

6/19/12: Drafted by Dr. Elizabeth Loftus, Dr. Elizabeth Francis and Jeannine Turgeon, Judge

## **1.00 Eyewitness Identification Instructions**

### **1.01 General – Given in all Cases**

The Commonwealth must prove beyond a reasonable doubt the identity of the person who committed a crime.

You must decide whether the Commonwealth presented<sup>1</sup> sufficient reliable evidence to prove that the defendant is the person who committed the crime in this case.

Human memory is not foolproof.

Memory is not an exact recording of past events.

Memory is not like a video recording we can simply replay.

Eyewitness identification evidence must be evaluated carefully.

Eyewitness identifications, even if made in good faith, may be mistaken.

Eyewitness identifications, even if made with a high level of confidence, can be unreliable.

You must determine whether the identification of the defendant as the person who committed the crime, is accurate and reliable.

In reaching your decision, please consider the following specific factors:

- 1) The witness's opportunity to observe the person committing the crime;
- 2) The witness's level of stress;
- 3) Whether the witness saw a weapon;
- 4) The amount of time elapsed between the time of the crime and the time the eyewitness identified the defendant;
- 5) Whether the eyewitness consistently described the person committing the crime;
- 6) The eyewitness's degree of confidence in the identification;
- 7) Police or other person's statements and behaviors;
- 8) Post-crime influences and other feedback;
- 9) Other factors

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<sup>1</sup> The instructions are written as concluding instructions, utilizing past tense. They should be revised for the Chapter of Introductory Instructions to the jury, prior to receiving testimony. For example, this sentence should read, for introductory remarks: "You must decide whether the Commonwealth presents sufficient reliable...."

{Only if Applicable;}

- 10) Whether the witness was intoxicated;
- 11) Whether the person committing the crime changed or disguised his/her appearance;
- 12) Whether the eyewitness's race is different from the race of the person identified.

These factors, based on generally accepted scientific research, are important to consider when evaluating eyewitness testimony.

I will now explain them to you in greater detail:

**1) The Witness's Opportunity to Observe Factor:**

In evaluating the eyewitness's opportunity to observe the person who committed the crime you should consider:

- The witness's distance from the crime scene;
- The length of time (s)he had to observe the person committing the crime;
- The lighting at the crime scene.

(a) Distance between the eyewitness and the person committing the crime:

Scientific research suggests that the greater the distance between an eyewitness and the person committing a crime, the higher the risk of a mistaken identification.

Scientific research suggests people often have difficulty estimating distances accurately.

*How far was the eyewitness from the scene of the crime and from the person committing the crime?*

(b) Length of Observation Time:

Scientific research suggests that the amount of time an eyewitness has to observe an event may affect the reliability of identification.

The more time a witness has to observe someone; the more likely the identification will be accurate.

Although no minimum time is required to make an accurate identification, a brief observation is less likely to produce an accurate one than a longer one.

Scientific research suggests that witnesses tend to think events lasted longer than they actually did.

*How much time did the eyewitness have to observe the person committing the crime?*

(c) **Lighting:**

Scientific research suggests that dim lighting may reduce the accuracy of eyewitness identification.

*What lighting conditions existed at the time the eyewitness observed the person committing the crime?*

**2) The Witness's Level of Stress Factor:**

Scientific research establishes that high levels of stress can reduce an eyewitness's ability to later remember details and make an accurate identification of who was committing the crime.

*Did the eyewitness experience a high level of stress?*

*Did stress make it difficult for the eyewitness to remember details and accurately identify the person committing the crime?*

**3) Weapon Focus Factor:**

Scientific research establishes that the presence of a weapon can distract a witness and take the witness's attention away from the face of a person committing a crime.

As a result, the presence of a weapon may reduce the reliability of an eyewitness's identification.

*Did the witness's focus on a weapon take [his/her] attention away from the face of the person committing the crime?*

**4) Time Elapsed:**

Memories fade with time.

The more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken and becomes more vulnerable to contamination by other influences.

As a result, delays between observing a person committing a crime and the time an identification is made, affect the reliability of an identification.

*How much time elapsed between the time of the crime and the time the eyewitness identified the defendant?*

### **5) Consistency of Eyewitness's Description of Perpetrator:**

You also should consider whether the eyewitness's first description of the person committing the crime is consistent with [his/her] later descriptions of the suspect and [his/her] identification of the defendant.

Scientific research suggests that the earliest description is more likely to be more accurate than a description provided later on.

*Did the first description include details or was it just general in nature?*

*Were the eyewitness's [testimony at trial] and/or [identification at the lineup/photo array]] consistent with, or different from, [his/her] first description of the person who committed the crime?*

### **6) Eyewitness's Degree of Confidence in the Identification:**

You have heard testimony that when the eyewitness identified the defendant, (s)he was confident the defendant was the person who committed the crime.

While confident witnesses are somewhat more accurate than unconfident witnesses, scientific research shows that eyewitness's confidence generally is not a reliable indicator of accuracy.

### **7) Police or Other Persons' Statements and Behavior:**

You should consider what the police or others said to the eyewitness before (s)he identified the defendant as the person who committed the crime.

Scientific research shows that body language or statements made to the eyewitness by police or others, can affect the accuracy of an eyewitness's memory of who committed the crime.

Any feedback can affect the independent nature and reliability of an eyewitness's identification and can inflate a witness's confidence in that identification.

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When police or others indicate to an eyewitness that (s)he has correctly identified the suspect, they create a false sense of confidence the eyewitness has correctly identified the person.

### **8) Post-Crime Influences and Other Feedback:**

You should also consider whether the eyewitness was exposed to opinions, descriptions, or identifications given by other witnesses which influenced [his/her] memory.

You should consider whether the eyewitness saw photographs or read newspaper accounts, or was exposed to any other information or influence, that may have affected the independence of [his/her] identification.

*Was the eyewitness's identification of the suspect affected by post-crime influences or other feedback?*

**{Insert Other Applicable Factors Here – See Below}**

**9) Other Factors:**

You may also consider any other factors based on the evidence or lack of evidence, relevant to evaluating the credibility of the eyewitnesses' testimony.

**{Give the Following Instructions Only if Applicable:}**

**10) Eyewitness's Intoxication Factor:**

Scientific research suggests that identifications by intoxicated witnesses are generally less reliable than identifications given by witnesses who are not intoxicated by alcohol or drugs.

Even the equivalent of 2 or 3 drinks can affect the formation of memory.

*Was the eyewitness intoxicated at the time by drugs or alcohol?*

**11) Perpetrator's Changed Appearance or Disguises Factor:**

Scientific research shows that changes in appearance or use of a disguise can reduce a witness's ability to accurately identify the person who committed a crime.

People can alter how they look by changing haircut, hair color, facial hair, make-up, clothing or other changes in their appearance.

People can also alter their appearance with disguises as simple as hats, sunglasses, or masks.

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*Did the person who committed the crime wear a disguise?*

*Could the person who committed the crime have altered [his/her] appearance before or after committing the crime?*

**12) Cross-Racial Effects:**

In this case, the eyewitness and the person (s)he identified are racially different.

Scientific research shows that people have greater difficulty in accurately identifying strangers of a different race than strangers of their own race.

*Did the difference between the race of the eyewitness and the race of the person (s)he identified affect the accuracy of the identification?*

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## 1.02 Prior Out-of-Court Lineup or Photo Array Eyewitness Identification

In evaluating the reliability of an eyewitness's identification, you should consider the circumstances under which the eyewitness previously identified the defendant prior to trial in a [lineup/photo array].

Was it the result of a suggestive procedure?

Generally accepted scientific research teaches us that suggestive procedures can reduce the accuracy of eyewitness identifications.

In deciding whether or not the procedure was suggestive, please consider the following additional factors:

- 1) Whether a neutral officer conducted the [lineup/photo array];
- 2) Whether the officer properly instructed the eyewitness;
- 3) The composition of the [lineup/photo array];
- 4) The number of people in the [lineup/photo array];
- 5) The number of [lineups/photo arrays] viewed by the eyewitness;
- 6) Other factors

I will now explain in detail those factors:

### 1) Neutral Police Officer to Conduct [Lineup/Photo Array]:

You should consider who conducted the identification procedure.

A police [officer/administrator] who knows the identity of the person the police suspect may intentionally or unintentionally convey this knowledge to the witness, increasing the chance that the witness will identify that suspect, even if the suspect is innocent.

Body language or statements made to the eyewitness by police or others can affect the accuracy of an eyewitness's memory.

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When police or others suggest to an eyewitness that (s)he has correctly identified the suspect, they can enhance the eyewitness's confidence (s)he correctly identified the person who committed the crime.

Negative feedback can reduce an eyewitness's confidence that (s)he correctly identified the person who committed the crime.

Therefore, whenever possible, [lineups and photo arrays] should be conducted by a police [officer/administrator] who does not know the identity of the person the police suspect committed the crime.

If a neutral police [officer/administrator] who does not know the suspect's identity is unavailable, then the officer conducting the procedure in a way so they cannot influence the eyewitness's choice.

## 2) Identification Procedure Instructions to the Eyewitness:

You should consider what the police said or did not say to the eyewitness just before (s)he viewed the [lineup/photo array].

The police should begin by telling the eyewitnesses that the person who committed the crime, may or may not be in the [lineup/photo array].

The police should tell the eyewitnesses (s)he should not feel compelled to identify anyone.

Scientific research shows failure to give this instruction can increase the risk of mistaken identification.

*Did the police give this important instruction to the eyewitness?*

## 3) Lineup/Photo Array Composition:

All [lineups/photo arrays] should include similar-looking people and the people should generally match the eyewitnesses' description(s) of the perpetrator.

### (a) Similar-looking people:

All [lineups/photo arrays] should include similar-looking people.

Scientific research shows that when a police suspect's appearance obviously differs from the others in the [lineup/photo array], the suspect stands out, which can increase the risk of a mistaken identification.

When a suspect stands out and the identification seems easy, an eyewitness may become over-confident (s)he identified the right person.

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*Were all the people in the [lineup/photo array] similar-looking or did the police suspect stand out?*

### (b) People fitting the eyewitness's description of the perpetrator:

All people in a [line up/photo array] should generally match the eyewitness's initial description of the person who committed the crime.

Scientific research shows that if only one person in the [lineup/photo array] fits the eyewitness's description of the person who committed the crime, the witness may select that person, even if (s)he are innocent.



*Did all the people in the [lineup/photo array] generally match the eyewitness's initial description of the person who committed the crime?*

**4) Number of People in the [Lineup/Photo Array]:**

Police [lineups/photo arrays] should include numerous possible choices

Scientific research shows the greater the number of choices, the more likely the [lineup/photo array] will serve as a reliable test of the eyewitness's memory of who committed the crime.

*Did the [lineup/photo array] include numerous possible choices?*

**5) Number of [Lineup/Photo Array] Identification Procedures:**

When an eyewitness sees a person in multiple identification procedures, the witness's memory of the actual perpetrator can be replaced by the witness's memory of the person seen multiple times.

Scientific research shows that when a witness views an innocent suspect multiple times, the risk of a mistaken identification increases.

*Did the eyewitness view the suspect multiple times?*

**6) Other Factors:**

As I said earlier, you should also consider the other factors, based on the scientific research, that are important to consider when evaluating eyewitness memory:

- 1) The witness's opportunity to observe the person committing the crime;
- 2) The witness's level of stress;
- 3) Whether the witness saw a weapon;
- 4) The amount of time elapsed between the time of the crime and the time the eyewitness identified the defendant;
- 5) Whether the eyewitness consistently described the person committing the crime;

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- 6) The eyewitness's degree of confidence in the identification;
- 7) Police or other person's statements and behaviors;
- 8) Post-crime influences and other feedback;
- 9) Other factors

{Only if Applicable:}

- 10) Whether the witness was intoxicated;
- 11) Whether the defendant changed or disguised his/her appearance;
- 12) Whether the eyewitness's race is different from the race of the person identified.

### 1.03 If “Showup” or One-on-One Identification Procedure

In this case, the witness saw only one person, the defendant, during the first identification procedure.

Additional factors apply when a one-on-one identification occurs prior to trial.

One-on-one identification procedures can lead to an increased risk of misidentification.

Even though such a procedure is inherently suggestive, sometimes it is necessary for the police to conduct a one-on-one identification procedure.

Police officers must tell the eyewitness that the person (s)he is about to see may or may not be the person who committed the crime.

*Did the police appropriately instruct the witness the person may or may not be the person who committed the crime?*

#### **1.04 Concluding Eyewitness Identification Instruction**

The presence of any single factor or combination of factor(s) I have reviewed with you does not mean a particular eyewitness's identification testimony is or is not accurate.

You should consider all the factor(s) I have discussed and all of the testimony and documentary evidence to determine whether the eyewitness's identification of the defendant is accurate.

If, after consideration of all of the evidence, you determine that the Commonwealth has not proven beyond a reasonable doubt that [defendant] was the person who committed the crime(s) charged, then you must find [him] [her] not guilty.

If, on the other hand, you are convinced beyond a reasonable doubt that [defendant] was correctly identified as the person who committed any of the crime(s) charged, you must then decide whether the Commonwealth has proven beyond a reasonable doubt, each and every element of the offense(s) charged.

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