be up to ten years old (or even older if the suspect's license is suspended and he hasn't been back for a new photo). If possible, the officer should get a look at the suspect and compare his appearance to the



photo to be used in the array, or show the photo to an officer who recently dealt with or knows the suspect.

Next, the officer must assemble an adequate group of filler photographs. The national standard calls for an array of one suspect and five fillers, although some Massachusetts police departments use seven fillers. Arrays of more than eight photographs do not appear to offer any more in the way of fairness or accuracy. The current minimum in Massachusetts is five fillers for every suspect.

Fillers should be selected who fit the description of the offender as given by the witness, not who look just like the suspect. By the same token, filler photos should not be used if the people look substantially different from the suspect to the point that the suspect stands out. Officers must avoid reusing fillers shown to a witness in previous arrays. If an array is being shown to multiple witnesses, especially where there will be a time gap between showings, officers should shuffle the order of the photos to prevent collusion among witnesses and to demonstrate that collusion could not have occurred.

Importantly, officers should ensure that nothing about the suspect or his photo draws the witness's attention to it. Showing the array to a fellow officer for review, prior to showing it to the witness, is one technique for ensuring that the array is a fair one.

**Comment C: Instructing the Witness.** It is important that a witness be given specific instructions prior to any eyewitness identification procedure. The most significant of these is the warning that the offender may or may not be in the photo array or lineup, or the person being shown in a showup. But other instructions are also designed to take the pressure off the witness to make a choice and to avoid suggestiveness.

For photo arrays, lineups, and voice lineups, police should use a form that the officer and witness can date and sign. With showups, the instructions should be read from a card. Not only does the reading of instructions ensure that the officer accurately recites them all, but it helps facilitate the discovery requirements of Mass. R. Crim. P. 14 and facilitates proof of compliance at any subsequent suppression hearing and trial. A model set of witness instructions appears in the appendix of this Recommendation.

**Comment D: Blind Administration.** In its basic form, blind administration simply means that the officer showing a photo array does not know when the witness is looking at the photograph of the suspect. The concern expressed by researchers, psychologists, and the legal community is that an officer can telegraph signals to a witness during the showing of an array, or that a witness may read something into a facial expression, and thus taint the procedure. Most who have written about this topic express that they are not worried about intentional misconduct by the police. The concern is that an officer could send inadvertent, unintentional signals to the witness. This is not solely a law enforcement phenomenon; it is why medical trials are conducted blind with doctors and nurses in the dark about whether a particular patient is taking real medication or a placebo.

Two sets of techniques are available for "blinding" an array, "double blind" and "blinded." The term "double blind" means that neither the test subject nor the person conducting the test knows the answer to the question. In the eyewitness identification context, the term refers to a method whereby neither the eyewitness nor the officer showing the array knows which photograph is of the suspect. In a double blind procedure, the officer who puts the array together is different from the officer who actually shows it. A blinded procedure, on the other hand, involves an officer who knows which photograph is

of the suspect, but who shows the array in such a way that he or she cannot actually see the photographs as they are being presented, and therefore does not know when the witness is viewing the suspect. Blinded techniques are useful for smaller departments that may not always have a second officer available.

One blinding technique, called the folder shuffle, has been encouraged by some innocence projects around the United States.<sup>47</sup> It features placing photographs in individual folders, shuffling their order, and allowing the witness to open each folder in such a way that the officer cannot see which photograph the witness is viewing.

We recommend that police departments use the double blind procedure whereby the case detective enlists the aid of a second officer not involved in the investigation to show his or her array. The detective and officer meet with the witness together and the detective explains that the officer knows nothing about the photos in the array. The detective reads the instructions to the witness, has the witness sign the form, and asks if there are any questions. He then explains that he is going to step out of the room while the second officer shows the array. The officer's only duties are to show the photos (sequentially), document any comments or identification from the witness, and if there is one, ask the witness how certain he is. When the procedure has concluded, the second officer calls the detective back into the room, and the detective takes it from there. This procedure keeps the case detective engaged while simplifying the role of the second officer.

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<sup>47</sup> The New England Innocence Project and the Municipal Police Institute have posted a training video on the folder shuffle at <http://www.newenglandinnocence.org/knowledge-center/causes/eyewitness-identification>.

**Comment E: Simultaneous versus Sequential Arrays and Lineups.** Years ago, detectives used both methods for showing photo arrays, displaying photos one at a time (sequential) or all at the same time (simultaneous). Over time, some detectives developed a preference for the simultaneous system for several reasons. Most significantly, there was a concern that if a witness was viewing photos one at a time, and the suspect's photo was one of the first to be shown, defense counsel could file a motion to suppress based on suggestiveness because his client had been selected from an array of only two or three photos. Detectives believed that by placing the photos in view all at once, they were being fair and avoiding suppression. Less important were issues of convenience. A company began making folders that could hold two rows of three photos, making preservation and filing of the array more convenient. This configuration became so common that officers began referring to them as "six-packs."

Over the years, researchers and psychologists have begun to express a concern about simultaneous arrays. The prevailing theory is that witnesses who can see multiple photos at the same time have a tendency to compare them to each other rather than comparing each to their memory of the offender. This tendency, known as relative judgment, can be a problem. Some witnesses are prone to treat the procedure as a multiple choice test where "none of the above" is not one of the choices. These concerns are exacerbated by the witness's understandable desire to help the police solve the crime.

The police and the courts do not want to know which photo looks the most like the offender; they want to know whether the offender's photo is in the array. Invariably, someone in the array looks more like the offender than the rest. In fact, when a suspect comes to the attention of the police because he looks like the composite or sketch, it is

highly likely that he looks more like the offender than anyone else in the array. There have been numerous cases where a suspect who looks like the offender has been picked from a simultaneous array, only to be exonerated by DNA later on. It is believed that some of these wrongful convictions could have been avoided had the police used a procedure designed to thwart relative judgment.

On the other hand, a system that displays only one photo at a time encourages absolute judgment. While a witness looking at the fifth photo may have a vague recollection of what the second one looked like, making comparisons among them is difficult. Many studies have been conducted on this specific topic. While the results vary somewhat on the ability of witnesses to accurately identify offenders, most studies show reduced picks of fillers or innocent suspects when the sequential system is used. Research studies aside, it is highly unlikely that the simultaneous method could be more reliable in cases where the police have successfully focused on the culprit. After all, if the witness truly recognizes the offender, how could the presence of other random photos, in view at the same time, possibly help that recognition? The simultaneous system simply cannot be more reliable.

The concerns of detectives about witnesses who identify photos early in arrays can be alleviated by requiring officers to show the entire array. If the witness selects a photo and identifies the subject as the offender, continuing with the array could lead the witness to believe he must be mistaken. To counter this, police departments should instruct the witness, "I am required to show you the entire series." When a witness spots the offender and identifies him, regardless of where in the array the photo was placed, the officer showing the array should stop and ask the witness how certain he is. Once the statement of

certainty (or confidence) has been noted, the officer should simply remind the witness, "remember that I'm required to show you the entire series," and show the remaining photos.

**Comment F: Additional Laps.** Some witnesses view an entire array and then ask to see it again, or ask to see a particular photo again. Both situations should be handled the same way: tell the witness he can see the entire array one more time. As long as the witness has already seen all the photos once, showing the one the witness asks for probably carries little risk of suggestiveness, but showing the entire array is a safer course. If the witness recognizes the offender, he should be able to spot him during the second lap of the entire array.

An array should not be shown a third time. A witness who needs to see the photos three times is probably unlikely to make an accurate selection, and showing three or more laps may permit relative judgment to occur. The desire for a third showing may be avoided if the officer uses the instruction, "I can show you the entire array only one more time," before showing it a second time.

**Comment G: Documenting Certainty.** Research has shown that an eyewitness who identifies a suspect can become increasingly certain that he or she has selected the right person. Certainty can also be artificially inflated if the witness receives positive feedback from police, the media, or other witnesses after making a selection. For this reason, there is consensus that a police officer showing an array to an eyewitness should ask the witness how certain (or confident) he is as soon as an identification takes place and should avoid providing feedback or encouragement.

Many police departments use an instruction, "Tell me in your own words how certain you are." The phrase "in your own words" is intended to steer the witness away from using a numerical scale (eight on a scale of one to ten, eighty-five percent, etc.) As mentioned above, the taking of a certainty statement should immediately follow the witness's selection. If an identification occurs mid-way through the showing of the array, certainty should be assessed at that time, and the remaining photos shown afterward. So the order of events should go something like this:

WITNESS: Wait, that's the guy right there.

OFFICER: Without using a numerical scale, how certain are you?

WITNESS: Oh, that's him. I'm sure of it. I'll never forget that face.

OFFICER: Now remember what I told you, I have to show you the entire series.

WITNESS: Oh, right. OK.

### Showups

A showup is a one-on-one live identification attempt, usually conducted in the field shortly after the commission of a crime. A showup should not be attempted more than two hours after the witness's observation of the suspect.

The first crucial step in any eyewitness identification procedure, including a showup, is for the police to take from the witness as complete a description of the offender as soon as possible prior to beginning the procedure. This gives the police and the court the opportunity to assess the reliability of the identification by comparing the description with the appearance of the suspect. A description is usually taken by the time an array or lineup is shown, but it can be overlooked when patrol units spot a suspect quickly and call for a showup. Therefore, the first step in a showup should be to take down the description before the showup begins.

The second step is to instruct the witness. As discussed above, the use of a form is an effective way for detectives to memorialize instructions given prior to the showing of an array or a lineup. However, most patrol officers do not carry those forms in the field. Over the past few years, Massachusetts police departments have begun to issue their officers cards containing standardized showup instructions. The Newton and Wellesley Police Departments, for example, issue cards to their officers, and a company called Law Enforcement Dimensions sells cards to police departments over the Internet. Other police departments have found unique ways to deploy the instructions: the Norwood Police Department issues field notebooks to every officer with the instructions printed on the back cover; and the Brookline Police Department includes them in the calendar books it provides to its officers.

Once the witness has been instructed, the suspect is presented to the witness for viewing. While a suspect can be transported to the witness where reasonable suspicion exists, the procedure preferred and most often used by the police is to transport the witness to where the suspect is located. Transporting the suspect back to the scene of the crime can potentially taint evidence at the scene, expose the suspect to several witnesses simultaneously, or, in cases of heinous crimes, incite a crowd gathered at the scene.

Police should minimize the suggestiveness of the showup whenever possible by reducing the number of uniformed officers guarding the suspect, turning a handcuffed suspect so the cuffs are not visible to the witness, and lowering the volume of their radios so the witness does not overhear broadcasts.

Although the one-on-one nature of showups is a concern to some, many police officers find them reliable and useful. They permit the police to confirm the identity of a



suspect and take him into custody, but just as importantly, they permit the police to clear an innocent suspect and move on with their investigation. In fact, police oftentimes conduct "elimination show-ups," where officers have detained someone who fits the description but they doubt his involvement. A quick showup allows them to confirm his innocence and send him on his way.

**Comment H: Unconscious Transference.** Psychologists believe that witnesses sometimes identify a suspect, not because he is the offender, but because they recognize him from another context. This effect, called unconscious transference, can occur naturally, such as when a witness spots someone in a photo array that he has seen before, or as the result of police procedures that display a suspect to a witness more than once.

As an example of a case where unconscious transference may have occurred, during an investigation of a Brockton homicide in 2003, police brought two witnesses into a bar where they believed the shooter had gone. Neither witness identified anyone inside the bar, but one witness later identified one of the patrons as the shooter after viewing him in a photo array. Testimony from an expert witness raised the issue of unconscious transference: did the witness recognize the defendant because he was in fact the killer, or did he remember him because he saw him in the bar following the shooting?

Police can create the possibility of unconscious transference by conducting a showup followed by a photo array, or an array followed by a lineup, or by showing an array to a witness who has viewed a mug book containing the suspect's photograph. The likelihood of unconscious transference can be greatly diminished if police officers avoid successive identification procedures with the same suspect.

**Comment I: Composites, Sketches, and Mug Files.** For decades, police have used sketches, composites, and mug books to generate leads. However, some research has shown that these techniques may actually distort the witness's memory. Many scientists believe that people do not remember faces feature-by-feature, but they do so holistically. Asking a witness to isolate individual features may be more difficult, and perhaps more damaging to his memory, than previously thought. While the dissemination of sketches and composites has produced viable leads in some cases, research has shown that a person selected based on resemblance to a composite may be more likely to be mistakenly identified, and that building a composite may lower a witness's accuracy for identifying the actual perpetrator. Police officers should be trained to judge which cases and which witnesses are the best candidates for a composite or sketch. (In fact, preference should be given to sketches by trained artists over composites.)

Regarding mug files, there is some concern among scientists that subjecting a witness to a large number of photographs, whether printed or digital, may distort the witness's memory. While showing photographs of a limited number of known gang members during an investigation into a gang-related shooting may be worthwhile, showing a witness a broad range of random photographs in large numbers may do more harm than good.

**Comment J: Recording Identification Procedures.** The Police Practices Subcommittee discussed whether the police should videotape the showing of photo arrays. On one hand, when the police record an identification procedure, they preserve not only their procedure, but also the reaction and exact words of the witness, including any voice inflections, mannerisms, or body movements. Thus recordings can save the court and police time by

obviating the need for hearings. By the same token, recording a procedure is not always feasible, such as when an array is shown at a hospital, or the witness's home or place of employment. Additionally, the naturally stressful experience of trying to identify a criminal may be exacerbated if the victim or witness is aware that the video camera is on, thereby exerting pressure and detracting from her main focus, which is to concentrate on making an accurate identification.

On this last point, some members of the subcommittee observed that the public is increasingly comfortable with videotape. They want and expect to see it where possible and appreciate its necessity in important matters. Other members voiced their concern that the recording process could stand in the way of the candid reactions of witnesses. The Study Group recommends that the showing of photo arrays and the conducting of lineups be audio- or video- recorded whenever practicable.

**Comment K: The Status of Reform in Massachusetts.** States have taken various routes in encouraging or implementing eyewitness identification reform. Some States have pursued laws mandating that the police undertake specific procedures, or even that individual officers perform specific steps when managing eyewitness evidence. Others have appointed task forces and commissions to recommend best practices. In New Jersey, the State's attorney general directed that police adhere to reform protocols, and the State's Supreme Court undertook an extensive review of the available research. By 2004, some Massachusetts police departments and a number of district attorneys were aggressively implementing reform through training and the development of new policies.

In early November 2011, just prior to formation of the Supreme Judicial Court's Study Group, a meeting called by the Massachusetts Chiefs of Police Association (Mass. Chiefs) was held at the Executive Office of Public Safety and Security (EOPSS). The purpose was to talk about the direction of reform of eyewitness identification procedures and to determine what needed to be done to ensure it was moving along within the police community. The meeting was attended by representatives of Mass. Chiefs, the Municipal Police Training Committee (MPTC), the Massachusetts District Attorneys' Association, the Boston Bar Association, the New England Innocence Project, the EOPSS undersecretary for law enforcement, and the general counsel for EOPSS.

There was widespread support for reform among those in attendance, and a number of approaches were discussed. One concrete outcome was the launching of a project to assess the state of reform among Massachusetts police departments. It was decided that every police department in Massachusetts would be contacted and, when possible, each department's policy and procedures for eyewitness identification would be collected and examined.

The project was led by the Mass. Chiefs, but the bulk of the work was done by the New England Innocence Project. This collaboration between Massachusetts law enforcement and the New England Innocence Project is nothing new. Within a few weeks of the meeting, an email was sent to every police department in the Commonwealth asking chiefs to submit their policies. The policies of departments in Middlesex County were collected and forwarded to the New England Innocence Project by the Middlesex District Attorney's Office. The State Police, MBTA Transit Police, and 250 of the Commonwealth's 351 cities and towns submitted their policies for review. (A number of

the communities contacted, primarily in western Massachusetts, have very small departments, or merely a chief and a few part time officers, and rely heavily on State Police to conduct investigations. Many of these departments reported that they have few written policies.) All policies were assessed for their inclusion of the reform procedures. Of the police departments reporting, the vast majority have reform-based policies: 84 % have policies that require or recommend sequential photo arrays, 85 % require or recommend blind administration of arrays, and 86 % require or recommend that officers obtain a statement of certainty from a witness viewing a photo array.

**Comment L: Police Training.** Regardless of what action law enforcement, the courts, or our legislature may take to encourage eyewitness identification reform, the importance of police training cannot be overstated. While guidelines and procedures are helpful, educating police officers about the nature of human memory, the causes of wrongful convictions, the impact of estimator and system variables, and the techniques that enhance the likelihood of accurate outcomes will make them more effective. Such training would be equally important for attorneys practicing criminal law as well as for judges and other court personnel.

Police training occurs in a number of formats. All new police officers are required to attend police academies that run approximately six months. The MPTC is re-writing the entire academy curriculum, and eyewitness identification reform is part of that re-write. New police officers have already begun receiving this training. In addition, several entities, both public and private, conduct training for veteran officers on a wide range of topics including eyewitness identification, and police departments can train their personnel in-house either in formal training sessions, or for shorter periods during roll calls.

For years, the MPTC has offered annual professional development training for veteran officers at regional venues across the Commonwealth. Officers attend a four-to five- day series of classes designed to update them on a variety of topics including law and police procedure, as well as re-certifying them in CPR and first aid. The Police Practices Subcommittee discussed at length whether the MPTC professional development program would be an efficient vehicle for delivering uniform training on eyewitness identification statewide. However, the MPTC cancelled all professional development training the past two years due to a chronic funding shortage. We do not blame the MPTC for this predicament, and the adequacy of funding for police training in Massachusetts is beyond the charge of the Study Group, but we cannot help but observe that an opportunity to train the Commonwealth's police on this crucial topic is being missed.

Another vehicle for delivering training to police departments is the production of a series of videos. Each video could run five to seven minutes, short enough to be presented at roll call, and cover a particular aspect of eyewitness identification reform. The Police Practices Subcommittee explored this concept preliminarily with the International Association of Chiefs of Police and the Innocence Project. Both entities have shown interest, but more work beyond the charge of the Study Group is required.

The Police Practices Subcommittee believes that the education and training of law enforcement officers, prosecutors and defense attorneys, and judges is a crucial component of improving the accuracy of eyewitness evidence in the Massachusetts criminal justice system. While policy is important, training is vital.

## MODEL FORMS FOR USE BY MASSACHUSETTS POLICE DEPARTMENTS IN EYEWITNESS EVIDENCE PROCEDURES

### **FORM 1: Officer's Field Card for Show-up Identifications**

A show-up should be conducted shortly after the commission of the crime or the witness's observation of the suspect. A person should only be detained when the officer has reasonable suspicion to believe the person could be a suspect.

Barring special circumstances, the witness should be transported to the suspect's location. When transporting a witness to a show-up, attempt to prevent the witness from hearing radio transmissions or other officer-to-officer conversations related to the suspect or the investigation.

A suspect should only be viewed by one witness at a time out of the presence and hearing of other witnesses. Talking among witnesses should not be allowed.

Minimize suggestiveness. Unless necessary for the safety of officers or others, show-ups should not be conducted if the suspect is seated in the rear of a police cruiser, in a cell, or in any other enclosure associated with custody. If the suspect is handcuffed, he should be turned so that the handcuffs are not visible to the witness.

Do not tell the witness where the suspect was found, whether the suspect said anything or did anything suspicious, or whether the suspect was found with items potentially related to the crime.

Once a witness has positively identified the suspect at a show-up, do not conduct additional show-ups with the same suspect.

If the witness fails to make an identification, or is not sure of an identification, and probable cause to arrest cannot be immediately developed, the person must be permitted to leave.

Instructions to be read aloud to the Witness:

1. You are going to be asked to view some people (even if only one person is shown).
2. The person you saw may or may not be among the people you are about to view.
3. It is just as important to clear innocent persons from suspicion as it is to identify the guilty.
4. Regardless of whether you identify someone, we will continue to investigate the incident.
5. If you identify someone, I will ask you to state, in your own words, how certain you are.
6. If you do select someone, please do not ask us questions about the person you have selected, because we cannot share that information with you at this time.
7. Regardless of whether you select a person, please do not discuss the procedure with any other witnesses in the case or the media.
8. Do you have any questions before we begin?

**If an identification is made, ask:** Without using a numerical scale, how certain are you?

**FORM 2: Photo Array Instruction Form**

1. You are being asked to view a set of photographs.
2. You will be viewing the photographs one at a time and in random order.
3. Please look at all of them. I am required to show you the entire series.
4. Please make a decision about each photograph before moving on to the next one.
5. The person you saw may or may not be in the set of photographs you are about to view.
6. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.
7. The officer showing the photographs does not know whether any of the people in the array are the person you saw.
8. The individuals in the photographs may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.
9. Regardless of whether or not you select a photograph, the police department will continue to investigate the incident.
10. If you select someone, the procedure requires the officer to ask you to state, in your own words, how certain you are.
11. If you do select a photograph(s), please do not ask the officer questions about the person you have selected, as no information can be shared with you at this stage of the investigation.
12. Regardless of whether you select a photograph(s), please do not discuss the procedure with any other witnesses in the case or the media.
13. Do you have any questions before we begin?

Witness Signature \_\_\_\_\_

Date \_\_\_\_\_

Officer Signature \_\_\_\_\_

Date \_\_\_\_\_

Administrator Signature \_\_\_\_\_

Date \_\_\_\_\_

**If an identification is made, ask:** Without using a numerical scale, how certain are you?



**FORM 3: Line-up Instruction Form**

1. You are being asked to view a group of people.
2. You will be viewing them one at a time in random order.
3. Please look at all of them. I am required to show you the entire series.
4. Please make a decision about each person before moving onto the next one.
5. The person who you saw may or may not be one of the people you are about to view.
6. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.
7. The officer who will be administering the line-up does not know whether any of the people in the line-up are the person you saw.
8. The individuals you view may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.
9. Regardless of whether or not you select someone, the police department will continue to investigate the incident.
10. If you select someone, the procedure requires the officer to ask you to state, in your own words, how certain you are.
11. If you do select someone, please do not ask the officer questions about the person you have selected.
12. Regardless of whether you select someone, please do not discuss the procedure with any other witnesses in the case or the media.
13. Do you have any questions before we begin?

Witness Signature \_\_\_\_\_

Date \_\_\_\_\_

Officer Signature \_\_\_\_\_

Date \_\_\_\_\_

Administrator Signature \_\_\_\_\_

Date \_\_\_\_\_

**If an identification is made, ask:** Without using a numerical scale, how certain are you?

### **RECOMMENDATION 3: PROTOCOLS FOR PRETRIAL HEARINGS**

#### **Preface**

Scientific studies establishing the limitations of eyewitness identifications highlight the need in certain cases for a pretrial judicial determination of not only whether the pretrial identification procedures are unnecessarily suggestive, see, e.g., Commonwealth v. Walker, 460 Mass. 590 (2011), but also whether the witness was involved in a highly suggestive confrontation with the suspect/defendant independent of police action; whether the police have failed to follow certain identification protocols, thereby increasing the risk of irreparable misidentification; or whether factors apart from police conduct cast doubt on the reliability of identification testimony. Following the invitation of the Justices to revisit the Court's jurisprudence on eyewitness evidence in the wake of scientific advances in the understanding of memory, and in light of precedent such as Commonwealth v. Jones, 423 Mass. 99 (1996), the Study Group offers these Recommendation for pretrial hearings in criminal matters involving contested eyewitness identifications. The Study Group has concluded that the Recommendations below appropriately balance the rights of criminal defendants and the obligation of the Commonwealth to provide for public safety. Because the Recommendations are grounded in scientific research, they provide important guidance to judges in exercising their considerable discretion in evidentiary matters. The Study Group also recognizes that future scientific research may require revision of these Recommendations from time to time.

## **I. The Showing Required for a Pretrial Hearing**

Pursuant to Mass. R. Crim. P. 13, as appearing in 442 Mass. 1516 (2004), the defendant is entitled to an evidentiary pretrial hearing in any of the following circumstances:

- A. when the defendant makes a showing that the identification was the product of impermissibly suggestive police conduct as a result of either direct police conduct, factors relating to the administration of the identification procedure that are within the control of those administering the procedure, or a combination of both;
- B. when the defendant makes a showing that a witness was involved in a highly suggestive confrontation with the defendant independent of any police involvement, see Commonwealth v. Jones, 423 Mass. 99 (1996);
- C. when the defendant makes a showing that in arranging or conducting a pretrial eyewitness identification procedure the police failed in a substantial way to follow certain specific Best Police Practices set out in the Appendix to this Recommendation, infra; or,
- D. when the pretrial eyewitness identification is uncorroborated and the defendant makes a showing of the presence of factors recognized in law or science ("estimator variables") casting doubt on the reliability of the identification.

## **II. The Pretrial Hearing**

- A. The Judicial Notice Concerning Contested Eyewitness Evidence shall be incorporated into the factual findings of every case in which eyewitness evidence is contested, including without limitation the pretrial hearing.
- B. Burden of Proof

1. Where the defendant proves by a preponderance of the evidence that the out-of-court identification was so unnecessarily suggestive that it was conducive to irreparable misidentification, the pretrial identification will be excluded without any further inquiry as to its reliability. In order for any in-court identification by the same witness to be admissible, the Commonwealth must prove by clear and convincing evidence that the in-court identification is the product of a source independent of the tainted procedure and is reliable. If the Commonwealth cannot so prove, both the in-court and the out-of-court identifications will be excluded (this is the standard that is articulated in Commonwealth v. Botelho, 369 Mass. 860, 867 (1976)) (see I.A, supra); or
  2. Where the defendant proves by a preponderance of the evidence that the pretrial eyewitness identification is unreliable, taking into account the totality of the circumstances in the case at bar, including system and estimator variables, both the out-of-court and any in-court identification will be excluded (see I.B and I.D, supra); or
  3. Where the defendant proves by a preponderance of the evidence that the police failed in a substantial way to follow certain specific Best Police Practices, both the out-of-court and any in-court identification will be excluded (see I.C, supra).
- C. Evidence at the Hearing. The Court will consider evidence of both system and estimator variables in making the determination described in II (B) (2) and (3) above.

### **III. Findings of Fact**

Following the hearing, the Court must make detailed factual findings about the relevant system and estimator variables as well as any other facts pertinent to the issue of eyewitness identification in order to lay the groundwork for proper jury charges and trial procedures, and to facilitate meaningful appellate review.

### **VI. Appeal**

Pursuant to Mass. R. Crim. P. 15 (a) (2), as appearing in 422 Mass. 1501 (1996), any aggrieved party may apply to a single justice of the Supreme Judicial Court for leave to appeal an order determining a motion to suppress evidence, or any part of it, prior to trial.

**V. Remedies**

- A. Commentary. In light of the scientific research, and in fairness to both the Commonwealth and the defendant, the Study Group has concluded that, in certain circumstances, the traditional "in/out" option on the admission of eyewitness evidence is an improper restraint on the exercise of judicial discretion. Clearly, there will be instances in which judges will face a simple "in/out" decision about eyewitness testimony. More often, the Court will face opportunities to exercise discretion concerning the admissibility of elements of the testimony, the use of voir dire and expert testimony, limiting instructions, and cautionary instructions to deal with variances from best practices in eyewitness identification procedures.
- B. Expert Testimony. If the hearing discloses system and estimator variables which, while not warranting exclusion, cast doubt on the reliability of identification, and for which other remedial measures are not sufficient to minimize the jury's possible misperception of the validity of the eyewitness identification, the Court shall permit the introduction of expert testimony at trial.

- C. Venire Questioning. The Court may exercise its discretion in questioning the venire about willingness to accept for purposes of the case the facts set forth in the Judicial Notice Concerning Eyewitness Evidence.
- D. Certainty Statements, In-Court Identification. Certainty testimony should only be permitted in two circumstances: (1) where the statement of certainty occurred immediately after the out-of-court identification (see, e.g., Police Protocols, Best Practices for Photo Arrays and Lineups, No. 6) , or (2) within the judge's discretion, on redirect rebuttal, or in other circumstances where the defendant challenges the witness's certainty. In-court identification will not be permitted except, in the judge's discretion, on redirect examination, in rebuttal, or in other circumstances where the defendant challenges the witness's ability to make such identification.
- E. Jury Instructions. Where the Court finds that the police have failed to follow the Best Police Practices or failed to record the identification procedures where it was feasible to do so, it shall give appropriate jury instructions. Where the Court makes findings concerning the reliability of the identification, the Court should give appropriate jury instructions targeted to the issue or issues on which the Court based its findings. The Court may consider the timing of jury instructions as a remedy, and give all or any jury instruction on eyewitness testimony before or after a witness testifies or at any other time that the Court in its discretion deems appropriate.

## VI. Discovery

In light of the proposed changes to cases involving eyewitness identification, the Study Group recommends that Mass. R. of Crim. P. 14 (a) (1) (A) (viii), first par., as amended, 444 Mass. 1501 (2005), regarding mandatory discovery of identification procedures, be further amended by replacing the period after "procedures" with a comma and adding thereafter the phrase: "including without limitation as a summary of the location, time, and conditions of the identification procedure; a list of all persons present during the identification procedure; and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity, the fairness or accuracy of the identification procedures, or compliance with the certain specific best police practices on eyewitness identification."

## **APPENDIX TO HEARING SUBCOMMITTEE RECOMMENDATIONS**

The best police practices listed below should become standard operating procedures at all Massachusetts law enforcement agencies. Failure to adhere to these specific protocols carries a likelihood of tainting an identification by an eyewitness. A substantial failure in any category should warrant a hearing.

1. Police officers should not take an offender description from one eyewitness in the presence of another eyewitness in a case where the offender is a stranger to the witnesses.
2. A showup should not be conducted more than approximately two hours after the commission of the offense.
3. A showup should not be conducted where the suspect is seated in the rear of a police cruiser or in a cell. If the suspect is handcuffed he should be presented, if practicable, so that the handcuffs are not visible to the witness.
4. If showups are to be conducted with multiple witnesses, they should be conducted in such a way that one witness cannot see or hear the procedure or results of another witness.
5. When assembling a photographic array or line-up:
  - (a) fillers should fit the general description of the offender;
  - (b) to the extent possible, nothing about the suspect or his photo should make him stand out;
  - (c) each photographic array or line-up must contain at least five fillers;
  - (d) each array or line-up should contain only one suspect; and,
  - (e) the police should not repeat fillers with the same witness from one array or line-up to the next.
6. Prior to conducting a show-up, array or line-up, police officers should instruct the witness that:
  - (a) the alleged wrongdoer may or may not be in the photographs depicted in the array;
  - (b) it is just as important to clear a person from suspicion as to identify a person as the wrongdoer;



- (c)<sup>48</sup> Individuals depicted in the photographs may not appear exactly as they did on the date of the incident because features such as weight, head, and facial hair are subject to change;
  - (d) regardless of whether an identification is made, the investigation will continue; and
  - (e) 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.
7. When showing a photographic array or conducting a line-up, the police should use a technique that will ensure that no one present will know when the witness is viewing the suspect. This may be accomplished by having an officer unfamiliar with the suspect conduct the procedure (double blind) or by using a blinded technique.
  8. Police officers should conduct photographic arrays and line-ups by displaying the suspect and fillers to the witness sequentially.
  9. When an eyewitness identifies a photograph or person, the officer should immediately ask the witness how certain or confident he or she is of the identification.

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<sup>48</sup>

Not for use with show-ups.

**RECOMMENDATION 4: EYEWITNESS IDENTIFICATION JURY INSTRUCTIONS****PRECHARGE**

**(To be given before opening statements in all cases in which there is an eyewitness identification. May be given before identification witness's testimony in the trial judge's discretion depending on length of trial, complexity, number of witnesses, and order of witnesses.)**

One of the most important issues in this case is the identification of the defendant as the person who committed the crime.

I am now going to talk to you about the general nature of memory. Some of this information may surprise you and may contradict what we once thought of as common sense about memory. I am not expressing any opinion about the accuracy of any specific memory of any particular witness.

Memory does not function like a videotape or DVR, permanently and accurately capturing a person, a scene, or an event.<sup>1</sup> Memory is far more complex. We do have the ability to recognize other people from past experiences and to identify them at a later time. Generally, memory is most accurate right after the event and begins to fade quickly thereafter. Also, a person's memory may change due to information the person gets between the time of the incident and whenever the witness recalls it. A person may not realize that his<sup>2</sup> memory has changed because of the information he gets.<sup>3, 4</sup>

### **FINAL INSTRUCTIONS**

One of the most important issues in this case is the identification of the defendant as the person who committed the crime. The Commonwealth has the burden of proving the identity of the perpetrator beyond a reasonable doubt. Therefore, you must determine not only whether the Commonwealth has proven each and every element of the offense(s) charged beyond a reasonable doubt, but also whether the Commonwealth has proven beyond a reasonable doubt that this defendant is the person who committed it (them).<sup>5</sup> You must examine the identification testimony of any witness with great care and caution.<sup>6</sup>

In evaluating the identification testimony, you must determine whether it is both (1) truthful and (2) accurate.

With respect to whether the identification is truthful, you must consider the credibility of each identification witness in the same way as any other witness and decide whether or not the person is telling the truth.<sup>7</sup>

With respect to the accuracy of the identification, I will now instruct you on how memory generally works and on the specific factors that you should consider in determining the accuracy of a witness's identification. By instructing you on the general nature and operation of memory, I am not expressing any opinion about the accuracy of any specific memory of any particular witness. You, the jury, must decide whether the witness's identification is accurate.

We remember an event or person in three stages.<sup>8</sup> First, we acquire information. Second, we store information in our minds. And third, we form a memory from the information stored in our minds.

### **ACQUIRING INFORMATION**

Let me discuss with you stage one, which is the acquisition of information. I will now give you a number of factors you should consider in deciding whether the acquisition of information in this case is complete and accurate.

One factor to consider is the witness's opportunity to observe an event or a person.<sup>9</sup> Just as in this courtroom, our ability to see what is going on depends on our individual ability to see, and the opportunity we are given to use our eyesight.

For example, the information we acquire about this courtroom depends on our individual eyesight, our physical and mental condition, such as illness, injury, or fatigue, where we are, and what we are looking at. If we are talking about the back row of seats to my right, what we see is affected by distance, lighting, angle of vision, and things blocking our view. But keep in mind that the level of activity in this courtroom may differ from the conditions at the time of the crime.

Another factor to consider about the acquisition of information is the amount of time a witness had to observe a person or an event.<sup>10, 11</sup> There is no minimum time required to make an accurate identification, but a brief or fleeting contact is less likely to produce an accurate identification than a longer exposure to the person who committed the crime. In

addition, a witness's time estimate may not be accurate because witnesses tend to think events last longer than they actually did.

Another factor to consider about the acquisition of information is the degree to which the witness is focused on an event or a person.<sup>12</sup> A distraction may affect the witness's focus. For example, in this courtroom right now, you are all focusing on my instructions. However, if people enter and leave the room during my instructions, you might lose focus on all the words that I am saying to you.

Another factor to consider about the acquisition of information is stress.<sup>13</sup> Although moderate levels of stress may improve focus in some circumstances, high levels of stress or fear can have a negative effect on a witness's ability to acquire information and make an accurate identification.<sup>14, 15</sup>

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**INSERT SUPPLEMENTAL INSTRUCTIONS, WHERE APPROPRIATE, HERE:**

**SUPPLEMENTAL INSTRUCTION #1: WEAPON** If a weapon was involved, give this instruction.

**SUPPLEMENTAL INSTRUCTION #2: USE OF ALCOHOL** If there is use of alcohol, give this instruction.

**SUPPLEMENTAL INSTRUCTION #3: HIDDEN OR ALTERED FEATURES** If some type of "disguise" was used, give this instruction.

**SUPPLEMENTAL INSTRUCTION #4: DISTINCTIVE FACE OR**

**FEATURE** If the perpetrator had a distinctive face or feature, give this instruction.

**SUPPLEMENTAL INSTRUCTION #5: CROSS-RACIAL/CROSS-**

**ETHNICITY** If the witness and the perpetrator are of a different race or ethnicity, give this instruction.

**SUPPLEMENTAL INSTRUCTION #6: IF THE WITNESS KNEW THE**

**DEFENDANT OR HAD PRIOR CONTACT WITH THE DEFENDANT** If the witness knew the defendant or had seen the defendant prior to the crime, give this instruction.

[CONTINUE GENERAL INSTRUCTIONS:]

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**STORAGE OF INFORMATION AND FORMATION OF MEMORY**

Let me now discuss with you the second and third stages of memory. The second stage of remembering is the storage of information. Storage occurs during the time between the event and our effort to form a memory from the information stored in our minds. The third stage is forming a memory. Forming a memory involves assembling an account of an event or a person from the information stored in our minds.<sup>16</sup> Now let me talk to you about the factors that may affect these stages of memory.

One factor to consider about storing information and forming a memory is the amount of time between the incident and the time of an identification.<sup>17</sup> Memories fade over time.<sup>18</sup> Most memory loss occurs shortly after the initial observation, sometimes even within minutes or hours.<sup>19</sup> The memory loss of the witness then levels off. As a result, the passage of time between the incident and the identification can affect the accuracy of the identification.<sup>20</sup>

There are also external factors that may affect storing information and forming a memory.<sup>21</sup> For example, you may consider whether a witness was exposed to opinions, descriptions, or identifications by other individuals, to photographs or newspaper accounts, or to any other information or influence. Such information may affect the witness's memory and the accuracy of the identification and a witness's confidence in that identification.<sup>22</sup> Often witnesses may not be aware that their memories have been changed by information that has been introduced from these external sources.<sup>23</sup>

### **IDENTIFICATION PROCEDURES**

Other outside factors that may affect storing information and forming a memory are the identification procedure(s) used in this case. The way that an identification procedure is conducted can affect the accuracy of an identification.<sup>24</sup> Therefore, in evaluating the accuracy of each identification made in this case, you should consider the manner in which the procedure was conducted, including anything said to the witness before, during, or after the identification procedure(s).<sup>25</sup>

There are general factors that apply to every type of identification procedure the police conducted in this case. First, before conducting an identification procedure, the police should obtain from the witness a detailed description of the offender.<sup>26</sup> Second, witnesses should not be interviewed or participate in identification procedures together.<sup>27</sup> For example, witnesses should not view a lineup at the same time or within earshot of each other. Third, the police should not provide witnesses with any feedback about the offender or the identification procedure(s).<sup>28</sup>

I will now instruct you on the specific identification procedure(s) used in this case.

**[IF THERE WAS A SHOWUP].**<sup>29</sup> In this case, a witness identified the defendant during a "showup," that is, the defendant was the only person shown to the witness when the identification was made.

In evaluating the identification that was made, one factor to consider is when the showup was conducted. Showups conducted more than two hours after an incident tend to be less accurate than showups conducted within two hours of the incident.<sup>30</sup>

Another factor to consider is how the showup was conducted. An appropriate showup procedure conducted by the police should include the following:<sup>31</sup>

1. When transporting a witness to a showup, officers should attempt to prevent the witness from hearing radio transmissions or other officer-to-officer conversations related to the suspect or their investigation.
2. The police should minimize suggestiveness. For example, showups should not be conducted if the suspect is seated in the rear of a police cruiser, in a cell, or in any other enclosure associated with custody. If the suspect is handcuffed, he should not be put into a position where the witness can see the handcuffs.



3. The police should not tell the witness anything about the suspect, including whether he was arrested or where he was caught. In addition, the police should not tell the witness whether the suspect was found with anything.

Another factor to consider is what the police told the witness about the showup procedure. Before conducting a showup, the police should tell the witness the following:

1. You are going to be asked to view some people.
2. The person you saw earlier may or may not be one of the people you are about to view.
3. It is just as important to clear innocent persons from suspicion as it is to identify the guilty.
4. Regardless of whether you identify someone, we will continue to investigate the incident.
5. If you do identify someone, our procedures require me to ask you to state, in your own words, how certain you are.
6. If you do identify someone, please do not ask us questions about the person because we cannot share any information with you.
7. Regardless of whether you identify a person, please do not discuss the procedure with any other witnesses in the case or the media.

**[IF THERE WAS A PHOTO ARRAY]**<sup>32</sup>

In this case, a witness identified the defendant during a photo array. In evaluating the identification that was made, one factor to consider is how the photo array was conducted.<sup>33</sup> An appropriate photo array procedure conducted by the police should include the following:<sup>34</sup>

1. Photo arrays should contain at least five fillers.<sup>35</sup> A filler is a picture of someone who is not a suspect. The fillers should be based on their

similarity to the witness's description of the offender, not to the appearance of the suspect. The police should not repeat fillers with the same witness from one photo array to the next.

2. Officers should ensure they are using a current and accurate photograph of the suspect. Officers must ensure that nothing about the suspect or his photo makes him stand out.<sup>36, 37</sup> A photo array where the suspect stands out may inflate a witness's confidence in the identification because the selection process seemed so easy to the witness.<sup>38</sup>
3. The police should use a technique that will ensure that no investigator present will know when the witness is viewing the suspect in the array.<sup>39</sup>
4. Police officers should show the photographs one at a time and in random order. The order of the photos should be changed if there is a time gap between showings to multiple witnesses.<sup>40</sup>
5. Witnesses who ask to see a photo array a second time should be shown the entire photo array, but no more than for a second time.

Another factor to consider is what the police told the witness about the photo array procedure.<sup>41</sup> Before conducting a photo array, the police should tell the witness the following:

1. You are being asked to view a set of photographs.
2. You will be viewing the photographs one at a time in random order.
3. Please look at all of them. I am required to show you the entire series.
4. Please make a decision about each photograph before moving on to the next one.
5. The person who you saw may or may not be in the set of photographs you are about to view.
6. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.
7. The officer showing the photographs does not know whether any of the people in the array are the person you saw.

8. The individuals in the photographs may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.
9. Regardless of whether or not you select a photograph, the police department will continue to investigate the incident.
10. If you select someone, the procedure requires the officer to ask you to state, in your own words, how certain you are.
11. If you do select a photograph(s), please do not ask the officer questions about the person you have selected, as no information can be shared with you at this stage of the investigation.
12. Regardless of whether you select a photograph(s), please do not discuss the procedure with any other witnesses in the case or the media.

**[IF THERE WAS A LINEUP]** In this case, a witness identified the defendant during a lineup.

In evaluating the accuracy of the identification that was made, one factor to consider is how the lineup was conducted.<sup>42</sup> An appropriate lineup procedure conducted by the police should include the following:<sup>43</sup>

1. Lineups should contain at least five fillers.<sup>44</sup> A filler is someone who is not a suspect. The fillers should be based on their similarity to the witness's description of the offender, not to the appearance of the suspect. The police should not repeat fillers with the same witness from one lineup to the next.
2. Officers must ensure that nothing about the suspect makes him stand out.<sup>45, 46</sup> Where the suspect stands out, the witness's confidence may be inflated because the selection process seemed so easy to the witness.<sup>47</sup>
3. When conducting a lineup, the police should use a technique that will ensure that no investigator present will know when the witness is viewing the suspect in the lineup. The preference is for the police to have an officer who does not know who the suspect is administer the lineup.<sup>48</sup>

4. Police officers should conduct lineups by showing the suspect and fillers sequentially, meaning that the participants should be shown to the witness one at a time in a random order.<sup>49</sup>
5. Witnesses who ask to see a lineup a second time should be shown the entire lineup, but no more than for a second time.
6. The order of the photos should be changed if there is a time gap between showings to multiple witnesses.

Another factor to consider is what the police told the witness about the lineup procedure.<sup>50</sup> Before conducting the lineup, the police should tell the witness the following:

1. You are being asked to view a group of people.
2. You will be viewing them one at a time in random order.
3. Please look at all of them. I am required to show you the entire series.
4. Please make a decision about each person before moving on to the next one.
5. The person who you saw may or may not be one of the people you are about to view.
6. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.
7. The officer who will be administering the lineup does not know whether any of the people in the lineup are the person you saw.
8. The individuals you view may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.
9. Regardless of whether or not you select someone, the police department will continue to investigate the incident.
10. If you select someone, the procedure requires the officer to ask you to state, in your own words, how certain you are.

11. If you do select someone, please do not ask the officer questions about the person you have selected.
12. Regardless of whether you select someone, please do not discuss the procedure with any other witnesses in the case or the media.

### **CONFIDENCE AND ACCURACY**

#### **[If evidence of confidence is admitted.]<sup>51</sup>**

You heard testimony that [name of witness] made a statement at the time he identified the defendant from a [showup/photo array] [lineup] concerning his/her level of certainty that the [photograph] [person] he/she selected is in fact the person who committed the crime. A witness's level of confidence may not be an indication of the reliability of the identification.

#### **[IF THERE WERE MULTIPLE VIEWINGS OF SUSPECT.]<sup>52</sup>**

When a witness views a person in multiple identification procedures, the witness's memory of the actual perpetrator can be replaced by the witness's memory of the person seen in the earliest procedure. In this way, when a witness views a suspect in the earliest identification procedure, the risk of mistaken identification in the subsequent procedure is increased. You may consider whether the witness viewed the suspect multiple times and, if so, whether viewing the suspect in multiple procedures affected the accuracy of the identification.

**[IF FEEDBACK IS AN ISSUE IN THE CASE.]<sup>53</sup>**

Feedback occurs when the police or other witnesses to an event convey to a witness that he or she correctly identified the suspect. That confirmation poses a risk of creating a false sense of confidence in a witness. Feedback can also present a risk of falsely enhancing a witness's memory of the quality of his or her view of an event. It is for you to determine whether or not the memory of the witness was affected by feedback or whether the memory instead reflects the accurate perceptions of the witness during the event.

Identification is a question of fact for you, the jury, to decide. If, after your consideration of all the evidence, you determine that the Commonwealth has not proven beyond a reasonable doubt that the defendant was the person who committed this offense(s), then you must find him not guilty. If, on the other hand, after your consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant was correctly identified, you then must consider whether the Commonwealth has proven each and every element of the offense[s] charged beyond a reasonable doubt.

**SUPPLEMENTAL INSTRUCTION #1: WEAPON<sup>54</sup>****[If a weapon was involved, give this instruction.]**

Another factor to consider about the acquisition of information is whether the witness saw a weapon during the incident. 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.

**SUPPLEMENTAL INSTRUCTION: #2: USE OF ALCOHOL<sup>55</sup>**

**[If there is use of alcohol, give this instruction.]**

Another factor to consider about the acquisition of information is the witness's use of alcohol. Identifications made by witnesses with high levels of alcohol at the time of the incident tend not to be accurate.



**SUPPLEMENTAL INSTRUCTION #3: HIDDEN OR ALTERED FEATURES<sup>56, 57</sup>**

**[If some type of "disguise" was used, give this instruction.]**

Another factor to consider about the acquisition of information is whether the perpetrator's features were visible or hidden. For example, hats, sunglasses, and masks can affect a witness's ability to both remember and identify the perpetrator and can reduce the accuracy of an identification.

**SUPPLEMENTAL INSTRUCTION #4: DISTINCTIVE FACE OR FEATURE<sup>58</sup>**

**[If the perpetrator had a distinctive face or feature, give this instruction.]**

Another factor to consider about the acquisition of information is whether the perpetrator had a distinctive face or feature. A witness may be more likely to remember a distinctive face or feature and to accurately identify it.

**SUPPLEMENTAL INSTRUCTION #5: CROSS-RACIAL/CROSS-ETHNICITY<sup>59</sup>**

**[If the witness and the perpetrator are of a different race or ethnicity, give this instruction.]**

Another factor to consider about the acquisition of information is whether the witness and the perpetrator are of a different race or a different ethnicity. You should consider that people of all races and all ethnicities may have greater difficulty in accurately identifying members of a different race or a different ethnicity.<sup>60</sup>

**SUPPLEMENTAL INSTRUCTION #6: IF THE WITNESS KNEW THE DEFENDANT OR HAD PRIOR CONTACT WITH THE DEFENDANT<sup>61</sup>**

**[If the witness knew the defendant or had seen the defendant prior to the crime, give this instruction.]**

Another factor to consider is whether the witness knew the defendant or had seen the defendant before the incident or before the identification. 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. Prior exposure to a person can help a witness recognize that person. But it can also lead to a mistaken identification if the witness confuses people he saw at a different times or places. For example, if the witness got off a bus before witnessing the crime, he might mistakenly remember another passenger on the bus when asked to identify the perpetrator of the crime. It is for you to decide whether the prior contact between the witness and the defendant makes the witness identification more accurate, less accurate, or had no effect.

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<sup>1</sup> This instruction comports with scientific studies and expert evidence summarized in the Special Master's Report (June 18, 2010), State v. Henderson, N. J. Supreme Court, No. A-8-08 (Special Master's Report) ("studies, pioneered by Dr. Elizabeth Loftus, demonstrate that eyewitness performance depends on many variables. . . . 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").

By order of the New Jersey Supreme Court, the Special Master reviewed over 200 published scientific studies, articles, and books about, and heard ten days of testimony from seven distinguished experts on, scientific evidence concerning eyewitness evidence, including evidence on the workings of human memory. See id. at 2-4. The Special Master issued comprehensive findings of fact and recommendations that subsequently became the basis of New Jersey's revised evidentiary rules and jury instructions on eyewitness evidence. Id. at 72-86. In Commonwealth v. Walker, 460 Mass. 590 (2011), the Supreme Judicial Court drew on the findings of the Special Master, in addition to its own review of the scientific literature, to support its conclusions concerning eyewitness evidence. See,

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e.g., *id.* at 601-604. For the sake of brevity, these proposed Jury Instructions cite to summaries of the science of eyewitness evidence provided in the Special Master's Report wherever possible; those who wish to peruse the scientific literature more fully are directed in the first instance to the scientific studies and expert testimony cited in the Special Master's Report for each topic.

<sup>2</sup> For ease of reading, the terms "he" and "his" are used throughout these jury instructions to denote both males and females.

<sup>3</sup> The Supreme Judicial Court has stressed the importance of instructing the jury that the witness could have made a good faith error in identifying the defendant. See *Commonwealth v. Pressley*, 390 Mass. 617, 620 (1983) ("Fairness to a defendant compels the trial judge to give an instruction on the possibility of an honest but mistaken identification"). A *Pressley* instruction is not required in every case where identification is an issue, but it is required when the facts permit it and when the defendant requests it. See *id.* at 619-620 ("We do not suggest that in every case in which the issue of identification plays a viable role that a judge is required to give a 'good faith error' instruction. There may be cases in which the parties are so well known to each other, or so closely related that under sufficient lighting, and with appropriate physical proximity, the identification by the [witness] is either true or the [witness] is lying"). The Supreme Judicial Court has not established other exceptions to the *Pressley* rule. *Commonwealth v. Rosado*, 428 Mass. 76, 79 n.1 (1998).

<sup>4</sup> This instruction comports with the scientific findings summarized in Principles of Neural Science, Box 62-1, at p. 1239 (E. Kandel, J. Schwartz, and T. Jessell, eds., 2000) (describing unconscious reconstructive and condensing operation of memory).

<sup>5</sup> The first three sentences of the Final Instructions are taken, almost verbatim, from the pattern instruction for eyewitness identification set forth by the Supreme Judicial Court in *Commonwealth v. Rodriguez*, 378 Mass. 296, 310-311 (1979).

<sup>6</sup> See *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 796 (2009) (quoting *Commonwealth v. Jones*, 423 Mass. 99, 109 (1996)) ("We have long recognized that '[e]yewitness identification of a person whom the witness had never seen before the crime or other incident presents a substantial risk of misidentification and increases the chance of a conviction of an innocent defendant"); *Commonwealth v. Johnson*, 420 Mass. 458, 465 (1995) ("mistaken identification is believed widely to be the primary cause of erroneous convictions").

<sup>7</sup> This sentence comports with the pattern eyewitness identifications set forth in *Commonwealth v. Rodriguez*, 378 Mass. 296, 311 (1979).

<sup>8</sup> This instruction comports with scientific studies and expert evidence summarized in Special Master's Report at 9-10 ("Memory is comprised of three successive mental processes: encoding, which occurs when the witness perceives the event; storage, which is

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the period between the event and the witness's attempt to recall it; and retrieval, which is the process through which the witness attempts to reconstruct the event"). See also *Principles of Neural Science*, *supra* at 1237-1238 (scientists have discerned "three important things about episodic and semantic knowledge. First, there is not a single, all-purpose memory store. Second, any item of knowledge has multiple representations in the brain, each of which corresponds to a different meaning and can be accessed independently (by visual, verbal or other sensory clues). Third, both semantic and episodic knowledge are the result of at least four related but distinct types of processing: encoding, consolidation, storage, and retrieval," and discussing the four stages).

<sup>9</sup> Opportunity to observe is a factor listed in the pattern eyewitness identification instructions set forth in *Commonwealth v. Rodriguez*, 378 Mass. 296, 310 (1976) ("Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?").

<sup>10</sup> In the pattern eyewitness identification instructions, time length of encounter is listed as a factor in the witness's opportunity to observe the offender. See *Commonwealth v. Rodriguez*, 378 Mass. 296, 310 (1979) ("Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available").

<sup>11</sup> This instruction comports with scientific studies and expert evidence summarized in Special Master's Report at 44 ("The scientific studies demonstrate that the reliability of an identification is related to the duration of the witness's exposure to the perpetrator: while there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure. . . . In their self-reports, however, witnesses consistently tend to overestimate short durations, particularly where much was going on or the event was particularly stressful").

<sup>12</sup> This instruction comports with the scientific research summarized in Wells and Quinlivan, *Suggestive Eyewitness Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & Hum. Behav. 1, 11 (2009) ("Generally, the amount of time spent looking at a stimulus has not been considered to be a particularly strong predictor of the ability of the witness to process the stimulus. Instead, psychological scientists have emphasized the type of processing that is occurring while attending to a stimulus to be much more important. In the case of faces, for example, devoting attention to special facial features . . . can take a considerable amount of time when compared to making a global or holistic judgment of the face. Yet, it is the holistic judgments, which can occur fairly rapidly, that lead to better ability later to recognize that face among filler faces . . . . On the other hand, for purposes of being able to reconstruct the face . . . attention to specific facial features is superior to the global judgments").

<sup>13</sup> In ruling that trial judges should have discretion in deciding whether to admit expert eyewitness testimony, the Supreme Judicial Court noted that "juries are not without a general understanding" of "general principles, such as the fact that . . . people under severe

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stress do not acquire information as well as alert persons not under stress." Commonwealth v. Francis, 390 Mass. 89, 101 (1983). The Supreme Judicial Court subsequently held that judges do not need to include an instruction about the effect of stress on eyewitness identification accuracy. See Commonwealth v. DiBenedetto, 427 Mass. 414, 420 (1998) ("The judge . . . did not err in declining to supplement his eyewitness identification instruction"). In DiBenedetto, "[t]he proposed instruction included the following: [Y]ou may take into consideration general principles, such as the fact that . . . people under severe stress do not acquire information as well as alert persons not under stress." Id. at 420 n.6. The Supreme Judicial Court concluded that "[t]he matters on which additional instructions were sought are appropriate for final argument but need not be included in a judge's charge." Id.

<sup>14</sup> This instruction comports with scientific studies and expert evidence summarized in Special Master's Report at 43 ("The scientific literature reports that, while moderate levels of stress improve cognitive processing and might improve accuracy . . . an eyewitness under high stress is likely to make a reliable identification of the perpetrator. . . . Stress and fear ensure that the witness will not forget the event, but they interfere with the ability to encode reliable details"). See also State v. Lawson, 352 Or. 724, 769 (2012) ("High levels of stress or fear can have a negative effect on a witness's ability to make accurate identifications. Although moderate amounts of stress may improve focus in some circumstances, research shows that high levels of stress significantly impair a witness's ability to recognize faces and encode details into memory").

<sup>15</sup> "Age can also significantly affect the reliability of a witness's identification, memory, and perception. Studies show that children and elderly witnesses are generally less likely to make accurate identifications than adults, especially in target-absent conditions." State v. Lawson, 352 Or. 724, 774 (2012), citing Wells and Olson, *Eyewitness Testimony*, 54 *Ann. Rev. Psychol.* 277, 280 (2003). See also State v. Henderson, 208 N. J. at 265-266, citing Pozzulo and Lindsay, *Identification Accuracy of Children Versus Adults: A Meta-Analysis*, 22 *L. & Hum. Behav.* 549, 563, 565 (1998) ("The Special Master . . . found that '[a] witness's age . . . bears on the reliability of an identification.' A meta-analysis has shown that children between the ages of nine and thirteen who view target-absent lineups are more likely to make incorrect identifications than adults. . . . Based on the record before us, we cannot conclude that a standard jury instruction questioning the reliability of identifications by all older eyewitnesses would be appropriate for use in all cases").

<sup>16</sup> Principles of Neural Science, supra at 1238 ("Storage refers to the mechanism and sites by which memory is retained over time. . . . [R]etrieval refers to those processes that permit the recall and use of the stored information. Retrieval involves bringing different kinds of information together that are stored separately in different storage sites"); see also Special Master's Report at 9-10 ("storage . . . is the period between the event and the witness's attempt to recall it; and retrieval . . . is the process through which the witness

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attempts to reconstruct the event. . . . At each of those stages, the information ultimately offered as 'memory' can be distorted, contaminated and even falsely imagined").

<sup>17</sup> This general instruction comports with the pattern eyewitness identification instructions. See Commonwealth v. Rodriguez, 378 Mass. 296, 311 (1979) ("You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant, as a factor bearing on the reliability of the identification").

<sup>18</sup> See Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness Memory Representation*, 14 *J. Experimental Psych.: Applied* 148 (2008).

<sup>19</sup> See Lawson, 352 Or. at 746 ("Memory generally decays over time. Decay rates are exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time").

<sup>20</sup> This instruction comports with scientific studies and expert testimony summarized in Special Master's Report at 45 ("A 2008 meta-analysis. . . shows that memory quality declines by 20% after two hours, by 30% within the first day and by 50% one month after the observation. . . . Longer retention intervals are associated with fewer correct identifications").

<sup>21</sup> This instruction comports with scientific studies and expert testimony summarized in Special Master's Report at 10 ("retained memory can be unknowingly contaminated by post-event information").

<sup>22</sup> In Commonwealth v. Cuffie, 414 Mass. 632, 639 (1993), the Supreme Judicial Court indicated that the jury should be told that they could "take into account . . . the strength of the identification." In Commonwealth v. Santoli, 424 Mass. 837, 845 (1997), however, the court concluded that the language regarding "strength" should be omitted from the standard instructions, noting that "there is significant doubt about whether there is any correlation between a witness's confidence in her identification and the accuracy of her recollection." Santoli, 424 Mass. at 846. The Court further noted that "the significance, if any, of a witness's confidence in an identification should be left to cross-examination and to the argument of counsel and should not, in the normal course, be a subject of a jury instruction." Id.; see also Commonwealth v. Rodriguez, 457 Mass. 461, 475 n.20 (2010) (holding instruction properly excluded language allowing jury to take strength of identification into account); Commonwealth v. Cruz, 445 Mass. 589, 596 (2005) (declining to find error when judge refused "to instruct the jury that the confidence of an identifying witness does not correlate to the accuracy of the identification"); Commonwealth v. Cowans, 52 Mass. App. Ct. 811, 814 (2001), overruled in part on other grounds by 451 Mass. 200 (2008) ("The relevancy, as well as the weight, of a witness's level of confidence in an identification will vary from case to case, depending on a multitude of factors. The significance that should be given to the level of confidence is . . . for the jury to determine,



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not the court"). See New Jersey Eyewitness Identification Instruction (2012), citing State v. Chen, 298 N. J. 307 (2011).

<sup>23</sup> See supra note 4.

<sup>24</sup> This instruction comports with scientific studies summarized in Wells and Quinlivan, Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science, 31 L. & Hum. Behav. 1, 6 (2009) ("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 Leippe, Eisenstadt and Rauch, Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions, 33 L. & Hum. Behav. 194 (2009).

<sup>25</sup> Id.

<sup>26</sup> See United States Department of Justice, Eyewitness Evidence: A Guide for Law Enforcement 27 (1999).

<sup>27</sup> Id. at 21, 27.

<sup>28</sup> Id. at 33, 35, 37. See also State v. Guilbert, 306 Conn. 218, 253 (2012) ("witnesses may develop unwarranted confidence in their identification if they are privy to postevent or postidentification information about the event or the identification").

<sup>29</sup> In Stoval v. Denno, 388 U.S. 293, 302 (1967), the Supreme Court noted that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." The Supreme Judicial Court has made similar observations and seems to strongly disfavor the use of show-ups. See, e.g., Commonwealth v. Storey, 378 Mass. 312, 317 (1979) ("one-on-one confrontations, whether photographic or in person . . . pose particularly serious danger [of suggestiveness]"); Commonwealth v. Torres, 367 Mass. 737, 740 (1975) ("Single person identification procedures are constitutionally suspect"); Commonwealth v. Nolin, 373 Mass. 45, 51 (1977) ("a one-to-one confrontation, whether in person or by photograph, is disfavored"). While showups are disfavored, they are not subject to a per se rule of exclusion. See Storey, 378 Mass. at 317 ("one-on-one confrontations . . . are not subject to a rule of per se exclusion"). But see Commonwealth v. Silva-Santiago, 453 Mass. 782, 797-798 (2009) (citing Commonwealth v. Austin, 421 Mass. 357, 362 (1995)) ("We have also recognized that eyewitness identification may be highly probative of who did (and did not) commit a crime, and that the exigencies of police work sometimes require police to employ less than perfect identification procedures. . . . [Showups] may be admissible, even

though they are inherently suggestive"). The Supreme Judicial Court has also recognized that timing is an important factor for showups. See Commonwealth v. Williams, 399 Mass. 60, 67 (1987) (quoting Commonwealth v. Harris, 395 Mass. 296, 299 (1985)) ("We have repeatedly held that due process rights are not violated when police arrange a one-on-one confrontation between the victim and a suspect promptly after a criminal event occurs"). Showups will only be excluded if, "in the totality of the circumstances, the identification was so unnecessarily suggestive and conducive to misidentification as to deny the defendant due process of law." H.J. Alperin., Summary of Basic Law § 7.107 (4th ed. 2006) (citing Commonwealth v. Dickerson, 372 Mass. 783, 791 (1977)).

<sup>30</sup> This instruction comports with the scientific studies and expert opinion summarized in Special Master's Report at 29 ("a one-person display is inevitably suggestive . . . The research shows, in fact, that the risk of misidentification is not heightened if a showup is conducted immediately after the witnessed event, ideally within two hours: the benefits of a fresh memory seem to balance the risks of undue suggestion. . . The likelihood of misidentification of innocent persons substantially increases thereafter"). See also Lawson, 352 Or. at 783 ("Despite [their] shortcomings, some research indicates that, when conducted properly and within a limited time period immediately following an incident, showups can be equally as reliable as lineups. Showups are most likely to be reliable when they occur immediately after viewing a criminal perpetrator in action, ostensibly because the benefits of a fresh memory outweigh the inherent suggestiveness of the procedure. In as little as two hours after an event occurs, however, the likelihood of misidentification in a showup procedure increases dramatically").

<sup>31</sup> These procedures are recommended by the Police Practices Subcommittee of the Supreme Judicial Court's Study Group on Eyewitness Identification.

<sup>32</sup> See 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 it 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").

<sup>33</sup> See Commonwealth v. Silva-Santiago, 453 Mass. 782, 794-799 (2009) (assessing lineup procedures). While Silva-Santiago did not directly examine the issue of jury instructions, it may be useful in illuminating the Supreme Judicial Court's position on proper lineup procedures. The Supreme Judicial Court noted "disapprov[al] of an array of photographs which distinguishes one suspect from all the others on the basis of some physical characteristic." Id. at 795 (quoting Commonwealth v. Melvin, 399 Mass. 201, 207

n.10 (1987)). The Supreme Judicial Court also noted, "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 because it eliminates the risk of conscious or unconscious suggestion." Id. at 797. The Supreme Judicial Court also declined to hold that the absence of pre-identification warnings to the eyewitness made the identification inadmissible, but noted that "we expect such protocols to be used in the future." Id. at 798.

<sup>34</sup> The Supreme Judicial Court discussed lineup procedures in the context of suppression in Commonwealth v. Walker, 460 Mass. 590, 601-604 (2011). After discussing a sampling of research on the simultaneous versus sequential lineup displays, the Supreme Judicial Court concluded that "it is still too soon to conclude that sequential display is so plainly superior that any identification arising from a simultaneous display is unnecessarily suggestive and therefore must be suppressed." Id. at 602-603 (citing State v. Henderson, 27 A.3d 872 (2011)). The court concluded that "[u]ntil we reach such a conclusion, the choice of a simultaneous rather than sequential display of photographs shall go solely to the weight of the identification, not to its admissibility." Walker, 460 Mass. at 603 (citing Commonwealth v. Silva-Santiago, 453 Mass. 782, 798-799 (2009)). Walker involved a situation where a witness had been shown a photo array composed entirely of suspects. Walker, 460 Mass. at 603. While concluding that the use of an all-suspect lineup in that particular case did not result in a miscarriage of justice, the court noted that "an all-suspect array significantly and needlessly increases the potentially unjust consequences that may arise from a false positive identification." Id. at 604.

<sup>35</sup> See Special Master's Report at 25 (noting "[t]he ordinary and accepted practice among law enforcement agencies is to present an array embedding the suspect among at least five fillers"). Accord Commonwealth v. Walker, 460 Mass. 590, 604 (2011). See also Wells and Quinlivan, supra at 7 (discussing the scientific literature distinguishing between the "nominal" and "functional" composition of lineups/arrays).

<sup>36</sup> The Supreme Judicial Court has held that "identifications based on a suggestive array where only one subject is pictured with a distinctive feature are admissible if 'it is clear that the [witness] did *not* select the photograph on that basis.'" Commonwealth v. Thornley, 406 Mass. 96, 100 (1989) (quoting Commonwealth v. Melvin, 399 Mass. 201, 207 n. 10 (1987)) (emphasis added); see Commonwealth v. Mobley, 369 Mass. 892, 894-895 (1976) (involving an array in which the defendant's photo was the only one showing a ski hat, where the victim testified that he was not looking for a hat, did not focus on it, and could not even remember which photo had the hat).

<sup>37</sup> See, e.g., Smalarz and Wells, Eyewitness Identification Evidence: Scientific Advances and the New Burden on Trial Judges, 48 Court Rev. 14 (2012) ("The degree to which the suspect seems to fit the witness's memory of the perpetrator is highly dependent on the properties of the lineup itself. For example, if a lineup is somehow biased against the suspect (i.e., the suspect stands out in some way or the fillers in the lineup do not fit the

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witness's description of the culprit), then the suspect will be the one who, relative to the other lineup members, is the most similar to the witness's memory of the culprit. Given what we know about the relative-judgment process, a biased lineup drastically increases the chances that an innocent suspect will be mistakenly identified").

38        Id.

39        See Commonwealth v. Silva-Santiago, 453 Mass. 782, 797 (2009).

40        This instruction comports with scientific studies and expert evidence summarized in Special Master's Report, at 40 ("The research broadly confirms the research hypothesis that an innocent person is at greater risk of being misidentified in a simultaneous lineup than in a sequential lineup. . . . The consensus explanation appears to be that sequential viewing of the lineup inhibits the witness's resort to relative judgment, i.e., choosing the person who looks most like the perpetrator. . . . The studies show that a sequential procedure reduces both accurate and inaccurate identifications, but there is dispute as to the rate of reduction of accurate identifications as compared to the well-established rate of reduction in inaccurate identifications. . . . A 2001 meta-analysis reviewing 30 studies with a total of 4145 witnesses concluded that while accurate identifications fell from 50% in simultaneous lineups to 35% in sequential lineups, foil identifications in target-absent arrays fell to a greater extent, from 51% in simultaneous lineups to 28% in sequential lineups"). See also Commonwealth v. Walker, 460 Mass. at 602-603; Guilbert, 306 Conn. at 238 and n.17 (collecting cases).

41        See supra note 32 (instructions to witnesses).

42        See supra note 33.

43        See supra note 34.

44        See supra note 35.

45        See supra note 36.

46        See supra note 37.

47        Id.

48        See supra note 33.

49        See supra note 34.

50        See supra note 32 (instructions to witnesses).

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<sup>51</sup> This instruction comports with the scientific studies and expert testimony summarized in Special Master's Report at 33-35 ("Witness confidence is of concern because the research shows that the persuasiveness of an eyewitness identification is closely linked to the certainty expressed by the witness in his or her identification. . . . A number of meta-analyses show . . . that witnesses' pre-identification confidence in their ability to make an identification has no correlation to the accuracy of the identifications they make . . . and that confidence expressed immediately after making an identification has only a low correlation to the accuracy of the identification. . . . The studies do show that witnesses expressing post-identification high confidence (e.g., 90-100%) are in fact highly accurate (e.g., 90%), but only a small fraction of witnesses report such levels of confidence and even 10% of them make incorrect identifications. . . . The studies conclude, in short, that a witness's self-report of confidence, whether given before or after the identification, is not a reliable indicator of accuracy"). See also Guilbert, 306 Conn. at 237 and n.12, 241 and n.23 (collecting cases).

<sup>52</sup> This instruction comports with scientific studies and expert evidence summarized in Special Master's Report at 27-28 ("The administration of multiple lineup procedures to a single witness . . . can undermine the reliability of any resulting identifications. . . . 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"). See also Wells and Quinlivan, supra at 9 (noting "the dominant view among psychological scientists that, once an eyewitness has mistakenly identified someone, that person 'becomes' the witness's memory and the error will simply repeat itself").

<sup>53</sup> This instruction comports with the scientific studies and expert testimony summarized in Special Master's Report 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").

<sup>54</sup> This instruction comports with scientific studies and expert evidence summarized in Special Master's Report at 44 ("the presence of a weapon at the observed event has been demonstrated to impair eyewitness memory and identification accuracy. . . . The studies find that the visible presence of a weapon diverts a witness's attention away from the face of the perpetrator and reduces the witness's ability to encode, describe and identify the face. . . . The effect is particularly strong during crimes of short duration . . . and when combined with the effects of stress," and citing to scientific studies and expert testimony).

<sup>55</sup> This instruction comports with scientific studies and expert evidence summarized in Special Master's Report at 47 ("Studies of the effects of alcohol on identification accuracy show that high levels of alcohol promote false identifications; low alcohol intake produces fewer misidentifications than high alcohol intake").

<sup>56</sup> There is a lack of Massachusetts case law regarding jury instructions on the issue of an eyewitness who views the perpetrator in a disguise. This factor could be considered, however, under the "opportunity to observe" factor listed in the pattern eyewitness identification instructions set forth in Commonwealth v. Rodriguez, 378 Mass. 296, 310 (1976) ("Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?").

<sup>57</sup> This instruction comports with scientific studies and expert evidence summarized in Special Master's Report at 47 ("Disguises (e.g., hats, sunglasses, masks) are confounding to witnesses and reduce the accuracy of identifications. . . . Changes to perpetrators' facial appearance (e.g., appearance or disappearance of facial hair) between initial exposure and identification procedure also impair identification accuracy: one study found that correct identifications dropped by 50% (to almost the equivalence of chance) with such changes of facial appearance. . . . Dissimilarity between a perpetrator's appearance in the event and in a later lineup reduces the positive effects of longer initial exposure during the event").

<sup>58</sup> This instruction comports with scientific studies and expert evidence summarized in Special Master's Report at 47 ("Experimental studies demonstrate that distinctive faces are more readily remembered and accurately identified").

<sup>59</sup> This instruction comports with scientific studies and expert evidence summarized in Special Master's Report at 48 ("Several meta-analyses published over the past 20 years consistently show that other-race recognition is poorer than same-race recognition"). See generally Meissner and Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces, 7 *Psych., Pub. Pol'y and L.* 3. (2001).

<sup>60</sup> Currently, it is within the trial judge's discretion to choose whether to give a special instruction about cross-racial identification. In Commonwealth v. Bly, 448 Mass. 473 (2007), the defendant requested that the jury receive an instruction that stated, in part, "You may consider in the context of my instructions on identification that persons of one race have difficulty in identifying persons of another race." Bly, 448 Mass. at 496. The trial judge denied the request, and the Supreme Judicial Court affirmed this decision, stating that "[w]e have said the decision to give such an instruction is within the judge's discretion when warranted by the evidence. . . . While we acknowledge the significant body of scientific literature on the problems inherent in cross-racial identification . . . we have never held that those problems require a jury instruction when cross-racial identification testimony is offered." Id.; see Commonwealth v. Hyatt, 419 Mass. 815, 818 (1995) (trial judge acted within his discretion in declining to give cross-racial instruction), citing Commonwealth v. Charles, 397 Mass. 1, 8 (1986); see also Commonwealth v. Walker, 421 Mass. 90, 96 (2011) (trial judge did not abuse discretion by refusing to allow expert testimony on cross-racial identifications).

<sup>61</sup> See, e.g., Sheehan, "Making the Jurors the 'Experts': The Case for Eyewitness Identification Jury Instructions," 52 *B. C. L. Rev.*, 651, 692 (2011). This instruction also comports with scientific studies and expert evidence summarized in Special Master's

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Report, at 46 ("misleading familiarity with a face . . . can . . . occur when a witness confuses a person seen at or near the crime scene with the actual perpetrator. . . . 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 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"). See also Guilbert, 306 Conn. at 253, 254.

### **RECOMMENDATION 5: EDUCATION AND CONTINUED REVIEW**

The recommendations in this report, if adopted in whole or in part, would represent significant changes in Massachusetts criminal procedure. For these changes to succeed, both the bench and the bar will need to be educated about the rationale and the implementation of the reforms. The Study Group strongly recommends that the Justices, in consultation with the Chief Justice of the Trial Court, the Chief Justices of the Trial Court Departments hearing criminal matters, bar leaders, and others, convene a standing Education Committee on Eyewitness Evidence to develop educational seminars and trainings on an ongoing basis to address new eyewitness evidence procedures and protocols. Several judicial and legal organizations in Massachusetts have enthusiastically offered to develop and host such educational programs, and several Study Group members have indicated that they are willing to participate in or even lead such efforts. Judge Kane would be pleased to discuss this subject further with the Justices at their convenience.

Moreover, this report is not intended as a definitive statement on the science of eyewitness identification, or on the police practices and criminal procedures most appropriate in light of the science. Much remains unknown about how memory works and how jurors perceive eyewitness testimony. While the recommendations in this report may guide the Court in light of the scientific research as it stands today, individual recommendations may need to be modified or discarded in light of the evolving scientific research. As a matter of justice, our courts must be able to respond to the science as it evolves rather than "catch up" to advances in research after years of inaction. For this



reason, the Study Group recommends that the Justices establish a Standing Committee on Eyewitness Evidence (perhaps including the Education Committee discussed above) that will periodically meet to assess the evolving science and law of eyewitness identification and make appropriate recommendations to the Justices in light of their findings. Again, many members of the Study Group stand ready to assist the Justices in this effort.

**MINORITY STATEMENT OF JAMES M. DOYLE, ESQ.**

Efforts to modernize the legal system's treatment of eyewitness evidence pursue three fundamental goals. They seek to enlarge the quantity of eyewitness evidence, to protect its quality, and to improve the trial system's ability to evaluate it.<sup>49</sup>

The Study Group's approaches to the first two goals -- enhancing quality and preserving quality -- are exemplary. I believe, however, that after making an important start by recommending that formal judicial notice be taken of the core principles of the modern science of memory, the Study Group goes astray in its recommendations regarding pretrial hearings as the principal vehicle for modernizing retrospective evaluation.

The Study Group advocates replacing two complementary, long-standing, and familiar legal mechanisms for evaluating eyewitness evidence -- a constitutionally-required due process screen for evidence generated by police suggestion and a common-law evidentiary screen directed against unreliable evidence in general -- with an ambitious new architecture: a "Massachusetts test" for the admission of eyewitness evidence.

There is a more conservative approach available. A radical new test will unnecessary if -- although admittedly only if -- the Supreme Judicial Court adopts the Study Group's most fundamental recommendation and takes judicial notice as legislative facts of the core principles of the modern science of eyewitness memory. If that step is taken, courts that carefully take account of the scientific facts concerning memory can best

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<sup>49</sup> See, e.g., National Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999).

evaluate eyewitness evidence by mobilizing the existing constitutional and evidence law machinery on a case-by-case basis.

The positive impact of the judicial notice approach taken by the Oregon Supreme Court when confronting eyewitness evidence in State v. Lawson, 352 Or. 724 (2012), cannot be overstated.

Litigants in Massachusetts eyewitness cases currently have no way to ascertain what an individual Massachusetts judge knows or believes about any of the general principles of the psychology of memory that are inextricably bound up in the process of the evaluation of evidence. Does this judge believe, for example, that witness confidence indicates accuracy? That memory operates as a stable record of history, like a videotape or DVR? Does this judge feel that the presence of a weapon degrades accuracy? Or not? To complicate matters further, parties can only rarely identify in advance which particular judge will ultimately hear and decide a contested eyewitness issue in the busy trial courts of the Commonwealth.

In this environment, parties to cases where eyewitness evidence is pivotal have no alternative to seeking to find, pay for, and offer the time-consuming testimony of expert witnesses who address core scientific issues of memory, perception, and recall. As things now stand, these issues are always potentially contestable. Lawyers for parties -- most often criminal defendants, who are most often indigent -- who are alert to eyewitness issues must drain system resources to ensure that science finds a way into the evaluation of evidence. Those whose lawyers are unaware, and the jurors before whom their cases appear, are disadvantaged.

Authoritative appellate judicial notice of legislative facts embodying modern science eliminates much of this uncertainty without freezing the science. In effect, it introduces a consistent "new normal" while -- as with any other exercise of judicial notice - - it allows for the challenge of any reigning "normal" if science advances and psychological doctrine is changed. In terms of reducing uncertainty this approach is immeasurably more effective than the most ambitious education and training effort could ever hope to be. Training and education are certainly valuable, but they will still leave parties (and reviewing courts) to ask: "Did my judge attend the training? When was he or she appointed? Did he or she understand the material? Does he or she remember it? Will he or she rule on the basis of that understanding?"

With the core principles judicially noticed all parties will at least know where they start. This new common starting point reflects a very strong consensus judgment of the scientific community. It can be expected that the need for expert testimony will decrease and that retrospective fact-finding even in the absence of expert challenges will be more accurate. Cases will certainly arise in which expert testimony before the jurors on eyewitness issues is necessary, but even resolution of expert witness admissibility issues will be considerably streamlined by the availability of judicially noticed facts that can be applied to offers of proof and objections. There should be fewer experts testifying about whether experts should testify.

Once the scientific principles are judicially noticed, two familiar bodies of law can be efficiently mobilized as vehicles for retrospective evaluation of eyewitness evidence.

The first of these is the substantial body of law vindicating the State and Federal constitutional guarantees of due process of law. The principal target of this "screen" is the

prevention of police misconduct that produces irreparable misidentifications. It is ordinarily focused on a binary "in/out" decision, aimed at the identification ("That's the guy") itself and it is not well-adapted for dealing with associated issues regarding evidence (for example, of witness certainty) that adds heavy (and often unwarranted) persuasive weight to the identification in the eyes of the jurors after the identification has been admitted. The due process cases are concerned with the choice at the moment of choice, more than with the sources and the justifications of the choice.

The Study Group's report identifies this constitutional screen with the due process oriented opinion of the New Jersey Supreme Court in State v. Henderson, 208 N. J. 208 (2011), and describes a conflict between the New Jersey court's approach to eyewitness evidence and that taken by the Oregon Supreme Court in State v. Lawson.

I do not agree that this conflict exists. My answer to the question "Henderson or Lawson?" to which the Study Group answers "neither" would be "both."

In fact, I believe both tests are currently latent in Massachusetts law, although arguably they have not yet been optimally (or explicitly) utilized where eyewitness memory is concerned. Once the modern science of memory is accepted the general law of evidence and its procedures for requiring and showing foundational facts, as in Lawson, would apply automatically, unless the Supreme Judicial Court decides to take the radical and in my view unwarranted step of declaring an eyewitness evidence exception" to the law of evidence.

In Lawson, the Oregon court -- which recognized that it was in no position to abrogate existing federal constitutional due process tests -- pointed to a complementary approach to evaluating eyewitness evidence. This approach was present in the State's general law of evidence and is mobilized once judicial notice was taken of the legislative

scientific facts. The Study Group's observation that the Oregon Court's Lawson opinion "places the burden of proof of admissibility on the prosecution in all situations, [and] is incompatible with existing Massachusetts due process standards" misses the point.

(Emphasis added.) Lawson does not -- it could not -- supplant the constitutional due process test; in fact, it does not address it. Eyewitness evidence that must be excluded on due process grounds is excluded; Lawson does not affect that evidence. Lawson principally addresses the vast majority of cases in which an eyewitness's identification choice is not suppressed, but is admitted and must be evaluated by jurors.

What Lawson accomplishes is quite different from what the Study Group's pre-trial hearing subcommittee fears. First, by taking judicial notice of the modern science of memory, Lawson improves and regularizes fact-finding in traditional due process "in/out" hearings. It adds the basic elements of the operation of human memory unrelated to police misconduct such as the impact of "estimator variables" such as stress, violence, or witness's age, to the list of facts a judge conducting a suppression hearing must take into account when weighing reliability. Second, it reminds State courts that the common law of evidence applies to eyewitness evidence, a point that the Supreme Judicial Court has already underlined in Commonwealth v. Jones, 423 Mass. 99 (1996).

Eyewitness testimony is offered as a record of experience. One of the dangerous features of the obsolete view of memory as a stable DVR or videotape was that it suggested that eyewitness evidence was a unique species of direct evidence that was simply being re-played in the courtroom. Modern science, however, has made it clear that there is nothing fundamentally unique about eyewitness memory evidence. As with photographic evidence, or business records evidence, the process of making the eyewitness memory

record may be distorting. Like trace evidence, eyewitness memory can be contaminated. Although eyewitness evidence presents some special challenges -- it cannot, for example, be sent to a lab to test for contaminants -- in the end, it is still just evidence. In Massachusetts, as in Oregon, there is a long-standing process for dealing with the issues the offer of evidence presents.

The proponent must prove certain preliminary facts to the judge by a preponderance of the evidence.<sup>50</sup> These preliminary facts include, for example, the witness's first-hand knowledge of the event, the basis for a proper lay opinion, the regular course of business in which the record was made, and the absence of contamination. The proponent must also demonstrate that the probative value of the offered evidence outweighs its prejudicial effect. By this method the general law of evidence assigns the burden of producing and showing preliminary facts to the party mostly likely to be in possession of those facts and best motivated to bring them forward. Courts and lawyers are deeply experienced in operating within this framework.

An important benefit of this approach is the incentive it provides institutional law enforcement litigants to develop and execute standard operating procedures for handling and documenting eyewitness evidence that will make it easy for them to prove the required preliminary facts. Just as law enforcement has developed regularized methods for handling the "chain of custody" of physical trace evidence to protect it against contamination and make its admission a matter of routine, police and prosecutors can develop and utilize procedures for handling memory evidence that simplify the process of admissibility in

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<sup>50</sup> See, e.g., Proposed Mass. R. Evid. 104 (a); Fed. R. Evid. 104 (a); P. Liacos et al., *Handbook of Massachusetts Evidence* § 3.9.1 (6th ed. 1994).

court and control the quality of evidence offered. Compliance with the police procedures set out in the Study Group's recommendations, for example, will go a long way toward demonstrating an absence of contamination and the basis of an eyewitness's personal knowledge.

Whether the evidentiary issues raised by applying this familiar framework to the modernized science of memory must be decided in a "pretrial hearing" seems to me to be an incidental question. I suspect that sometimes a pretrial in limine hearing will be the most effective way to decide the admissibility questions, sometimes it will not, and that one of the virtues of the Lawson approach is that it retains the flexibility necessary to chose the most effective approach on a case-by-case basis. As long as it is understood that the judge must take explicit account of the facts of science and the facts of the events in deciding, it does not matter very much when the decision is made.

Experience with a case-by-case approach may at some point indicate that a new more sweeping rule is required. It may turn out, as some fear, that unless judges are compelled to focus on the issues at a pretrial hearing they will never focus on them at all. But to impose such a rule now seems premature.

For me the advantages of the case-by-case approach, particularly when applied to many crucial questions beyond the "in/out" nuclear option of total exclusion, are illustrated in the Study Group's own Report.

Recognizing that jurors place undue reliance on an eyewitness's confidence the Study Group generally disfavors confidence testimony. But recognizing that immediate measurement of confidence after a lineup or photo array identification is a good police practice that inhibits confidence boosting by post-lineup feedback, the Study Group also



makes an exception, permitting certainty testimony "where the statement of certainty occurred immediately after the out of court identification." This effort to reward good police work is understandable.

But the new general rule permitting admission of immediate confidence statements ignores the fact that there will be many cases where witness confidence has been artificially boosted before the witness chooses anyone from a lineup or photo-array. Research shows that confidence can be innocently boosted by repeated questioning, by the presence of bad "fillers" in the array, or by post-event (but pre-lineup) information such as "we found your property on the guy we arrested."<sup>51</sup> The Study Group's general rule implies that immediately obtaining a post-lineup certainty statement launders pre-lineup boosting. It does not. Deciding the admissibility of certainty evidence in these situations on a case-by-case basis is far more accurate and far less dangerous.

With core psychological principles judicially noticed as legislative facts, trial judges are much better armed to conduct this case-by-case inquiry. The legislative facts will also enable judges to craft meaningful -- and accurately targeted instructions to jurors where guidance on psychological principles is required in case-specific situations not addressed by standard instructions. The Study Group quotes researchers as saying that there is no evidence that jury instructions either help or harm jury deliberations. Whatever this might say about the state of the research, it is an incomplete description of the legal situation. As the Supreme Judicial Court made clear in Commonwealth v. Santoli, 424 Mass. 837

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<sup>51</sup> Eisenstadt and Leippe, Social Influences on Eyewitness Confidence: The Social Psychology of Memory Self-Certainty, in Handbook of the Uncertain Self 36 (R. Arkin et al., eds., 2013).

(1997), instructions containing bad science -- in that case an admonition to give weight to witness certainty -- have to be assumed to be followed by the jurors and to be harmful.

**MINORITY STATEMENT OF RADHA NATARAJAN, ESQ.**<sup>52</sup>

(Joined by Hon. Jay Blitzman and Hon. Nancy Gertner)

With the realization that eyewitness identification evidence has been the "greatest source" of known wrongful convictions, the Study Group was asked to examine the science and make recommendations supported by that science to achieve at least three goals: (1) to deter suggestive identification procedures, (2) to reduce the admission of unreliable identification evidence against criminal defendants, and (3) to help fact-finders evaluate identification evidence despite its inherent flaws. I write separately to address a few additional recommendations that are consistent with Massachusetts law, are supported by scientific principles concerning eyewitness identification evidence, and that move us toward achieving these goals.

Best Practices for Massachusetts Police Departments

The Report makes arbitrary and unsupported distinctions between those procedures it calls "best practices," supra at 86-88, and those it calls "specific best police practices," supra at 88-89, that, if violated, would warrant a hearing. In support of this delineation, the Report states that "[f]ailure to adhere to these specific protocols carries a likelihood of tainting an identification by an eyewitness," thereby implying that a failure to adhere to the

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<sup>52</sup> The views reflected in this statement are mine as an individual and do not necessarily reflect the position of the Committee for Public Counsel Services (CPCS) on all matters addressed herein. Specifically, because it would not have been feasible, or preferable, to publicly circulate the Study Group's "Report and Recommendations to the Justices" before its actual submission to the Justices, it was not possible to obtain CPCS's official position on the recommendations it contains.

other protocols ("best practices") would not carry that same likelihood. However, nothing in the Report justifies the distinction, and indeed, the science does not support making such a distinction.

For an example, the Report indicates that for a showup, "best practice" would mean that the police "not tell the witness where the suspect was found or whether he did or said anything suspicious." Supra at 87. In addition, "best practice" would include preventing the witness from learning "whether the suspect was found with items associated with the crime, such as the car used or a stolen purse." Id. These "best practices" are inexplicably excluded from the list of "specific best police practices" that might trigger a hearing despite the fact that failure to adhere to them would be both suggestive and could render any resulting identification less reliable. See, e.g., Commonwealth v. Moon, 380 Mass. 751, 758 (1980).

As we know from the science, eyewitness memory is like trace evidence in that it can be easily contaminated. Police officers are in a unique position to be able to control the environment in which a witness makes an identification, and therefore, those officers can encourage or prevent the kind of contamination that could lead to a wrongful conviction. If deterring preventable contamination of a witness's memory by police officers is the goal of these recommendations, then there should be no distinction between "best practices" and those "specific best police practices" that would trigger a hearing. At the very least, the list of "specific best police practices" currently included in the Report is underinclusive.

Therefore, I would recommend that a substantial failure on the part of the police to adhere to the "best practices" as listed on pages 86-88, supra, be sufficient to warrant a pretrial hearing.

### Protocols for Pretrial Hearings

(1) Judicial Discretion in Granting Pretrial Hearings: Given the fact-specific nature of cases involving eyewitness identifications, and the reality that Study Group members cannot anticipate every case scenario likely to arise in Massachusetts courts, I would recommend that trial courts be given the discretion to hold an evidentiary pretrial hearing concerning a pretrial eyewitness identification in any case "where justice so requires." By permitting trial courts to hold such a hearing in the unusual case, a wrongful conviction could be averted.

(2) Certainty Statements: The Report recommends that an eyewitness's statement of confidence in his/her out-of-court identification be admissible but only in the words stated by the eyewitness immediately after the identification and before any opportunity for feedback (or if admissible as rebuttal evidence). Supra at 113. While a certainty statement taken immediately after a double-blind/blinded identification is a better indicator of accuracy than one taken after contaminating feedback, the scientific studies indicate that the correlation between confidence and accuracy is still only moderate. At the same time, studies indicate that jurors tend to rely more heavily on a witness's confidence as an indicator of accuracy than is supported by the science. Additionally, other factors besides post-identification feedback could improperly inflate a witness's confidence, such as statements made to the witness before the identification or an array where the suspect stands out. Given the science, any statement of a witness's confidence in his/her own identification would be more prejudicial than probative, and because it would constitute bolstering of the eyewitness's own opinion, I would recommend that certainty statements be inadmissible altogether.

Eyewitness Identification Jury Instructions

(1) "Good Faith Error": The Report makes note of the fact that a "good faith error" instruction is only required where it is supported by the facts and the defendant specifically requests it. Commonwealth v. Pressley, 390 Mass. 617, 619-20 (1983). For this reason, the "good faith error" language is not included in the Report's proposed instructions. However, where eyewitness identification evidence is the primary cause of wrongful convictions, and where potential jurors in studies have demonstrated difficulty evaluating identification evidence, an error of omission by defense counsel should not prevent the fact-finder from hearing that the eyewitness could be honest, but mistaken. Therefore, I recommend that this be included in the proposed instructions and be given *sua sponte* whenever the facts support such an instruction.

(2) Use of the word "Suspect": The Report proposes that jurors be instructed on the best police practices for conducting an identification procedure. In its proposed instructions, however, the Report uses the word "suspect" to describe the defendant's role during the police investigation. Supra at 123-128. Such a characterization is unnecessarily prejudicial and could easily be replaced with a more neutral word. In many instances, simply replacing the word "suspect" with "defendant" would be sufficient to cure the prejudice and would maintain the presumption of innocence. If jurors are told that the defendant was "the suspect" (and by implication, the only suspect), jurors will speculate as to the reasons why the police suspected him and will assume that there is information (even if not admitted at trial) to corroborate the identification. Indeed, the identification could simply be considered confirmation that the police were correct. In a case where the police officer's decision to include the defendant's photograph in an array is not contested, there

would be no reason to introduce evidence of why the defendant was suspected.

Additionally, where the officer's decision to conduct a showup or lineup is not itself contested at trial, there would be no relevance to telling the jury that the defendant was the suspect. If the proposed jury instructions are actually adopted with the word "suspect," defense counsel will be forced to request a limiting instruction telling the jurors not to speculate as to the reasons why the defendant was a suspect and to not consider it at all during their deliberations. Because the defendant's designation as a police suspect is not probative of his guilt, and to ensure that the defendant receives a fair trial, I recommend that any language characterizing the defendant as a "suspect" be omitted from instructions given to the jury.

(3) Source of Photographs: As is discussed cursorily in Commonwealth v. Hoilett, 430 Mass. 369, 372-73 (1999), when instructing the jurors about an identification procedure that involved a photograph of the defendant, I recommend that jurors be further instructed that the police have photographs of people from a variety of sources, including the Registry of Motor Vehicles and the licensing of various professions, and the jurors should not make any negative inference from the fact that the police had a photograph of the defendant. Where the actual photograph is relevant to the jurors' consideration of the evidence against the defendant, such an instruction would help ensure that the defendant receives a fair trial.