STATEMENT OF THE SUPREME JUDICIAL COURT

MODEL JURY INSTRUCTIONS ON EYEWITNESS IDENTIFICATION

NOVEMBER 16, 2015

The Supreme Judicial Court approves and recommends the use of the Model Eyewitness Identification Instruction (Instruction), which replaces the provisional instruction in the appendix of Commonwealth v. Gomes, 470 Mass. 352, 379-388 (2015). It is recommended that the judge use the language of the Instruction, unless the judge determines that different language would more accurately or clearly provide comparable guidance to the jury or better promote the fairness of the trial.

In the Instruction, the capitalized bracketed language, e.g., [ADD IF THERE WAS EVIDENCE THAT . . .], is intended to alert the judge that the language following the brackets need only be given under the circumstances described. The non-capitalized bracketed language, e.g., [set of photographs] [lineup of individuals], is intended to alert the judge that one or more of the bracketed options may be applicable.

In some cases, the judge may appropriately decide to further omit or alter portions of the Instruction to promote the fairness of the trial. For example, as noted in Gomes, supra at 368, we recognize "the possibility that a party may offer expert testimony at trial that properly may persuade a trial judge to depart from the model instruction." However, a judge should give careful consideration before making any omission or alteration that affects the substantive guidance of the Instruction because, in most cases, the Instruction will provide appropriate guidance.

The Instruction is not intended to be a comprehensive statement of the law of eyewitness identification. We recognize that the Instruction is unlikely to be the final word and will need to evolve with new developments in the science of eyewitness identification, and with the experience of judges giving the Instruction. See Gomes, supra. We thank the Standing Committee on Eyewitness Identification for its outstanding work in providing recommendations concerning the revision of the provisional jury instruction, and those who provided comments regarding its revision. We ask the Standing Committee to continue to review the applicable science, monitor the efficacy of the Instruction in providing guidance to jurors, and recommend further revisions as needed or warranted.

PRELIMINARY/CONTEMPORANEOUS INSTRUCTION[1]

You may hear testimony from a witness who has identified the defendant as the person who committed [or participated in] the alleged crime[s]. Where a witness has identified the defendant as the person who committed [or participated in] the alleged crime[s], you should examine the identification with care. As with any witness, you must determine the credibility of the witness, that is, do you believe the witness is being honest? Even if you are convinced that the witness believes his or her identification is correct, you still must consider the possibility that the witness made a mistake in the identification. A witness may honestly believe he or she saw a person, but perceive or remember the event inaccurately. You must decide whether the witness's identification is not only truthful, but accurate.

People have the ability to recognize others they have seen and to accurately identify them at a later time, but research and experience have shown that people sometimes make mistakes in identification. The mind does not work like a video recorder. A person cannot just replay a mental recording to remember what happened. Memory and perception are much more complicated.

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[1] Upon request by any party, the trial judge shall give the preliminary/contemporaneous instruction before opening statements or immediately before or after the testimony of an identifying witness, saving the full model instruction to be given at a later time during the trial.

Generally, memory is most accurate right after the event and begins to fade soon thereafter. Many factors occurring while the witness is observing the event may affect a witness's ability to make an accurate identification. Other factors occurring after observing the event also may affect a witness's memory of that event, and may alter that memory without the witness realizing that his or her memory has been affected. Later in the trial, I will discuss in more detail the factors that you should consider in determining whether a witness's identification is accurate. Ultimately, you must determine whether or not the Commonwealth has proved the charge[s], including the identity of the person who committed [or participated in] the alleged crime[s], beyond a reasonable doubt.

MODEL EYEWITNESS IDENTIFICATION INSTRUCTION[1]

The Commonwealth has the burden of proving beyond a reasonable doubt that the defendant is the person who committed [or participated in] the alleged crime[s]. If you are not convinced beyond a reasonable doubt that the defendant is the person who committed [or participated in] the alleged crime[s], you must find the defendant not guilty.

Where a witness has identified the defendant as the person who committed [or participated in] the alleged crime[s], you should examine the identification with care. As with any witness, you must determine the witness's credibility, that is, do you believe the witness is being honest? Even if you are convinced that the witness believes his or her identification is correct, you still must consider the possibility that the witness made a mistake in the identification. A witness may honestly believe he or she saw a person, but perceive or remember the event inaccurately. You must decide whether the witness's identification is not only truthful, but accurate.

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

People have the ability to recognize others they have seen and to accurately identify them at a later time, but research and experience have shown that people sometimes make mistakes in identification.

The mind does not work like a video recorder. A person cannot just replay a mental recording to remember what happened. Memory and perception are much more complicated.[a] Remembering something requires three steps. First, a person sees an event. Second, the person's mind stores information about the event. Third, the person recalls stored information. At each of these stages, a variety of factors may affect -- or even alter -- someone's memory of what happened and thereby affect the accuracy of identification testimony.[b] This can happen without the witness being aware of it.

I am going to list some factors that you should consider in determining whether identification testimony is accurate.

1. Opportunity to view the event. You should consider the opportunity the witness had to observe the alleged offender at the time of the event. For example, how good a look did the witness get of the person and for how long? How much attention was the witness paying to the person at that time? How far apart were the witness and the person? How good were the lighting conditions? You should evaluate a witness's testimony about his or her opportunity to observe the event with care.[c]

[ADD IF THERE WAS EVIDENCE THAT A DISGUISE WAS INVOLVED OR THE ALLEGED OFFENDER'S FACE WAS OBSCURED] You should consider whether the person was disguised or had his or her facial features obscured. For example, if the person wore a hat, mask, or sunglasses, it may affect the witness's ability to accurately identify the person.[d]

[ADD IF THERE WAS EVIDENCE THAT THE ALLEGED OFFENDER HAD A DISTINCTIVE FACE OR FEATURE] You should consider whether the person had a distinctive face or feature.[e]

[ADD IF THERE WAS EVIDENCE THAT A WEAPON WAS INVOLVED] You should consider whether the witness saw a weapon during the event. If the event is of short duration, the visible presence of a weapon may distract the witness's attention away from the person's face. But the longer the event, the more time the witness may have to get used to the presence of a weapon and focus on the person's face.[f]

2. Characteristics of the witness. You should consider the physical and mental characteristics of the witness when the observation was made. For example, how good was the witness's eyesight? Was the witness experiencing illness, injury, or fatigue? Was the witness under a high level of stress? High levels of stress may reduce a person's ability to make an accurate identification.[g]

[ADD IF THERE WAS EVIDENCE THAT THE WITNESS AND THE PERSON IDENTIFIED ARE FAMILY MEMBERS, FRIENDS, OR LONGTIME ACQUAINTANCES] If the person identified is a witness's family member, friend, or longtime acquaintance, you should consider the witness's prior familiarity with the person.[h]

[ADD IF THERE WAS EVIDENCE THAT DRUGS OR ALCOHOL WERE INVOLVED] You should consider whether, at the time of the observation, the witness was under the influence of alcohol or drugs and, if so, to what degree.

3. Cross-racial identification. **[ADD UNLESS ALL PARTIES AGREE THAT THERE WAS NO CROSS-RACIAL IDENTIFICATION]** If the witness and the person identified appear to be of different races, you should consider that people may have greater difficulty in accurately identifying someone of a different race than someone of their own race.[2,i]

4. Passage of time. You should consider how much time passed between the event observed and the identification. Generally, memory is most accurate immediately after the event and begins to fade soon thereafter.[j]

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[2] The trial judge has discretion to add a reference to ethnicity in the instruction, as follows: "If the witness and the person identified appear to be of different races or ethnicities, you should consider that people may have greater difficulty in accurately identifying someone of a different race or ethnicity than someone of their own race or ethnicity." See Commonwealth v. Bastaldo, 472 Mass. 16, 29-30 (2015).

5. Expressed certainty. You may consider a witness's identification even where the witness is not free from doubt regarding its accuracy. But you also should consider that a witness's expressed certainty in an identification, standing alone, may not be a reliable indicator of the accuracy of the identification,[k] especially where the witness did not describe that level of certainty when the witness first made the identification.[l]

6. Exposure to outside information. You should consider that the accuracy of identification testimony may be affected by information that the witness received between the event and the identification,[m] or received after the identification.[n] Such information may include identifications made by other witnesses, physical descriptions given by other witnesses, photographs or media accounts, or any other information that may affect the independence or accuracy of a witness's identification.[o] Exposure to such information not only may affect the accuracy of an identification, but also may affect the witness's certainty in the identification and the witness's memory about the quality of his or her opportunity to view the event.[p] The witness may not realize that his or her memory has been affected by this information.[q]

An identification made after suggestive conduct by the police or others should be scrutinized with great care.

Suggestive conduct may include anything that a person says or does that might influence the witness to identify a particular individual.[r] Suggestive conduct need not be intentional, and the person doing the "suggesting" may not realize that he or she is doing anything suggestive.[s]

7. Identification procedures. **[ADD IF THERE WAS EVIDENCE OF A PHOTOGRAPHIC ARRAY OR A LINEUP]** An identification may occur through an identification procedure conducted by police, which involves showing the witness a [set of photographs] [lineup of individuals]. Where a witness identified the defendant from a [set of photographs] [lineup], you should consider all of the factors I have already described about a witness's perception and memory. You also should consider the number of [photographs shown] [individuals in the lineup], whether anything about the defendant's [photograph] [physical appearance in the lineup] made the defendant stand out from the others,[t] whether the person [showing the photographs] [presenting the lineup] knew who was the suspect and could have, even inadvertently, influenced the identification,[u] and whether anything was said to the witness that may have influenced the identification.[v] You should consider that an identification made by picking a defendant out of a group of similar individuals is

generally less suggestive than one that results from the presentation of a defendant alone to a witness.[3]

[ADD IF THERE WAS EVIDENCE OF A SHOWUP] An identification may occur through an identification procedure conducted by police known as a showup, in which only one person is shown to a witness. A showup is more suggestive than asking a witness to select a person from a group of similar individuals, because in a showup only one individual is shown and the witness may believe that the police consider that individual to be a potential suspect.[w] You should consider how much time has passed between the event and the showup because the risk of an inaccurate identification arising from the inherently suggestive nature of a showup generally increases as time passes.[x]

[ADD IF THERE WAS EVIDENCE OF A PHOTOGRAPHIC ARRAY, LINEUP, OR SHOWUP] You should consider whether the police, in showing the witness [a set of photographs] [a lineup] [a showup], followed protocols established or recommended by the Supreme Judicial Court or the law enforcement agency conducting the identification procedure that are designed to diminish the risk

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

of suggestion. If any of those protocols were not followed, you should evaluate the identification with particular care.[4,5]

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

[ADD IF THERE WAS EVIDENCE OF MULTIPLE VIEWINGS OF THE DEFENDANT BY THE SAME WITNESS] You should consider whether the witness viewed the defendant in multiple identification procedures or events. When a witness views the same person in more than one identification procedure or event, it may be difficult to know whether a later identification comes from the witness's memory of the original event, or from the witness's observation of the person at an earlier identification procedure or event.[y]

8. Failure to identify or inconsistent identification. You should consider whether a witness ever failed to identify the defendant, or made an identification that was inconsistent with the identification that the witness made at the trial.

9. Totality of the evidence. In evaluating the accuracy of a witness's identification, you should consider all of the relevant factors that I have discussed, in the context of the totality of the evidence in this case. Specifically, you should consider whether there was other evidence in the case that tends to support or to cast doubt upon the accuracy of an identification. If you are not convinced beyond a reasonable doubt that the defendant is the person who committed [or

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

participated in] the alleged crime[s], you must find the defendant not guilty.

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[a] See Commonwealth v. Gomes, 470 Mass. 352, 369 (2015); Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices 15 (July 25, 2013), available at http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf [http://perma.cc/WY4M-YNZN] (Study Group Report), quoting Report of the Special Master, State vs. Henderson, N.J. Supreme Ct., No. A-8-08, at 9 (June 10, 2010) (Special Master's Report) ("The central precept is that memory does not function like a videotape, accurately and thoroughly capturing and reproducing a person, scene or event. . . . Memory is, rather[,] a constructive, dynamic and selective process"); State v. Henderson, 208 N.J. 208, 245 (2011); State v. Lawson, 352 Or. 724, 771 (2012) (Appendix). See also E.F. Loftus, J.M. Doyle, & J.E. Dysart, Eyewitness Testimony: Civil and Criminal § 2-2, at 14 (5th ed. 2013) (Loftus et al.).

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

For a detailed discussion of the three stages of memory and how those stages may be affected, see Study Group Report, supra at 15-17; National Research Council of the National Academies, Identifying the Culprit: Assessing Eyewitness Identification 59-69 (2014) (National Academies) ("Encoding, storage, and remembering are not passive, static processes that record, retain, and divulge their contents in an informational vacuum, unaffected by outside influences"). See also State v. Guilbert, 306 Conn. 218, 235-236 (2012); Henderson, supra at 247; Loftus et al., supra at § 2-2, at 15 ("Numerous factors at each stage affect the accuracy and completeness of an eyewitness account").

[c] See D. Reisberg, The Science of Perception and Memory: A Pragmatic Guide for the Justice System 51-52 (2014) (witnesses may not accurately remember details, such as length of time and

distance, when describing conditions of initial observation). See also Lawson, 352 Or. at 744 (information that witness receives after viewing event may falsely inflate witness's "recollections concerning the quality of [his or her] opportunity to view a perpetrator and an event").

[d] See Study Group Report, supra at 30, quoting Lawson, 352 Or. at 775 (Appendix) ("[S]tudies confirm that the use of a disguise negatively affects later identification accuracy. In addition to accoutrements like masks and sunglasses, studies show that hats, hoods, and other items that conceal a perpetrator's hair or hairline also impair a witness's ability to make an accurate identification"); Henderson, 208 N.J. at 266 ("Disguises and changes in facial features can affect a witness'[s] ability to remember and identify a perpetrator"); State v. Clopten, 223 P.3d 1103, 1108 (Utah 2009) ("[A]ccuracy is significantly affected by factors such as the amount of time the culprit was in view, lighting conditions, use of a disguise, distinctiveness of the culprit's appearance, and the presence of a weapon or other distractions"); Wells & Olson, Eyewitness Testimony, 54 Ann. Rev. Psychol. 277, 281 (2003) (Wells & Olson) ("Simple disguises, even those as minor as covering the hair, result in significant impairment of eyewitness identification"). See also Cutler, A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy, 4 Cardozo Pub. L. Pol'y & Ethics J. 327, 332 (2006) ("In data from over 1300 eyewitnesses, the percentage of correct judgments on identification tests was lower among eyewitnesses who viewed perpetrators wearing hats [44%] than among eyewitnesses who viewed perpetrators whose hair and hairlines were visible [57%]").

[e] See Study Group Report, supra at 30-31, quoting Lawson, 352 Or. at 774 (Appendix) ("Witnesses are better at remembering and identifying individuals with distinctive features than they are those possessing average features"); Clopten, 223 P.3d at 1108; Wells & Olson, supra at 281 ("Distinctive faces are much more likely to be accurately recognized than nondistinctive faces" but "what makes a face distinctive is not entirely clear"). See also Shapiro & Penrod, Meta-Analysis of Facial Identification Studies, 100 Psychol. Bull. 139, 140, 145 (1986) (meta-analysis finding that distinctive targets were "easier to recognize than ordinary looking targets").

[f] See Study Group Report, supra at 130 ("A weapon can distract the witness and take the witness's attention away from

the perpetrator's face, particularly if the weapon is directed at the witness. As a result, if the crime is of short duration, the presence of a visible weapon may reduce the accuracy of an identification. In longer events, this distraction may decrease as the witness adapts to the presence of the weapon and focuses on other details"); Guilbert, 306 Conn. at 253; Lawson, 352 Or. at 771-772 (Appendix). See also Kassin, Hosch, & Memon, On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts, 56 Am. Psychol. 405, 407-412 (2001) (Kassin et al.) (in 2001 survey, eighty-seven per cent of experts agree that principle that "[t]he presence of a weapon impairs an eyewitness's ability to accurately identify the perpetrator's face" is reliable enough to be presented in court); Maass & Köhnken, Eyewitness Identification: Simulating the "Weapon Effect," 13 Law & Hum. Behav. 397, 405-406 (1989); Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 Law & Hum. Behav. 413, 415-417 (1992) (meta-analysis finding "weapon-absent condition[s] generated significantly more accurate descriptions of the perpetrator than did the weapon-present condition"); id. at 421 ("To not consider a weapon's effect on eyewitness performance is to ignore relevant information. The weapon effect does reliably occur, particularly in crimes of short duration in which a threatening weapon is visible"); Wells & Quinlivan, Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 Law & Hum. Behav. 1, 11 (2009) (Wells & Quinlivan). But see National Academies, supra at 93-94 (recent meta-analysis "indicated that the effect of a weapon on accuracy is slight in actual crimes, slightly larger in laboratory studies, and largest for simulations").

[g] See Gomes, 470 Mass. at 372-373; Study Group Report, supra at 29, quoting Special Master's Report, supra at 43 (while moderate levels of stress might improve accuracy, "eyewitness under high stress is less likely to make a reliable identification of the perpetrator"); Lawson, 352 Or. at 769 (Appendix). See also Deffenbacher, Bornstein, Penrod, & McGorty, A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, 28 Law & Hum. Behav. 687, 699 (2004) (finding "considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details"); Morgan, Hazlett, Doran, Garrett, Hoyt, Thomas, Baranoski, & Southwick, Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, 27

Int'l J. L. & Psychiatry 265, 272-274 (2004). But see Study Group Report, supra, quoting Henderson, 208 N.J. at 262 ("There is no precise measure for what constitutes 'high' stress, which must be assessed based on the facts presented in individual cases").

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

[i] See Study Group Report, supra at 31 ("A witness may have more difficulty identifying a person of a different race or ethnicity"); Kassin et al., supra at 407-412 (in 2001 survey, ninety per cent of experts agree that principle that "[e]yewitnesses are more accurate when identifying members of their own race than members of other races" is reliable enough to be presented in court); Meissner & Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, 7 Psychol., Pub. Pol'y, & L. 3, 15 (2001) (meta-analysis of thirty-nine research articles concluding that participants were "1.4 times more likely to correctly identify a previously viewed own-race face when compared with performance on other-race faces" and "1.56 times more likely to falsely

identify a novel other-race face when compared with performance on own-race faces"); Wells & Olson, supra at 280-281. See also Commonwealth v. Zimmerman, 441 Mass. 146, 154-155 (2004) (Cordy, J., concurring); State v. Cabagbag, 127 Haw. 302, 310-311 (2012); Lawson, 352 Or. at 775 (Appendix); National Academies, supra at 96, citing Grimsley, Innocence Project, What Wrongful Convictions Teach Us About Racial Inequality, Innocence Blog (Sept. 26, 2012, 2:30 P.M.), at http://www.innocenceproject.org/Content/What_Wrongful_Convictions_Teach_Us_About_Racial_Inequality.php [http://perma.cc/KX2J-XECN] ("Recent analyses revealed that cross-racial [mis]identification was present in 42 percent of the cases in which an erroneous eyewitness identification was made").

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

[j] See Study Group Report, supra at 31-32, quoting Lawson, 352 Or. at 778 (Appendix) ("The more time that elapses between an initial observation and a later identification procedure [a period referred to in eyewitness identification research as a 'retention interval'] . . . the less reliable the later recollection will be. . . . [D]ecay rates are exponential

rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time"); National Academies, supra at 15 ("For eyewitness identification to take place, perceived information must be encoded in memory, stored, and subsequently retrieved. As time passes, memories become less stable").

[k] See Gomes, 470 Mass. at 370-371; Study Group Report, supra at 19 ("Social science research demonstrates that little correlation exists between witness confidence and the accuracy of the identification"); Lawson, 352 Or. at 777 (Appendix) ("Despite widespread reliance by judges and juries on the certainty of an eyewitness's identification, studies show that, under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy"); Clopten, 223 P.3d at 1108. See also Commonwealth v. Cruz, 445 Mass. 589, 597-600 (2005); Commonwealth v. Santoli, 424 Mass. 837, 845-846 (1997); Commonwealth v. Jones, 423 Mass. 99, 110 n.9 (1996).

[l] See Henderson, 208 N.J. at 254 ("to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness'[s] own words" before any possible influence from any extraneous information, known as feedback, that confirms witness's identification); Lawson, 352 Or. at 745 ("Retrospective self-reports of certainty are highly susceptible to suggestive procedures and confirming feedback, a factor that further limits the utility of the certainty variable"); Wells & Bradfield, Distortions in Eyewitnesses' Recollections: Can the Postidentification-Feedback Effect Be Moderated?, 10 Psychol. Sci. 138, 138 (1999) (Distortions) ("The idea that confirming feedback would lead to confidence inflation is not surprising. What is surprising, however, is that confirming feedback that is given after the identification leads eyewitnesses to misremember how confident they were at the time of the identification"). See also Commonwealth v. Crayton, 470 Mass. 228, 239 (2014) ("Social science research has shown that a witness's level of confidence in an identification is not a reliable predictor of the accuracy of the identification, especially where the level of confidence is inflated by [an identification procedure's] suggestiveness").

[m] See Gomes, 470 Mass. at 373-374; Study Group Report, supra at 21-22; Special Master’s Report, supra at 30-31 ("An extensive body of studies demonstrates that the memories of witnesses for events and faces, and witnesses' confidence in their memories, are highly malleable and can readily be altered by information

received by witnesses both before and after an identification procedure"); Lawson, 352 Or. at 786 (Appendix) ("The way in which eyewitnesses are questioned or converse about an event can alter their memory of the event").

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

[o] See Study Group Report, supra at 22, quoting Lawson, 352 Or. at 788 (Appendix) ("[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"); Henderson, 208 N.J. at 253 ("Confirmatory or post-identification feedback presents the same risks. It occurs when police signal to eyewitnesses that they correctly identified the suspect"); Lawson, supra at 777-778 (Appendix); Hope, Ost, Gabbert, Healey, & Lenton, "With a Little Help from My Friends . . .": The Role of Co-Witness Relationship in Susceptibility to Misinformation, 127 Acta Psychologica 476, 481 (2008); Skagerberg, Co-Witness Feedback in Line-ups, 21 Applied Cognitive Psychol. 489, 494 (2007) ("post-identification feedback does not have to be presented by the experimenter or an authoritative figure [e.g., police officer] in order to affect a witness'[s] subsequent crime-related judgments").

[p] See Study Group Report, supra at 21-22; Henderson, 208 N.J. at 255; Lawson, 352 Or. at 744. See also Douglass &

Steblay, Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect, 20 Applied Cognitive Psychol. 859, 863-65 (2006) (participants who received confirming feedback "expressed significantly more retrospective confidence in their decision compared with participants who received no feedback"); Wells & Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. Applied Psychol. 360, 366-367 (1998) (witnesses receiving confirming feedback reported "a better view of the culprit, a greater ability to make out details of the face, greater attention to the event, [and] a stronger basis for making an identification" compared to witnesses receiving no feedback); Distortions, supra at 140-143; National Academies, supra at 92-93 ("Research has . . . shown that . . . if an eyewitness hears information or misinformation from another person before law enforcement involvement, his or her recollection of the event and confidence in the identification can be altered . . .").

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

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

[s] See Study Group Report, supra at 22-23, quoting Lawson, 352 Or. at 779 (Appendix) ("research shows that lineup administrators who know the identity of the suspect often consciously or unconsciously suggest that information to the witness"); National Academies, supra at 91-92 ("Law enforcement's maintenance of neutral pre-identification communications -- relative to the identification of a suspect -- is seen as vital to ensuring that the eyewitness is not

subjected to conscious or unconscious verbal or behavioral cues that could influence the eyewitness' identification").

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

[u] See Silva-Santiago, 453 Mass. at 797 ("we acknowledge that [a double-blind procedure] is the better practice [compared to a non-blind procedure] because it eliminates the risk of conscious or unconscious suggestion"); Study Group Report, supra at 88 ("When showing a photo array or conducting a lineup, the police must use a technique that will ensure that no investigator present will know when the witness is viewing the suspect. The preference is that the police have an officer who does not know who the suspect is administer the array or lineup"); Guilbert, 306 Conn. at 237-238 (courts across country accept that "identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure"); Henderson, 208 N.J. at 249 ("The consequences are clear: a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect"). See also National Academies, supra at 27 ("As an alternative to a double-blind array, some departments use 'blinded' procedures. A blinded procedure prevents an officer from knowing when the witness is viewing a photo of the suspect, but can be conducted by the investigating officer"); id. at 107 ("The committee [appointed by the National Academy of Sciences] recommends blind [double-blind or blinded] administration of both photo arrays and live lineups and the adoption of clear, written policies and training on photo array and live lineup administration. Police should use blind procedures to avoid the unintentional or intentional exchange of information that might bias an eyewitness").

[v] See Clark, Marshall, & Rosenthal, supra at 74 (subtle, nondirective statements by lineup administrator "can lead a witness to make an identification, particularly when the perpetrator was not present"); Malpass & Devine, Eyewitness Identification: Lineup Instructions and the Absence of the Offender, 66 J. Applied Psychol. 482, 486-487 (1981) (where subject witnesses were asked to identify assailant in staged experiment, "[c]hanging the instruction from biased [suspect is present in lineup] to unbiased [suspect may or may not be present] resulted in fewer choices and fewer false identifications without a decrease in correct identifications").

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

[x] See Lawson, 352 Or. at 783 (Appendix) ("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"); Yarmey, Yarmey, & Yarmey, Accuracy of Eyewitness Identifications in Showups and Lineups, 20 Law & Hum. Behav. 459, 473 (1996) ("Although showups conducted within [five minutes] of an encounter were significantly better than chance, identifications performed

[thirty minutes] or longer after a low-impact incident are likely to be unreliable"). Dysart & Lindsay, The Effects of Delay on Eyewitness Identification Accuracy: Should We Be Concerned?, in 2 Handbook of Eyewitness Psychology 370 (2007) (results of studies support conclusion that showups, "if they are to be used, should be used within a short period after the crime, perhaps a maximum of [twenty-four] hours," but acknowledging that "such a conclusion is highly speculative, given the minimal amount of data available").

[y] See Gomes, 470 Mass. at 375-376; Study Group Report, supra at 25, quoting Special Master's Report, supra at 27-28 ("The problem is that successive views of the same person create uncertainty as to whether an ultimate identification is based on memory of the original observation or memory from an earlier identification procedure"); Henderson, 208 N.J. at 255; Deffenbacher, Bornstein, & Penrod, Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 Law & Hum. Behav. 287, 306 (2006) (Deffenbacher, Bornstein, & Penrod) ("prior mugshot exposure decreases accuracy at a subsequent lineup, both in terms of reductions in rates for hits and correct rejections as well as in terms of increases in the rate for false alarms").

In Gomes, supra at 376 n.37, quoting Study Group Report, supra at 31, we noted that support for the phenomenon of "unconscious transference," which occurs "when a witness confuses a person seen at or near the crime scene with the actual perpetrator," was not as conclusive as the support for mugshot exposure. Unconscious transference nevertheless has substantial support and is relevant to the issue of multiple viewings of a person identified. See Study Group Report, supra at 31, quoting Special Master's Report, supra at 46 ("The familiar person is at greater risk of being identified as the perpetrator simply because of his or her presence at the scene. . . . This 'bystander error' most 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"); Lawson, 352 Or. at 785-786 ("Yet another facet of the multiple viewing problem is the phenomenon of unconscious transference. Studies have found that witnesses who, prior to an identification procedure, have incidentally but innocently encountered a suspect may unconsciously transfer the familiar suspect to the role of criminal perpetrator in their memory"); Guilbert, 306 Conn. at 253- 254 ("the accuracy of an eyewitness identification may be undermined by an unconscious

transference, which occurs when a person seen in one context is confused with a person seen in another"). See also Deffenbacher, Bornstein, & Penrod, supra at 301, 304-305 (although negative impact of unconscious transference was less pronounced than that of mugshot exposure, both types of errors considered "products of the same basic transference design"); Ross, Ceci, Dunning, & Toglia, Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person, 79 J. Applied Psychol. 918, 923 (1994) (witnesses in experiment who viewed bystander in staged robbery "were nearly three times more likely to misidentify the bystander than were control subjects" who did not view bystander).