



TEXAS FORENSIC SCIENCE COMMISSION

Justice Through Science

1700 North Congress Ave., Suite 445
Austin, Texas 78701

SUMMARY OF TEXAS CPI CASE REVIEW PROCESS

June 2015:

On June 16, 2015, the FBI released a document entitled *Notice of Amendment of the FBI's STR Population Data Published in 1999 and 2001*. The notice identified minor errors in the population data attributable to manual data entry and technology limitations of the time. The notice concluded, "any discrepancy between profile probabilities calculated using the original and corrected data is expected to be less than a factor of two in a full profile."

After the FBI released its notice, Texas laboratories, including the Department of Public Safety ("DPS") system, issued their own notices to the criminal justice community in Texas explaining the FBI announcement and offering to recalculate statistics for pending cases upon request. (**Attachment 1.**) The DPS notice stated in pertinent part:

"All of the errors have been corrected and changes have empirically demonstrated minimal impact on the calculations used to determine the significance of an association. Further, the database corrections have no impact on the inclusion or exclusion of victims or defendants in any result."

DPS and other laboratories offered to "recalculate and report statistics previously reported in individual cases" upon request.

July-August 2015:

Some Texas prosecutors submitted requests for recalculation to DPS and other laboratories, not expecting significant changes in statistics but making the request in an abundance of caution for pending cases.

When the prosecutors received their recalculated reports, they were surprised to find some statistics had changed dramatically (*e.g.*, from 1 in 1.4 billion to 1 in 36 or 1 in 4000 to inconclusive). The affected prosecutors reached out to the Commission for assistance in understanding what happened. They also sought the Commission's assistance in assessing the scope of potentially affected cases, so they could assess their potential notification obligations under Texas discovery rules (commonly referred to as the Michael Morton Act (TEX. CODE CRIM. PROC. 39.14(h)).

The Commission consulted with the forensic DNA community and determined the cause of the changes was *not* the FBI Notice but rather the fact that the laboratories' internal protocols for CPI analysis had changed from when the cases were originally analyzed. The new results were

reported under the protocols in place at the time the recalculation requests were submitted by prosecutors in 2015. These newer protocols reflected a better understanding of the CPI statistic including the use of a stochastic threshold (ST) and other analytical tools as recommended in the 2010 SWGDAM Interpretation Guidelines for Autosomal STR Typing. The Commission concluded that when the cases were originally analyzed, some laboratories did not observe the main limitation of CPI—that loci with possible allelic dropout should be disqualified from use. Once those loci were eliminated from consideration, the statistics dropped—and in some cases dropped dramatically.

In light of these observations, the Commission’s Presiding Officer (Vincent J.M. Di Maio, MD) released a letter to the community entitled “Unintended Catalyst: the Effects of 1999 and 2001 FBI STR Population Data Correction on Evaluation of DNA Mixture Interpretation in Texas.” (*See Attachment 2.*)

The Commission also convened a statewide DNA Mixture Notification Subcommittee of attorneys including Chiefs of Conviction Integrity Units and representatives from the Texas District and County Attorney’s Association, Texas Criminal Defense Lawyer’s Association, Attorney General’s Office, Governor’s Office and publicly funded innocence projects to assist in developing a statewide notification and case triage protocol.

September 2015:

The Commission sought expert help from Drs. Frederick Bieber, John Buckleton, Bruce Budowle, John Butler, and Mike Coble to provide clarification to the forensic DNA community in Texas on proper application of the CPI. The Commission held a meeting with the group during the International Symposium on Human Identification in Grapevine, Texas to discuss the best path forward. All experts provide assistance to the State of Texas at no charge.

Drs. Bieber, Budowle, Butler and Coble also attended a meeting at the Southwestern Institute of Forensic Sciences during which they presented their observations regarding DNA mixture interpretation (with a focus on CPI application) to a combined audience of Texas DNA analysts, defense attorneys and prosecutors and answered questions. It was clear during the meeting that many attorneys did not appreciate the extent to which DNA mixture interpretation involves subjective judgment on the part of analysts.

On September 10, 2015, the Texas Department of Public Safety generated and distributed a list of approximately 24,000 DNA mixture cases analyzed from 1999-2015 separated by county. Other laboratories began to work with their local prosecutors to generate similar case lists, though not all laboratories were able to segregate mixture cases from single source cases. DPS casework constitutes roughly 50% of the total casework for the State of Texas.¹

¹ While most publicly funded laboratories have generated case lists as of this writing, a few are still in the process of generating their lists due to the sheer enormity of the task and the difficulty of pinpointing specific types of cases using older technology systems. As a result, notifications are being issued to potentially affected parties on a rolling basis.

October 2015:

The Commission requested that all publicly funded laboratories provide copies of their mixture interpretation protocols to Dr. Budowle along with case examples representing a range of mixture casework. The Commission published a document entitled “Criteria for Case Review” to provide laboratories with an understanding of what elements would be evaluated. (**Attachment 3.**)

The Commission also published a copy of the Notification Review Flow Chart developed by the DNA Mixture Notification Subcommittee on its website (**Attachment 4.**)

November 2015:

The Texas District and County Attorney’s Association issued a notice to its membership recommending a three-step process for notifying potentially affected defendants:

<http://www.tdcaa.com/announcements/dna-mixture-notification-update>

Notifications and forms requesting recalculation were also posted in English and Spanish in prison law libraries throughout Texas. (**Attachment 5.**)

Drs. Buckleton, Budowle and Gittelson provided training on key issues in DNA mixture interpretation, including proper application of the CPI, to Texas laboratories at a meeting in Fort Worth.

December 2015—January 2016:

The Commission released a document entitled “Clarification Regarding the Term ‘Current and Proper Mixture Interpretation Protocols,’” (**Attachment 6**) in response to a request by the forensic DNA community in Texas to provide additional information on CPI application pending the publication of the CPI paper by Drs. Bieber, Buckleton, Budowle, Butler and Coble.

Dr. Budowle began reviewing laboratory protocols and case examples and provided feedback regarding the same to the laboratories.

Dr. Simone Gittelson (NIST) returned to Texas to provide multi-day workshops in three regional locations on concepts needed for transition to probabilistic genotyping, including assigning the number of contributors, mixture deconvolution and likelihood ratios.

March 2016:

The Texas Commission on Indigent Defense awarded a \$400,000 grant to fund the DNA Mixture Review Project. The lawyers hired by the project receive and triage the recalculation requests submitted by potentially affected defendants according to the process outlined in **Attachment 4.**

March 2016—September 2016:

Lawyers from the DNA Mixture Project, prosecutors and laboratories began working together to screen recalculation requests as they are received.

Commission staff provided training on key issues and notification process to lawyers and judges at various statewide conferences.

September 2016:

On September 3, 2016 the long-awaited CPI article was published in BMC Genetics entitled: “Evaluation of Forensic DNA Mixture Evidence: Protocol for Evaluation, Interpretation, and Statistical Calculations Using the Combined Probability of Inclusion.” Authors are Bieber, Buckleton, Budowle, Butler and Coble.

In the words of the authors:

CPI is a straightforward formula and, as such, follows from first principles. There have been acknowledged concerns about the application of CPI to complex forensic DNA mixtures. These concerns tend to relate to case-specific decisions preceding the application of the actual formula. The different approaches to these case-specific decisions, we believe, have led to the diversity of statistical estimates and results reported in various trials such as Mix13. While published empirical studies of the laboratory decision processes would be interesting, the more pressing need is for standardization of an approach, training and ongoing testing of DNA analysts.

To help with such standardization we recently codified our recommended approach to evaluation of complex forensic DNA mixtures and subsequent application of the CPI. URL: <http://www.biomedcentral.com/1471-2156/17/125>. We have trialed these “Rules” ourselves on a large dataset (unpublished) with good results.

We support the application of the CPI by any laboratory that follows our recommended protocol, or any other valid method, and has performed internal trials to assess the performance of that method in their own hands.

ATTACHMENT 1

TEXAS DEPARTMENT OF PUBLIC SAFETY

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512/424-2000

www.dps.texas.gov



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June 30, 2015

The Texas Department of Public Safety Crime Laboratory system was informed by the Federal Bureau of Investigation in May 2015 of errors in the FBI-developed population database. This database has been used by the Texas DPS Crime Laboratory system as well as many other crime laboratories across the country for calculating match statistics in criminal investigations and other types of human identification applications since 1999.

Upon notification, the forensic DNA community immediately began corrective action. During implementation of corrective measures, minor discrepancies were discovered in additional data used exclusively by the Texas Department of Public Safety. All of the errors have been corrected and the changes have empirically demonstrated minimal impact on the calculations used to determine the significance of an association. **Further, the database corrections have no impact on the inclusion or exclusion of victims or defendants in any result.**

If requested in writing, the Texas DPS Crime Laboratory System will recalculate and report statistics previously reported in individual cases.

If you have any questions, please contact your local crime laboratory.

Brady W Mills
Deputy Assistant Director
Law Enforcement Support
Crime Laboratory Service

ATTACHMENT 2



TEXAS FORENSIC
SCIENCE COMMISSION

Justice Through Science

1700 North Congress Ave., Suite 445
Austin, Texas 78701

August 21, 2015

Members of the Texas Criminal Justice Community:

This letter provides notification to the community regarding an issue of potential concern to judges, criminal prosecutors, criminal defense lawyers, victims and defendants in the Texas criminal justice system. The concerns involve the interpretation of DNA results where multiple contributors may be present, commonly referred to as DNA mixture interpretation. The attached document details the origin and scope of the concerns.

While the Commission assesses the issues described in the attached document, we recommend any prosecutor, defendant or defense attorney with a currently pending case involving a DNA mixture in which the results could impact the conviction consider requesting confirmation that Combined Probability of Inclusion/Exclusion (referred to as "CPI" or "CPE") was calculated by the laboratory using current and proper mixture interpretation protocols. If the laboratory is unable to confirm the use of currently accepted protocols for the results provided, counsel should consider requesting a re-calculation of CPI/CPE.

The extent to which any closed criminal cases may require re-analysis will be a subject of Commission review and subsequent notification to the stakeholder community.

If you have any questions regarding these issues, please contact the Commission's general counsel, Lynn Garcia, at 512-936-0649 or lynn.garcia@fsc.texas.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Vincent J.M. Di Maio".

Vincent J.M. Di Maio, MD
Presiding Officer

Unintended Catalyst: the Effects of 1999 and 2001 FBI STR Population Data Corrections on an Evaluation of DNA Mixture Interpretation in Texas

1. FBI Data Corrections: What Do They Mean?

In May 2015, the Federal Bureau of Investigation (“FBI”) notified all CODIS laboratories it had identified minor discrepancies in its 1999 and 2001 STR Population Database. Laboratories across the country have used this database since 1999 to calculate DNA match statistics in criminal cases and other types of human identification. The FBI attributed the discrepancies to two main causes: (a) human error, typically due to manual data editing and recording; and (b) technological limitations (*e.g.*, insufficient resolution for distinguishing microvariants using polyacrylamide gel electrophoresis), both of which were known limitations of the technology. The FBI has provided corrected allele frequency data to all CODIS laboratories.

In May and June 2015, Texas laboratories notified stakeholders (including prosecutors, the criminal defense bar and the Texas Forensic Science Commission) that the FBI allele frequency data discrepancies were corrected. The immediate and obvious question for the criminal justice community was whether these discrepancies could have impacted the outcome of any criminal cases. The widely accepted consensus among forensic DNA experts is the database corrections have *no impact* on the threshold question of whether a victim or defendant was *included or excluded* in any result. The next questions were whether and to what extent the probabilities associated with any particular inclusion changed because of the database errors.

The FBI conducted empirical testing to assess the statistical impact of the corrected data. This testing concluded the difference between profile probabilities using the original data and the corrected data is less than a two-fold difference in a full and partial profile. Testing performed by Texas laboratories also supports the conclusion the difference is less than two-fold. For example, in an assessment performed by one Texas laboratory, the maximum factor was determined to be 1.2 fold. In other words, after recalculating cases using the amended data, the case with the *most substantially affected* Combined Probability of Inclusion/Exclusion (“CPI”)¹ statistical calculation (evaluated for a mixed sample) changed from a 1 in 260,900,000 expression of probability to a 1 in 225,300,000 expression of probability.

Amended allele frequency tables are publicly available for anyone to compare the calculations made using the previously published data and the amended allele frequencies, though expert assistance may be required to ensure effective use of the tables.²

2. The Impact of FBI Database Errors on DNA Mixture Interpretation Using CPI

As part of their ongoing commitment to accuracy, integrity and transparency, many Texas laboratories offered to issue amended reports to any stakeholder requesting a report using the corrected FBI allele frequency data. Some prosecutors have submitted such requests to laboratories, particularly for pending criminal cases. As expected, the FBI corrected data have not had an impact exceeding the

¹ The Combined Probability of Inclusion/Exclusion is commonly referred to as either “CPI” or “CPE.” They are referred to jointly in this document as “CPI” for ease of reference.

² <https://www.fbi.gov/about-us/lab/biometric-analysis/codis/amended-fbi-str-final-6-16-15.pdf>

two-fold difference discussed above. However, because analysts must issue *signed amended reports* with the new corrected data, they may only issue such reports if they believe *the analyses and conclusions in the report comply with laboratory standard operating procedures*. For cases involving DNA mixtures, many laboratories have changed their interpretation protocols and related procedures using CPI. To reiterate, changes in mixture interpretation protocols are unrelated to the FBI allele frequency data corrections discussed above. However, when issuing new reports requested because of the FBI data corrections, the laboratory's use of current mixture protocols may lead to different results if the laboratory had a different protocol in place when the report was originally issued. Changes in mixture interpretation have occurred primarily over the last 5-10 years and were prompted by several factors, including but not limited to mixture interpretation guidance issued in 2010 by the Scientific Working Group on DNA Analysis ("SWGDM").

The forensic DNA community has been aware of substantial variance in mixture interpretation among laboratories since at least 2005 when the National Institute of Standards and Technology ("NIST") first described the issue in an international study called MIX05. Though NIST did not expressly flag which interpretation approaches were considered scientifically acceptable and which were not as a result of the study, it has made significant efforts to improve the integrity and reliability of DNA mixture interpretation through various national training initiatives. These efforts have ultimately worked their way into revised standard operating procedures at laboratories, including laboratories in Texas. Based on the MIX05 study, we know there is variation among laboratories in Texas and nationwide, including differences in standards for calculation of CPI that could be considered scientifically acceptable. However, we also know based on a recent audit of the Department of Forensic Sciences ("DFS") in Washington, DC that some of the "variation" simply does not fall within the range of scientifically acceptable interpretation. This finding does not mean laboratories or individual analysts did anything wrong intentionally or even knew the approaches fell outside the bounds of scientific acceptability, but rather the community has progressed over time in its ability to understand and implement this complex area of DNA interpretation appropriately.

While in many cases the changed protocols may have no effect, it is also possible changes to results may be considered material by the criminal justice system, either in terms of revisions to the population statistics associated with the case or to the determination of inclusion, exclusion or an inconclusive result. The potential range of interpretive issues has yet to be assessed, but the potential impact on criminal cases raises concerns for both scientists and lawyers. We therefore recommend any prosecutor, defendant or defense attorney with a currently pending case involving a DNA mixture in which the results could impact the conviction consider requesting confirmation that CPI was calculated by the laboratory using current and proper mixture interpretation protocols. If the laboratory is unable to confirm the use of currently accepted protocols for the results provided, counsel should consider requesting a re-analysis of CPI.

The Texas Forensic Science Commission is currently in the process of assembling a panel of experts and criminal justice stakeholders to determine what *guidance and support* may be provided to assist Texas laboratories in addressing the challenging area of DNA mixture interpretation. In particular, a distinction must be made between acceptable variance in laboratory interpretation policies and protocols and those approaches that do not meet scientifically acceptable standards. An emphasis on statewide collaboration and stakeholder involvement will be critical if Texas is to continue to lead the nation in tackling challenging forensic problems such as those inherent in DNA mixture interpretation.

ATTACHMENT 3

CRITERIA FOR EVALUATION OF DNA MIXTURE INTERPRETATION PROTOCOLS

On October 7, 2015, the Texas Forensic Science Commission (“Commission”) requested that Texas laboratories provide copies of their DNA mixture interpretation protocols to a panel of international experts (see below) for review. The primary purpose of the exercise is to provide proactive and constructive feedback to Texas laboratories about their current protocols, with a particular focus on the way in which laboratories evaluate and interpret forensic casework involving DNA mixtures, including calculation and expression of Combined Probability of Inclusion/Exclusion (CPI/CPE) in final laboratory reports. A secondary purpose is to ensure legal end-users that Texas forensic laboratories are using scientifically appropriate protocols for all DNA mixture cases involving CPI/CPE calculations that are currently pending disposition in the criminal justice system.

Some laboratories have requested the Commission announce criteria the panel will consider in evaluating current laboratory protocols. In response, the Commission worked with members of the expert panel to develop the criteria set forth herein. We are extremely grateful to Drs., Frederick Bieber, John Buckleton, Bruce Budowle, John Butler, and Michael Coble for their expertise and generous commitment of time to this effort.

N.B. The presence or absence of any particular criteria in a laboratory’s protocol should not be interpreted as a definitive indication of the scientific acceptability of that protocol. For protocols that may not explicitly reference all criteria, the expert panel will work with the laboratory to assess how the issues are being considered in casework.

1. Does the protocol contain both an analytical threshold (AT) and a stochastic threshold (ST)? Is each threshold clearly defined? How were these thresholds chosen in the laboratory?
2. Does the protocol address **the main limitation of CPI**, *i.e.*, that loci *having a reasonable probability of allele dropout* should be disqualified from being used in computing the CPI/CPE statistic?
3. Does the protocol consider the following concepts in deciding which loci survive the main limitation of CPI/CPE?
 - a. Any locus with an allelic peak below the ST and above the AT should not be used in computation of CPI/CPE.
 - b. Any locus with subthreshold peaks below the AT that the analyst deems likely to be a "true" allele should not be used for CPI/CPE calculations. A peak deemed likely to be allelic should be distinct from the local noise, should not

be in a forward, single or double backward stutter position (also referred to as +/- stutter in the U.S.) and should have Gaussian morphology.

- c. Any locus with no allelic peaks below the ST or the AT but which looks likely to have an unseen contributor in the stochastic zone (below the ST) is disqualified and should not be used in computation of CPI/CPE. This is often determined by reference to adjacent loci or a pattern across multiple loci.
4. Stutter Rule: Does the laboratory have a “stutter threshold”? Does the protocol consider that if the height of minor peaks is similar to that of the stutter peaks then the stutter peaks should be included as potentially allelic in the mixture interpretation and in subsequent CPI/CPE calculation?
5. Considering Exceptions: Does the protocol consider scenarios in which it is possible to reinstate some loci? For example, if an assumption of one minor contributor can be made, then if both minor alleles can be seen below the ST the locus may be used. Does the protocol set forth a policy on how to handle scenarios *where there is no evidence of dropout below the ST*?
6. Interpreting Major Clusters Using CPI/CPE. Does the protocol consider application of CPI/CPE for situations in which a set of peaks representing more than one donor is distinct from one or more minor or trace peaks? Does the protocol provide guidance for qualifying a locus as a major cluster?
7. Avoiding “Suspect-Driven CPI/CPE”. Does the protocol explain (or implicitly account for in some way) the concept of suspect-driven CPI/CPE (i.e., where the comparison of each suspect results in a different statistic)? Does it provide guidance regarding how to avoid “suspect-driven CPI/CPE”? Does it emphasize the importance of calculating the CPI/CPE statistic from the evidence profile, and not calculating the CPI/CPE estimate based on the reference profile?

ATTACHMENT 4

Labs generate DNA mixture lists.
Commission combines into master list.

COLOR KEY:
 LAB ACTION
 PROSECUTOR ACTION
 DEFENDANT/DEFENSE COUNSEL ACTION
 FORENSIC SCIENCE COMMISSION ACTION
 COURT

PRIORITIES:
 1. CAPITAL
 2. CURRENTLY INCARCERATED
 3. PAROLE/SUPERVISION
 4. OUT OF SYSTEM



*In some counties (Tarrant, Travis) counsel may be appointed to fulfill function of defense triage team

ATTACHMENT 5

IMPORTANT NOTICE REGARDING DNA MIXTURES
November 19, 2015

Please read this notice if you were prosecuted for an offense where the evidence used against you included a DNA mixture analysis conducted by a Texas crime laboratory.

A DNA mixture refers to evidence that includes DNA from more than one person. When a DNA mixture is analyzed, the laboratory report often includes a statistic informing the prosecutor, judge or jury how probable it is that a random person in the population who is unrelated to you could be included in the DNA mixture.

DNA evidence has become more complicated over the last 5-10 years, and forensic scientists have recently become aware that a common statistical method they used may not always have taken into account certain important scientific limitations.

The Texas Forensic Science Commission is in the process of working with prosecutors, defense attorneys and laboratories to determine which cases may have problems.

If you would like your case recalculated on the DNA mixture issue, please fill out the attached form and send it to the address provided.

ATTACHMENT 6

TEXAS FORENSIC SCIENCE COMMISSION
CLARIFICATION REGARDING THE TERM
“CURRENT AND PROPER MIXTURE INTERPRETATION PROTOCOLS”

In May 2015, the FBI notified the public that it had identified some errors in the population data used to generate statistical calculations when analyzing DNA cases by crime laboratories around the country. The changes in the population statistics were attributable to human error in data entry and technology limitations at the time the database was created in the 1990’s. The errors, being nominal, were not expected to have any material impact on the statistics derived in criminal cases. Empirical studies in and outside of Texas showed the differences in statistical calculations were minor. Regardless, Texas laboratories sent notifications to the criminal justice community in an abundance of caution, offering to provide statistical re-analysis upon request.

Some prosecutors accepted the offer for re-analysis in the notices, not expecting any significant difference in statistics but making the requests in an abundance of caution in cases set for trial. When these prosecutors received their new reports, they noticed significant changes in the statistics results in some (but not all) of the cases. The cases involved complex DNA mixtures, usually with difficult evidentiary samples such as gun swabs, steering wheel swabs, items of clothing, or other examples of “touch DNA” where multiple people may have contributed DNA to the sample.

The prosecutors went back to the laboratories and also sought the Texas Forensic Science Commission's help in understanding the cause of the unexpected statistical changes. The changes were attributable to the fact that the evidence was originally analyzed *before* certain important revisions were made in laboratory mixture interpretation protocols. These revisions were made due to an evolving understanding among forensic scientists of how to apply certain statistical methods to increasingly complex biological samples, particularly a statistical method referred to as the Combined Probability of Inclusion/Exclusion (“CPI/CPE”). Though DNA analysis is based on sound science, well-defined guidelines for interpretation are necessary when analyzing DNA samples containing multiple contributors, because of the complexity of the samples and the possibility of missing data (e.g., allele dropout and other stochastic effects).

The results of the Texas re-analysis requests highlighted in one state what has been an issue of concern in the forensic DNA community for years—that mixture interpretation is challenging; there can be wide variation from laboratory to laboratory and even within laboratories on how mixture evidence is interpreted; guidance on how to interpret mixtures properly was described in various journal publications and websites but it was not as centralized or proscriptive as it could have been; and efforts by the federal government (in particular the National Institute of Standards and Technology) to train laboratories and raise red flags regarding mixture interpretation problems they observed in two major studies (MIX05 and MIX13) took many years to transfer to the local level.

On August 21, 2015, Dr. Vincent Di Maio, Presiding Officer of the Texas Forensic Science Commission, published a letter to the Texas Criminal Justice Community. The letter explained the issues identified above and suggested that any prosecutor, defendant or defense attorney with a currently pending case involving a DNA mixture in which the results could impact the conviction consider requesting confirmation that CPI/CPE was calculated by the laboratory using “current and proper mixture interpretation protocols.”

Since the publication of that letter, some in the community have asked for clarification regarding what the Commission means by “current and proper mixture interpretation protocols” in its August 21, 2015 letter. In using this term, the Commission specifically refers to ensuring the laboratory observes the main principle of CPI/CPE, as follows:

Loci that have a reasonable probability of allele dropout should be disqualified from use in calculation of the CPI/CPE statistic. The entire profile must be evaluated to determine the likelihood of dropout, not just the observable peaks at a single locus.

Laboratory protocols may allow for the reinstatement of loci in certain situations, as well as distinguishing a profile comprised of multiple major contributors and minor or trace contributors where the majors are clearly distinguishable from the minors. These concepts are represented in a memorandum regarding mixture interpretation protocols dated October 15, 2015, and available on the Commission’s website at the following link: [http://www.fsc.texas.gov/sites/default/files/Texas%20Forensic%20Lab%20Mixture%20Criteria%20101515%20\(FINAL\).pdf](http://www.fsc.texas.gov/sites/default/files/Texas%20Forensic%20Lab%20Mixture%20Criteria%20101515%20(FINAL).pdf)

Further information regarding implementation of these concepts is anticipated in an article by Drs. Frederick Bieber, John Buckleton, Bruce Budowle, John Butler and Michael Coble currently under review in the journal *FSI Genetics*. The Commission will provide a link to the article on its website as soon as it is publicly available.

Last Name	First Name	Age	Race	State	County	Tags	Crime	Sentence	Convicted	Exonerated	DNA	*	MWID	FC	P/FA	F/MFE	OM	ILD
Brown	Joyce Ann	33	Black	TX	Dallas	F, H, JI	Murder	25 to Life	1980	1990			MWID		P/FA		OM	
Macias	Federico	31	Hispanic	TX	El Paso	CDC, H, JI	Murder	Death	1984	1993					P/FA			ILD
Deeb	Muneer	23	Other	TX	McLennan	CV, H, JI	Murder	Death	1985	1993					P/FA	F/MFE		
Williams	Joe Sidney	19	Black	TX	McLennan	H, JI	Murder	Life	1987	1993	DNA	*			P/FA	F/MFE	OM	
Ramirez	Jesus	48	Hispanic	TX	Lamb	H, JI	Murder	Life	1998	2008			MWID		P/FA		OM	ILD
Sifuentes	Alberto	22	Hispanic	TX	Lamb	H, JI	Murder	Life	1998	2008			MWID		P/FA		OM	ILD
Boyd, Jr.	Kenneth Wayne	22	Black	TX	Shelby	CV, H, JI	Murder	Life	1999	2013					P/FA		OM	ILD
Toney	Michael	19	Caucasian	TX	Tarrant	CV, H, JI	Murder	Death	1999	2009					P/FA		OM	
Winfrey, Sr.	Richard	49		TX	San Jacinto	H, JI	Murder	75 years	2007	2010					P/FA	F/MFE		

Tags:

CDC Co-Defendant Confessed
CV Child Victim
F Femail Exoneree
H Homicide
JI Jailhouse Informant

Model Policy on Eyewitness Identification

I. Purpose

The purpose of this model policy is to outline proper protocol for eyewitness identification procedures for photographic, show-up, and live lineup identifications which maximize the reliability of identifications, protect innocent persons, and establish evidence that is reliable and conforms to established legal requirements.

II. Policy

Eyewitness identifications are a significant component of many criminal investigations. The identification process must be carefully administered to minimize the likelihood of misidentifications. Moreover, constitutional safeguards must be observed in the process. The goal of reducing erroneous convictions can be furthered in many ways. Employing the most rigorous eyewitness identification methods is one way of doing this, but there are others. The eyewitness identification process is only one step in the criminal investigative process, albeit an important one. Corroborative evidence, for example, will lessen the impact of an erroneous eyewitness identification. The more other evidence that is available, the less risk there is of conviction based solely on erroneous eyewitness identification. There is no substitute for a competent and thorough criminal investigation.

This model policy was written to provide guidance on eyewitness identification procedures based on credible research on eyewitness memory and best practices designed not only to reduce erroneous eyewitness identification but also to enhance the reliability and objectivity of eyewitness identifications.

Evidence-based and best practices surrounding the collection and preservation of eyewitness evidence are addressed as are procedures to be employed where witnesses or victims are unable to read or write, are non-English speaking, or possess limited English language proficiency.

III. Procedural Guidelines

A. Definitions

1. **Blind Procedure** – A procedure wherein the person administering the live lineup or photo array does not know who the suspect is.
2. **Blinded Photo Array Procedure** – A procedure wherein the person who administers the photo array knows who the suspect is, but each photo is presented so that the administrator cannot see or track which photograph is being presented to the witness.

3. **Folder Shuffle Method** – A method of administering a photo array such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed. This method is employed when a blind procedure is not possible.
4. **Fillers** – Non-suspect photographs or persons. Fillers are selected to both fit the description of the perpetrator provided by the witness and to ensure that no individual or photo stands out.
5. **Illiterate Person** – An individual who speaks and understands English but cannot read and write in English.
6. **Interpreter** – An interpreter is a person who is fluent in English and the language of the witness or victim and who facilitates communication between two parties in two different languages. The term includes persons who facilitate communication with persons who are deaf, hearing impaired, or speaking impaired.
7. **Live lineup** – An identification procedure in which a group of persons is displayed to the witness or victim in order to identify or exclude the suspect.
8. **Person with Limited English Proficiency** – An individual who is unable to communicate effectively in English with a level of fluency that is typical of native English speakers. Such a person may have difficulty speaking, reading, or writing in English and includes persons who can comprehend English, but are physically unable to talk or write.
9. **Photo Array** – An identification procedure in which a series of photographs is displayed to the witness or victim in order to identify or exclude the suspect.
10. **Sequential Live Lineup or Photo Array** – An identification procedure in which the persons in the live lineup or the photographs in the photo array are displayed one by one (sequentially).
11. **Show-up** – An identification procedure in which a single suspect is shown to a victim or witness soon after the commission of a crime for the purpose of identifying or eliminating the suspect as the perpetrator.
12. **Witness Certification Statement** – A written statement that is read out loud to the witness or victim describing the procedures of the identification process.

B. Selecting the Best Identification Method

1. Photo arrays are preferred over other techniques because: (a) they can be controlled better, (b) nervousness can be minimized, and (c) they are easier to manage logistically.

2. Because they involve multiple persons under relatively controlled circumstances, a properly conducted live lineup, like a properly conducted photo array, is preferable to a show-up.
3. Because they are highly suggestive, show-ups are vulnerable to challenges to their validity. Consequently, a show-up should be employed only where other indicia of guilt are present (e.g., suspect located relatively close in time and place to the crime).
4. Because witnesses may be influenced, however unintentionally, by cues from the person administering the procedure, a blind administrator should be used. This can be achieved through the use of a blind procedure or a blinded photo array procedure (e.g. the folder shuffle method).
5. Because research shows the sequential presentation of live lineups and photo arrays is less likely to result in misidentification and carry very little risk of increasing the likelihood of failure to identify the suspect, a sequential presentation should be used.

C. Selecting Fillers

All persons in the photo array or live lineup should be of the same sex and race and should be reasonably similar in age, height, weight, and general appearance. Ideally, the characteristics of the filler should be consistent with the description of the perpetrator provided by the witness(es). Where there is a limited or inadequate description of the perpetrator provided by the witness(es), where the description of the perpetrator differs significantly from the appearance of the suspect, where a witness has provided a highly detailed description, or where the witness's description of the perpetrator or the suspect has a highly distinctive feature, fillers should be chosen so that no person stands out in the live lineup or photo array.

D. Explaining that the Perpetrator May or May Not Be Present

Because witnesses may be under pressure to identify a suspect, they should be informed that the suspect may or may not be present in a live lineup or photo array and that the person presented in a show-up may or may not be the perpetrator.

E. Explaining that the Investigation will Continue

The administrator should also explain to the witness that the investigation will continue, regardless of whether an identification is made, as another way of alleviating pressure on the witness to identify a suspect.

F. Witness Contamination

Precautions must be taken to ensure that witnesses do not encounter suspects or fillers at any time before or after the identification procedure. Avoid multiple identification procedures in which the same witness views the same suspect more than once. When showing a different suspect to the same witness, do not reuse the same fillers from a previous live lineup or photo array shown to that witness. Witnesses should not be allowed to confer with each other before, during, or after the identification procedure. Ensure that no one who knows the suspect's identity is present during live lineup or photo array procedure. In some live lineups, exceptions must be made to allow for the presence of defense counsel.

G. Documenting the Procedure

In order to strengthen the evidentiary value of the identification procedure, it should be documented in full. Video documentation is the preferred method. Audio recording is the preferred alternative. If neither method is employed, then the reason for not video or audio recording should be documented.

IV. Sample Standard Operating Procedures

The procedures which follow have been designed to: (a) reduce erroneous eyewitness identifications, (b) enhance the reliability and objectivity of eyewitness identifications, (c) collect and preserve eyewitness evidence properly, (d) respect the needs and wishes of victims and witnesses, and (d) address the needs of witnesses with limited English proficiency, where applicable.

In order to choose among the various identification methods, a brief description of each method follows in order of most preferred method to least preferred. Once the appropriate method is selected, the administrator should go directly to the Sample Standard Operating Procedures for that particular method. In any given situation only set of Sample Standard Operating Procedures applies.

A. Descriptions of Eyewitness Identification Methods

1. Sequential, Blind Photo Array – photo arrays where the photographs are presented one at a time to the witness or victim by a person who does not know who the suspect is. This method requires a preparer who may be familiar with the case and an administrator who does not know the identity of the suspect.
2. Sequential, Blinded Photo Array – photo arrays where the photographs are presented one at a time to the witness or victim by a person who knows who the suspect is, but who takes steps (putting the photographs in folders and shuffling them) to avoid knowledge of which person the witness or victim is looking at. This method

typically involves an administrator who is familiar with the case and knows who the suspect is.

3. Sequential Live Lineup – live lineups where the persons in the live lineup are presented one at a time to the witness or victim. This method requires a preparer who may be familiar with the case and an administrator who does not know the identity of the suspect.
4. Show-up – procedure where the witness or victim is presented with a single suspect and asked to identify whether that suspect is the perpetrator. This procedure can be carried out by any officer.

B. Sample Standard Operating Procedures for Sequential, Blind Photo Array Administrations

1. Preparation

a. Designating a Preparer

Preparing the photo array should be undertaken by someone other than the person who will administer the photo array. Ideally, the investigating officer will prepare the photo array as this ensures that others who might be involved in the case are not used as fillers. Moreover, because the investigating officer knows who the suspect is, he or she should not be conducting the actual administration of the photo array.

b. Selecting Suspect Photograph

If multiple photos of the suspect are available, choose the photo that most resembles the suspect's appearance at the time of the crime. Do not include more than one photograph of the same suspect. If you do not know what the suspect looked like at the time of the crime, choose the photo that most resembles the victim's or witness's description of the perpetrator. If there are multiple suspects, include only one suspect's photo in the array.

c. Selecting Fillers

All persons in the photo array should be of the same sex and race and should be reasonably similar in age, height, weight, and general appearance. Ideally, the characteristics of the filler should be consistent with the description of the perpetrator provided by the witness(es). Where there is a limited or inadequate description of the perpetrator provided by the witness(es), where the description of the perpetrator differs significantly from the appearance of the suspect, fillers should be chosen so that no person stands out in the photo array. Do not mix color and black and white photos. Use photos of the same size and basic composition. Never mix mug shots with other types of photographs.

d. Choosing Number of Fillers

Wherever possible, include a minimum of five fillers. Because increasing the number of fillers tends to increase the reliability of the procedure, one may have more than the minimum number of fillers.

e. Ensuring Similarity

Assess the array to ensure that no person stands out from the rest. Cover any portions of the photographs that provide identifying information on the suspect and similarly cover other photographs used in the array.

f. Placing Subject Photographs in Order

- 1) Place a filler in the lead position.
- 2) Place the remaining photographs which will comprise the photo array in random order.
- 3) Place two blank photographs at the end (blanks on the same type of photographic paper as the actual photographs but which will not be shown to the witness; this is intended to cause the witness to think there may still be photographs to view in order to reduce pressure to choose what the witness may presume to be the last photograph).

g. Presenting the Photo Array to the Independent Administrator

Present the ordered photo array to the independent administrator. Do not tell the independent administrator which position the suspect is in.

2. Administration

The administrator of the photo array presentation should be an independent administrator who does not know the identity of the suspect and the witness should be informed of this. In a blind procedure, no one should be present who knows the suspect's identity.

a. Blinded Administration

If the blind procedure described above is not followed, then the photo array administrator should document the reason why and the administrator should be blinded. That is, he or she should conduct the photo array in a manner such that he or she does not know which person in the array the witness is looking at. There is a separate sample standard operating procedure for blinded photo array administration in this model policy immediately following this sample standard operating procedure.

b. Instruct Witness

Each witness should be instructed outside the presence of the other witnesses. The independent administrator should give the witness a written copy of the following Witness Certification Statement and should read the instruction statement aloud at the beginning of each identification procedure:

In a moment, I am going to show you a series of photos. The person who committed the crime may or may not be included. I do not know whether the person being investigated is included.

Even if you identify someone during this procedure, I will continue to show you all photos in the series.

The investigation will continue whether or not you make an identification.

Keep in mind that things like hair styles, beards, and mustaches can be easily changed and that complexion colors may look slightly different in photographs.

You should not feel you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator.

The photos will be shown to you one at a time. Take as much time as you need to look at each one. After each photo, I will ask you "Is this the person you saw [insert description of act here]?" Take your time answering the question. If you answer "Yes," I will then ask you, "In your own words, can you describe how certain you are?"

Because you are involved in an ongoing investigation, in order to prevent damaging the investigation, you should avoid discussing this identification procedure or its results.

Do you understand the way the photo array procedure will be conducted and the other instructions I have given you?

c. Document Consent to Participate

Witnesses should then be asked to read the following additional paragraph and sign and date below.

I have read these instructions, or they have been read to me, and I understand the instructions. I am prepared to review the photographs, and I will follow the instructions provided on this form.

- a) Some witnesses may decline to sign. When a witness declines to sign, it is sufficient for the investigating officer to document that the witness was appropriately instructed.

d. Presentation of Photographs

Present each photo to the witness separately (one at a time), in order. When the witness is finished viewing the photo, have the witness hand the photo back.

e. Question Witness

After the witness has looked at a photo and handed it back to you, ask: “**Is this the person you saw [insert description of act here]?**” If the witness answers “Yes,” ask the witness, “**In your own words, can you describe how certain you are?**”

f. Document Witness’s Responses

Document the witness’s response using the witness’s own words. Have the witness complete the appropriate section of the Witness Certification Statement to reflect the outcome of the procedure.

g. Show All Photographs

Even if the witness makes an identification, show the witness the next photo until you have gone through all the photographs. If a witness asks why he or she must view the rest of the photos, despite already making an identification, simply tell the witness that to assure objectivity and reliability, the witness is required to view all of the photographs.

h. Avoid Feedback During the Procedure

Do not give the witness any feedback regarding the individual selected or comment on the outcome of the identification procedure in any way. Be aware that witnesses may perceive such things as unintentional voice inflection or prolonged eye contact, in addition to off-hand words or phrases, as messages regarding their selection. Avoid casual conversation comments such as “very good.” Be polite but purposeful when you speak.

i. Additional Viewings

Only upon request of the witness, the witness may view the photo array again after the first photo array procedure has been completed. If the witness requests an additional viewing, the photo array administrator should present the entire photo array in the same order as the original presentation, a second time. If this occurs, it must be documented. The photo array administrator should never suggest an additional viewing to the witness. It is recommended that the witness not be allowed to view the photo array more than two times.

j. Subsequent Use of Materials

Ensure that if the witness writes on, marks, or in any way alters identification materials, those materials are not used in subsequent procedures.

k. Multiple Identification Procedures With Same Witness

Avoid multiple identification procedures in which the same witness views the same suspect more than once.

l. Multiple Identification Procedures With Different Witness

If you need to show the same suspect to a new witness, have the preparer remix the photo array and renumber them accordingly.

m. Multiple Suspects

When there are multiple suspects, a separate photo array should be conducted for each suspect. There should not be more than one suspect per photo array.

n. Reuse of Fillers

When showing a different suspect to the same witness, do not reuse the same fillers from a previous array shown to that witness.

o. Contact Among Witnesses

To the extent possible, prevent witnesses from conferring with each other before, during, and after the photo array procedure.

p. Identification of Special Features

Only after an identification is made, a follow-up interview should assess any relevant factors that support the identification, such as: special facial features, hair, marks, etc.

3. Special Procedures are Required for Illiterate Persons or Persons Who Possess Limited English Proficiency

a. Be Alert to People Who do not Speak English or Possess Limited English Proficiency

Given the diversity of communities, police officers may encounter persons who do not speak English or who possess limited English proficiency in the course of a criminal investigation. When presented with this situation, officers should carefully consider the ethical and legal ramifications of how to handle the case when there is a language barrier.

b. Using an Interpreter

Unless the administrator speaks the victim's or witness's language fluently, an interpreter should be used for persons who do not speak English. The interpreter shall sign the Witness Instruction Statement on obtaining consent of a non-English speaking person to assist in the eyewitness identification process. Law enforcement personnel should consider arranging for an interpreter if a person interviewed:

- 1) Is unable to communicate in English
- 2) Has a limited understanding of English
- 3) Is deaf, hearing impaired, or speaking impaired
- 4) Is otherwise physically challenged to communicate in English

c. Review and Explain Forms

If the person is unable to read, the administrator, in the presence of the witness, will give the explanation, read any forms, and obtain consent and acknowledge the consent on the Witness Certification Statement, stating why the person was unable to sign the form.

4. Documentation

In order to strengthen the evidentiary value of the administration it should be documented in full. Video documentation (with audio) is the preferred method. Audio recording is the preferred alternative. If neither method is employed, then the reason for not video or audio recording should be documented. Preserve the photo array, together with all information about the identification process.

C. Sample Standard Operating Procedures for Sequential, Blinded Photo Array Administrations

1. Preparation

a. Select Suspect Photograph

If multiple photos of the suspect are available, choose the photo that most resembles the suspect's appearance at the time of the crime. Do not include more than one photograph of the same suspect. If you do not know what the suspect looked like at the time of the crime, choose the photo that most resembles the victim's or witness's description of the perpetrator. If there are multiple suspects, include only one suspect's photo in the array.

b. Selecting Fillers

All persons in the photo array should be of the same sex and race and should be reasonably similar in age, height, weight, and general appearance. Ideally, the characteristics of the filler should be consistent with the description of the perpetrator provided by the witness(es). Where there is a limited or inadequate description of the perpetrator provided by the witness(es), where the description of the perpetrator differs significantly from the appearance of the suspect, fillers should be chosen so that no person stands out in the photo array. Do not mix color and black and white photos. Use photos of the same size and basic composition. Never mix mug shots with other types of photographs.

c. Choosing Number of Fillers

Whenever possible, include a minimum of five fillers. Because increasing the number of fillers tends to increase the reliability of the procedure, one may have more than the minimum number of fillers.

d. Ensuring Similarity

Assess the array to ensure that no person stands out from the rest. Cover any portions of the photographs that provide identifying information on the suspect and similarly cover other photographs used in the array.

e. Placing Subject Photographs in Order

1) Place a filler in a folder and set it aside for placement in the lead position.

- 2) Place the remaining photographs which will comprise the photo array in separate folders and place them in random order (mix them up) so you do not know which photograph is in which folder.
- 3) Take the folder you set aside in step 1), above and place it in the lead position.
- 4) Place two empty folders at the end.
- 5) Number the folders.

2. Administration

a. Blinded Administration

The purpose of a blinded administration is to conduct the photo array in a manner such that the administrator does not know which person in the array the witness is looking at.

b. Instruct Witness

Each witness should be instructed outside the presence of the other witnesses. The blinded administrator should give the witness a written copy of the following Witness Instruction Statement and should read the instruction statement aloud at the beginning of each identification procedure:

The folders in front of you contain photos. In a moment, I am going to ask you to look at the photos. The person who committed the crime may or may not be included in the photos. I do not know whether the person being investigated is included.

Although I placed the photos into the folders, I have shuffled the folders so that right now I do not know which folder contains a particular photo.

Even if you identify someone during this procedure, I will continue to show you all photos in the series.

The investigation will continue whether or not you make an identification.

Keep in mind that things like hair styles, beards, and mustaches can be easily changed and that complexion colors may look slightly different in photographs.

You should not feel you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator.

You will look at the photos one at a time. When you open a folder, please open it in a manner that does not allow me to see the photo inside the folder. Take as much time as you need to look at each one.

When you have finished looking at a photo, close the folder and hand it to me. I will then ask you, "Is this the person you saw [insert description of act here]?" Take your time answering the question. If you answer "Yes," I will then ask you, "In your own words, can you describe how certain you are?"

Because you are involved in an ongoing investigation, in order to prevent compromising the investigation, you should avoid discussing this identification procedure or its results.

Do you understand the way the photo array procedure will be conducted and the other instructions I have given you?

c. Document Consent to Participate

Witnesses should then be asked to read the following additional paragraph and sign and date below.

I have read these instructions, or they have been read to me, and I understand the instructions. I am prepared to review the photographs, and I will follow the instructions provided on this form.

- 1) Some witnesses may decline to sign. When a witness declines to sign, it is sufficient for the investigating officer to document that the witness was appropriately instructed.

d. Present Folders

Present each folder to the witness separately (one at a time), in order. The blinded administrator should not be in a position to view the photographs while the witness is viewing the photographs. The eyewitness should be the only person viewing the photographs. When the witness is finished viewing the photo, have the witness hand the folder back.

e. Question Witness

After the witness has looked at a photo and handed it back to you, ask: **"Is this the person you saw [insert description of act here]?"** If the witness answers

"Yes," ask the witness, **“In your own words, can you describe how certain you are?”**

f. Document Witness’s Responses

Document the witness’s response using the witness’s own words. Have the witness complete the appropriate section of the Witness Certification Statement to reflect the outcome of the procedure.

g. Show All Folders with Photos

Show all folders containing photos to the witness. Even if the witness makes an identification, show the witness the next photo until you have gone through all the photographs. If a witness asks why he or she must view the rest of the photos, despite already making an identification, simply tell the witness that to assure objectivity and reliability, the witness is required to view all of the photographs.

h. Avoid Feedback During the Procedure

Do not give the witness any feedback regarding the individual selected or comment on the outcome of the identification procedure. Be aware that witnesses may perceive such things as unintentional voice inflection or prolonged eye contact, in addition to off-hand words or phrases, as messages regarding their selection. Avoid casual conversation comments such as “very good.” Be polite but purposeful when you speak.

i. Additional Viewings

Only upon request of the witness, the witness may view the photo array again after the first photo array procedure has been completed. If the witness requests an additional viewing, the photo array administrator should present the entire photo array in the same order as the original presentation, a second time. If this occurs, it must be documented. The photo array administrator should never suggest an additional viewing to the witness. It is recommended that the witness not be allowed to view the photo array more than two times.

j. Subsequent Use of Materials

Ensure that if the witness writes on, marks, or in any way alters identification materials, those materials are not used in subsequent procedures.

k. Multiple Identification Procedures with Same Witness

Avoid multiple identification procedures in which the same witness views the same suspect more than once.

l. Multiple Identification Procedures with Different Witness

If you need to show the same suspect to a new witness, remix the photo array as before and renumber them accordingly.

m. Multiple Suspects

When there are multiple suspects, a separate photo array should be conducted for each suspect. There should not be more than one suspect per photo array.

n. Reuse of Fillers

When showing a different suspect to the same witness, do not reuse the same fillers from a previous array shown to that witness.

o. Contact Among Witnesses

To the extent possible, prevent witnesses from conferring with each other before, during, and after the photo array procedure.

p. Identification of Special Features

Only after an identification is made, a follow-up interview should assess any relevant factors that support the identification, such as: special facial features, hair, marks, etc.

3. Special Procedures are Required for Illiterate Persons or Persons Who Possess Limited English Proficiency

a. Be Alert to People Who do not Speak English or Possess Limited English Proficiency

Given the diversity of communities, police officers may encounter persons who do not speak English or who possess limited English proficiency in the course of a criminal investigation. Where presented with this situation, officers should carefully consider the ethical and legal ramifications of how to handle the case when there is a language barrier.

b. Using an Interpreter

Unless the administrator speaks the victim's or witness's language fluently, an interpreter should be used for persons who do not speak English. The interpreter shall sign the Witness Certification Statement on obtaining consent of a non-

English speaking person to assist in the eyewitness identification process. Law enforcement personnel should consider arranging for an interpreter if a person interviewed:

- 1) Is unable to communicate in English
- 2) Has a limited understanding of English
- 3) Is deaf, hearing impaired, or speaking impaired
- 4) Is otherwise physically challenged to communicate in English

c. Review and Explain Forms

If the person is unable to read, the administrator, in the presence of the witness, will give the explanation, read any forms, and obtain consent and acknowledge the consent on the Witness Instruction Statement, stating why the person was unable to sign the form.

4. Documentation

In order to strengthen the evidentiary value of the administration it should be documented in full. Video documentation (with audio) is the preferred method. Audio recording is the preferred alternative. If neither method is employed, then the reason for not video or audio recording should be documented. Preserve the photo array, together with all information about the identification process.

D. Sample Standard Operating Procedures for Sequential, Blind Live lineups

1. Preparation

a. Designating a Preparer

Preparing the live lineup should be undertaken by someone other than the person who will administer the live lineup. Ideally, the investigating officer will prepare the live lineup as this ensures that others who might be involved in the case are not used as fillers. Moreover, because the investigating officer knows who the suspect is, he or she should not conduct the actual administration of the live lineup

b. Selecting Fillers

All persons in the live lineup should be of the same sex and race and should be reasonably similar in age, height, weight, and general appearance. Ideally, the characteristics of the filler should be consistent with the description of the perpetrator provided by the witness(es). Where there is a limited or inadequate description of the perpetrator provided by the witness(es), where the description of the perpetrator differs significantly from the appearance of the suspect, fillers should be chosen so that no person stands out in the live lineup.

c. Choosing Number of Fillers

Whenever possible, include a minimum of five fillers. Because increasing the number of fillers tends to increase the reliability of the procedure, one may have more than the minimum number of fillers.

d. Ensuring Similarity

Assess the lineup to ensure that no person stands out from the rest.

e. Placing the Subjects in Order

Place a filler in the lead position and place the remaining persons who will comprise the live lineup in random order.

f. Presenting the Live lineup to Administrator

Present the ordered live lineup to the administrator. Do not tell the administrator which position the suspect is in.

2. Administration

The administrator of the live lineup should be an independent administrator who does not know the identity of the suspect and the witness should be informed of this. In a blind procedure, no one should be present who knows the suspect's identity. In some live lineups, exceptions must be made to allow for the presence of defense counsel. Once the live lineup commences, defense counsel's role is limited to that of observer.

a. Instruct Witness

Each witness should be instructed outside the presence of the other witnesses. The live lineup administrator should give the witness a written copy of the following Witness Certification Statement and should read the instruction statement aloud at the beginning of each identification procedure:

In a moment, I am going to show you a series of individuals. The person who committed the crime may or may not be included. I do not know whether the person being investigated is included.

The investigation will continue whether or not you make an identification.

Even if you identify someone during this procedure, I will continue to show you all individuals in the series.

Keep in mind that things like hair styles, beards, and mustaches can be easily changed.

You should not feel you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator.

The individuals will be shown to you one at a time. Take as much time as you need to look at each one. After each individual, I will ask you "Is this the person you saw [Insert description of act]?" Take your time answering the question. If you answer "Yes," I will then ask you, "In your own words, can you describe how certain you are?"

Because you are involved in an ongoing investigation, in order to prevent damaging the investigation, you should avoid discussing this identification procedure or its results.

Do you understand the way the lineup procedure will be conducted and the other instructions I have given you?

b. Document Consent to Participate

Witnesses should then be asked to read the following additional paragraph and sign and date below.

I have read these instructions, or they have been read to me, and I understand the instructions. I am prepared to view the individuals who will be presented to me, and I will follow the instructions provided on this form.

1) Some witnesses may decline to sign. When a witness declines to sign, it is sufficient for the investigating officer to document that the witness was appropriately instructed.

c. Presentation of Subjects

Begin with all live lineup participants out of the view of the witness. Present each subject one at a time in the order presented to the administrator by the preparer. Present each individual to the witness separately, removing those previously shown from the field of view.

d. Question Witness

After each individual is shown, ask the witness: "**Is this the person you saw [insert description of act]?**" If the witness answers "Yes," ask the witness, "**In your own words, can you describe how certain you are?**" Document the witness's response using the witness's own words.

e. Document Witness's Responses

Document the witness's response using the witness's own words. Have the witness complete the appropriate section of the Witness Certification Statement to reflect the outcome of the procedure.

f. Show Every Subject

Even if the witness makes an identification, show the witness the next subject until all subjects have been shown. If a witness asks why he or she must view the rest of the subjects despite already making an identification, simply tell the witness that to assure objectivity and reliability, the witness is required to view all of the subjects.

g. Consistency of Actions

Ensure that any identification actions (e.g., speaking, moving) are performed by all members of the live lineup.

h. Avoid Feedback During the Procedure

Do not give the witness any feedback regarding the individual selected or comment on the outcome of the identification procedure in any way. Be aware that witnesses may perceive such things as unintentional voice inflection or prolonged eye contact, in addition to off-hand words or phrases, as messages regarding their selection. Avoid casual comments such as “very good.” Be polite but purposeful when you speak.

i. Additional Viewings

Only upon request of the witness, the witness may view the lineup again after the first live lineup has been completed. If the witness requests an additional viewing, the independent administrator should present the entire live lineup a second time. If this occurs, it must be documented. The live lineup administrator should never suggest additional viewing. It is recommended that the witness not be allowed to view the live lineup more than two times.

j. Multiple Identification Procedures With Same Witness

Avoid multiple identification procedures in which the same witness views the same suspect more than once.

k. Multiple Identification Procedures With Different Witness

If you need to show the same suspect to a new witness, have the preparer change the order of the subjects in the lineup.

l. Multiple Suspects

When there are multiple suspects, a separate live lineup should be conducted for each suspect. There should not be more than one suspect per lineup.

m. Reuse of Fillers

When showing a different suspect to the same witness, do not reuse the same fillers from a previous lineup shown to that witness.

n. Contact Among Witnesses

To the extent possible, prevent witnesses from conferring with each other before, during, and after the live lineup procedure.

o. Contact between Witnesses, Suspects, and Fillers

Take precautions to ensure that witnesses do not encounter suspects or fillers at any time before or after the identification procedure.

p. Identification of Special Features

Only after an identification is made, a follow-up interview should assess any relevant factors that support the identification, such as: special facial features, hair, marks, etc.

3. Special Procedures are Required for Illiterate Persons or Persons Who Possess Limited English Proficiency

a. Be Alert to People Who do not Speak English or Possess Limited English Proficiency

Given the diversity of communities, police officers may encounter persons who do not speak English or who possess limited English proficiency in the course of a criminal investigation. Where presented with this situation, officers should carefully consider the ethical and legal ramifications of how to handle the case when there is a language barrier.

b. Using an Interpreter

Unless the administrator speaks the victim's or witness's language fluently, an interpreter should be used for persons who do not speak English. The interpreter shall sign the Witness Certification Statement on obtaining consent of a non-English speaking person to assist in the eyewitness identification process. Law enforcement personnel should consider arranging for an interpreter if a person interviewed:

- 1) Is unable to communicate in English
- 2) Has a limited understanding of English
- 3) Is deaf, hearing impaired or speaking impaired
- 4) Is otherwise physically challenged to communicate in English

c. Review and Explain Forms

If the person is unable to read or write, the administrator, in the presence of the witness, will give the explanation, read any forms, and obtain consent and acknowledge the consent on the Witness Certification Statement, stating why the person was unable to sign the form.

4. Documentation

In order to strengthen the evidentiary value of the administration, it should be documented in full. Video documentation (with audio) is the preferred method. Audio recording is the preferred alternative. If neither method is employed, then the reason for not video or audio recording should be documented. A still photograph of each individual in the live lineup should be taken and details of all persons present during the live lineup should be documented.

E. Sample Standard Operating Procedures for Show-ups

Show-ups should be avoided whenever possible because of their suggestiveness. Photo arrays and live lineups are preferred. However, where circumstances require the prompt display of a suspect to a witness, the following procedures should be followed to minimize potential suggestiveness.

1. Preparation

a. Contact Among Witnesses

Separate witnesses and do not allow communication between them before or after conducting a show-up.

b. Document Witness's Description of Perpetrator

Document the witness's description of the perpetrator prior to conducting the show-up.

c. Temporal and Spatial Proximity to the Offense

Use show-ups only where the suspect is detained within a reasonably short time frame following the offense and is found in relatively close proximity to it. Although this is dependent on the individual circumstances of each case, courts have generally held that a two-hour time lapse is acceptable.

d. Transport Witness to Suspect

Transport the witness to the location of the suspect whenever practical, rather than bringing the suspect to the witness. The suspect may be taken to a location where the witness can view the suspect for possible identification.

e. Do not Return Suspect to Crime Scene

Suspects should not be taken to the scene of the crime.

f. Disclosure of Location of Witness's Home

Consider carefully whether to take the suspect to the witness's or victim's home.

g. Avoid Appearance of Guilt

Do not conduct show-ups when the suspect is in a patrol car, handcuffed, or physically restrained by police officers unless such protective measures are necessary to ensure safety.

h. Minimize Reliance on Show-ups

If one witness identifies the suspect, you are strongly urged to use a photo array or a live lineup with any remaining witnesses.

2. Administration

a. Instruct Witness

Each witness should be instructed outside the presence of the other witnesses. The show-up administrator should give the witness a written copy of the following Witness Certification Statement and should read the instruction statement aloud at the beginning of the show-up identification procedure:

In a moment, I am going to show you a person who may or may not be the person who committed the crime.

You should not feel you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator. The investigation will continue whether or not you make an identification.

Because you are involved in an ongoing investigation, in order to prevent damaging the investigation, you should avoid discussing this identification procedure or its results.

Do you understand the procedure and the instructions I have given you?

b. Presentation of Suspect and Questioning of Witness

Present the suspect to the witness and ask the witness whether the person they are looking at is the person they saw commit the crime.

If the witness answers "Yes," ask the witness to describe, in their own words, how certain they are.

c. Document Witness's Response

Document the witness's response using the witness's own words.

d. Multiple Identification Procedures With Same Witness

Avoid multiple identification procedures in which the same witness views the same suspect more than once.

e. Avoid Requirement of Performance by the Suspect

Do not require show-up suspects to put on clothing worn by, speak words uttered by, or perform other actions of the perpetrator.

f. Avoid Conduct Suggestive of the Suspect's Guilt

Officers should avoid words or conduct that may suggest to the witness that the individual is or may be the perpetrator.

g. Contact Among Witnesses

Remind the witness not to talk about the show-up to other witnesses until police or prosecutors deem it permissible.

3. Special Procedures are Required for Illiterate Persons or Persons Who Possess Limited English Proficiency

a. Be Alert to People Who do not Speak English or Possess Limited English Proficiency

Given the diversity of communities, police officers may encounter persons who do not speak English or who possess limited English proficiency in the course of a criminal investigation. Where presented with this situation, officers should carefully consider the ethical and legal ramifications of how to handle the case when there is a language barrier.

b. Using an Interpreter

Unless the show-up administrator speaks the victim's or witness's language fluently, an interpreter should be used for persons who do not speak English. Law enforcement personnel should consider arranging for an interpreter if a person interviewed:

- 1) Is unable to communicate in English
- 2) Has a limited understanding of English
- 3) Is deaf, hearing impaired, or speaking impaired
- 4) Is otherwise physically challenged to communicate in English

4. Documentation

In order to strengthen the evidentiary value of the administration it should be documented in full including the time, date, and location of the procedure, identities of persons present, and the outcome of the procedure. Video documentation (with audio) is the preferred method. Audio recording is the preferred alternative. If

neither method is employed, then the reason for not video or audio recording should be documented.

Appendix A

Witness Certification Statement for Photo Array

Reference No.:

Offense:

Date of Offense:

Witness:

Time, Date, and Place of Photo Array:

Persons present:

Instructions:

In a moment, I am going to show you a series of photos. The person who committed the crime may or may not be included. I do not know whether the person being investigated is included.

The investigation will continue whether or not you make an identification. Even if you identify someone during this procedure, I will continue to show you all photos in the series. Keep in mind that things like hair styles, beards, and mustaches can be easily changed and that complexion colors may look slightly different in photographs.

*You should not feel you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator. The photos will be shown to you one at a time. Take as much time as you need to look at each one. After each photo, I will ask you "Is this the person you saw **[insert description of act here]**?" Take your time answering the question. If you answer "Yes," I will then ask you, "In your own words, can you describe how certain you are?"*

Because you are involved in an ongoing investigation, in order to prevent damaging the investigation, you should avoid discussing this identification procedure or its results.

Do you understand the way the photo array procedure will be conducted and the other instructions I have given you?

Consent to Participate:

I have read these instructions, or they have been read to me, and I understand the instructions. I am prepared to review the photographs and I will follow the instructions provided on this form.

Signed: _____
(Witness)

I certify that I have translated and read the instructions to the witness.

Signed: _____
(Translator, if applicable)

Signed: _____
(Photo Array Administrator)

Identification Result:

I have picked photo number _____

Signed: _____
(Witness)

I did not pick anyone from the photo array

Signed: _____
(Witness)

Witness Confidence Statement:

Administrator Certification:

The photo that was picked from the photo array by the above-named witness has been identified as _____

Signed: _____
(Photo Array Administrator)

Appendix B

Witness Certification Statement for Live Lineup

Reference No.:

Offense:

Date of Offense:

Witness:

Time, Date, and Place of Live Lineup:

Persons present:

Instructions:

In a moment, I am going to show you a series of individuals. The person who committed the crime may or may not be included. I do not know whether the person being investigated is included.

The investigation will continue whether or not you make an identification. Even if you identify someone during this procedure, I will continue to show you all individuals in the series. Keep in mind that things like hair styles, beards, and mustaches can be easily changed.

*You should not feel you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator. The individuals will be shown to you one at a time. Take as much time as you need to look at each one. After each individual, I will ask you "Is this the person you saw **[Insert description of act]**?" Take your time answering the question. If you answer "Yes," I will then ask you, "In your own words, can you describe how certain you are?"*

Because you are involved in an ongoing investigation, in order to prevent compromising the investigation, you should avoid discussing this identification procedure or its results.

Do you understand the way the lineup procedure will be conducted and the other instructions I have given you?

Consent to Participate:

I have read these instructions, or they have been read to me, and I understand the instructions. I am prepared to view the individuals, and I will follow the instructions provided on this form.

Signed: _____
(Witness)

I certify that I have translated and read the instructions to the witness.

Signed: _____
(Translator, if applicable)

Signed: _____
(Lineup Administrator)

Identification Result:

I have picked number _____

Signed: _____
(Witness)

I did not pick anyone _____

Signed: _____
(Witness)

Witness Confidence Statement:

Administrator Certification:

The individual who was picked from the live lineup by the above-named witness has been identified

as _____

Signed: _____
(Lineup Administrator)

Model Policy on Eyewitness Identification

Frequently Asked Questions

1. Do I have to adopt the LEMIT model policy?
 - a. No. Article 38.20 § 2 of the Texas Code of Criminal Procedure requires that any “law enforcement agency of this state or of a county, municipality, or other political subdivision of this state that employs peace officers who conduct photograph or live lineup identification procedures in the routine performance of the officers' official duties” to “adopt, implement, and as necessary amend a detailed written policy regarding the administration of photograph and live lineup identification procedures.”
 - b. The LEMIT model policy was drafted in response to § 3(b) of the Texas Code of Criminal Procedure, which required LEMIT to “develop, adopt, and disseminate to all law enforcement agencies in this state a model policy... regarding the administration of photograph and live lineup identification procedures.”
 - c. Thus, agencies are required to adopt a policy pursuant to § 2 and LEMIT was required to develop a model policy, pursuant to § 3.
2. Some witnesses may refuse to be recorded out of fear for their safety and some victims may be too fragile to be video recorded. Won't this policy put them at risk or further traumatize them?
 - a. No. The welfare of victims and witnesses is paramount. If the victim or witness refuses to be recorded or recording would place the victim or witness at risk, then the procedure can be documented in writing. Under these circumstances, the model policy indicates that “the reason for not video or audio recording should be documented.”
 - b. Because actual recordings are very persuasive, reluctant victims--who clearly have a stake in the successful prosecution of guilty offenders-- should be informed that actual recordings will likely carry greater weight in court.
3. Our resources are so limited we don't have sufficient personnel to conduct sequential lineups and photo arrays. Is the sequential method that important?

- a. Yes. First, conducting an eyewitness identification procedure sequentially (one at a time), as opposed to simultaneously (all at once), requires no additional personnel.
 - b. Second, the research is quite clear that sequential procedures are less likely than simultaneous ones to result in selecting the wrong person. Insofar as the chief purpose of the legislation leading to this policy was to reduce false identifications, we have expressed a clear preference for sequential methods.
4. Our resources are so limited we do not have sufficient personnel to conduct blind administrations of lineups and photo arrays. Is blind administration that important?
 - a. Yes. Decades of research have made it quite clear that people “leak” information. Despite their best efforts, administrators who are not blind may inadvertently communicate information about the suspect. Although we typically are not aware of subtle cues, even animals are able to pick up on these unintentional cues (see the “Clever Hans effect”).
 - b. Photo arrays are much more common than live lineups and, if resources are limited, a properly conducted blinded procedure is just as effective as a blind procedure and it requires no additional resources.
 - c. If the procedure will be a live lineup, then consider using non-sworn personnel or getting assistance from or working in partnership with another agency.
5. Our detectives go to great lengths to establish good rapport with witnesses and victims. Isn’t “handing off” our witness or victim to a blind administrator, whom they don’t know or trust, insensitive to their needs?
 - a. No. The administrator of a blind procedure will be just as sensitive to the witness’s needs as the detective is. Victims and witnesses regularly interact with criminal justice professionals other than detectives, including physicians and nurses who collect evidence for rape kits; Child Protective Service workers in cases involving children who have been abused; Assistant District Attorneys who must prepare witnesses for court; and a host of others. The decision to conduct a non-blind administration in the interest of maintaining rapport should be undertaken with the knowledge that doing so may sacrifice the validity of the procedure.

6. Do we have to use a court-certified interpreter every time we conduct an eyewitness identification procedure with someone who speaks a language other than English?
 - a. No. We realize that different communities have varying levels of interpretation resources. Moreover, even in communities where court-certified interpreters are abundant, they may not be easily accessible for a show-up conducted at 3:00 am. Consequently, the policy allows for some flexibility. Administrators should be thoughtful about whom to use for this purpose.

7. Why do we have to allow defense attorneys to attend certain lineups when the policy says nobody should be present who knows which person is the suspect?
 - a. The United States Supreme Court decided the issue that way (see *Gilbert v. California*, 388 U.S. 263, 1967).

8. How did LEMIT develop the policy?
 - a. LEMIT convened a working group that canvassed existing policies and research on eyewitness identification to develop a working draft which was then submitted to various stakeholders including: (a) prosecuting attorneys, (b) defense attorneys, (c) a sitting Judge from the Texas Court of Criminal Appeals, (d) non-governmental organization stakeholders, (e) researchers and scholars who have studied the issue for decades, and (f) law enforcement agencies of various sizes. We received written feedback from many of these stakeholders and many attended a day-long meeting in September at LEMIT. Feedback from this meeting led to revisions of the policy and the revised policy went back out for public review and comment which included a public hearing in Austin on December 1. Based on that round of comments, the policy was revised again and the revised policy was sent to a number of working detectives to provide feedback on clarity and consistency. That feedback led to the final draft.

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(Defendant), as part of [his/her] general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that [he/she] is the person who committed the alleged offense. The burden of proving the identity of the person who committed the crime is upon the State. For you to find defendant guilty, the State must prove beyond a reasonable doubt that this person is the person who committed the crime. (Defendant) has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person. You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that (this defendant) is the person who committed it.

The State has presented testimony of [insert name of witness who identified defendant]. You will recall that this witness identified the defendant as the person who committed [insert the offense(s) charged]. According to the witness, [his/her] identification of the defendant was based upon the observations and perceptions that [he/she] made of the perpetrator at the time the offense was being committed. It is your function to determine whether the witness's identification of (defendant) is reliable and believable, or whether it is based on a mistake or for any reason is not worthy of belief.¹ You must decide whether it is sufficiently reliable evidence upon which to conclude that (this defendant) is the person who committed the offense[s] charged.

¹ United States v. Wade, 388 U.S. 218, 228, 87 S. Ct. 1926, 1933, 18 L. Ed. 2d 1149, 1158 (1967); State v. Green, 86 N.J. 281, 291-93 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-19 (App. Div. 1996).

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Eyewitness identification evidence must be scrutinized carefully. Human beings have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.

Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex.² The process of remembering consists of three stages: acquisition -- the perception of the original event; retention -- the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval -- the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.³

Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. In evaluating this identification, you should consider the observations and perceptions on which the identification was based, the witness's ability to make those observations and perceive events, and the circumstances under which the identification was made. Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore,

² State v. Henderson, 208 N.J. 208, 245 (2011).

³ Id. at 245-46.

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when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.⁴

In deciding what weight, if any, to give to the identification testimony, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself.⁵ **[choose appropriate factors]:**

(1) The Witness's Opportunity to View and Degree of Attention: In evaluating the reliability of the identification, you should assess the witness's opportunity to view the person who committed the offense at the time of the offense and the witness's degree of attention to the perpetrator at the time of the offense. In making this assessment you should consider the following **[choose appropriate factors from (a) through (g) below]:**

(a) Stress: Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification. Therefore, you should consider a witness's level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.⁶

(b) Duration: The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Although 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 to the perpetrator. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did.⁷

(c) Weapon Focus: You should consider whether the witness saw a weapon during the incident and the duration of the crime. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.⁸

⁴ State v. Romero, 191 N.J. 59, 76 (2007).

⁵ Henderson, supra, 208 N.J. at 247.

⁶ Id. at 261-62.

⁷ Id. at 264.

⁸ Id. at 262-63.

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- (d) **Distance:** A person is easier to identify when close by. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.⁹
- (e) **Lighting:** Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case.¹⁰
- (f) **Intoxication:** The influence of alcohol can affect the reliability of an identification.¹¹ An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who drank a small amount of alcohol.¹²
- (g) **Disguises/Changed Appearance:** The perpetrator's use of a disguise can affect a witness's ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification.¹³ Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.¹⁴
- (2) **Prior Description of Perpetrator:** Another factor for your consideration is the accuracy of any description the witness gave after observing the incident and before identifying the perpetrator. Facts that may be relevant to this factor include whether the prior description matched the person picked out later, whether the prior description provided details or was just general in nature, and whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. [**Charge if appropriate:** You may also consider whether the witness did not identify the defendant at a prior identification procedure or chose a different suspect or filler.]
- (3) **Confidence and Accuracy:** You heard testimony that (insert name of witness) expressed his/her level of certainty that the person he/she selected is in fact the person who committed the crime. As I explained earlier, a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.¹⁵ Although some research has found that highly confident

⁹ Id. at 264.

¹⁰ Ibid.

¹¹ If there is evidence of impairment by drugs or other substances, the charge can be modified accordingly.

¹² Henderson, supra, 208 N.J. at 265.

¹³ Id. at 266.

¹⁴ Ibid.

¹⁵ Id. at 254 (quoting Romero, supra, 191 N.J. at 76).

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witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.¹⁶

- (4) **Time Elapsed:** Memories fade with time. As a result, delays between the commission of a crime and the time an identification is made can affect the reliability of the identification. In other words, the more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken.¹⁷
- (5) **Cross-Racial Effects:** Research has shown that people may have greater difficulty in accurately identifying members of a different race.¹⁸ You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness's identification.

[The jury should also be charged on any other relevant factors in the case.]

You may consider whether the witness was exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence, that may have affected the independence of his/her identification.¹⁹ Such information can affect the independent nature and reliability of a witness's identification and inflate the witness's confidence in the identification.

You are also free to consider any other factor based on the evidence or lack of evidence in the case that you consider relevant to your determination whether the identification was reliable. Keep in mind that the presence of any single factor or combination of factor(s), however, is not an indication that a particular witness is incorrect. Instead, you may consider the factors that I have discussed as you assess all of the circumstances of the case, including all of the testimony and documentary evidence, in determining whether a particular identification made by a witness is accurate and thus

¹⁶ Id. at 253-55.

¹⁷ Id. at 267.

¹⁸ This instruction must be given whenever there is a cross-racial identification. Id. at 299 (modifying State v. Cromedy, 158 N.J. 112, 132 (1999)).

¹⁹ State v. Chen, 208 N.J. 307 (2011).

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worthy of your consideration as you decide whether the State has met its burden to prove identification beyond a reasonable doubt. If you determine that the in-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, you may consider that evidence and decide how much weight to give it. If you instead decide that the identification is the product of an impression gained at the in-court identification procedure, the identification should be afforded no weight. The ultimate issue of the trustworthiness of the identification is for you to decide.

If, after considering all of the evidence, you determine that the State has not proven beyond a reasonable doubt that (defendant) was the person who committed this offense [these offenses], then you must find him/her not guilty. If, on the other hand, after considering all of the evidence, you are convinced beyond a reasonable doubt that (defendant) was correctly identified, you will then consider whether the State has proven each and every element of the offense[s] charged beyond a reasonable doubt.

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(Defendant), as part of [his/her] general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that [he/she] is the person who committed the alleged offense. The burden of proving the identity of the person who committed the crime is upon the State. For you to find this defendant guilty, the State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. The defendant has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person. You must determine, therefore, not only whether the State has proven each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proven beyond a reasonable doubt that this defendant is the person who committed it.

The State has presented the testimony of [insert name of witness who identified defendant]. You will recall that this witness identified the defendant in court as the person who committed [insert the offense(s) charged]. The State also presented testimony that on a prior occasion before this trial, this witness identified the defendant as the person who committed this offense [these offenses]. According to the witness, [his/her] identification of the defendant was based upon the observations and perceptions that [he/she] made of the perpetrator at the time the offense was being committed. It is your function to determine whether the witness's identification of the defendant is reliable and believable, or whether it is based on a mistake or for any reason is not worthy

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of belief.¹ You must decide whether it is sufficiently reliable evidence that this defendant is the person who committed the offense[s] charged.

Eyewitness identification evidence must be scrutinized carefully. Human beings have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.

Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex.² The process of remembering consists of three stages: acquisition -- the perception of the original event; retention -- the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval -- the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.³

Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. In evaluating this identification, you should consider the observations and perceptions on which the identification was based, the witness's ability to make those observations and perceive events, and the circumstances under which the identification was made. Although nothing may appear more convincing than

¹ United States v. Wade, 388 U.S. 218, 228, 87 S. Ct. 1926, 1933, 18 L. Ed. 2d 1149, 1158 (1967); State v. Green, 86 N.J. 281, 291-93 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-19 (App. Div. 1996).

² State v. Henderson, 208 N.J. 208, 245 (2011).

³ Id. at 245-46.

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a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.⁴

If you determine that the out-of-court identification is not reliable, you may still consider the witness's in-court identification of the defendant if you find that it resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, and that the identification is reliable. If you find that the in-court identification is the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight. The ultimate question of the reliability of both the in-court and out-of-court identifications is for you to decide.⁵

To decide whether the identification testimony is sufficiently reliable evidence to conclude that this defendant is the person who committed the offense[s] charged, you should evaluate the testimony of the witness in light of the factors for considering credibility that I have already explained to you. In addition, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself.⁶ In particular, you should consider **[choose appropriate factors from one through five below]**:

- (1) **The Witness's Opportunity to View and Degree of Attention:** In evaluating the reliability of the identification, you should assess the witness's opportunity

⁴ State v. Romero, 191 N.J. 59, 76 (2007).

⁵ Wade, *supra*, 388 U.S. at 229-32, 241, 87 S. Ct. at 1933-35, 1940, 18 L. Ed. 2d at 1158-60, 1165 (manner in which lineup or other identification procedure conducted relevant to reliability of out-of-court identification and in-court identification following out-of-court identification, and jury's credibility determinations).

⁶ Henderson, *supra*, 208 N.J. at 247.

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to view the person who committed the offense at the time of the offense and the witness's degree of attention to the perpetrator at the time of the offense. In making this assessment you should consider the following [**choose appropriate factors from (a) through (g) below**]:

- (a) **Stress:** Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification. Therefore, you should consider a witness's level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.⁷
- (b) **Duration:** The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Although 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 to the perpetrator. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did.⁸
- (c) **Weapon Focus:** You should consider whether the witness saw a weapon during the incident and the duration of the crime. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.⁹
- (d) **Distance:** A person is easier to identify when close by. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.¹⁰
- (e) **Lighting:** Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case.¹¹

⁷ Id. at 261-62.

⁸ Id. at 264.

⁹ Id. at 262-63.

¹⁰ Id. at 264.

¹¹ Ibid.

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- (f) **Intoxication:** The influence of alcohol can affect the reliability of an identification.¹² An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who drank a small amount of alcohol.¹³
- (g) **Disguises/Changed Appearance:** The perpetrator's use of a disguise can affect a witness's ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification.¹⁴ Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.¹⁵
- (2) **Prior Description of Perpetrator:** Another factor for your consideration is the accuracy of any description the witness gave after observing the incident and before identifying the perpetrator. Facts that may be relevant to this factor include whether the prior description matched the photo or person picked out later, whether the prior description provided details or was just general in nature, and whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. [**Charge if appropriate:** You may also consider whether the witness did not identify the defendant at a prior identification procedure or chose a different suspect or filler.]
- (3) **Confidence and Accuracy:** You heard testimony that (insert name of witness) made a statement at the time he/she identified the defendant from a photo array/line-up concerning his/her level of certainty that the person/photograph he/she selected is in fact the person who committed the crime. As I explained earlier, a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.¹⁶ Although some research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.¹⁷
- (4) **Time Elapsed:** Memories fade with time. As a result, delays between the commission of a crime and the time an identification is made can affect the reliability of the identification. In other words, the more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken.¹⁸

¹² If there is evidence of impairment by drugs or other substances, the charge can be modified accordingly.

¹³ Henderson, supra, 208 N.J. at 265.

¹⁴ Id. at 266.

¹⁵ Ibid.

¹⁶ Id. at 254 (quoting Romero, supra, 191 N.J. at 76).

¹⁷ Id. at 253-55.

¹⁸ Id. at 267.

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- (5) **Cross-Racial Effects:** Research has shown that people may have greater difficulty in accurately identifying members of a different race.¹⁹ You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness's identification.

[The jury should also be charged on any other relevant factors in the case.]

In evaluating the reliability of a witness's identification, you should also consider the circumstances under which any out-of-court identification was made, and whether it was the result of a suggestive procedure. In that regard, you may consider everything that was done or said by law enforcement to the witness during the identification process.

You should consider the following factors: **[Charge if appropriate]:**²⁰

- (1) **Lineup Composition:** A suspect should not stand out from other members of the lineup. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness's confidence in the identification because the selection process seemed so easy to the witness.²¹ It is, of course, for you to determine whether the composition of the lineup had any effect on the reliability of the identification.
- (2) **Fillers:** Lineups should include a number of possible choices for the witness, commonly referred to as "fillers." The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness's memory. A minimum of six persons or photos should be included in the lineup.²²
- (3) **Multiple Viewings:** When a witness views the same person in more than one identification procedure, it can be difficult to know whether a later identification comes from the witness's memory of the actual, original event or of an earlier identification procedure. As a result, if a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased. You may consider whether the witness viewed the suspect multiple times during

¹⁹ This instruction must be given whenever there is a cross-racial identification. *Id.* at 299 (modifying *State v. Cromedy*, 158 N.J. 112, 132 (1999)).

²⁰ The following factors consist of "the system ... variables ... for which [the Court] found scientific support that is generally accepted by experts." *Henderson*, *supra*, 208 N.J. at 298-99.

²¹ *Id.* at 251.

²² *Ibid.*

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the identification process and, if so, whether that affected the reliability of the identification.²³

[CHARGE IN EVERY CASE IN WHICH THERE IS A SHOWUP PROCEDURE]

(4) Showups: In this case, the witness identified the defendant during a “showup,” that is, the defendant was the only person shown to the witness at that time. Even though such a procedure is suggestive in nature, it is sometimes necessary for the police to conduct a “showup” or one-on-one identification procedure. Although the benefits of a fresh memory may balance the risk of undue suggestion, showups conducted more than two hours after an event present a heightened risk of misidentification. Also, police officers must instruct witnesses that the person they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification. In determining whether the identification is reliable or the result of an unduly suggestive procedure, you should consider how much time elapsed after the witness last saw the perpetrator, whether the appropriate instructions were given to the witness, and all other circumstances surrounding the showup.²⁴

**[CHARGE (a) and (b) IN EVERY CASE IN WHICH THE POLICE CONDUCT
AN IDENTIFICATION LINEUP PROCEDURE]²⁵**

In determining the reliability of the identification, you should also consider whether the identification procedure was properly conducted.

(a) Double-blind: A lineup administrator who knows which person or photo in the lineup is the suspect may intentionally or unintentionally convey that knowledge to the witness. That increases the chance that the witness will

²³ Id. at 255-56. If either “mugshot exposure” (no identification in first lineup/photo array, but later identification of someone from the first array in second lineup/photo array) or “mugshot commitment” (selection of person in lineup who was identified in previous photo array) are part of the evidence, the jury should be instructed on the concepts implicated by those terms without using the word “mugshot.” See Model Jury Charge (Criminal) on “Identity-Police Photos.”

²⁴ Henderson, supra, 208 N.J. at 259-61.

²⁵ “To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability.” Id. at 219 (asking the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to this charge “and address various system and estimator variables”).

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identify the suspect, even if the suspect is innocent. For that reason, whenever feasible, live lineups and photo arrays should be conducted by an officer who does not know the identity of the suspect.²⁶

[CHARGE IF BLIND ADMINISTRATOR IS NOT USED]

If a police officer who does not know the suspect's identity is not available, then the officer should not see the photos as the witness looks at them. In this case, it is alleged that the person who presented the lineup knew the identity of the suspect. It is also alleged that the police did/did not compensate for that by conducting a procedure in which the officer did not see the photos as the witness looked at them.

[RESUME MAIN CHARGE]

You may consider this factor when you consider the circumstances under which the identification was made, and when you evaluate the overall reliability of the identification.²⁷

- (b) **Instructions:** You should consider what was or what was not said to the witness prior to viewing a photo array.²⁸ Identification procedures should begin with instructions to the witness that the perpetrator may or may not be in the array and that the witness should not feel compelled to make an identification. The failure to give this instruction can increase the risk of misidentification. If you find that the police [did/did not] give this instruction to the witness, you may take this factor into account when evaluating the identification evidence.²⁹

[CHARGE IF FEEDBACK IS AN ISSUE IN THE CASE]

- (c) **Feedback:** Feedback occurs when police officers, or witnesses to an event who are not law enforcement officials, signal to eyewitnesses that they correctly identified the suspect. That confirmation may reduce doubt and engender or produce a false sense of confidence in a witness. Feedback may also falsely enhance a witness's recollection of the quality of his or her view of an event. It is for you to determine whether or not a witness's

²⁶ Id. at 248-50.

²⁷ Ibid.

²⁸ See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

²⁹ Henderson, supra, 208 N.J. at 250.

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recollection in this case was affected by feedback or whether the recollection instead reflects the witness's accurate perception of the event.³⁰

[RESUME MAIN CHARGE]

You may consider whether the witness was exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence, that may have affected the independence of his/her identification.³¹ Such information can affect the independent nature and reliability of a witness's identification and inflate the witness's confidence in the identification.

You are also free to consider any other factor based on the evidence or lack of evidence in the case that you consider relevant to your determination whether the identifications were reliable. Keep in mind that the presence of any single factor or combination of factor(s), however, is not an indication that a particular witness is incorrect. Instead, you may consider the factors that I have discussed as you assess all of the circumstances of the case, including all of the testimony and documentary evidence, in determining whether a particular identification made by a witness is accurate and thus worthy of your consideration as you decide whether the State has met its burden to prove identification beyond a reasonable doubt. If you determine that the in-court or out-of-court identifications resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, you may consider that evidence and decide how much weight to give it. If you instead decide that the identification(s) is/are the product of an impression gained at the in-court and/or out-of-court identification

³⁰ Id. at 253-55; see also State v. Herrera, 187 N.J. 493, 509 (2006) (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991) (citing State v. Long, 721 P.2d 483, 493 (Utah 1986)).

³¹ State v. Chen, 208 N.J. 307 (2011).

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procedures, the identifications should be afforded no weight. The ultimate issue of the trustworthiness of an identification is for you to decide.

If, after consideration of all of the evidence, you determine that the State has not proven beyond a reasonable doubt that (defendant) was the person who committed this offense [these offenses], then you must find him/her not guilty. If, on the other hand, after consideration of all of the evidence, you are convinced beyond a reasonable doubt that (defendant) was correctly identified, you will then consider whether the State has proven each and every element of the offense[s] charged beyond a reasonable doubt.

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(Defendant), as part of [his/her] general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that [he/she] is the person who committed the alleged offense. The burden of proving the identity of the person who committed the crime is upon the State. For you to find (defendant) guilty, the State must prove beyond a reasonable doubt that this person is the person who committed the crime. (Defendant) has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person. You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that (this defendant) is the person who committed it.

The State has presented testimony that on a prior occasion before this trial, [insert name of witness who identified defendant] identified (defendant) as the person who committed [insert the offenses charged]. According to the witness, [his/her] identification of the defendant was based upon the observations and perceptions that [he/she] made of the perpetrator at the time the offense was being committed. It is your function to determine whether the witness's identification of (defendant) is reliable and believable or whether it is based on a mistake or for any reason is not worthy of belief.¹ You must decide whether it is sufficiently reliable evidence that (this defendant) is the person who committed the offense[s] charged.

¹ United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L. Ed. 2d 1149, 1158 (1967); State v. Green, 86 N.J. 281, 291-93 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-19 (App. Div. 1996).

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Eyewitness identification evidence must be scrutinized carefully. Human beings have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.

Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex.² The process of remembering consists of three stages: acquisition -- the perception of the original event; retention -- the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval -- the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.³

Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. In evaluating this identification, you should consider the observations and perceptions on which the identification was based, the witness's ability to make those observations and perceive events, and the circumstances under which the identification was made. Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing

² State v. Henderson, 208 N.J. 208, 245 (2011).

³ Id. at 245-46.

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alone, may not be an indication of the reliability of the identification.⁴ In deciding what weight, if any, to give to the identification testimony, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself.⁵ **[choose appropriate factors from one through five below]:**

- (1) The Witness's Opportunity to View and Degree of Attention:** In evaluating the reliability of the identification, you should assess the witness's opportunity to view the person who committed the offense at the time of the offense and the witness's degree of attention to the perpetrator at the time of the offense. In making this assessment you should consider the following **[choose appropriate factors from (a) through (g) below]:**
 - (a) Stress:** Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification. Therefore, you should consider a witness's level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.⁶
 - (b) Duration:** The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Although 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 to the perpetrator. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did.⁷
 - (c) Weapon Focus:** You should consider whether the witness saw a weapon during the incident and the duration of the crime. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.⁸
 - (d) Distance:** A person is easier to identify when close by. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a

⁴ State v. Romero, 191 N.J. 59, 76 (2007).

⁵ Henderson, supra, 208 N.J. at 247.

⁶ Id. at 261-62.

⁷ Id. at 264.

⁸ Id. at 262-63.

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mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.⁹

(e) **Lighting:** Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case.¹⁰

(f) **Intoxication:** The influence of alcohol can affect the reliability of an identification.¹¹ An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who drank a small amount of alcohol.¹²

(g) **Disguises/Changed Appearance:** The perpetrator's use of a disguise can affect a witness's ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification.¹³ Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.¹⁴

(2) **Prior Description of Perpetrator:** Another factor for your consideration is the accuracy of any description the witness gave after observing the incident and before identifying the perpetrator. Facts that may be relevant to this factor include whether the prior description matched the photo or person picked out later, whether the prior description provided details or was just general in nature, and whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. [**Charge if appropriate:** You may also consider whether the witness did not identify the defendant at a prior identification procedure or chose a different suspect or filler.]

(3) **Confidence and Accuracy:** You heard testimony that (insert name of witness) made a statement at the time he/she identified the defendant from a photo array/line-up concerning his/her level of certainty that the person/photograph he/she selected is in fact the person who committed the crime. As I explained earlier, a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.¹⁵ Although some research has found that

⁹ Id. at 264.

¹⁰ Ibid.

¹¹ If there is evidence of impairment by drugs or other substances, the charge can be modified accordingly.

¹² Henderson, supra, 208 N.J. at 265.

¹³ Id. at 266.

¹⁴ Ibid.

¹⁵ Id. at 254 (quoting Romero, supra, 191 N.J. at 76).

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highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.¹⁶

- (4) **Time Elapsed:** Memories fade with time. As a result, delays between the commission of a crime and the time an identification is made can affect the reliability of the identification. In other words, the more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken.¹⁷
- (5) **Cross-Racial Effects:** Research has shown that people may have greater difficulty in accurately identifying members of a different race.¹⁸ You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness's identification.

[The jury should also be charged on any other relevant factors in the case.]

In evaluating the reliability of a witness's identification, you should also consider the circumstances under which the out-of-court identification was made, and whether it was the result of a suggestive procedure. In that regard, you may consider everything that was done or said by law enforcement to the witness during the identification process.

You should consider the following factors: **[Charge if appropriate]:**¹⁹

- (1) **Lineup Composition:** A suspect should not stand out from other members of the lineup. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness's confidence in the identification because the selection process seemed so easy to the witness.²⁰ It is, of course, for you to determine whether the composition of the lineup had any effect on the reliability of the identification.

¹⁶ Id. at 253-55.

¹⁷ Id. at 267.

¹⁸ This instruction must be given whenever there is a cross-racial identification. Id. at 299 (modifying State v. Cromedy, 158 N.J. 112, 132 (1999)).

¹⁹ The following factors consist of "the system ... variables ... for which [the Court] found scientific support that is generally accepted by experts." Henderson, supra, 208 N.J. at 298-99.

²⁰ Id. at 251.

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- (2) **Fillers:** Lineups should include a number of possible choices for the witness, commonly referred to as “fillers.” The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness’s memory. A minimum of six persons or photos should be included in the lineup.²¹
- (3) **Multiple Viewings:** When a witness views the same person in more than one identification procedure, it can be difficult to know whether a later identification comes from the witness’s memory of the actual, original event or of an earlier identification procedure. As a result, if a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased. You may consider whether the witness viewed the suspect multiple times during the identification process and, if so, whether that affected the reliability of the identification.²²

[CHARGE IN EVERY CASE IN WHICH THERE IS A SHOWUP PROCEDURE]

- (4) **Showups:** In this case, the witness identified the defendant during a “showup,” that is, the defendant was the only person shown to the witness at that time. Even though such a procedure is suggestive in nature, it is sometimes necessary for the police to conduct a “showup” or one-on-one identification procedure. Although the benefits of a fresh memory may balance the risks of undue suggestion, showups conducted more than two hours after an event present a heightened risk of misidentification. Also, police officers must instruct witnesses that the person they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification. In determining whether the identification is reliable or the result of an unduly suggestive procedure, you should consider how much time elapsed after the witness last saw the perpetrator, whether the appropriate instructions were given to the witness, and all other circumstances surrounding the showup.²³

²¹ Ibid.

²² Id. at 255-56. If either “mugshot exposure” (no identification in first lineup/photo array, but later identification of someone from the first array in second lineup/photo array) or “mugshot commitment” (selection of person in lineup who was identified in previous photo array) are part of the evidence, the jury should be instructed on the concepts implicated by those terms without using the word “mugshot.” See Model Jury Charge (Criminal) on “Identity-Police Photos.”

²³ Henderson, supra, 208 N.J. at 259-61.

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[CHARGE (a) AND (b) IN EVERY CASE IN WHICH THE POLICE CONDUCT AN IDENTIFICATION LINEUP PROCEDURE]²⁴

In determining the reliability of the identification, you should also consider whether the identification procedure was properly conducted.

- (a) **Double-blind:** A lineup administrator who knows which person or photo in the lineup is the suspect may intentionally or unintentionally convey that knowledge to the witness. That increases the chance that the witness will identify the suspect, even if the suspect is innocent. For that reason, whenever feasible, live lineups and photo arrays should be conducted by an officer who does not know the identity of the suspect.²⁵

[CHARGE IF BLIND ADMINISTRATOR IS NOT USED]

If a police officer who does not know the suspect's identity is not available, then the officer should not see the photos as the witness looks at them. In this case, it is alleged that the person who presented the lineup knew the identity of the suspect. It is also alleged that the police did/did not compensate for that by conducting a procedure in which the officer did not see the photos as the witness looked at them.

[RESUME MAIN CHARGE]

You may consider this factor when you consider the circumstances under which the identification was made, and when you evaluate the overall reliability of the identification.²⁶

- (b) **Instructions:** You should consider what was or what was not said to the witness prior to viewing a photo array.²⁷ Identification procedures should begin with instructions to the witness that the perpetrator may or may not be in the array and that the witness should not feel compelled to make an identification. The failure to give this instruction can increase the risk of misidentification. If you find that the police [did/did not] give this

²⁴ “To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability.” *Id.* at 219 (asking the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to this charge “and address various system and estimator variables”).

²⁵ *Id.* at 248-50.

²⁶ *Ibid.*

²⁷ See *State v. Cherry*, 289 N.J. Super. 503 (App. Div. 1995).

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instruction to the witness, you may take this factor into account when evaluating the identification evidence.²⁸

[CHARGE IF FEEDBACK IS AN ISSUE IN THE CASE]

- (c) **Feedback:** Feedback occurs when police officers, or witnesses to an event who are not law enforcement officials, signal to eyewitnesses that they correctly identified the suspect. That confirmation may reduce doubt and engender or produce a false sense of confidence in a witness. Feedback may also falsely enhance a witness's recollection of the quality of his or her view of an event. It is for you to determine whether or not a witness's recollection in this case was affected by feedback or whether the recollection instead reflects the witness's accurate perception of the event.²⁹

[RESUME MAIN CHARGE]

You may consider whether the witness was exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence, that may have affected the independence of his/her identification.³⁰ Such information can affect the independent nature and reliability of a witness's identification and inflate the witness's confidence in the identification.

You are also free to consider any other factor based on the evidence or lack of evidence in the case that you consider relevant to your determination whether the identification was reliable. Keep in mind that the presence of any single factor or combination of factor(s), however, is not an indication that a particular witness is incorrect. Instead, you may consider the factors that I have discussed as you assess all of the circumstances of the case, including all of the testimony and documentary evidence,

²⁸ Henderson, supra, 208 N.J. at 250.

²⁹ Id. at 253-55; see also State v. Herrera, 187 N.J. 493, 509 (2006) (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991) (citing State v. Long, 721 P.2d 483, 493 (Utah 1986)).

³⁰ State v. Chen, 208 N.J. 307 (2011).

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in determining whether a particular identification made by a witness is accurate and thus worthy of your consideration as you decide whether the State has met its burden to prove identification beyond a reasonable doubt. If you determine that the out-of-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, you may consider that evidence and decide how much weight to give it. If you instead decide that the identification is the product of an impression gained at the out-of-court identification procedure, the identification should be afforded no weight. The ultimate issue of the trustworthiness of the identification is for you to decide.

If, after considering all of the evidence, you determine that the State has not proven beyond a reasonable doubt that (defendant) was the person who committed this offense [these offenses], then you must find him/her not guilty. If, on the other hand, after consideration of all of the evidence, you are convinced beyond a reasonable doubt that (defendant) was correctly identified, you will then consider whether the State has proven each and every element of the offense[s] charged beyond a reasonable doubt.

MODEL EYEWITNESS IDENTIFICATION INSTRUCTION

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, 910-12 (2013), this instruction or “some variation” of it should be given upon request. The instruction is set forth at 473 Mass. 1051 (2015).

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.

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.ⁱ 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.ⁱⁱ 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.ⁱⁱⁱ

a. 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.^{iv}

b. 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.^v

c. 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.^{vi}

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.^{vii}

a. 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.^{viii}

b. 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.

Omit the following instruction only if all parties agree that there was no cross-racial identification. The trial judge has the discretion to add the references to ethnicity to the instruction. See *Commonwealth v. Bastaldo*, 472 Mass. 16, 29-30 (2015).

3. Cross-racial identification.

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).^{ix}

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.^x

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,^{xi} especially where the witness did not

describe that level of certainty when the witness first made the identification.^{xii}

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,^{xiii} or received after the identification.^{xiv} 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.^{xv} 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.^{xvi} The witness may not realize that his or her memory has been affected by this information.^{xvii}

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.^{xviii} Suggestive conduct need not

be intentional, and the person doing the “suggesting” may not realize that he or she is doing anything suggestive.^{xix}

7. Identification procedures.

a. 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,^{xx} whether the person (showing the photographs) (presenting the lineup) knew who was the suspect and could have, even inadvertently, influenced the identification,^{xxi} and whether anything was said to the witness that may have influenced the identification.^{xxii} 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.

b. 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.

c. 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.^{xxiii}

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.^{xxiv}

d. 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 of suggestion.

If any of those protocols were not followed, you should evaluate the identification with particular care.

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, 797-98 (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.

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.

e. If there was evidence of a 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.^{xxv}

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 participated in) the alleged crime(s), you must find the defendant not guilty.

NOTES:

1. **Expert testimony.** Whether to permit expert testimony on the general reliability of eyewitness identifications generally rests in the judge's discretion. The weight of authority is against the general admissibility of such expert testimony, but some jurisdictions favor its admission if special factors are present (typically, lack of corroboration, or discrepancies, concerning the identification). At least where there is other evidence corroborating the identification, the admissibility of such evidence is consigned to the judge's discretion. Before admitting such evidence the judge must, at minimum, find that it meets the general requirements for expert testimony: that it is relevant to the circumstances of the identification; that it will help, rather than confuse or mislead, the jury; that the underlying basis of the opinion, and any tests or assumptions, are reliable; and that the opinion is sufficiently tied to the facts of the case so that it will aid the jury in resolving the matter. General acceptance by other experts is a factor, but is not controlling. *Commonwealth v. Santoli*, 424 Mass. 837, 841-45 (1997); *Commonwealth v. Hyatt*, 419 Mass. 815, 818 (1995); *Commonwealth v. Francis*, 390 Mass. 89, 95-102 (1983); *Commonwealth v. Weichell*, 390 Mass. 62, 77-78 (1983), *cert. denied*, 465 U.S. 1032 (1984); *Commonwealth v. Jones*, 362 Mass. 497, 501-02 (1972) (psychological characteristics and dangers of recall are probably "well within the experience of" ordinary jurors). Expert testimony on a particular witness's visual acuity is proper. *Commonwealth v. Sowers*, 388 Mass. 207, 215-16 (1983).

2. **Other potential perpetrators.** A defendant is entitled to introduce evidence tending to show that someone else committed the crime or had motive, opportunity, and intent to do so, provided such evidence is not too remote in time, probatively weak, or irrelevant. Doubtful cases should be resolved in favor of admissibility. *Commonwealth v. Lawrence*, 404 Mass. 378, 387-88 (1989); *Commonwealth v. Murphy*, 282 Mass. 593, 597-98 (1933); *Commonwealth v. Walker*, 14 Mass. App. Ct. 544, 552 (1982); *Commonwealth v. Magnasco*, 4 Mass. App. Ct. 144, 147-48 (1976). This may include evidence of other recent, similar crimes by similar methods. *Commonwealth v. Rosario*, 21 Mass. App. Ct. 286, 291 (1985). A judge, however, should exclude evidence of other, allegedly similar crimes by another perpetrator where they are insufficiently proximate in time and location, or where they do not share similar features. *Commonwealth v. Brown*, 27 Mass. App. Ct. 72, 75-76 (1989).

3. **Evidence of prior identifications.** A witness's testimony as to his own prior identification is admissible to corroborate his in-court identification, and is not hearsay. *Commonwealth v. Nassar*, 351 Mass. 37, 42 (1966) (photograph); *Commonwealth v. Locke*, 335 Mass. 106, 112 (1956) (lineup). A third party may testify as to another witness's prior identification even in the absence of any in-court identification and even when the witness denies having made an identification. *Commonwealth v. Le*, 444 Mass. 431, 438 (2005). A third party's testimony is also admissible to impeach an identification witness who now denies having made the prior identification. *Commonwealth v. Daye*, 393 Mass. 55, 60 (1984); *Commonwealth v. Swenson*, 368 Mass. 268, 274 (1975). Where a witness is unavailable after a good faith, unsuccessful effort to obtain his or her testimony, evidence of his prior in-court identification is admissible if it was made under oath and subject to

cross-examination; it may be admitted by means of a transcript or by the testimony of someone who was present. *Commonwealth v. Furtick*, 386 Mass. 477, 480 (1982); *Commonwealth v. Bohannon*, 385 Mass. 733, 740-49 (1982). The Supreme Judicial Court has held that this doctrine is consistent with *Crawford v. Washington*, 541 U.S. 36 (2004), where “a reasonable person in the [witness’s] position would not have anticipated this his statement would be used against the defendant in prosecuting the crime.” *Commonwealth v. Robinson*, 451 Mass. 672, 680 (2008).

4. **Reliability.** If the defendant proves by a preponderance of evidence that a prior identification was unnecessarily suggestive in all the circumstances, the identification may not be admitted at trial. Article 12 of the Massachusetts Declaration of Rights requires this rule of per se exclusion of out-of-court identification evidence, without regard to reliability, whenever the identification has been obtained through unnecessarily suggestive confrontation procedures. *Commonwealth v. Johnson*, 420 Mass. 458, 461-64 (1995). Massachusetts thus follows the former *Wade-Gilbert-Stovall* Federal rule instead of the current reliable-in-the-totality-of-circumstances rule adopted in *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). Any subsequent identifications may be admitted only if the prosecution proves by clear and convincing evidence that they have an independent source, considering (1) the extent of the witness’s opportunity to observe the perpetrator at the time of the crime (the “most important [factor] because the firmer the contemporaneous impression, the less the witness is subject to the influence of subsequent events,” *Commonwealth v. Bodden*, 391 Mass. 356, 361 (1984)); (2) any prior errors in description; (3) any prior errors in identifying another person; (4) any prior failures to identify the defendant; (5) any other suggestions; and (6) the lapse of time between the crime and the identification. *Commonwealth v. Johnson*, 420 Mass. 458, 464 (1995); *Commonwealth v. Botelho*, 369 Mass. 860, 869 (1976).

As to other reliability issues, see *Commonwealth v. Collins*, 470 Mass. 255, 261-67 (2014) (in-court identification against an equivocal out-of-court identification); *Commonwealth v. Crayton*, 470 Mass. 228, 233-45 (2014) (in-court identification in the absence of an out-of-court identification); *Commonwealth v. Harris*, 395 Mass. 296, 299-300 (1985) (one-on-one confrontations); *Commonwealth v. Weichell*, 390 Mass. 62, 68-73 (1983) (composite drawings); *Commonwealth v. Porter*, 384 Mass. 647, 657-58 (1981) (showing single photo); *Commonwealth v. Simmons*, 383 Mass. 46, 49-53 (1981) (identification of inanimate object); *Commonwealth v. Venios*, 378 Mass. 24, 29 (1979) (showing single photo); *Commonwealth v. Moynihan*, 376 Mass. 468, 476 (1978) (identification in presence of other witnesses); *Commonwealth v. Marini*, 375 Mass. 510, 516-17 (1978) (voice identification); *Commonwealth v. Dickerson*, 372 Mass. 783, 787-88 (1977) (initial failure to identify does not bar later positive identification), *overruled on other grounds*, *Commonwealth v. Paulding*, 438 Mass. 1, 6-11 (2002); *Commonwealth v. Chase*, 372 Mass. 736, 741-45 (1977) (one-on-one confrontations); *Commonwealth v. Lacy*, 371 Mass. 363, 368-69 (1976) (same); *Commonwealth v. Wilson*, 360 Mass. 557, 562 (1971) (weight of identification testimony is for jury); *Commonwealth v. Cunningham*, 104 Mass. 545, 547 (1870) (several non-positive identifications can provide proof beyond reasonable doubt); *Commonwealth v. Amorin*, 14 Mass. App. Ct. 553, 555 (1982) (one-on-one confrontations); *Commonwealth v. Walker*, 14 Mass. App. Ct. 544, 550-51 (1982) (same); *Commonwealth v. Marks*, 12 Mass. App. Ct. 511, 515-16 (1981) (same); *Commonwealth v. Bishop*, 9 Mass. App. Ct. 468, 471-73 (1980) (weight of uncertain identification is for jury); *Commonwealth v. Jones*, 9 Mass. App. Ct. 83, 92-93 (1980) (same); *Commonwealth v. Cincotta*, 6 Mass. App. Ct. 812, 817 (doubts as to reliability not of constitutional dimension are matters of weight for jury), *aff’d*, 379 Mass. 391 (1979).

ENDNOTES TO MODEL INSTRUCTION:

ⁱ 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 v. 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.).

ⁱⁱ See Study Group Report, *supra* note i, 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* note i, 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, 235-36 (2012); *Henderson*, 208 N.J. at 247; Loftus et al., *supra* note i, at § 2-2, at 15 (“Numerous factors at each stage affect the accuracy and completeness of an eyewitness account”).

ⁱⁱⁱ 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”).

^{iv} See Study Group Report, *supra* note i, 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%]”).

^v See Study Group Report, *supra* note i, 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* note iv, 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”).

^{vi} 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 771-72 (Appendix); see also Kassin, Hosch, & Memon, *On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts*, 56 *Am. Psychol.* 405, 407-12 (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, 405-06 (1989); Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 *Law & Hum. Behav.* 413, 415-17 (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* note ii, 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").

^{vii} See *Gomes*, 470 Mass. at 372-73; Study Group Report, *supra* note i, at 29, quoting Special Master's Report, *supra* note i, 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, 272-74 (2004). *But see* Study Group Report, *supra* note i, 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").

^{viii} See Study Group Report, *supra* note i, 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").

^{ix} See Study Group Report, *supra* note i, at 31 ("A witness may have more difficulty identifying a person of a different race or ethnicity"); Kassin et al., *supra* note vi, at 407-12 (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* note iv, at 280-81; see also *Commonwealth v. Zimmerman*, 441 Mass. 146, 154-55 (2004) (Cordy, J., concurring); *State v. Cabagbag*, 127 Haw. 302, 310-11 (2012); *Lawson*, 352 Or. at 775 (Appendix); National Academies, *supra* note ii, 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).

^x See Study Group Report, *supra* note i, 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* note ii, 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”).

^{xi} See *Gomes*, 470 Mass. at 370-71; Study Group Report, *supra* note i, 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, 845-46 (1997); *Commonwealth v. Jones*, 423 Mass. 99, 110 n.9 (1996).

^{xii} 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”).

^{xiii} See *Gomes*, 470 Mass. at 373-74; Study Group Report, *supra* note i, at 21-22; Special Master’s Report, *supra* note i, 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”).

^{xiv} See Study Group Report, *supra* note i, 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*

note i, 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’”).

^{xv} See Study Group Report, *supra* note i, 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*, 352 Or. at 777-78 (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”).

^{xvi} See Study Group Report, *supra* note i, 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* note xii, at 140-43; National Academies, *supra* note ii, 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 . . .”).

^{xvii} See Study Group Report, *supra* note i, 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).

^{xviii} See Study Group Report, *supra* note i, at 140, quoting Wells & Quinlivan, *supra* note vi, 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”).

^{xix} See Study Group Report, *supra* note i, 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* note ii, 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”).

^{xx} 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* note iv, 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”).

^{xxi} 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* note i, 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 237-38 (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* note ii, 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”).

^{xxii} See Clark, Marshall, & Rosenthal, *supra* note xvii, 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, 486-87 (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”).

^{xxiii} See Study Group Report, *supra* note i, at 26, citing Special Master’s Report, *supra* note i, 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 742-43 (“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”).

^{xxiv} 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”).

^{xxv} See *Gomes*, 470 Mass. at 375-76; Study Group Report, *supra* note i, at 25, quoting Special Master’s Report, *supra* note i, 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*, 470 Mass. at 376 n.37, quoting Study Group Report, *supra* note i, at 31, the Supreme Judicial Court 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* note i, at 31, quoting Special Master’s Report, *supra* note i, 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 785-86 (“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 253-54 (“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* note xxv, at 301, 304-05 (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, & Togliani, *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).

Tarrant County Criminal District Attorney's Office Jailhouse Informant Procedure

Effective June 10, 2016, the Tarrant County Criminal District Attorney's Office implements this *Jailhouse Informant Procedure*. As part of this procedure, the TCCDA will establish and maintain a central index of jailhouse informants. The central index will track jailhouse informant (JI) testimony as well as JI formal offers to give testimony or other information. The index will be maintained by the designated Informant ACDA who will be responsible for the JI database as well as any associated documents. This index/JI database is the confidential work product of the TCCDA.

For purposes of this procedure, a JI is defined as an incarcerated witness who claims to have been the recipient of an admission made by another inmate and who agrees to testify against that inmate, usually, although not necessarily, in exchange for some benefit.

Prior to using a JI's testimony or information at any stage in a criminal prosecution and regardless of any consideration or lack of consideration given to that JI, an ACDA must 1) request all information known about the JI from the designated ACDA and 2) consult with his or her court chief about the use of the JI.

As part of the determination whether to use the JI, the ACDA should consider the following non-exhaustive list:

- a. The facts of the case in which the testimony is being contemplated for use;
- b. The JI's criminal history;
- c. Relevant information regarding the JI's current case;
- d. Any known, or readily available, information about the JI's past cooperation with law enforcement or previous testimony;
- e. Any JI information conveyed and maintained by the designated ACDA;
- f. Asking the JI detailed questions regarding his previous offers of cooperation or testimony. If the JI is represented by counsel,

these inquiries should be made in the presence of JI's counsel, or with counsel's permission;

- g. Any known, or readily available, information about the JI's mental health;
- h. The specific evidence to be offered by the JI;
- i. How evidence corroborates the JI's statement;
- j. What verification exists that the JI and the defendant were housed in the same part of the jail, at the same time, or were otherwise capable of communicating with one another while in custody and how the JI came to be in the same location as the defendant and;
- k. The strengths and weaknesses of the case if the informant is not used;
- l. The proposed offer and benefit being sought by the JI; and
- m. How the agreement impacts justice due the victim in the JI's case;
- n. Results of any polygraph examination about the JI's statement(s).

Disclosure Requirements:

If the ACDA decides to use the JI, the ACDA must make a written disclosure to the defense attorney in the instant case and must also upload that information into the JI's pending case(s), if any. Disclosure to the defense is mandatory as soon as an agreement in principle is made with the JI.

That disclosure should include:

1. Any benefit the JI is receiving, including plea deals, letters to parole, offers to contact other law enforcement agencies, and anything else that could conceivably be interpreted as a benefit or consideration, including benefits provided to third parties in consideration of the JI's cooperation;
2. A summary of the JI's expected testimony or, when available, a copy of the record/transcript made of any sworn proffers or statements;

3. A detailed summary of the JI's criminal history, or a copy of the informant's TCIC/NCIC* (*if disclosed pursuant to a protective order);
4. The exact nature of any deal reached with the JI for his/her testimony or, if no benefit has been, or will be conveyed to the witness, a written recitation of that fact;
5. Information regarding any prior testimony given by the JI on behalf of law enforcement and/or any known prior offers to testify on behalf of law enforcement. If a confirmed Tarrant County case exists where the JI testified on behalf of the State, the ACDA should also make reasonable efforts to obtain, and turn over to the defense, a copy of the relevant portion of that transcript;
6. Any discussions with federal or out-of-county prosecutors or the JI's defense attorney and relating to the agreement, when a JI's pending case originates from another county or the federal system.
7. Gang affiliation, if any;
8. Any information regarding the mental health status or history of the JI (only under a protective order);
9. All known information about the JI's current case, including offense reports, digital media, or anything else in the State's possession; and
10. A copy of the JI's Tarrant County Sheriff's Office jail records.

All agreements shall be entered into prior to the JI's testimony. In the unusual event that it may become necessary to deviate from this policy, any agreement reached after the JI testimony must be approved by the Criminal Division Chief. Any post-testimony agreement or deviation must be provided to the defendant's attorney in writing when the agreement or benefit is reached.

If, at any time, the ACDA received information that the JI has or is attempting to fabricate any evidence, the ACDA must fulfill all ethical obligations regarding disclosure of these facts.

Jl Index and Database

If the JI testifies, the fact of his testifying along with any other relevant information regarding that testimony should be forwarded to the Informant ACDA responsible for the JI index and database, along with a copy of the disclosure and supporting documents given to defense counsel. Formal offers to testify should also be forwarded to the Informant ACDA for inclusion in the database regardless of whether the JI ultimately testifies.

Best Practices

ACDA's are encouraged to use the "5 P's" which constitute the best practices in using jailhouse informant testimony:

- **Polygraph:** Prior to entering into any agreement with a JI have him/her submit to a polygraph examination.
- **Produce:** Give immediate disclosure of the agreement to the defense counsel.
- **Plea:** Dispose of the JI's case prior to his or her testimony at trial.
- **Proffer:** Have the JI make a recorded, sworn proffer at the time of the disposition of the JI's case.
- **Provide:** Forward the details of the plea and contents of the sworn proffer to defense counsel.

Eyewitness Misidentification: Current Texas Law and Additional Considerations

Witness misidentification is the leading contributing factor in Texas exonerations that have occurred since 2010, playing a role in 45 percent of cases.¹ Nationally, witness misidentification is the leading contributing factor in the nation's 341 wrongful convictions overturned with DNA evidence, playing a role in over 70 percent of these cases.²

Decades of research has demonstrated that witness memory is often unreliable and can be influenced by “estimator” variables which cannot be controlled by law enforcement such as lighting, distance from the crime scene, presence of a weapon, stress and own-race bias (e.g. the tendency of people to have difficulty identifying members of races other than their own). Witness memory can also be impacted by “system variables,” which are factors that law enforcement can control such as the way that lineups are conducted.

Texas has taken steps to address eyewitness misidentification by enacting a statute that requires law enforcement to use evidence-based identification procedures. However, current law provides neither a remedy for situations where law enforcement deviates from established policies,³ or procedures to ensure that triers of fact understand the factors bear upon the accuracy of an identification. Going forward, the Timothy Cole Exoneration Review Commission (TCERC) may wish to consider further reforms that would equip judges and juries to properly evaluate witness identifications in court.

Current Texas Law Regarding Eyewitness Identification Procedures

In 2011 Texas codified Article 38.20 of the Texas Code of Criminal Procedure, which directs the Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) to develop a state model policy on eyewitness identification and requires that agencies either adopt the model policy, or develop their own policy using credible research and relevant policies, guidelines and best practices designed to reduce the risk of misidentification and to enhance the reliability and objectivity of identifications. The policies must address the following topics: 1) the selection of photograph and live lineup fillers, 2) instructions given to a witness before conducting a photographic or live lineup procedure, 3) documentation and preservation of results of the identification procedure, including the documentation of witness statements, 4) procedures for administering an identification procedure to an illiterate person or a person with limited English language proficiency, and 5) procedures for assigning an administrator who is unaware of which member of the lineup is the suspect, or alternative procedures designed to prevent opportunities to influence the witness.

Subsequently, LEMIT issued a model policy that included the following evidence-based procedures: blind or blinded administration of the lineup (e.g. the administrator is unaware of the suspect's identity, or an alternative procedure is used to prevent the administrator from seeing which lineup member is being viewed by the witness at a given time); instructing the witness that the perpetrator may or may not be present; using non-suspect fillers that generally match the witness's description of the perpetrator and do not make the suspect stand out and; eliciting a witness statement of confidence immediately after a selection is made.

Since this law was enacted the National Academy of Sciences, the nation's leading independent scientific entity, conducted the first-ever comprehensive review of eyewitness identification research and recommended

¹ National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited May 10, 2016).

² The Innocence Project. Eye Witness Misidentification, www.innocenceproject.org (last visited May 10, 2016).

³ See Tex. Code Crim. Proc., art. 38.20, § 5(b) (Vernon's 2015) (“failure to conduct a photograph or live lineup identification procedure in substantial compliance with the model policy or any other policy adopted under this article or the minimum requirements of this article does not bar admission of eyewitness identification testimony”); see also *Guardado v. State*, 08-14-00083-CR, 2015 WL 7281704, at *2 (Tex. App.—El Paso Nov. 18, 2015, no pet.) (“a police officer's failure to conduct a photograph identification procedure in compliance with department policy or Article 38.20 is not a basis for suppressing pretrial identifications.”)

practices included in the LEMIT model policy.⁴ In addition, the International Association of Chiefs of Police issued a model policy that includes these evidence-based procedures and today 15 states have uniformly implemented key eyewitness identification reforms.

However, Texas law does not contain safeguards to ensure that peace officers conform to the written procedures adopted pursuant to this enactment or a legal framework for evaluating pretrial contamination to a witness's identification. In fact, the Code of Criminal Procedure explicitly states that compliance with written lineup policies is not a condition precedent to an out-of-court eyewitness identification's admission into evidence, and that "failure to conduct a photograph or live lineup identification procedure in substantial compliance with" these policies does not bar admission of eyewitness identification testimony."⁵ Thus, judges and juries often hear eyewitness testimony even where the initial identification occurred in a prejudicial setting, but lack guidance to accurately assess and assign weight to this evidence.

Future Considerations

In addition to the use of evidence-based lineups, there are ways to strengthen the value of eyewitness identification evidence in court. The National Academy of Sciences report notes that many scientifically established aspects of eyewitness identification memory are counterintuitive and jurors will likely need assistance in understanding the factors that may affect the accuracy of an identification.⁶ The report makes the following recommendations to ensure that witness identifications are properly evaluated by triers of fact:

- Conducting pretrial judicial inquires: *United States v. Wade*, 388 U.S. 218 (1967) requires a pretrial suppression hearing to determine the admissibility of any extra-judicial identification. This procedure allows courts to ensure that identification procedures were constitutional and yielded evidence that is reliable and not suggestive. Such a hearing permits judges to inquire into prior lineups conducted in the case, information and instructions given to the witness before the lineup, whether the lineup had been conducted blindly, reports of the witness' confidence, procedures the agency had in place and to what extent they were followed. A pretrial suppression hearing also enables the judge to determine the reliability and admissibility of the identification evidence and how it will be handled at trial if found admissible.
- Using scientific framework expert testimony: Expert witnesses can provide the jury with an explanation of scientific research on variables that may influence a witness' visual experience of an event and factors that underlie the formation, storage and recall of memory.
- Using jury instructions: Using clear and concise jury instructions can convey information regarding the factors that the jury should consider regarding witness identification.

In Texas, only one of these recommendations, the use of expert testimony, is in use.⁷ However, defense access to funding for experts often differs dramatically across the state, which raises troubling questions regarding access to justice and equal protection. A more uniform procedure for obtaining funding for such experts is advisable.

Although section (1)(6) of Article 28.01 of the Texas Code of Criminal Procedure allows judges to hold pretrial suppression hearings, and this includes hearings inquiring into the suppression of eyewitness identifications, too often trial judges do not hold these hearings before empanelling a jury. Instead, the judge continues the hearing until after the jury is empaneled, at which time the suppression hearing is held without jurors present. As a

⁴ National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* (2014), available at <http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification>.

⁵ Tex. Code Crim. Proc. art. 38.20 § 5(a)&(b) (Vernon's 2015).

⁶ *Id.*

⁷ *Tillman v. State*, 354 S.W.3d 425 (Tex. Crim. App. 2011) (holding that expert testimony relating to the reliability of eyewitness identification procedures is admissible).

result, prosecutors and defense lawyers go to trial without knowing whether eyewitness identification will be part of the merits case, nor whether prospective jurors can properly weigh the case in the presence (or absence) of an identification. Given the complexities of eyewitness evidence and the outsize role it plays in wrongful convictions, a pretrial suppression hearing that occurs before jury empanelment is warranted.

Texas jury instructions also do not assist jurors in assessing eyewitness identification evidence. Currently, no instruction advises jurors that, in weighing its consideration of an eyewitness identification, it may take into account a police agency's failure to follow its internal guidelines for such evidence. Nor are jurors told that, in weighing that evidence, they can consider the many variables that research studies have shown affect the reliability of eyewitness identifications. For example, jurors are not instructed that the reliability of an identification may be affected by contamination of the witness's memory by other witnesses, family and friends, the media, factors inherent in the witness (including race, stress, age, influence of alcohol) or factors inherent in the crime (including whether a weapon was present, the distance between the witness and the perpetrator, lighting conditions, etc.).

Several states have already implemented these recommendations. Massachusetts, New Jersey, North Carolina and Ohio require jury instructions when there is evidence of suggestive identification practices or mandated procedures are not followed. Jury instructions in Massachusetts and New Jersey direct jurors to consider both system and estimator variables when evaluating witness identification. North Carolina and Ohio laws state that evidence of noncompliance with required procedures can be used to adjudicate motions to suppress an identification. The Supreme Courts of both New Jersey and Oregon require, when there is evidence of suggestiveness, pre-trial reliability hearings that examine both system and estimator variables.

TCERC Eyewitness Identification Reform Questions

- o Requiring special procedures where a prospective witness searches social media to identify a suspect
 - This suggestion came from practices in the UK. Do you know if any of our states have something in place for this? Or do you all have policy recommendations for this topic? UK policy is attached.
- o Adoption of a jury charge that would guide the jury in assessing an identification in light of other evidence at issue in a case. Have any states adopted such a charge? If so, which ones?

New Jersey and Massachusetts have adopted eyewitness identification jury instructions that direct jurors to consider both system variables (e.g. factors under the state's control such as lineup procedures) and estimator variables (e.g. factors that cannot be controlled such as lighting, distance from the crime scene, presence of a weapon).

- **New Jersey:** In *State v. Henderson* (2011) the New Jersey Supreme Court revised the legal framework for evaluating eyewitness identification evidence by: 1) allowing relevant system and estimator variables to be explored and weighed at pretrial hearings if there is evidence of suggestiveness, and 2) developing enhanced jury charges to help jurors evaluate eyewitness identification evidence.⁸ In 2012 the New Jersey Supreme Court released a final version of the expanded jury instructions, which caution that certain factors about an eyewitness's circumstances at time of the offense could render the testimony less reliable. Those factors include the stress the eyewitness was under, the duration of the event, lighting, distance, the eyewitness's focus on a weapon, and cross-racial identification. Other factors include the procedures used by law enforcement during the actual identification process. The instructions require jurors to consider the composition of a lineup or photo array and whether any spoken word or gesture by the police could have suggested a specific defendant.⁹

⁸ *State v. Henderson*, 27 A.3d 872, 918–19 (N.J. 2011).

⁹ <http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.html>

- **Massachusetts:** In *Commonwealth v. Gomes* the Massachusetts Supreme Judicial Court (SJC) concluded that juries should be instructed on five increasingly accepted scientific principles regarding eyewitness identification and human memory, most importantly that (1) human memory does not operate like a video recording that a person can replay to recall what happened; (2) a witness's level of confidence in an identification may not indicate its accuracy; (3) high levels of stress can reduce the likelihood of making an accurate identification; (4) information from other witnesses or outside sources can affect the reliability of an identification and inflate an eyewitness's confidence in the identification; and (5) viewing the same person in multiple identification procedures may increase the risk of misidentification.¹⁰ The SJC issued a final version of the jury instruction in November 2015. The instructions are 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.

Below are other notable court actions and statutes involving jury instructions or possible suppression of an identification by a judge:

- **Oregon:** In *State v. Lawson*, the Oregon Supreme Court established a new legal framework that requires Oregon courts to consider all of the factors that may affect an identification's reliability (e.g. both system and estimator variables) and instructs courts, where appropriate, to employ remedies, such as limiting the witness's testimony and permitting expert testimony to explain the scientific research on memory and identification. The test shifts the burden to the state to establish that the evidence is admissible. If the state satisfies its initial burden, the court charges that judges may still need to impose remedies, including suppressing the evidence in some circumstances, to prevent injustice if the defendant establishes that he or she would be unfairly prejudiced by the evidence.¹¹
- **North Carolina:** The state enacted a statute in 2007 requiring law enforcement agencies to use specific eyewitness identification procedures including blind administration, sequential presentation, specific instructions to the witness, appropriate filler photo usage, obtaining a confidence statement and recording the procedure when practicable. All of the following remedies are available as consequences of noncompliance: (1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification. (2) Failure to comply with any of the requirements shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible, and (3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.¹²
- **Ohio:** Ohio passed a statute in 2010 requiring blind administration, specific instructions to the witness, appropriate filler selection, acquisition of confidence statements and the recording of the procedure when practicable. Evidence of failure to comply shall be considered by trial courts in adjudicating motions to suppress identifications, and shall be admissible in support of any claim of eyewitness misidentification resulting from or related to the lineup as long as that evidence otherwise is admissible. When evidence of failure to comply is presented at trial, the jury shall be instructed that it may consider credible evidence of noncompliance in determining the reliability of any eyewitness identification resulting from or related to the lineup.¹³

□ [Do you all have a policy sample/recommendation in this topic?](#) MA & NJ jury instructions are attached.

¹⁰ *Commonwealth v. Gomes*, 470 Mass. 352 (2015)

¹¹ <http://www.innocenceproject.org/oregon-supreme-court-issues-landmark-decision-mandating-major-changes-in-the-way-courts-handle-identification-procedures/>

¹² N.C. Gen Stat. § 15A-284.52, Enacted 2007

¹³ OHIO ST. J. CRIM. L. 603, 623-31 (2010)

□ We discussed (in TX) something similar to Jury Charge 38.23

o Providing juries with necessary information and guidance to properly gauge the accuracy of any pretrial/trial identification of the defendant (i.e. New Jersey and Massachusetts jury instruction on estimator variable)

In addition to jury instructions, the National Academy of Sciences recommends the use of expert witnesses that can explain the scientific framework surrounding witness identification to jurors. In the 2011 *State v. Tillman* case, the Texas Court of Criminal Appeals recognized the benefits of using eyewitness identification experts, ruling that a judge abused his discretion by excluding expert testimony “that would ‘assist the trier of fact’ by increasing the jurors’ awareness of biasing factors in eyewitness identification.”¹⁴ TCERC may consider ways to improve access for defense counsel to eyewitness identification and other experts.

¹⁴ *Tillman v. State*. 354 S.W.3d 425 (2011).

Informant Regulation: Recommendations & National Landscape

Jailhouse informants and other types of incentivized witnesses played a role in 16 percent of the nation's DNA-based exonerations.¹ Informants increase the risk of wrongful convictions for several reasons. First, the actual or perceived promise of leniency, reduced sentences, or other benefits creates strong incentives for an informant to fabricate evidence. Perjured informant testimony can taint every stage of a criminal case from an initial investigation to a conviction.

Second, because of the secrecy surrounding the use of incentivized witnesses, legal procedures such as cross-examination are ineffective at weeding out perjured informant testimony.² In her book *Snitching: Criminal Informants and the Erosion of American Justice*, Loyola Law School Professor Alexandra Natapoff writes that informant deals “evade the traditional checks and balances of judicial and public scrutiny, even as it determines the outcomes of millions of investigations and cases.”³ Third, the use of informant testimony is largely unregulated by state legislatures or courts, despite many documented miscarriages of justice that have resulted from this type of evidence.⁴

This document outlines describes state efforts to regulate informant testimony through statute or court action.

1. **Corroboration of Informant Testimony**: Given the inherent unreliability of jailhouse informants, California and Texas have enacted statutes which provide that defendants cannot be convicted based on jailhouse informant testimony unless it is corroborated with other evidence.

National Landscape:

California (Cal. Penal Code 1111.5 (2011)) “The testimony of an in-custody informant shall be corroborated by other evidence that connects the defendant with the commission of the offense, the special circumstance, or the evidence offered in aggravation to which the in-custody informant testifies. Corroboration is not sufficient if it merely shows the commission of the offense or the special circumstance or the circumstance in aggravation. Corroboration of an in-custody informant shall not be provided by the testimony of another in-custody informant unless the party calling the in-custody informant as a witness establishes by a preponderance of the evidence that the in-custody informant has not communicated with another in-custody informant on the subject of the testimony.”

Texas (Tex. Code Crim. Pro. art. 38-075 (2009)) “A defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed. Corroboration is not sufficient for the purposes of this article if the corroboration only shows that the offense was committed.”

2. **Pre-trial discovery for in-custody informant testimony**. Robust discovery practices can prevent wrongful convictions by allowing the defense to obtain and present facts that point to their client's innocence, and to properly refute facts that indicate guilt. *Brady v. Maryland*, provides a constitutional right for a defendant to access exculpatory information in the state's possession. However, *Brady* is a limited tool for preventing

¹ www.innocenceproject.org

² Jailhouse Snitch Testimony: A Policy Review,” The Justice Project (Washington DC, 2007).

³ Natapoff, Alexandra. *Snitching: Criminal Informants and the Erosion of the American Justice* (2009).

⁴ “Jailhouse Snitch Testimony: A Policy Review,” The Justice Project (Washington DC, 2007).

wrongful convictions because a violation can only be filed after a conviction has already occurred and the prosecution is found to have withheld evidence that would have changed the outcome of the trial.⁵

National Landscape

Florida (Rule of Criminal Procedure 3.220) Based on the recommendations issued by the Florida Innocence Commission, the Florida Supreme Court amended the Florida Rule of Criminal Procedure 3.220, governing discovery obligations, to include and apply to certain information obtained from informant witnesses, including those in custody. Specifically, they amended: 3.220(b)(1)(A)(i) to include informant witnesses, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried, in the category of witnesses the prosecution must disclose to the defense and added a new subdivision, (b)(1)(M) to specify which types of material or information relating to the informant must be disclosed,⁶

Illinois (725 ILCS 5/115-21 (2009)) Upon the recommendation of the Illinois Commission on Capital Punishment, the legislature enacted a statute imposing special disclosure requirements for capital cases including: 1) the complete criminal history of the informant; any deal, promise, inducement or benefit that the offering party has made or will make in the future to the informant; 2) the statements made by the accused; 3) the time and place of the statements and their disclosure to law enforcement, and the names of all individuals present when the statements were made; 4) whether the informant recanted statements; 5) other cases the informant has testified in and any incentives he received for that testimony; and 6) any other information relevant to the informant's credibility.⁷

Nebraska (LB 465 (2008)) A statute was enacted requiring that before jailhouse informant testimony is admissible in court, prosecutors must disclose certain information to the defense at least 10 days before trial such as the informant's criminal history, any benefit that has or may be offered, any other cases where the informant testified or offered statements, and any benefits received in those cases.⁸

Oklahoma (*Dodd v. State* (2000)): In *Dodd v. State*, the Oklahoma Criminal Court of Criminal Appeals ruled that before jailhouse informant testimony is admissible in court, prosecutors must disclose certain information to the defense at least 10 days before trial such as the informant's criminal history, any benefit that has or may be offered, any other cases where the informant testified or offered statements, and any benefits received in those cases.⁹

- 3. Pre-trial reliability hearings for informants.** Having judges act as gatekeepers to screen out unreliable informants would improve the quality of testimony that is heard by juries and reduce the risk of wrongful convictions.¹⁰ Courts have recognized that juries have limited knowledge of the types of pressures and inducements that inmates are under to provide information that is helpful to the state's case.¹¹ Judges are better positioned to assess an informant's reliability because they understand the incentivized structures of the criminal justice system.¹²

National Landscape:

⁵ Timothy Cole Advisory Panel on Wrongful Convictions: Report to the Texas Task Force on Indigent Defense (2010).

⁶ *In Re: Amendments to Florida Rule of Criminal Procedure 3.220*, No. SC13_1541 (May 29, 2014).

⁷ 725 ILCS 5/115-21 (2009).

⁸ *Dodd v. State*, 993 P.2d 778, 785 (Okla.Crim.App.2000). L.B. 465, 100th Leg., Sess. (Neb. 2008).

⁹ *Dodd v. State*, 993 P.2d 778, 785 (Okla.Crim.App.2000). L.B. 465, 100th Leg., Sess. (Neb. 2008).

¹⁰ Natapoff, Alexandra. *Snitching: Criminal Informants and the Erosion of the American Justice* (2009).

¹¹ See D'Agostino, 823 P.2d at 284 ("A legally unsophisticated jury has little knowledge as to the types of pressures and inducements that jail inmates are under to 'cooperate' with the state and to say anything that is 'helpful' to the state's case.").

¹² Natapoff, Alexandra. *Snitching: Criminal Informants and the Erosion of the American Justice* (2009).

Illinois (725 ILCS 5/115-21 (2009)) Upon the recommendation of the Illinois Commission on Capital Punishment, the legislature enacted a law that requires pre-trial reliability hearings when informants are used in capital murder cases.¹³ The statute states “the court shall conduct a hearing to determine whether the testimony of the informant is reliable, unless the defendant waives such a hearing. If the prosecution fails to show by a preponderance of the evidence that the informant's testimony is reliable, the court shall not allow the testimony to be heard at trial.” The statute directs the court to consider any factors relating to reliability.

Nevada (*D’Agostino v. State* (1992)) In *D’Agostino v. State* the Supreme Court of Nevada recognized the inherent problems with informant testimony and ruled that in specific instances during the penalty phase of a case, judges must hold reliability hearings before informant testimony can be heard by a jury. “We now hold that testimony in a penalty hearing relating to supposed admissions by the convict as to past homicidal criminal conduct may not be heard by the jury unless the trial judge first determines that the details of the admissions supply a sufficient indicia of reliability or there is some credible evidence other than the admission itself to justify the conclusion that the convict committed the crimes which are the subject of the admission.”¹⁴

4. **Jury instructions** While jury instructions are critical tools for shaping verdicts, they are insufficient alone to safeguard against lying informants. Natapoff notes that research shows that jurors often find jury instructions confusing or counterintuitive, and that jurors often do not understand how to apply instructions properly.¹⁵ Therefore, it is important to have carefully tailored instructions on how jurors should evaluate informant testimony.

National Landscape: California, Colorado, Illinois, Montana, Oklahoma, Ohio, and Wisconsin require jury instructions for in-custody informant testimony.¹⁶ Below is the jury instruction mandated in Oklahoma by *Dodd v. State*.

The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider: (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the informant has ever changed his or her testimony; (4) the criminal history of the informant; and (5) any other evidence relevant to the informer's credibility.¹⁷

5. **Collecting Aggregate Data on Informant Use:** Currently, most jurisdictions lack any mechanism for keeping track of the number of informants used or their benefits to crime fighting.¹⁸ Law enforcement agencies should track and report aggregate data on the number and demographics of the informants they use, crimes those informants help to solve, benefits conferred to those informants, and crimes they've

¹³ 725 ILCS 5/115-21 (2009)

¹⁴ *D’Agostino v. State*, 823 P.2d 283, 285 (Nev. 1992)

¹⁵ Marder, Nancy S. “Bringing Jury Instructions into the 21st Century,” 81 *Notre Dame Law Rev.* 449, 454-55 (2006).

¹⁶ The Justice Project. “Jailhouse Snitch Testimony: A Policy Review” (2007).

¹⁷ *Dodd v. State*, 993 P.2d 778, 785 (Okla.Crim.App.2000);

¹⁸ Natapoff, Alexandra. *Snitching: Criminal Informants and the Erosion of the American Justice* (2009).

committed. Like public tax data, aggregate informant data would not include information that could be used to identify individuals.

Law enforcement agencies are already required to provide the FBI with a wide array of crime statistics, and aggregate informant-related information should also be tracked. In addition, the FBI monitors the overall productivity of its own informants and is required to report the total number of times each field office authorizes an informant to engage in otherwise illegal activity.¹⁹ Collecting aggregate data on informants would enable legislators and law enforcement officials to more accurately assess whether informants are making communities safer and to create more effective public policy about their use.

National Landscape: Has not been adopted in any state or at the federal level.

¹⁹ *Id.*

Los Angeles County
District Attorney's Office

Legal Policies Manual

Steve Cooley
District Attorney

April 2005



CHAPTER 19

JAILHOUSE INFORMANTS

19.01 INTRODUCTION

There is a critical need for consistency in the handling of jailhouse informants; the integrity of this office and the integrity of our system of justice depends upon it.

It is the policy of this office to strictly control the use of jailhouse informants as witnesses. Before a jailhouse informant may be used as a witness, strong corroborative evidence is required. This corroborating evidence must consist of more than the fact that the informant appears to know details about the crime thought to be known only to law enforcement.

Commentary

It has been the longstanding practice of the deputies in this office to view skeptically and with caution the proposed testimony of any county jail prisoner. No deputy has ever supposed that such testimony springs from the prisoner's sense of good citizenship or moral duty. On the contrary, a deputy district attorney is by virtue of training and experience altogether conscious of the self-interest of the jailhouse informant and actively mindful of the source, his background and his character. Further, since we are unalterably committed to obtaining the truth and seeking justice, the informant's information is viewed through the prism of our ethical mandate.

19.02 OFFICE POLICY

A jailhouse informant is a person in custody who receives a communication from another person in custody about a crime committed by the latter and who chooses to convey this information to authorities.

No jailhouse informant shall be called to testify to a defendant's oral statement, admission or confession unless strong evidence exists which corroborates the truthfulness of the informant.

A deputy wishing to use a jailhouse informant as a prosecution witness must obtain the prior approval of the Jailhouse Informant Committee. The Committee is comprised of the Chief Deputy, the Assistant District Attorneys and Bureau Directors. All requests to use a jailhouse informant must be submitted, in writing, to the Chief Deputy through the chain of command.

A written request to use a jailhouse informant must include:

- A brief description of the crime and the name and criminal history of the informant;

- The evidence being offered by the informant;
- A description of the corroborating evidence;
- An analysis of the strengths and weaknesses of the case if the informant is not used; and
- Any benefit promised to the informant by any member of law enforcement or any employee of the District Attorney's Office for the information offered on the pending case.

The Habeas Corpus Litigation Team maintains a Central Index of jailhouse informants who have offered to be, or who have been used as witnesses. The trial deputy must contact the Deputy-in-Charge of the Habeas Corpus Litigation Team (HABLIT) and determine whether the informant has offered to be a witness in the past or has testified in any prior case. The information shall be included in the deputy's written memorandum.

The Head Deputy will forward the memorandum with his/her recommendation to the appropriate Bureau Director. If the Bureau Director agrees with a recommendation to use a jailhouse informant as a witness, the Bureau Director will forward the request to the Chief Deputy for consideration by the Jailhouse Informant Committee. The trial deputy may be asked to appear before the committee to explain his/her reasons why the request should be approved.

19.02.01 Trial Deputy Responsibilities if Approval is Granted

If the Committee approves the use of a jailhouse informant, the trial deputy must comply with the requirements of Penal Code §§ 1127a, 1191.25, and 4001.1.

If the informant testifies, the trial deputy must notify HABLIT.

Although Penal Code § 4001.1, if strictly applied, pertains only to "in custody informants" held within a "correctional institution," it is office policy that its provisions apply to any custodial setting (i.e., jail or prison).

19.02.02 Prohibition of Monetary Payments

Penal Code § 4001.1 prohibits law enforcement from making monetary payments to in custody informants in excess of \$50 in exchange for testimony. This limitation does not apply to funds expended for witness protection, relocation, or travel expenses.

19.03 FABRICATION OF EVIDENCE BY JAILHOUSE INFORMANTS

Should any deputy acquire any information that a jailhouse informant is attempting to fabricate or has fabricated evidence, the deputy shall immediately forward a memorandum setting forth all pertinent details to HABLIT. E-mail or fax transmission is acceptable. This information will be included in the Central Index maintained by HABLIT. It is a continuing responsibility of all deputy district attorneys to ensure that any attempt to falsify evidence is readily known to any of our deputies considering the

use of the jailhouse informant involved.

19.04 CRIMINAL CASE INFORMATION SECURITY

The flow of confidential information is critical to operating successfully day to day. Any policy on the disclosure of information must balance the need for security and the need for the efficient exchange of information among the people in this office, from this office to other law enforcement agencies, and to the members of the public. To that end, information on criminal cases being handled by this office shall be disclosed, over the telephone, only as follows:

- If the caller is a deputy district attorney, member of law enforcement, or probation officer personally known to the employee possessing the requested information, and the caller has a need to know the information, the information should be disclosed;
- If the caller is not personally known to the employee possessing the requested information, and claims to be a deputy district attorney, member of law enforcement, or probation officer, the employee possessing the information must request and receive a call-back verification number from the caller. If the number is verified, and there is a need to know the information, the information should be disclosed;
- If the caller is seeking information which is generally available to the public (e.g., time and location of a court appearance), that information should be given;
- Under no circumstances should the names, addresses or telephone numbers of witnesses be disclosed over the telephone; and
- Detailed information or prosecution strategy on a case should never be discussed over the telephone. Only the bare minimum facts, on a verified need-to-know basis, should be disclosed telephonically.

19.04.01 File Notations

Any employee who, in compliance with these guidelines, telephonically discloses information of a non-public nature must make a notation of what was disclosed and to whom it was disclosed. This notation should be placed in the case file or, if the file is not accessible, sent in written form to the deputy district attorney handling the case.

If an employee has any doubt about the identity of the caller, the validity of the call-back number, or whether the caller has a need to know, the employee should immediately contact the Assistant Chief of the Bureau of Investigation.

Commentary

It is essential that we prevent breaches of office security through the inadvertent disclosure of confidential information to persons not authorized to receive such information. Strict compliance with this policy should ensure that such breaches do not occur.

19.05 PRESERVATION OF JAILHOUSE INFORMANT RECORDS

The following Superior Court order, issued on December 16, 1988, remains in effect:

TO [THE] DISTRICT ATTORNEY OF LOS ANGELES COUNTY:

You are hereby ordered to preserve all records of jailhouse informants who have been used or consulted by you or your agents while incarcerated from November 1, 1978 to the present until the further order of this court. This order includes, but is not limited to, all notes, memoranda, computer printouts, or any records of promises made, payments made, or rewards given to each such jailhouse informant. The order shall further include all records of the last known location of said informants, all records relating to the cell assignments of such informants within the Los Angeles County jail system and all memoranda describing in whole or in part such informants.

Dated: 12/16/88

Signed:
Judge of the Superior Court

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Identifying the Culprit

Assessing Eyewitness Identification

**Committee on Scientific Approaches to Understanding and
Maximizing the Validity and Reliability of Eyewitness
Identification in Law Enforcement and the Courts**

Committee on Science, Technology, and Law

Policy and Global Affairs

Committee on Law and Justice

Division of Behavioral and Social Sciences and Education

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Findings and Recommendations

Eyewitnesses make mistakes. Our understanding of how to improve the accuracy of eyewitness identifications is imperfect and evolving. In the previous chapters, we described law enforcement procedures to elicit accurate eyewitness identifications; the courts' handling of eyewitness identification evidence; the science of visual perception and memory as it applies to eyewitness identifications; and the contributions of scientific research to our understanding of the variables that affect the accuracy of identifications. On the basis of its review, the committee offers its findings and recommendations for

- identifying and facilitating best practices in eyewitness procedures for the law enforcement community;
- strengthening the value of eyewitness identification evidence in court; and
- improving the scientific foundation underpinning eyewitness identification.

OVERARCHING FINDINGS

The committee is confident that the law enforcement community, while operating under considerable pressure and resource constraints, is working to improve the accuracy of eyewitness identifications. These efforts, however, have not been uniform and often fall short as a result of insufficient training, the absence of standard operating procedures, and the continuing presence of actions and statements at the crime scene and elsewhere that may intentionally or unintentionally influence eyewitness' identifications.

Basic scientific research on human visual perception and memory has provided an increasingly sophisticated understanding of how these systems work and how they place principled limits on the accuracy of eyewitness identification (see Chapter 4).¹ Basic research alone is insufficient for understanding conditions in the field, and thus has been augmented by studies applied to the specific practical problem of eyewitness identification (see Chapter 5). Applied research has identified key variables that affect the accuracy and reliability of eyewitness identifications and has been instrumental in informing law enforcement, the bar, and the judiciary of the frailties of eyewitness identification testimony.

A range of best practices has been validated by scientific methods and research and represents a starting place for efforts to improve eyewitness identification procedures. A number of law enforcement agencies have, in fact, adopted research-based best practices. This report makes actionable recommendations on, for example, the importance of adopting "blinded" eyewitness identification procedures. It further recommends that standardized and easily understood instructions be provided to eyewitnesses and calls for the careful documentation of eyewitness' confidence statements. Such improvements may be broadly implemented by law enforcement now. It is important to recognize, however, that, in certain cases, the state of scientific research on eyewitness identification is unsettled.

¹Basic research on vision and memory seeks a comprehensive understanding of how these systems are organized and how they operate generally. The understanding derived from basic research includes principles that enable one to predict how a system (such as vision or memory) might behave under specific conditions (such as those associated with witnessing a crime), and to identify the conditions under which it will operate most effectively and those under which it will fail. Applied research, by contrast, empirically evaluates specific hypotheses about how a system will behave under a particular set of real-world conditions.

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For example, the relative superiority of competing identification procedures (i.e., simultaneous versus sequential lineups) is unresolved.

The field would benefit from collaborative research among scientists and law enforcement personnel in the identification and validation of new best practices that can improve eyewitness identification procedures. Such a foundation can be solidified through the use of more effective research designs (for example, those that consider more than one variable at a time, and in different study populations to ensure reproducibility and generalizability), more informative statistical measures and analyses (i.e., methods from statistical machine learning and signal detection theory to evaluate the performance of binary classification tasks), more probing analyses of research findings (such as analyses of consequences of data uncertainties), and more sophisticated systematic reviews and meta-analyses (that take account of current guidelines, including transparency and reproducibility of methods).

In view of the complexity of the effects of both system and estimator variables and their interactions on eyewitness identification accuracy, better experimental designs that incorporate selected combinations of these variables (e.g., presence or absence of a weapon, lighting conditions, etc.) will elucidate those variables with meaningful influence on eyewitness performance, which can, in turn, inform law enforcement practice of eyewitness identification procedures. To date, the eyewitness literature has evaluated procedures mostly in terms of a single diagnosticity ratio or an ROC (Receiver Operating Characteristic) curve; even if uncertainty is incorporated into the analysis, many other powerful tools for evaluating a “binary classifier” are available and worthy of consideration.² Finally, syntheses of eyewitness research has been limited to meta-analyses that have not been conducted in the context of systematic reviews. Systematic reviews of stronger research studies need to conform to current standards and be translated into terms that are useful for decision makers.

The committee offers the following recommendations to strengthen the effectiveness of policies and procedures used to obtain accurate eyewitness identifications.

RECOMMENDATIONS TO ESTABLISH BEST PRACTICES FOR THE LAW ENFORCEMENT COMMUNITY

The committee’s review of law enforcement practices and procedures, coupled with its consideration of the scientific literature, has identified a number of areas where eyewitness identification procedures could be strengthened. The practices and procedures considered here involve acquisition of data that reflect a witness’ identification and the contextual factors that bear on that identification. A recurrent theme underlying the committee’s recommendations is development of, and adherence to, guidelines that are consistent with scientific standards for data collection and reporting.

Recommendation #1: Train All Law Enforcement Officers in Eyewitness Identification

The resolution and accuracy of visual perceptual experience, as well as the fidelity of our memories to events perceived, may be compromised by many factors at all stages of processing (see Chapter 4). Unknown to the individual, perceptual experiences are limited by uncertainties and biased by expectations. Memories are forgotten, reconstructed, updated, and distorted. An eyewitness’s memory can be contaminated by a wide variety of influences, including interaction with the police.

The committee **recommends** that all law enforcement agencies provide their officers and agents with training on vision and memory and the variables that affect them, on practices for minimizing contamination, and on effective eyewitness identification protocols. In addition to instruction at the police academy, officers should receive periodic refresher training, and officers assigned to investigative units should receive in-depth instruction. Dispatchers should be trained not to “leak” information from one caller to the next and to ask for information in a non-leading way. Police officers should be trained to ask

²T. Hastie, R. Tibshirani, and J.H. Friedman, *The Elements of Statistical Learning: Data Mining, Inference, and Prediction* (New York: Springer, 2009).

open ended questions, avoid suggestiveness, and efficiently manage scenes with multiple witnesses (e.g., minimize interactions among witnesses).

Recommendation #2: Implement Double-Blind Lineup and Photo Array Procedures

Decades of scientific evidence demonstrate that expectations can bias perception and judgment and that expectations can be inadvertently communicated.³ Even when lineup administrators scrupulously avoid comments that could identify which person is the suspect, unintended body gestures, facial expressions, or other nonverbal cues have the potential to inform the witness of his or her location in the lineup or photo array.

Double-blinding is central to the scientific method because it minimizes the risk that experimenters might inadvertently bias the outcome of their research, finding only what they expected to find. For example, in medical clinical trials, double-blind designs are crucial to account for experimenter biases, interpersonal influences, and placebo effects.

To minimize inadvertent bias, double-blinding procedures are sometimes used in which the test administrator does not know the composition of the photo array or lineup. If administrators are not involved with construction of the lineup and are unaware of the placement of the potential suspect in the sequence, they cannot influence the witness.

Some in the law enforcement community have responded to calls for double-blind lineup administration with concern, citing the potential for increased financial costs and human resource demands. The committee believes there are ways to reduce these costs and **recommends** that police departments consider procedures and new technologies that increase efficiency of data acquisition under double-blind procedures or those procedures that closely approximate double-blind procedures. If an administrator who does not know the identity of the suspect cannot be assigned to the task, a non-blind administrator (one knowing the status of the individuals in the lineup) might use a computer-automated presentation of lineup photos. If computer-based presentation technology is unavailable, the administrator could place photos in numbered folders that are then shuffled, as is current practice in some jurisdictions.

The committee **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. The “blinded” procedure minimizes the possibility of either intentional or inadvertent suggestiveness and thus enhances the fairness of the criminal justice system. Suggestiveness during an identification procedure can result in suppression of both out-of-court and in-court identifications and thereby seriously impair the prosecutions’s ability to prove its case beyond a reasonable doubt. The use of double-blind procedures will eliminate a line of cross-examination of officers in court.

Recommendation #3: Develop and Use Standardized Witness Instructions

The committee **recommends** the development of a standard set of easily understood instructions to use when engaging a witness in an identification procedure.

Witnesses should be instructed that the perpetrator may or may not be in the photo array or lineup and that the criminal investigation will continue regardless of whether the witness selects a suspect. Administrators should use witness instructions consistently in all photo arrays or lineups, and can use pre-recorded instructions or read instructions aloud, in the manner of the mandatory reading of Miranda Rights. Accommodations should be made when questioning non-English speakers or those with restricted linguistic ability. Additionally, the committee **recommends** the development and use of a standard set of instructions for use with a witness in a showup.

³See Box 2-1.

Recommendation #4: Document Witness Confidence Judgments

Evidence indicates that self-reported confidence at the time of trial is not a reliable predictor of eyewitness accuracy.⁴ The relationship between the witness' stated confidence and accuracy of identifications may be greater at the moment of initial identification than at the time of trial. However, the strength of the confidence-accuracy relationship varies, as it depends on complex interactions among such factors as environmental conditions, persons involved, individual emotional states, and more.⁵ Expressions of confidence in the courtroom often deviate substantially from a witness' initial confidence judgment, and confidence levels reported long after the initial identification can be inflated by factors other than the memory of the suspect. Thus, the committee **recommends** that law enforcement document the witness' level of confidence verbatim at the time when she or he first identifies a suspect, as confidence levels expressed at later times are subject to recall bias, enhancements stemming from opinions voiced by law enforcement, counsel and the press, and to a host of other factors that render confidence statements less reliable. During the period between the commission of a crime and the formal identification procedure, officers should avoid communications that might affect a witness' confidence level. In addition, to avoid increasing a witness' confidence, the administrator of an identification procedure should not provide feedback to a witness. Following a formal identification, the administrator should obtain level of confidence by witness' self-report (this report should be given in the witness' own words) and document this confidence statement verbatim. Accommodations should be made for non-English speakers or those with restricted linguistic ability.

Recommendation #5: Videotape the Witness Identification Process

The committee **recommends** that the video recording of eyewitness identification procedures become standard practice.

Although videotaping does have drawbacks (e.g., costs, witness advocates opposing videotaping of witnesses' faces, and witnesses not wanting to be videotaped), it is necessary to obtain and preserve a permanent record of the conditions associated with the initial identification. When necessary, efforts should be made to obtain non-intrusive recordings of the initial identification process and to accommodate non-English speakers or those with restricted linguistic ability. Measures should also be taken to protect the identity of eyewitnesses who may be at risk of harm because they make an identification.

RECOMMENDATIONS TO STRENGTHEN THE VALUE OF EYEWITNESS IDENTIFICATION EVIDENCE IN COURT

The best guidance for legal regulation of eyewitness identification evidence comes not from constitutional rulings, but from the careful use and understanding of scientific evidence to guide fact-finders and decision-makers. The *Manson v. Brathwaite* test under the Due Process Clause of the U.S. Constitution for assessing eyewitness identification evidence was established in 1977, before much

⁴See, e.g., C. M. Allwood, J. Knutsson, and P. A. Granhag, "Eyewitnesses under influence: How feedback affects the realism in confidence judgements," *Psychology, Crime, and Law* 12(1): 25–38 (2006); B. H. Bornstein and D. J. Zickafoose, "'I know I know it, I know I saw it': The stability of the confidence-accuracy relationship across domain," *Journal of Experimental Psychology-Applied* 5(1): 76–88 (1999); P. A. Granhag, L. A. Stromwall, and C. M. Allwood, "Effects of reiteration, hindsight bias, and memory on realism in eyewitness confidence," *Applied Cognitive Psychology* 14(5): 397–420 (2000); H. L. Roediger, III, J. T. Wixted, and K. A. DeSoto, "The Curious Complexity between Confidence and Accuracy in Reports from Memory" in *Memory and Law*, ed. L. Nadel and W. P. Sinnott-Armstrong (Oxford: Oxford University Press, 2012).

⁵See, e.g., J. M. Talarico and D. C. Rubin, "Confidence, Not Consistency, Characterizes Flashbulb Memories," *Psychological Science* 14(5): 455–461 (September 2003).

applied research on eyewitness identification had been conducted. That test evaluates the “reliability” of eyewitness identifications using factors derived from prior rulings and not from empirically validated sources. As critics have pointed out, the *Manson v. Brathwaite* test includes factors that are not diagnostic of reliability. Moreover, the test treats factors such as the confidence of a witness as independent markers of reliability when, in fact, it is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors. While some states have made minor changes to the due process framework, (e.g., by altering the list of acceptable “reliability” factors; see Chapter 3), wholesale reconsideration of this framework is only a recent development (e.g., the recent decisions by state supreme courts in New Jersey and Oregon; see Chapter 3).

Recommendation #6: Conduct Pretrial Judicial Inquiry

Eyewitness testimony is a type of evidence where (as with forms of forensic trace evidence) contamination may occur pre-trial. Judges rarely make pre-trial inquiries about evidence in criminal cases without one of the parties first raising an objection. In cases involving eyewitness evidence, however, parties may not be sufficiently knowledgeable about the relevant scientific research to raise concerns.

Judges have an affirmative obligation to insure the reliability of evidence presented at trial. To meet this obligation, the committee **recommends** that, as appropriate, a judge make basic inquiries when eyewitness identification evidence is offered. While the contours of such an inquiry would need to be established on a case-by-case basis, at a minimum, the judge could inquire about prior lineups, what information had been given to the eyewitness before the lineup, what instructions had been given to the eyewitness in connection with administering the lineup, and whether the lineup had been administered “blindly.” The judge could also entertain requests from the parties for additional discovery, and could ask the parties to brief any issues raised by these inquiries. A judge also could review reports of the eyewitness’ confidence and any recordings of the identification procedures. When assessing the reliability of an identification, a judge could also inquire as to what eyewitness identification procedures the agency had in place and the degree to which they were followed. Both pre-trial judicial inquiries and any subsequent judicial review would create an incentive for agencies to adopt written eyewitness identification procedures and to document the identifications themselves.

If these initial inquiries raise issues with the identification process, a judge could conduct a pre-trial hearing to review the reliability and admissibility of eyewitness identification evidence and to assess how it should be treated at trial if found admissible. If indicia of unreliable eyewitness identifications are present, the judge should apply applicable law in deciding whether to exclude the identifications or whether some lesser sanction is appropriate. As discussed in the sections that follow, a judge may limit portions of the testimony of the eyewitness. A judge can also ensure that the jury is provided with a scientific framework within which to evaluate the evidence.

Recommendation #7: Make Juries Aware of Prior Identifications

The accepted practice of in-court eyewitness identifications can influence juries in ways that cross-examination, expert testimony, or jury instructions are unable to counter effectively. Moreover, as research suggests (see Chapters 4 and 5), the passage of time since the initial identification may mean that a courtroom identification is a less accurate reflection of an eyewitness’ memory. In-court confidence statements may also be less reliable than confidence judgments made at the time of an initial out-of-court identification; as memory fails and/or confidence grows disproportionately. The confidence of an eyewitness may increase by the time of the trial as a result of learning more information about the case, participating in trial preparation, and experiencing the pressures of being placed on the stand.

An identification of the kind dealt with in this report typically should not occur for the first time in the courtroom. If no identification procedure was conducted during the investigation, a judge should consider ordering that an identification procedure be conducted before trial. In any case, whenever the

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eyewitness identifies a suspect in the courtroom, it is important for jurors to hear detailed information about any earlier identification, including the procedures used and the confidence expressed by the witness at that time. The descriptions of prior identifications and confidence at the time of those earlier out-of-court identifications provide more useful information to the fact-finders and decision-makers. Accordingly, the committee **recommends** that judges take all necessary steps to make juries aware of prior identifications, the manner and time frame in which they were conducted, and the confidence level expressed by the eyewitness at the time.

Recommendation #8: Use Scientific Framework Expert Testimony

The committee finds that a scientific framework describing what factors may influence a witness' visual experience of an event and the resolution and fidelity of that experience, as well as factors that underlie and influence subsequent encoding, storage, and recall of memories of an event, can inform the fact-finder in a criminal case. As discussed throughout this report, many scientifically established aspects of eyewitness memory are counterintuitive and may defy expectations. Jurors will likely need assistance in understanding the factors that may affect the accuracy of an identification. In many cases this information can be most effectively conveyed by expert testimony.

Contrary to the suggestion of some courts, the committee **recommends** that judges have the discretion to allow expert testimony on relevant precepts of eyewitness memory and identifications. Expert witnesses can explain scientific research in detail, capturing the nuances of the research, and focusing their testimony on the most relevant research. Expert witnesses can convey current information based on the state of the research at the time of a trial. Expert witnesses can also be cross-examined, and limitations of the research can be expressed to the jury.

Certainly, qualified experts will not be easy to locate in a given jurisdiction; and indigent defendants may not be able to afford experts absent court funds. Moreover, once the defense secures an expert, the prosecution may retain a rebuttal expert, adding complexity to the litigation. Further investigation may explore the effectiveness of expert witness presentation of relevant scientific findings compared with jury instructions. Until we have a clearer understanding of the strengths and weaknesses of this technique, the committee views expert testimony as an appropriate and effective means of providing the jury with information to assess the strength of the eyewitness identification.

Expert witnesses should not be permitted to testify without limits. An expert explaining the relevant scientific framework can describe the state of the research and focus on the factors that are particularly relevant in a given case. However, an expert must not be allowed to testify beyond the limits of his or her expertise. Although current scientific knowledge would allow an expert to inform the jury of factors bearing on their evaluation of an eyewitness' identification, the committee has seen no evidence that the scientific research has reached the point that would properly permit an expert to opine, directly or through an equivalent hypothetical question, on the accuracy of an identification by an eyewitness in a specific case.

In many jurisdictions, expert witnesses who can testify regarding eyewitness identification evidence may be unavailable. In state courts, funding for expert witnesses may be far more limited than funding in federal courts. The committee **recommends** that local jurisdictions make efforts to ensure that defendants receive funding to obtain access to qualified experts.

Recommendation #9: Use Jury Instructions as an Alternative Means to Convey Information

The committee **recommends** the use of clear and concise jury instructions as an alternative means of conveying information regarding the factors that the jury should consider.

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Jury instructions should explain, in clear language, the relevant principles. Like the New Jersey instructions,⁶ the instructions should allow judges to focus on factors relevant to the specific case, since not all cases implicate the same factors. Jury instructions do not need to be as detailed as the New Jersey model instructions and do not need to omit all reference to underlying research. With the exception of the New Jersey instructions, jury instructions have tended to address only certain subjects, or to repeat the problematic *Manson v. Brathwaite* language, which was not intended as instructions for jurors.

Appropriate legal organizations, together with law enforcement, prosecutors, defense counsel, and judges, should convene a body to establish model jury instructions regarding eyewitness identifications.

RECOMMENDATIONS TO IMPROVE THE SCIENTIFIC FOUNDATION UNDERPINNING EYEWITNESS IDENTIFICATION RESEARCH

Basic scientific research on visual perception and memory provides important insight into the factors that can limit the fidelity of eyewitness identification (see Chapter 4). Research targeting the specific problem of eyewitness identification (see Chapter 5) complements basic scientific research. However, this strong scientific foundation remains insufficient for understanding the strengths and limitations of eyewitness identification procedures in the field. Many of the applied studies on key factors that directly affect eyewitness performance in the laboratory are not readily applicable to actual practice and policy. Applied research falls short because of a lack of reliable or standardized data from the field, a failure to include a range of practitioners in the establishment of research agendas, the use of disparate research methodologies, failure to use transparent and reproducible research procedures, and inadequate reporting of research data. The task of guiding eyewitness identification research toward the goal of evidence-based policy and practice will require collaboration in the setting of research agendas and agreement on methods for acquiring, handling, and sharing of data.

Recommendation #10: Establish a National Research Initiative on Eyewitness Identification

To further our understanding of eyewitness identification, the committee **recommends** the establishment of a National Research Initiative on Eyewitness Identification (hereinafter, the Initiative). The Initiative should involve the academic research community, law enforcement community, the federal government, and philanthropic organizations. The Initiative should (1) establish a research agenda to guide research for the next decade; (2) formulate practice- and policy-relevant research questions; (3) identify opportunities for additional data collection; (4) systematically review research to examine emerging findings on the impact of system and estimator variables; (5) translate research findings into policies and procedures that are both practical and appropriate for law enforcement; and (6) set priorities and timelines for issues to be addressed, the conduct of research, the development of best practices, and formal assessments.

The committee notes that there appear to be few existing partnerships between the scientific community and law enforcement organizations and therefore **recommends** that The National Science Foundation (NSF) and the National Institute of Standards and Technology (NIST) take a leadership role working with other federal agencies, such as the National Institute of Justice (NIJ), the Bureau of Justice Statistics (BJS), and the Federal Bureau of Investigation (FBI), to support such collaborations.

⁶New Jersey Criminal Model Jury Instructions, *Identification* (July 19, 2012), available at: http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf; New Jersey Court Rule 3:11, *Record of an Out-of-Court Identification Procedure* (July 19, 2012), available at: http://www.judiciary.state.nj.us/pressrel/2012/new_rule.pdf; New Jersey Court Rule 3:13-3, *Discovery and Inspection* (July 19, 2012), available at: http://www.judiciary.state.nj.us/pressrel/2012/rev_rule.pdf.

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The impact on society of innocents being incarcerated while perpetrators remain free, in conjunction with limited federal resources, highlights the need for both public and private support for this Initiative.

To enhance the scientific foundation of eyewitness identification research and practice, the Initiative should commit to the following:

a. Include a practice- and data-informed research agenda that incorporates input from law enforcement and the courts and establishes methodological and reporting standards for research to assess the fundamental performance of various aspects of eyewitness identification procedures as well as synthesize research findings across studies.

b. Develop protocols and policies for the collection, preservation, and exchange of field data that can be used jointly by the scientific and law enforcement communities. Data collection procedures used in the field should be developed to ensure the relevance of the collected data, to facilitate analysis of the data, and to minimize potential bias and loss of data through incomplete recording strategies.

Law enforcement agencies should take the lead in collecting, maintaining, and sharing relevant data from the field. Much of the data that would be useful for the evaluation of eyewitness identification procedures have been collected in the form of administrative records and may be readily adapted for use in research. Comprehensive data should be collected on lineup composition and witness selections (i.e., fillers, non-identifications, and position of suspect in lineup).

c. Develop and adopt guidelines for the conduct and reporting of applied scientific research on eyewitness identification that conform to the highest scientific standards. All eyewitness research, including field-based studies, laboratory-based studies, and research synthesis, should use rigorous research methods and provide detailed reporting of both methods and results, including (1) pre-registration of all study protocols; (2) investigation of research questions and hypotheses informed by the needs of practice and policy; (3) adoption of strict operationalization of key measures and objective data collection; (4) development of experimental designs informed by analytical concerns; (5) use of proper statistical procedures that account for the often non-traditional nature of data in this field (e.g., estimates of effects with appropriate statements of uncertainty, multiple responses from different scenarios from the same individuals, effects of order and time of presentation when important, treatment of extreme observations or outliers); (6) reporting of participant recruitment and selection and assignment to conditions; (7) complete reporting of findings including effect sizes and associated confidence intervals for both significant and non-significant effects; and (8) derivation of conclusions that are grounded firmly in the findings of the study, are framed in the context of the strengths and limitations of study methodology, and clearly state their implications for practice and policy decisions.

Strict adherence to guidelines for eyewitness identification research will result in more credible research findings that can guide policy and practice. Research that conforms to guidelines will withstand rigorous scrutiny by peers, will be verifiable through replication, and will permit inclusion in systematic reviews, leading to greater confidence in the validity and generalizability of findings.

d. Adopt rigorous standards for systematic reviews and meta-analytic studies. Meta-analyses of primary studies should be conducted only in the context of systematic reviews that locate and critically appraise *all* research findings, including those from unpublished studies. Analyses should consistently appraise and account for possible biases in the included research. Studies that do not adequately conduct or report research methods, such as randomization, should be identified in the findings. Sensitivity analyses considering impacts of lower quality or inadequately reported studies on pooled effect estimates should be conducted and reported. When attempting to draw conclusions

from studies with missing data, reviewers should first attempt to contact the authors of the research for additional information. When missing data cannot be retrieved from researchers, imputation methods should, if used, be specific, transparent, and reproducible. Statistical methods for meta-analysis should conform to current best practice, using models appropriate to the level of heterogeneity of results across studies, computing both point estimates and confidence intervals around effect sizes, and translating the results of meta-analyses into terms that are both understandable and useful to practice and policy decision-makers.

e. Provide basic instruction for police, prosecutors, defense counsel, and judges on aspects of the scientific method relevant to eyewitness identifications procedures (e.g., the rationale for blinded administration), including principles of research design and the uncertainties associated with data analysis. Training should cover the importance of data collection and interpretation, including the role of standardized eyewitness identification procedures and documentation of witness statements of confidence. Competencies acquired through such training (quantitative reasoning, understanding principles of research design, and recognition of data uncertainties) are likely to apply to issues beyond eyewitness identification. For example, the knowledge and skills from training can be applied to other issues that personnel face, either in forensic science technologies or in process administration, evaluation, and quality improvement. Similarly, scientists will benefit from a greater knowledge of legal issues, standards, and procedures related to the problem of eyewitness identification. Training of both communities (law and science) will enhance communication and lead to productive collaborations.

The collaborative research initiative between researchers and law enforcement communities will be challenging as it will necessitate (1) standardized police procedures;⁷ (2) systematic valid evidence collection and data entry and analysis; and (3) education and training for both researchers and law enforcement professionals on the differences between these two communities in their use of terms and considerations of standards of evidence and uncertainties in data. These three elements of a collaborative initiative are critical to advancing the science related to eyewitness identifications, as each bears directly on the integrity of the foundation upon which the efficacy and validity of current and future practices will be judged. Without such a foundation, practical advances in our scientific understanding are unlikely to occur.

The committee further **recommends** that the Initiative support research to better understand the following: (1) the variables that affect the accuracy, precision, and reliability of eyewitness identifications, and how those variables interact and vary in practice; (2) the (possibly joint) impact of estimator and system variables on both identification accuracy and response bias; (3) best practices for probing witness memory with the least potential for bias or contamination; (4) best strategies to assess witnesses' confidence levels when making an identification; and (5) appropriate types of instructions for police, witnesses, and juries to best inform and facilitate the collection and interpretation of eyewitness identifications; (6) photo array composition and procedures; (7) identification procedures in the field (showups); (8) innovative technologies that might increase the reliability of eyewitness testimony (e.g., algorithm-based computer face recognition software, computer administered photo arrays, and mobile technologies with photo identification programs); and (9) the most effective means of informing jurors how to consider the factors that affect the strengths and weaknesses of eyewitness identification evidence.

⁷The term *standardized procedures* refers to the notion that professionals reliably follow the same set of steps or procedures. Such standardization ensures that data across cases can be considered comparable and, to a greater extent, more reliable. Although reliability is not equivalent to validity, it is essential before researchers can assess questions of validity. Without standardized procedures, valid comparisons between departments and regions of the country cannot be achieved.

Recommendation #11: Conduct Additional Research on System and Estimator Variables

Among the many variables that can affect eyewitness identification, the procedures for constructing a lineup have received the greatest attention in recent years. As discussed in Chapter 5, the question as to whether a simultaneous or sequential lineup is preferred is a specific case of the more general question of what conditions might improve the performance of an eyewitness. The answer to that question depends upon the criteria used to evaluate performance, and much of the debate has thus focused on the analysis tools for evaluation. These tools have improved significantly over the years, beginning with the use of a diagnosticity ratio, which uses the likelihood that the person identified is actually guilty as an evaluation criterion. More recently, the diagnosticity ratio approach has been augmented by analysis of Receiver Operating Characteristics (ROC analysis), which uses a measure of discriminability (i.e. a measure of how well the witness can discriminate between different possible matches to his/her memory of the face of the culprit) as an evaluation criterion. In principle, ROC analysis is a positive step, if only because it incorporates more information (i.e. the earlier diagnosticity ratio is one component of the ROC analysis). But a more complex question concerns how policy-makers and practitioners should weigh the two evaluation criteria that have been considered thus far – likelihood of guilt and discriminability – when making a decision about which lineup procedures to adopt. The answer is particularly nuanced because the two criteria do not always lead to the same conclusion; one lineup procedure may yield poorer discriminability while at the same time increasing the likelihood that the identified person is actually guilty.

The committee concludes that there should be no debate about the value of greater discriminability – to promote a lineup procedure that yields less discriminability would be akin to advocating that the lineup be performed in dim instead of bright light. For this reason, the committee **recommends** broad use of statistical tools that can render a discriminability measure to evaluate eyewitness performance. But a lineup procedure that improves discriminability can yield greater or lesser likelihood of correct identification, depending on how the procedure is applied (see Chapter 5). For lineup procedures that yield greater discriminability, greater likelihood of correct identification would appear preferable and can be achieved by methods that elicit a more conservative response bias, such as a sequential (relative to simultaneous) lineup procedure.⁸ The committee thus **recommends** a rigorous exploration of methods that can lead to more conservative responding (such as witness instructions) but do not compromise discriminability.

In view of these considerations of performance criteria and recommendations about analysis tools, can we draw definitive conclusions about which lineup procedure (sequential or simultaneous) is preferable? At this point, the answer is no. Using discriminability as a criterion, there is, as yet, not enough evidence for the advantage of one procedure over another. The committee thus **recommends** that caution and care be used when considering changes to any existing lineup procedure, until such time as there is clear evidence for the advantages of doing so. From a larger perspective, the identification of factors (such as specific lineup procedures or states of other system variables) that can objectively improve eyewitness identification performance must be among the top priorities for this field. This leads us to three additional recommendations.

a. The committee **recommends** a broad exploration of the merits of different statistical tools for use in the evaluation of eyewitness performance. ROC analysis represents an improvement over a single diagnosticity ratio, yet there are well-documented quantitative shortcomings to the ROC approach. But are there alternatives? As noted in Chapter 5, the task facing an eyewitness is a binary classification task and there exist many powerful statistical tools for evaluation of binary classification performance that are widely used, for example, in the field of machine learning. While

⁸The committee stresses, however, that adoption of a more conservative response bias necessitates a compromise by which fewer lineup “picks” are made overall and thus fewer guilty suspects are identified (see Chapter 5).

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none of these tools has been vetted for application to the problem of eyewitness identification, they offer a potentially rich resource for future investigation in this field.

b. The alternative (sequential) lineup procedure was introduced as part of an effort to improve eyewitness performance. While, as noted above, it remains unclear whether the procedure has improved eyewitness performance, that goal is still primary. In an effort to achieve that goal, many studies over the past three decades have explored the possibility that other factors may also affect performance, but until recently these investigations have not evaluated performance using a discriminability measure. The committee therefore **recommends** a broad exploration of the effects of different system variables (e.g. additional variants on lineup procedures, witness lineup instructions) and estimator variables (e.g. presence or absence of weapon, elapsed time between incident and identification task, levels of stress), and – importantly – interactions between these variables, using either the ROC approach or other tools for evaluation of binary classifiers that can be shown to have advantages over existing analytical methods.

c. Building upon the committee’s call for a practice- and data-informed research agenda that incorporates input from law enforcement and the courts and establishes methodological and reporting standards for research, the committee **recommends** that the scientific community engaged in studies of eyewitness identification performance work closely with law enforcement to identify other system and estimator variables that might influence performance and practical issues that might preclude certain strategies for influencing performance. In addition, the committee **recommends** that policy decisions regarding changes in procedure should be made on the basis of evidence of superiority and should be made in consultation with police departments to determine which procedure yields the best combination of performance and practicality.

CONCLUSION

Eyewitness identification can be a powerful tool. As this report indicates, however, the malleable nature of human visual perception, memory, and confidence; the imperfect ability to recognize individuals; and policies governing law enforcement procedures can result in mistaken identifications with significant consequences. New law enforcement training protocols, standardized procedures for administering lineups, improvements in the handling of eyewitness identification in court, and better data collection and research on eyewitness identification, can improve the accuracy of eyewitness identifications.