

CHILD WITNESS

You have heard the testimony of [*child witness*] , and you may be wondering whether his (her) young age should make any difference.

In the end, what you must determine, as with any witness, is whether his (her) testimony is believable. In weighing his (her) testimony, you must consider not only his (her) age, but the factors that are important for all witnesses. Did he (she) understand the questions? Does he (she) have a good memory? Is he (she) telling the truth?

There may be a few additional considerations when the witness is a child. Because some young children may not fully understand what is happening here, you should consider whether [*child witness*] understood the seriousness of his (her) appearance here as a witness.

Also, some young children may be more suggestible than adults, and they may be influenced by the way that questions are asked. It is up to you to decide whether [*child witness*] understood the questions asked of him (her).

You should give his (her) testimony, like that of all witnesses, whatever weight you conclude that it is fairly entitled to receive.

Some portions of this instruction were adapted from Federal Judicial Center, *Pattern Criminal Jury Instructions*, Instruction 28 (1987).

Commonwealth v. Brusgalis, 398 Mass. 325, 329-331, 496 N.E.2d 652, 655-656 (1986); *Commonwealth v. Tatisos*, 238 Mass. 322, 130 N.E. 495 (1921); *Commonwealth v. Baran*, 21 Mass. App. Ct. 989, 990-991, 490 N.E.2d 479, 480-481 (1986); *Kentucky v. Stincer*, 482 U.S. 730, 742 n.12, 107 S.Ct. 2658, 2665 n.12 (1987); *Wheeler v. United States*, 159 U.S. 523, 524, 16 S.Ct. 93, 93 (1895). Such an instruction is permissible in the judge's discretion, but is not of right. *Commonwealth v. Perkins*, 39 Mass. App. Ct. 577, 580, 658 N.E.2d 975, 977 (1995); *Commonwealth v. Avery*, 14 Mass. App. Ct. 137, 140-145, 437 N.E.2d 242, 244-247 (1982). Particularly where the witness's age has been fully explored and argued to the jury, the judge may decide not to go beyond the general instructions on witness credibility (see Instruction 2.260), *Commonwealth v. Figueroa*, 413 Mass. 193, 198, 595 N.E.2d 779, 783 (1992) (judge "properly exercised his discretion" in declining to give specialized instruction "and thereby avoiding the risk of intrusion on the jury's role . . . by singling out a particular witness's testimony for special scrutiny"), or the judge may prefer simply to add "age" to the list of relevant factors in those general instructions, *Commonwealth v. A Juvenile*, 21 Mass. App. Ct. 121, 122-126, 485 N.E.2d 201, 203-204 (1985).

As to child witnesses and their competence, see *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 4.15. A judge who decides to allow the prosecutor to pose questions during the voir dire of a child witness as to competence must allow defense counsel the same opportunity. *Commonwealth v. Massey*, 402 Mass. 453, 454-455, 523 N.E.2d 781, 782 (1988).

For the procedure to be followed after a child witness has been found presently incompetent, see *Commonwealth v. Corbett*, 26 Mass. App. Ct. 773, 533 N.E.2d 207 (1989).