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Seeing Is Believing: Should Massachusetts Courts Adopt SJC Recommendations for Eyewitness Testimony

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SEEING IS BELIEVING: SHOULD MASSACHUSETTS COURTS ADOPT SJC RECOMMENDATIONS FOR EYEWITNESS TESTIMONY?

“There is no longer any doubt that mistaken eyewitness identification is the primary cause of erroneous convictions, outstripping all other causes combined[.]”¹ Even though it is well known that eyewitness identifications are not reliable, they are still an important tool for law enforcement.² In order to resolve this dilemma and ensure that defendants’ rights are protected from wrongful conviction, courts, like the Supreme Court of New Jersey, have begun incorporating the science behind eyewitness testimony and its reliability into jury instructions to better educate jurors on the subject.³ Similarly, the Supreme Judicial Court of Massachusetts (“SJC”) recently commissioned a study group to address eyewitness identification issues and to draft recommendations on how to approach eyewitness testimony being used at trial. By examining the science behind eyewitness testimony, and reevaluating the current practice with regard to police protocols and procedures, pretrial evidentiary hearings, and jury instructions, the SJC sought to offer guidance to the judiciary on how to best minimize the risk of wrongful conviction.⁴

¹ Commonwealth v. Martin, 850 N.E.2d 555, 570 & n.4 (Mass. 2006) (Cordy, J., dissenting) (revealing seventy-percent of wrongful convictions were due to mistaken eyewitness identification).

² See Commonwealth v. Walker, 953 N.E.2d 195, 208 n.16 (Mass. 2011) (explaining eyewitness testimonies are “an invaluable law enforcement tool in obtaining accurate convictions”).

³ See State v. Henderson, 27 A.3d 872, 925 (N.J. 2011) (revising jury instructions to reflect current scientific research on eyewitness testimony); Brian H. Bornstein & Joseph A. Hamm, *Jury Instructions on Witness Identification*, 48 CT. REV. 48, 48 (2012) (reviewing psychological impact of jury instructions on jurors); Hon. Samuel D. Natal et al., *Report of the Supreme Court Committee on Model Criminal Jury Charges on the Revisions to the Identification Model Charges*, (2012) [hereinafter “*Report on Model Criminal Jury Charges*”], <http://www.judiciary.state.nj.us/criminal/ModelCrimJuryChargeCommHENDERSONREPORT.pdf> (drafting new jury instructions give scientific research on eyewitness testimony); see also Derek Simonsen, Comment, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 MD. L. REV. 1044, 1082 (2011) (using instructions to educate jurors on factors affecting eyewitness testimony).

⁴ See Hon. Robert J. Kane et al., *Report and Recommendation to the Justices, Supreme Judicial Court Study Group on Eyewitness Evidence*, [hereinafter “*Report and Recommendation*”], 1 (2013), http://www.macdl.com/Resources/Documents/SJC_Report_on_Eyewitness_Evidence_and_Proposed_Jury_Instructions_and_Procedures_on_EyeWitness.pdf (drafting new jury

The purpose of this note is to evaluate the recommended jury instructions on how to approach eyewitness testimony, drafted by the SJC study group.⁵ Part I of this note will provide a history on Massachusetts' approach to eyewitness testimony, focusing on the techniques utilized by attorneys, as well as examining the jury instructions used in those cases.⁶ Given that Massachusetts used New Jersey as a guide when it drafted its new jury instructions, Part I will also explore New Jersey's revised jury instructions, which incorporate scientific developments concerning eyewitness testimony.⁷ Part II will explore the recommendations made by the SJC study group, focusing on the recommended jury instructions.⁸ Part

instructions with scientific research on eyewitness testimony).

⁵ See *infra* Part IV.

⁶ See *infra* Part II; see also *State v. Guilbert*, 49 A.3d 705, 760 (Conn. 2012) (explaining attorneys use cross-examination, closing argument, and jury instructions to help jurors spot mistaken identifications); *State v. McClendon*, 730 A.2d 1107, 1116 (Conn. 1999) (explaining defense counsel explored weakness in eyewitness identification during cross-examination); *State v. Kemp*, 507 A.2d 1387, 1390 (Conn. 1986) ("The weaknesses of identifications can be explored on cross-examination and during counsel's final arguments to the jury."). But see Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1277 (2005) (concluding cross-examinations not effective if witness believes he or she is telling the truth).

⁷ See *infra* Part I; see also *Henderson*, 27 A.3d at 925-26 (revising jury instructions, reflecting on current scientific research on eyewitness testimony); *Report on Model Criminal Jury Charges*, *supra* note 3, at 1 (drafting new jury instructions with scientific research on eyewitness testimony). In response to the scientific literature on eyewitness identification, the committee drafted "identification model jury charges" that reflected all variables affecting accurate identifications. *Report on Model Criminal Jury Charges*, *supra* note 3, at 2. The recommendations relied on the variables found by the New Jersey Supreme Court in *State v. Henderson*, which include: stress, weapon focus, duration, distance and lighting, witness characteristics, characteristics of predator, memory decay, race-bias, private actors, speed of identification, and juror understanding. *Id.*; see also *Henderson*, 27 A.3d at 904-11 (listing estimator variables "beyond the control of the criminal justice system").

⁸ See *infra* Part II; *Report and Recommendation*, *supra* note 4, at 41 (reviewing law review articles, emerging case law, and scientific research on eyewitness testimony). The study group found, as the New Jersey court also found, that variables, such as police conduct, out of court identifications, and what jury charges say regarding eyewitness evidence, affect the accuracy and reliability of eyewitness testimony. See *Report and Recommendation*, *supra* note 4, at 41 (detailing findings of the study group). The study group made five recommendations that, moving forward, would best assist courts when handling and evaluating eyewitness testimony. *Id.* at 2-5. First, the study group recommended that "the Court take judicial notice as legislative facts of the modern psychological principles regarding eyewitness memory set out in *State v. Lawson*, 352 Or. 724, 769-789 (2012)." *Id.* at 2. Second, it recommended "that uniform statewide procedures should be adopted to ensure that all Massachusetts police departments employ best practices on eyewitness identification procedures." *Id.* Third, it recommended that Massachusetts courts have a more active role in pretrial hearings to decide whether eyewitness identification evidence should be admitted. *Id.* at 3. Fourth, it recommended a revision of Massachusetts jury instructions. *Id.* at 3-4. Fifth, it recommended that in instruct jurors the following way: "[i]n evaluating the identification testimony, you must determine whether it is both (1) truthful and (2) accurate." *Id.* at 118.

III will analyze these proposed jury instructions and assess whether or not the SJC should adopt them by looking at the burdens these instructions place on attorneys, the courts and the criminal justice system overall.⁹ Part III will conclude with recommendations for the proposed jury instructions that will account for these burdens, while still ensuring that juries make the right call with eyewitness testimony.¹⁰

I. A LOOK BACK AT MASSACHUSETTS' ASSESSMENT OF EYEWITNESS TESTIMONY

Unreliable eyewitness testimony has traditionally been defeated through cross-examinations, closing arguments, and generalized jury instructions.¹¹ Courts, however, have recognized that these traditional

⁹ See *infra* Part III; see also *Comments on the Report of the Supreme Judicial Court Study Group on Eyewitness Evidence*, [hereinafter "*Eyewitness Evidence Report Comments*"], <http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-comments.pdf> (compiling letters from practitioners commenting on recommendations). Many of the comments made about the jury instructions focused on the incompleteness of the instructions. See *Eyewitness Evidence Report Comments, supra*, at Letter from Anthony J. Benedetti, Chief Counsel for CPCS, to Christen P. Burak, Legal Counsel to the Chief Justice (November 26, 2013) (criticizing recommended jury instructions). For example, the Committee for Public Counsel Services comments that the proposed instructions do not include language addressing when police fail to follow "Best Police Practices" when dealing with identification procedures. *Id.* They offer instructions, which includes language derived from *Commonwealth v. Bowden*, 399 N.E.2d 482, 491 (Mass. 1980), explaining to the jury that they can take into consideration that the police did not follow the "Best Police Practices" when deciding if the prosecution has proven beyond a reasonable doubt that the defendant was, in fact, the person who committed the crime. *Id.* Judges have also written to the SJC Study Group to voice their discomfort with having to instruct the jury on how memory generally works. See *Eyewitness Evidence Report Comments, supra* note 9, at Letter from Associate Justice Douglas H. Wilkins, Superior Court, to Christine Burak, Esq., (November 26, 2013) (voicing discomfort with instructing jurors on how memory works). See also Simmons, *supra* note 3, at 1091 (using instructions to educate jurors on factors affecting eyewitness testimony). Moreover, these recommended instructions favor the prosecution because they signal circumstances under which eyewitness testimony tends to be more reliable. *Id.* But see Bornstein & Hamm, *supra* note 3, at 49 (explaining instructions about factors affecting eyewitness testimony tend to decrease influence testimony has on jurors).

¹⁰ See *infra* Part III.

¹¹ See *United States v. Smith*, 122 F.3d 1355, 1358 (11th Cir. 1997) (holding cross-examination sufficient); *United States v. Larkin*, 978 F.2d 964, 971 (7th Cir. 1992) (noting counsel's "ample opportunity" to discuss eyewitness identification hazards and "cast[ing] doubt upon . . . eyewitness identification"); *Jackson v. Ylst*, 921 F.2d 882, 886 (9th Cir. 1990) (holding cross-examination sufficient); *Moore v. Tate*, 882 F.2d 1107, 1111 (6th Cir. 1989) (same); *United States v. Christophe*, 833 F.2d 1296, 1300 (9th Cir. 1987) (same); *State v. Guilbert*, 49 A.3d 705, 719 (Conn. 2012) (protecting criminal defendants from unreliable eyewitness testimony through cross-examination, closing argument, and jury instructions); *State v. Kemp*, 507 A.2d 1387, 1390 (Conn. 1986) (same); Garrett L. Berman et al., *Effects of Inconsistent Eyewitness Statements on Mock-Jurors' Evaluations of the Eyewitness, Perceptions of Defendant Culpability and Verdicts*, 19 L. & HUM. BEHAV. 79 (1995) (illustrating effectiveness of cross-examination). But see *United*

techniques are not reliable in helping juries spot mistaken identifications.¹² Generalized jury instructions are not helpful because they do not effectively explain eyewitness testimony may be unreliable.¹³ Massachusetts' current jury instructions fail to address how certain variables, like stress, and racial and ethnic differences between the perpetrator and the witness, can affect the accuracy of an eyewitness testimony.¹⁴

The SJC revised Massachusetts' jury instructions after the judiciary in New Jersey revised instructions to reflect the current science behind eyewitness testimony.¹⁵ In *State v. Henderson*,¹⁶ the New Jersey Supreme Court revisited the legal standard to be used when analyzing eyewitness

States v. Jones, 762 F. Supp. 2d 270, 277 (D. Mass. 2010) (explaining ineffectiveness of cross-examination when jury uses incorrect assumptions to analyze evidence).

¹² See *Ferensic v. Birkett*, 501 F.3d 469, 482 (6th Cir. 2007) (explaining, without expert eyewitness testimony, jury only has defense counsel's word stating testimony is unreliable); *Jones*, 762 F. Supp. 2d at 277 ("[C]ross-examination of the eyewitnesses will have little effect on jurors if they analyze the evidence through their common-sense, often incorrect assumptions. For example, if jurors incorrectly assume that in general, high levels of stress enhance a witness's ability to remember a suspect, they will not be persuaded by defense counsel's efforts to establish that the witness was under a high level of stress during an encounter with the suspect."); *Guilbert*, 49 A.3d at 725 ("As a result of this strong scientific consensus, federal and state courts around the country have recognized that the methods traditionally employed for alerting juries to the fallibility of eyewitness identifications . . . frequently are not adequate to inform them of the factors affecting the reliability of such identifications."); *State v. Clopten*, 223 P.3d 1103, 1110 (Utah 2009) (explaining cross-examinations ineffective when witnesses believe they are telling truth); see also Lisa Dufrainmont, *Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?*, 33 QUEEN'S L.J. 261, 287 (2008) (explaining traditional tools do not educate jurors about potential defects of eyewitness testimony); Jennifer L. Overbeck, Note, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U.L. REV. 1895, 1905 (2005) ("Yet even the most skillful cross-examination might not effectively expose inaccurate eyewitness identifications.").

¹³ See *Guilbert*, 49 A.3d at 726-27 (clarifying general term jury instructions less effective than expert testimony for eyewitness testimony); *Clopten*, 223 P.3d at 1110 ("Subsequent research, however, has shown that a cautionary instruction does little to help a jury spot a mistaken identification. While this result seems counterintuitive, commentators and social scientists advance a number of convincing explanations . . . [E]ven the best cautionary instructions tend to touch only generally on the empirical evidence. The judge may explain that certain factors are known to influence perception and memory, but will not explain how this occurs or to what extent. As a result, instructions have been shown to be less effective than expert testimony."); Peter J. Cohen, *How Shall They Be Known?* *Daubert v. Merrell Dow Pharmaceuticals and Eyewitness Identification*, 16 PACE L. REV. 237, 273 (1996) (arguing jury instructions listing factors affecting misidentification, but not explaining them, is not effective).

¹⁴ See *Report and Recommendation*, *supra* note 4, at 54 (discussing problems with jury instructions); see also *Commonwealth v. Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997) (holding language about witness' confidence should be omitted from jury instructions); *Commonwealth v. Rodriguez*, 391 N.E.2d 889, 892-93 (Mass. 1979) (concluding error in jury instructions for not warning against victim potentially being wrong).

¹⁵ See *Report and Recommendation*, *supra* note 4, at 54 (following New Jersey's approach).

¹⁶ 27 A.3d 872 (N.J. 2011).

identifications.¹⁷ Larry Henderson stood on trial for the murder of Rodney Harper, who was shot on the morning of January 1, 2003, in an apartment in Camden, New Jersey.¹⁸ During Henderson's trial, James Womble identified Henderson as one of two men who forcibly entered Harper's apartment.¹⁹ At trial, problems surrounding Womble's identification of the defendant were revealed, including the fact that investigators pressured him to make a positive identification.²⁰ During trial, and after determining that the identification testimony was admissible, certain facts came out that were relevant to the identification, including that:

Womble had smoked crack cocaine with his girlfriend . . . before the shooting; the two also consumed one bottle of champagne and one bottle of wine; the lighting was "pretty dark" in the hallway where Womble and the defendant interacted; . . . and Womble remembered looking at the gun pointed at his chest.²¹

Womble furthered explained that while he was "drawing a blank" when he first looked at photos during the identification procedure, he was "nonetheless 'sure' of the identification" and testified that he had helped police retrieve shell casings from the shooting that day.²² At the end of the trial, the court relied on existing jury instructions regarding eyewitness testimony.²³ The defendant was acquitted of murder, but the decision was

¹⁷ *Id.* at 877.

¹⁸ *Id.* at 879-80.

¹⁹ *See id.* at 879-82 (identifying Henderson as the man who pointed a gun at him while at Harper's apartment).

²⁰ *Id.* at 881-84.

²¹ *See Henderson*, 27 A.3d at 882-83 ("Womble also admitted smoking about two bags of crack cocaine each day from the time of the shooting until speaking with police ten days later.")

²² *Id.*

²³ *Id.* at 882-83. At the close of trial on July 20, 2004, the court relied on the existing model jury charge on eyewitness identification and instructed the jury as follows:

[Y]ou should consider the observations and perceptions on which the identification is based, and Womble's ability to make those observations and perceptions. If you determine that his out-of-court identification is not reliable, you may still consider Womble's in-court identification of Gregory Clark and Larry Henderson if you find that to be reliable. However, unless the identification here in court resulted from Womble's observations or perceptions of a perpetrator during the commission of an offense rather than being the product of an impression gained at an out-of-court identification procedure such as a photo lineup, it should be afforded no weight. The ultimate issues of the trustworthiness of both in-court and out-of-court identifications are for you, the jury to decide.

To decide whether the identification testimony is sufficiently reliable evidence . . . you may consider the following factors:

reversed on appeal.²⁴ The Supreme Court of New Jersey remanded the case to evaluate the validity of the eyewitness testimony and appointed the Honorable Geoffrey Gaulkin to evaluate the scientific research, and other evidence about eyewitness testimony.²⁵

The *Henderson* court held that the current legal standard had to be revised because it did not “offer an adequate measure for reliability, or sufficiently deter inappropriate police conduct . . . [and] overstate[d] the jury’s intent ability to evaluate [identification] evidence.”²⁶ In the revised jury instructions, the court explained what factors can make an eyewitness testimony less reliable.²⁷ Those factors included the stress the eyewitness was under during the crime, the duration of the crime or event, lighting,

First of all, Womble’s opportunity to view the person or persons who allegedly committed the offense at the time of the offense; second, Womble’s degree of attention on the alleged perpetrator when he allegedly observed the crime being committed; third, the accuracy of any prior description of the perpetrator given [b]y Womble; fourth, you should consider the fact that in Womble’s sworn taped statement of January 11th, 2003 to the police . . . , Womble did not identify anyone as the person or persons involved in the shooting of Rodney Harper

Next, you should consider the degree of certainty, if any, expressed by Womble in making the identification. . . .

You should also consider the length of time between Womble’s observation of the alleged offense and his identification You should consider any discrepancies or inconsistencies between identifications

Next, the circumstances under which any out-of-court identification was made including in this case the evidence that during the showing to him of eight photos by Detective Weber he did not identify Larry Henderson when he first looked at them and later identified Larry Henderson from one of those photos.

. . . . You may also consider any other factor based on the evidence or lack of evidence in the case which you consider relevant to your determination whether the identification made by Womble is reliable or not.

Defendant did not object to the charge or ask for any additional instructions related to the identification evidence presented at trial.

Id.

²⁴ *Id.* at 883-84.

²⁵ *See id.* at 884 (remanding case and ordering an evaluation of current admissibility test for eyewitness testimony).

²⁶ *Henderson*, 27 A.3d at 878.

²⁷ *Id.* at 904-10; *see Report on Model Criminal Jury Charges*, *supra* note 3, at 6 (acknowledging factors, like memory decay, affecting reliability). References to social science studies and scientific research are not part of the new jury charge because it could increase the chances of misidentification. *Report on Model Criminal Jury Charges*, *supra* note 3, at 6. The committee explained that “if the lighting is bad the charge does not need to state that the ‘science shows’” *Id.* The committee recognized, however, that references to the variables affecting eyewitness identification should still be part of the instructions. *Id.* at 5. In *State v. Cromedy*, 158 N.J. 112 (1999), cross-racial identification served as basis for the jury charge used in the case without actually referencing the social science studies on cross-racial identification. *Id.* at 6. “The Committee decided to include that ‘memory is not like a video recording’ and that ‘human memory is far more complex.’” *Id.* at 9.

distance, the eyewitness's focus on a weapon, and cross-racial identification.²⁸ The revised instructions also asked jurors to consider the police procedures that were used to identify the defendant, including photo lineups and suggestions or gestures made by police officers to indicate a specific defendant.²⁹

The goals of the new jury instructions were "to protect the rights of criminal defendants from police misconduct and uninformed jurors, while allowing the prosecution to introduce relevant evidence at trial."³⁰ Studies show, however, that the new jury instructions proposed in *Henderson* are still not very effective in educating and guiding jurors.³¹ The instructions instead make jurors skeptical about eyewitness testimony and as a result,

²⁸ See sources cited *supra* note 27. The committee and the *Henderson* court found that "[e]ven under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification." *Report on Model Criminal Jury Charges, supra* note 3, at 15. Moreover, "[t]he presence of a weapon can distract the witness and take the witness' attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of a subsequent identification." *Id.* at 17. The amount of time a witness had to observe an event has an effect on the accuracy of his or her identification, as well as the lighting, and these are reflected in the committee's revised instructions. *Id.* at 18-21. They also noted that it is important to consider the condition of the witness during the incident, and to be wary of identification given under the influence of drugs or alcohol. *Id.* at 22-24. The committee also included language that stated that confidence in an identification alone may not be an indication of reliability. *Id.* at 28-29. They also observed and included in the instructions that people in general have great difficulty accurately identifying members of a different race. *Id.* at 32-33.

²⁹ See *Henderson*, 27 A.3d at 878 (presenting revised jury instructions). The court in *Henderson* and the committee found that mistaken identifications during photo lineups occur when the suspect stands out from the other people in the lineup, when there are not enough people in the lineup, or when they feature more than one suspect. See *id.* at 897-98 (discussing faults in photo lineups); *Report on Model Criminal Jury Charges, supra* note 3, at 38-39. Therefore, the committee included language explaining that an identification made during faulty lineup is not very reliable. See *Report on Model Criminal Jury Charges, supra* note 3, at 39 (analyzing issues with lineups).

³⁰ See Jacob L. Zerkle, Note, *I Never Forget a Face: New Jersey Sets the Standard in Eyewitness Identification Reform*, 47 VAL. U. L. REV. 357, 387 (2012) (proposing each state adopt modified version of New Jersey's approach for eyewitness testimony); see also *Henderson*, 27 A.3d at 914 (explaining judiciary's role in ensuring Constitutional requirements and "ensur[ing] the integrity of criminal trials."). Many states have taken note of the new scientific developments with eyewitness identification, and have implemented changes to their eyewitness identification procedures. *Id.* This includes changes to police protocol regarding photo array and lineup procedures. *Id.*

³¹ See Athan P. Papailiou et al., *The Novel New Jersey Eyewitness Instruction Induces Skepticism But Not Sensitivity*, ARIZ. LEGAL STUD. DISCUSSION PAPER NO. 14-17, 8-9 (December 2015), <http://ssrn.stanford.edu/delivery.php?ID=854006004112116115064016023075109069053032069011093069025100064025001116086106069006030110036003123013013080099091006118115107028051002032011070092083029070009077026060014118024069066122097065101117118090027095119025072099110003120073023024080073084&EXT=pdf>. (finding jury instructions did not aid jurors because jurors discounted "weak" and "strong" testimony equally).

jurors are dismissing strong evidence just as much as weak evidence.³² The New Jersey instructions place burdens on law enforcement, the court, and prosecutors because they require more training for law enforcement, burden courts with more evidentiary hearings to determine the reliability of the eyewitness testimony, and the instructions themselves favor defendants.³³ The decision places a burden on law enforcement because in order to implement the recommendations, additional training would be required.³⁴ Furthermore, pretrial hearings to determine the reliability of the eyewitness identification—as suggested by the recommendations—will burden courts if in every criminal case involving eyewitness testimony the court would have to spend more of its limited time and resources.³⁵

Many courts have considered following New Jersey's approach, including Massachusetts.³⁶ Massachusetts courts have recognized that a number of wrongful convictions were due to unreliable eyewitness identification.³⁷ However, the judiciary has expressed that even with the

³² See *id.* at 2-3 (finding jury instructions did not aid jurors).

³³ See Zerkle, *supra* note 30, at 390 (describing burdens placed on courts and law enforcement). The State argued that because eyewitness identification science is probabilistic, "meaning that it cannot determine if a particular identification is accurate[.]" the courts should rely on jurors to determine the credibility of an eyewitness testimony. See *Henderson*, 27 A.3d at 915 (suggesting flexible instructions for guiding juries in assessing credibility).

³⁴ See Zerkle, *supra* note 30, at 390-91 (requiring training for officers if instructions are implemented). However, the burden is diminished, given the higher interest to acquire accurate identifications. *Id.*

³⁵ See *id.* at 394 (describing an increase in court proceedings if instructions are implemented).

³⁶ See *People v. Brown*, No. 1-12-1480, 2014 Ill. App. Unpub. LEXIS 483, at *14 (Ill. App. Ct. March 14, 2014) (refusing to consider studies used by *Henderson* court); *Batiste v. State*, 121 So. 3d 808, 855 n.7 (Miss. 2013) (declining to adopt standards set forth in *Henderson* for eyewitness testimony); *State v. Ranzy*, No. 97275, 2012 Ohio App. LEXIS 2424, at *10 (Ohio Ct. App. June 21, 2012) (declining to follow *Henderson* because it is not Ohio law); *State v. Allen*, 294 P.3d 679, 684 (Wash. 2013) (declining to follow *Henderson*); see also Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 726 (2013) (considering eyewitness identification one of "suspect evidentiary categories" causing wrongful convictions); Dana Walsh, Note, *The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness*, 36 B.C. INT'L & COMP. L. REV. 1415, 1416-17 (2013) (arguing states should have greater protection against unreliable eyewitness testimony); *Report and Recommendation*, *supra* note 4, at 1 (analyzing New Jersey's approach).

³⁷ See *Commonwealth v. Walker*, 953 N.E.2d 195, 208 n.16 (Mass. 2011) (acknowledging eyewitness identification "greatest source of wrongful convictions"); *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1261 (Mass. 1995) ("[M]istaken identification is believed widely to be the primary cause of erroneous convictions."); see generally *Report and Recommendation*, *supra* note 4, at 6-8 (discussing consensus on fallibility of eyewitness identification); Walsh, *supra* note 36, at 1420-21 (reviewing changes through the years in evaluation of eyewitness testimony); Robert Couch, Comment, *A Model for Fixing Identification Evidence After Perry v. New Hampshire*, 111 MICH. L. REV. 1535, 1537 (2013) (discussing impact of DNA analysis on

risk of wrongful identification, eyewitness testimony continues to be an invaluable law enforcement tool in obtaining convictions.³⁸ Therefore, in the fall of 2011, the SJC, assembled the Study Group on eyewitness identification to “offer guidance as to how our courts can most effectively deter unnecessarily suggestive identification procedures and minimize the risk of a wrongful conviction.”³⁹ The SJC appointed the Honorable Robert J. Kane, Associate Justice of the Superior Court Department, as Chair of the Study Group.⁴⁰ Judge Kane, along with other judges, prosecutors, defense attorneys, law enforcement personnel, and academics experienced in matters of criminal law and procedure, researched the current practice in Massachusetts when dealing with eyewitness testimony.⁴¹ In three

perception of eyewitness reliability).

³⁸ See *Walker*, 953 N.E.2d at 208 n.16 (asserting eyewitness identification continues invaluable tool for law enforcement); see generally *Commonwealth v. Raedy*, 862 N.E.2d 456, 463 (Mass. App. Ct. 2007) (quoting *Commonwealth v. Le*, 828 N.E.2d 501, 509 (Mass. 2005)) (“‘Prior identification evidence is of substantive value, even in the absence of any in-court identification, because it has occurred under nonsuggestive circumstances and closer in time to the offense,’ when there is less chance that the identification has been influenced by fading memories or any sort of outside pressure on the witness.”); *Commonwealth v. Adams*, 941 N.E.2d 1127, 1132 (Mass. 2011) (explaining eyewitness testimony identifying defendant admissible even when not made during identification procedures); Travis Andersen & Martin Finucane, *Jury Instructions on Eyewitness Testimony Updated*, BOS. GLOBE, Jan. 12, 2015, <http://www.bostonglobe.com/metro/2015/01/12/high-court-changes-jury-instructions-eyewitness-testimony-reflect-latest-science/Qo8FfCTeMeGrkYpKRYPRbL/story.html> (“‘Naturally, we’re always looking to make our evidence stronger, but eyewitness evidence is very familiar ground for police and prosecutors in Boston and Suffolk County.’” (quoting Jay Wark, spokesman for Suffolk County D.A. Dan Connelly)).

³⁹ See *Report and Recommendation*, *supra* note 4, at 1 (quoting letter from Chief Justice Roderick L. Ireland to Superior Court Chief Justice Barbara J. Rouse, October 17, 2011).

⁴⁰ *Id.*

⁴¹ See *id.* at 53-54 (“Massachusetts’s instructions, like the instructions of many other State and Federal courts, are based on the model instruction in *United States v. Telfaire*, 469 F.2d 552, 559-559 (D.C. Cir. 1972), which the Supreme Judicial Court adopted in *Commonwealth v. Rodriguez*, 378 Mass. 296, 310 (1979), and modified in *Commonwealth v. Cuffie*, 414 Mass. 632, 640 (1993), and *Commonwealth v. Santoli*, 424 Mass. 837, 845 (1997) (omitting language about witness’s confidence). The supplemental charge on good faith or honest mistake in identification is set forth in *Commonwealth v. Pressley*, 390 Mass. 617, 620 (1983).”); see also *Commonwealth v. Santoli*, 680 N.E.2d 1116, 1121 (1997) (“In the future, however, the significance, if any, of a witness’s confidence in an identification should be left to cross-examination and to argument of counsel and should not, in the normal course, be a subject of a jury instruction.”). The jury instructions specifically examined by the SJC were those used in *Commonwealth v. Cuffie*, 609 N.E.2d 437 (Mass. 1993), which were later modified by *Santoli*, striking the phrase “take into account . . . the strength of the identification.” See *Santoli* 680 N.E.2d at 1121 (omitting phrase “take into account . . . the strength of the identification” from instructions); *Report and Recommendation*, *supra* note 4, at 53-54 (discussing the origin and scope of the current Massachusetts jury instructions). The instructions read as follows:

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of proving identity,

subcommittees, the study investigated how Massachusetts and other jurisdictions approached three important areas to eyewitness testimony: police practices, hearings, and jury instructions.⁴² The committees also

beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight – but this is not necessarily so, and he may use other senses.

Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care.

You may also consider the length of time that lapsed between the occurrence of the crime and the opportunity of the witness, sometime after the occurrence of the crime, to see and identify the defendant as the offender, as a factor bearing on the reliability of the identification.

You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.

You may take into account any occasions in which the witness failed to make an identification of the defendant, or made an identification that was inconsistent with his identification at trial.

Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

Cuffie, 609 N.E.2d at 441-42.

⁴² See *Report and Recommendation*, *supra* note 4, at 1 (dividing into three subcommittees to

researched the developing science behind eyewitness testimony by looking at “over 2,000 published studies” conducted on eyewitness identification.⁴³

During their investigation, the study group found that Massachusetts’ practice required significant revision.⁴⁴ The study group found that several factors affect the reliability of eyewitness testimony.⁴⁵ These factors include distance and lighting, duration of the event, condition and characteristics of the witness, (including mental condition and age, stress, weapon focus, alcohol), disguise worn by the perpetrator, distinctive features, cross-racial/cross ethnic identification, unconscious transferee, and memory decay.⁴⁶ Taking these findings into consideration, the study

examine current practice with eyewitness evidence).

⁴³ See *id.* at 15 (discussing research of eyewitness identification and memory).

⁴⁴ See *id.* at 9 (finding Massachusetts’ jury instructions insufficient, given the developing science behind eyewitness identification).

⁴⁵ See *id.* at 6-7. The study group divided itself into three subcommittees: the Police Practices Subcommittee, the Hearing Subcommittee, and the Jury Instructions Subcommittee. *Id.* at 6. The members of these subcommittees took to examining current practices in their field. *Id.* at 7. They studied the practices not only in Massachusetts, but other states as well. *Id.* They looked also at:

[N]ational trends, academic research, and, if appropriate, national best practices; identifying and accounting for the effect of relevant variables, such as the type of identification procedure (e.g., photographic array, in-court identification) and the extent of the witness’s prior familiarity with the subject; coordinating activities where appropriate with other subcommittees; formulating conclusions and recommendations for Massachusetts that, among other things, take cognizance of overall benefits and drawbacks of each proposed approach, the impact on court workloads, and the challenges of representing poor defendants; and reporting to the entire Study Group.

Id. at 7.

⁴⁶ *Id.* at 27-32. The subcommittees found that the accuracy of an identification or face perception diminishes at 25 feet, even with 20/20 vision. *Id.* at 27. Poor lighting can also affect the accuracy of eyewitness identification, and witnesses typically do not estimate distances correctly. See *State v. Henderson*, 27 A.3d 872, 905 (N.J. 2011); Lindsay et al., *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy*, 32 LAW. & HUM. BEHAV. 526, 533 (2008). Duration of an event, specifically how much time the witness had to actually look at the perpetrator, affects how accurate their identification is, but there is no consensus about how much time is needed to observe an accurate identification. *State v. Lawson*, 291 P.3d 673, 702 (Or. 2012). Condition and characteristics of the witness, meaning their age and physical characteristics like intoxication, may affect the accuracy of their identification. *Id.* at 773-75. Furthermore, “[i]n assessing eyewitness reliability, it is important to consider not only what was within the witness’s view, but also on what the witness was actually focusing his or her attention.” *Id.* at 687. “A person’s capacity for processing information is finite, and the more attention paid to one aspect of an event decreases the amount of attention available for other aspects.” *Id.* Stress during an event can also affect the accuracy of an identification, and high levels of stress that may affect accuracy are determined on a case by case basis. See *id.* at 700; *Henderson*, 27 A.3d at 904. When a weapon is involved, it may distract the eyewitness and take his focus away from the perpetrator to the weapon and diminish the accuracy of the identification. *Henderson*, 27 A.3d at 904-05; *Lawson*, 291 P.3d. at 701-02. Disguises worn by the perpetrator

group made the recommendation that Massachusetts revise its jury instructions on eyewitness testimony.⁴⁷

II. AN OVERVIEW OF THE RECOMMENDED JURY INSTRUCTIONS

The fourth recommendation of the study group called for a revision

and/or alterations made to the perpetrators features between the time of the incident and the identification procedure may the decrease its accuracy. *Lawson*, 291 P.3d. at 703; *Henderson*, 27 A.3d at 907; Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 CARDOZO PUB. L. POL'Y, & ETHICS J. 327, 332 (2006); K.E. Patterson and A.D. Baddeley, *When Face Recognition Fails*, 3 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 406, 410, 414 (1977). “Th[e] process, known as ‘unconscious transference,’ can . . . occur when a witness confuses a person seen at or near the crime scene with the actual perpetrator.” *Report and Recommendation*, *supra* note 4, at 31. “Memory fades with time” and the longer the witness waits to identify the perpetrator, the less accurate the identification will be. *Henderson*, 27 A.3d at 907.

⁴⁷ See *Report and Recommendation*, *supra* note 4, at 27-117. The first recommendation of the study group urged that “the Court take judicial notice as legislative facts of the modern psychological principles regarding eyewitness memory set out in *State v. Lawson*, 352 Or. 724, 769-789 (2012).” *Id.* at 2. The second recommendation stated “that uniform statewide procedures should be adopted to ensure that all Massachusetts police departments employ best practices on eyewitness identification procedures.” *Id.* Additionally, the study group acknowledged that some procedures can inadvertently affect a witness when trying to make an accurate identification and recommended general basic practices, including written policy on eyewitness testimony, separating witnesses to prevent them from comparing what they remembered, best practices for showups, and best practices for photo arrays and lineups. *Id.* at 2-3; see Walsh, *supra* note 36 at 1429 (arguing states should have greater protection against unreliable eyewitness testimony); Steven J. Joffe, Comment, *Long Overdue: Utah’s Incomplete Approach to Eyewitness Identification and Suggestions for Reform*, 2010 UTAH L. REV. 443, 447-49 (2010) (arguing police procedure may influence witness’s identification). In its third recommendation, the study group suggested that Massachusetts courts take a more active role in the process and allow for pretrial hearings to determine the quality/fitness of the eyewitness testimony expected to be introduced at trial. *Report and Recommendation*, *supra* note 4, at 3. The defendant must prove to the court, not a jury, by a preponderance of the evidence that the testimony is unreliable. See *id.* (establishing standard). Under the fourth recommendation, the study also group recommended a revision of the Massachusetts jury instructions. *Id.* at 3-4. In its fifth and final recommendation, the group stated that if the recommendations are adopted, either in whole or in part, the SJC must:

[C]reate a Standing Committee or Committees on Eyewitness Identification in order to develop professional training for judges and attorneys on the new procedures, to ascertain the effect that adopted recommendations will have on criminal adjudications, and to monitor developments in the science that may require modification of eyewitness identification procedures and protocols from time to time.

Report and Recommendation, *supra* note 4, at 4. These recommendations face criticisms from current attorneys and judges in Massachusetts. See *Eyewitness Evidence Report Comments*, *supra* note 9, at Letter from Richard M. Page, Jr., Executive Director of the Boston Bar Association, to Christine P. Burak, Esq., Legal Counsel to the Chief Justice (Feb. 19, 2014) (criticizing jury instructions on multiple grounds).

of the Massachusetts jury instructions.⁴⁸ The study group found that given the current scientific development with regards to eyewitness testimony, the current jury instructions were inadequate.⁴⁹ The study group drafted a detailed set of jury instructions that explain, in plain language, why certain eyewitness testimonies are unreliable.⁵⁰ The recommendation includes a pre-charge that would be given in all cases with eyewitness identification, as well as final instructions.⁵¹ The pre-charge would “be given before opening statements in all cases in which there is an eyewitness identification.”⁵² The pre-charge explains that memory is not like a videotape but is actually more complex because of the different variables that can affect the accuracy of the identification.⁵³

The final instructions elaborate further from the pre-charge and explain to the jury that “[i]n evaluating the identification testimony, [they] must determine whether it is both (1) truthful and (2) accurate.”⁵⁴ The instructions further elaborate on how memory works and what factors to

⁴⁸ See *Report and Recommendation*, *supra* note 4, at 4 (incorporating scientific information on eyewitness identification into the jury instructions).

⁴⁹ See *id.* at 3-4 (concluding current jury instructions inadequate and drafting revised instructions).

⁵⁰ *Id.* at 2.

⁵¹ *Id.* at 117-18.

⁵² See *Report and Recommendation*, *supra* note 4, at 117 (incorporating scientific information on eyewitness identification into the jury instructions). The precharge reads as follows:

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

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

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

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

Id.

⁵³ *Id.*

⁵⁴ See *Report and Recommendation*, *supra* note 4, at 118 (aiding juries by explaining factors associated with memory).

consider when determining the accuracy of identification.⁵⁵ The instructions explain that people remember events or individuals in three stages; first, acquiring the information; second, storing the information; and third, forming a memory from the information stored.⁵⁶ There are different factors that affect how accurate and complete we acquire the information, including “the witness’s opportunity to observe an event or a person . . . the amount of time a witness had to observe a person or an event . . . the degree to which the witness is focused on an event or a person[.]” and whether the information is acquired under stress.⁵⁷ The study group also included

⁵⁵ See *id.* at 118-29 (explaining how to evaluate identification by considering if the testimony is truthful and accurate). The group explained that:

[w]ith respect to whether the identification is truthful, you must consider the credibility of each identification witness in the same way as any other witness and decide whether or not the person is telling the truth.

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

Id. at 118.

⁵⁶ See *Report and Recommendation*, *supra* note 4, at 119 (outlining steps of memory formation).

⁵⁷ *Id.* at 119-20. The group explained these stages as follows:

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

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

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

Another factor to consider about the acquisition of information is the amount of time a witness had to observe a person or an event. There is no minimum time required to make an accurate identification, but a brief or fleeting contact is less likely to produce an accurate identification than a longer exposure to the person who committed the crime. In addition, a witness’s time estimate may not be accurate because witnesses tend to think events last longer than they actually did.

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

supplemental instructions that should be given when a crime involves a weapon, alcohol, hidden or altered features, distinctive facial features, cross-racial/cross ethnicity, or if the witness knew the defendant or had prior contact with the defendant.⁵⁸

After the event has occurred, the second stage of memory perception is the storage of the information.⁵⁹ The third stage is actually forming the memory and this “involves assembling an account of an event

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

Id.

⁵⁸ See *Report and Recommendation*, *supra* note 4, at 120-21 (drafting fact specific jury instructions). If there is a weapon involved, the judge would provide the following additional instruction to the jury:

Another factor to consider about the acquisition of information is whether the witness saw a weapon during the incident. A weapon can distract the witness and take the witness's attention away from the perpetrator's face, particularly if the weapon is directed at the witness. As a result, if the crime is of short duration, the presence of a visible weapon may reduce the accuracy of an identification. In longer events, this distraction may decrease as the witness adapts to the presence of the weapon and focuses on other details.

Id. at 130.

⁵⁹ See *Report and Recommendation*, *supra* note 4, at 121. The study group explained in detail the second and third stages of memory:

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

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

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

Id. at 121-22.

or a person from the information stored in our minds.”⁶⁰ Factors that affect these three stages include memory loss, the amount of time between the event and the identification, if a witness is exposed to opinions or descriptions, or any other information that could influence the identification.⁶¹ “The way that an identification procedure is conducted

⁶⁰ See Report and Recommendation, *supra* note 4, at 121 (explaining third stage of memory).

⁶¹ See *id.* at 122 (discussing factors affecting storage of information). The report continued to discuss important factors which help form memory:

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

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

Id. at 122-23. Based on the circumstances of the case, the judge will pick and choose what additional instructions are appropriate. See *id.* at 123 (“I will now instruct you on the specific identification procedure(s) used in this case.”). For example, if the eyewitness identified the defendant during a line up, the following instruction is given:

In this case, a witness identified the defendant during a lineup.

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

1. Lineups should contain at least five fillers. A filler is someone who is not a suspect. The fillers should be based on their similarity to the witness’s description of the offender, not to the appearance of the suspect. The police should not repeat fillers with the same witness from one lineup to the next.
2. Officers must ensure that nothing about the suspect makes him stand out. Where the suspect stands out, the witness’s confidence may be inflated because the selection process seemed so easy to the witness.
3. When conducting a lineup, the police should use a technique that will ensure that no investigator present will know when the witness is viewing the suspect in the lineup. The preference is for the police to have an officer who does not know who the suspect is administer the lineup.
4. Police officers should conduct lineups by showing the suspect and fillers sequentially, meaning that the participants should be shown to the witness one at a time in a random order.
5. Witnesses who ask to see a lineup a second time should be shown the entire lineup, but no more than for a second time.
6. The order of the photos should be changed if there is a time gap between showings to multiple witnesses.

Another factor to consider is what the police told the witness about the lineup

can affect the accuracy of an identification.”⁶² These include show-up, photo array, and lineups.⁶³

procedure.

Before conducting the lineup, the police should tell the witness the following:

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

Id. at 126-28.

⁶² *Id.* at 122.

⁶³ See Michael D. Cicchini & Joseph G. Easton, *Criminal Law: Reforming The Law On Show-Up Identifications*, 100 J. CRIM. L. & CRIMINOLOGY 381, 381-88 (2010) (“A show-up is an identification procedure in which, unlike in a lineup or photo array, the suspect is presented singly to the crime victim. Based on a positive identification, the prosecutor will then prosecute, and often convict, the defendant.”). If the identification involved a show-up, the committee suggests using the following instruction:

In this case, a witness identified the defendant during a “show-up,” that is, the defendant was the only person shown to the witness when the identification was made. In evaluating the identification that was made, one factor to consider is when the show-up was conducted. Showups conducted more than two hours after an incident tend to be less accurate than showups conducted within two hours of the incident.

Another factor to consider is how the showup was conducted. An appropriate show-up procedure conducted by the police should include the following:

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

Another factor to consider is what the police told the witness about the show-up

The recommended jury instructions differ from the current instructions in a variety of ways.⁶⁴ First, while the current instructions address some circumstances that make eyewitness testimony unreliable, like “the witness’s capacity and opportunity to observe the offender, the duration of the event,” and “duration of event”, the instructions fail to explain how these variables affect memory.⁶⁵ The current instructions also leave out other variables that have a significant effect on the reliability of eyewitness testimony, such as “stress, the perpetrator’s use of a weapon, and the racial or ethnic difference between the perpetrator and the witness.”⁶⁶ Finally, the current instructions fail to explain to the jury “the weak correlation between confidence and the accuracy of identification.”⁶⁷ The recommended instructions address the issues that the current instructions were silent on.⁶⁸

procedure. Before conducting a showup, the police should tell the witness the following:

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

Report and Recommendation, *supra* note 4, at 123-24.

⁶⁴ Compare *supra* note 41 (describing current Massachusetts jury instructions), with *supra* notes 47-58 (explaining recommended jury instructions, which include recent scientific information on memory).

⁶⁵ Compare *supra* note 41 (describing current Massachusetts jury instructions), with *supra* notes 47-58 (explaining recommended jury instructions, which include recent scientific information on memory).

⁶⁶ Compare *supra* note 41 and accompanying text (describing current Massachusetts jury instructions), with *supra* notes 47-58 (explaining recommended jury instructions, which include recent scientific information on memory).

⁶⁷ See *Report and Recommendation*, *supra* note 4, at 54 (detailing shortcomings of current jury instructions). Compare *supra* note 41 and accompanying text (describing current Massachusetts jury instructions), and *Report and Recommendation*, *supra* note 4, at 139 n.22 (noting no error in cases where instructing jury on weak correlation between confidence and accuracy), with *supra* notes 47-58 (explaining recommended jury instructions, which include recent scientific information on memory). But see Gary L. Wells & Elizabeth A. Olsen, Eyewitness Testimony, 54 ANN. REV. PSYCHOL. 277, 283, 291 (2003) (suggesting methods by which to improve correlation between confidence and accuracy).

⁶⁸ See *supra* notes 47-58 (explaining recommended jury instructions, which include recent

In order to successfully implement these jury instructions, training of judges and attorneys is essential.⁶⁹ Judges must understand the science behind eyewitness identification before they can attempt to educate the jury.⁷⁰ They must also stay current with developing science and continuously modify the jury instructions in order for them to accurately reflect what is known about accurate eyewitness identification and better uphold justice.⁷¹

III. WHAT ARE THE FLAWS WITH THE RECOMMENDED JURY INSTRUCTIONS AND SHOULD THEY BE ADOPTED?

The recommended jury instructions address many of the problems that make eyewitness testimony unreliable.⁷² The goal of the instructions is to educate the jury by giving them a general overview on the science behind eyewitness testimony, using simple language that the jury will understand.⁷³ These jury instructions have become the subject of criticism by many judicial employees and attorneys, who feel that the instructions are still incomplete.⁷⁴ Some important areas that the committee should go over again include how a judge's role is defined with these new instructions, the favoritism the instructions may have over one side, the changes of how an attorney now conducts a trial given the new instructions,

scientific information on memory).

⁶⁹ See *Report and Recommendation*, *supra* note 4, at 3, 15 (recommending additional training for judges).

⁷⁰ See *id.* at 4 (recommending SJC create a committee). In the final recommendation, the study group recommends that if the recommendations are adopted, either in whole or in part, the SJC must:

[C]reate a Standing Committee or Committees on Eyewitness Identification in order to develop professional training for judges and attorneys on the new procedures, to ascertain the effect that adopted recommendations will have on criminal adjudications, and to monitor developments in the science that may require modification of eyewitness identification procedures and protocols from time to time.

Id.; see also Laura Smalarz & Gary L. Wells, *Eyewitness-Identification Evidence: Scientific Advances and the New Burden on Trial Judges*, 48 CT. REV.: J. AM. JUDGES ASS'N 14, 21 (2012) (suggesting continued judicial education programs on social science behind accuracy of eyewitness testimony for judges). See generally Bornstein & Hamm, *supra* note 3, at 49 ("Judges are well situated to aid jurors in making proper use of witness-identification testimony.").

⁷¹ See Smalarz & Wells, *supra* note 70, at 21 (stating importance of judicial education on social science behind accuracy of eyewitness testimony).

⁷² See *supra* notes 41-43 (explaining recommended jury instructions).

⁷³ See *Report and Recommendation*, *supra* note 4, at 2 (outlining objective of recommended jury instruction to educate jurors using simple language); *supra* notes 52-63 and accompanying text (producing draft of recommended jury instructions).

⁷⁴ See *supra* note 9 and accompanying text (commenting on inadequacy of jury instructions).

and finally, the cost associated with these new implementations.⁷⁵

A. Usurping the Role of an Expert

A prominent issue with the proposed jury instructions is whether the judge can accurately and authoritatively convey the science behind eyewitness testimony and memory.⁷⁶ Judges are in the best position to explain to the jury these instructions because they are authority figures, and, as a result, juries are less likely to question a judge and his instructions.⁷⁷ Furthermore, the pre-charge recommended by the committee explains to the jury that the judge is explaining in general terms and is not expressing his or her opinion on how memory actually works.⁷⁸

Many judges and attorneys, however, have written to the SJC Study Group to voice their discomfort with having the judge educate and instruct the jury on the science behind eyewitness testimony, a role usually reserved for an expert in that field.⁷⁹ In a letter commenting on the SJC Report and Recommendation, Suffolk County District Attorney Daniel Conley explains that the recommended jury instructions are the only instances where the judge is explaining “the science underlying” eyewitness testimony.⁸⁰ For example, Conley explains that “the model instruction on duress does not purport to explain to the jury the psychological principles underlying ‘free will’ and ‘coercion.’”⁸¹ Rather, the experts are qualified and trained to evaluate the evidence, are the ones who should educate jurors, instead of the judge.⁸²

⁷⁵ See Smalarz & Wells, *supra* note 70, at 21 (educating judges on important social science behind eyewitness testimony when admitting evidence); Simmons, *supra* note 3, at 1091 (stating testimony promotes skepticism or “signal the circumstances under which eyewitness identifications” is reliable); Dufraimont, *supra* note 70, at 287 (explaining cross-examinations are not enough to make juries understand importance of unreliable evidence); *see also* Simmons, *supra* note 3, at 1080 (noting jury instructions easy to implement).

⁷⁶ Compare *supra* note 41 (describing current Massachusetts jury instructions), with *supra* notes 47-58 (explaining the recommended jury instructions, which include scientific findings).

⁷⁷ See Simmons, *supra* note 3, at 1082 (“The judge, as a neutral authority figure, is the best source for this type of information and is more likely to be believed by the jury.”); *see also supra* note 70 and accompanying text (discussing training for judges).

⁷⁸ See *State v. Henderson*, 27 A.3d 872, 883-83 (N.J. 2011) (incorporating science into jury instructions in New Jersey).

⁷⁹ See *infra* pp. 50-52 and notes 80-87 (discussing specific critiques of instructions).

⁸⁰ See *Eyewitness Evidence Report Comments*, *supra* note 9 at Letter from Daniel F. Conley, District Attorney of Suffolk County, to The Justices of the Supreme Judicial Court (February 4, 2014) (commenting on shortcomings of the recommended jury instructions).

⁸¹ See *id.* (comparing jury instructions on duress to recommended jury instructions on eyewitness testimony).

⁸² See *id.* (comparing jury instructions on duress to recommended jury instructions on

Justice Douglas H. Wilkins, Associate Justice of the Superior Court also wrote voicing his discomfort with having to instruct the jury on the science behind eyewitness testimony, given his judicial role.⁸³ He writes that not only is he not qualified since he is not a “brain scientist,” but, “by putting incomplete science in the mouth of the court, the proposed model instruction runs counter to the standard instruction that experts (and judges) do not decide cases, juries do.”⁸⁴

When a defendant raises a lack of criminal responsibility defense, it is common practice for him to introduce expert testimony to prove his defense.⁸⁵ Judges do not instruct the jury on the social science behind criminal responsibility, but leave it to the experts to educate the jury.⁸⁶ Similarly with eyewitness testimony, judges should not be allowed to be the sole source of education for juries on the scientific theories of eyewitness testimony given that they are not experts and that such practice is not done in any other area of the law.⁸⁷ Moreover, a judge’s role where expert testimony is to be presented, is to serve as a gatekeeper and to ensure that the testimony is reliable.⁸⁸ A judge needs evidence that the testimony is accepted in the general scientific community and qualifies the witness as an expert.⁸⁹ In order to qualify the witness as an expert, the witness needs to have “sufficient education, training, experience and familiarity with the subject matter of the testimony.”⁹⁰ Judicial educational programs are helpful in educating judges about the scientific theory behind eyewitness testimony in order to allow them to make informed decisions on whether to allow eyewitness experts at trial.⁹¹ However, these programs

eyewitness testimony).

⁸³ See *Eyewitness Evidence Report Comments*, *supra* note 9, at Letter from Associate Justice Douglas H. Wilkins, Superior Court, to Christine Burak, Esq., (November 26, 2013) (voicing discomfort with instructing jurors on how memory works).

⁸⁴ *Id.*

⁸⁵ See MASS. R. CRIM. P. 14(b)(2) (setting conditions of notice and examination when introducing expert testimony); *Eyewitness Evidence Report Comments*, *supra* note 9, at Letter from Daniel F. Conley, District Attorney of Suffolk County, to the Justices of the Supreme Judicial Court (February 4, 2014) (commenting on practice when defendant raises lack of criminal capacity as his defense).

⁸⁶ See *Eyewitness Evidence Report Comments*, *supra* note 9, at Letter from Daniel F. Conley, District Attorney of Suffolk County, to The Justices of the Supreme Judicial Court (February 4, 2014) (commenting on shortcomings of the recommended jury instructions).

⁸⁷ See *id.* (commenting on shortcomings of recommended jury instructions).

⁸⁸ See MA Orders 2014-2 (explaining law of evidence in Massachusetts).

⁸⁹ *Id.*

⁹⁰ See *Commonwealth v. Frangipane*, 744 N.E.2d 25, 30 (Mass. 2001) (quoting *Commonwealth v. Richardson*, 667 N.E.2d 257 (1996)) (determining if witness is qualified).

⁹¹ See Smalarz & Wells, *supra* note 70, at 21 (urging educational programs for judges on social science of eyewitness identification).

should not be geared towards making judges experts on the scientific theory, given that a good eyewitness-identification expert is one who has published and researched the science extensively, and the field itself is highly specialized.⁹²

B. Do the Jury Instructions Favor One Side Over the Other?

The modified jury instructions that reflect the science behind eyewitness testimony tend to favor the defense because it discredits a witness's testimony when the jury hears all the different reasons why their testimony may not be reliable.⁹³ Such evidence normally would not come in unless through an expert testimony from the defendant, seeking to discredit the prosecution's witness.⁹⁴ However, what the proposed jury instructions seem to do is echo what an expert would have testified to with regards to memory if he or she were called to the stand without actually having him or her testify, thereby tipping the scale in favor of the defendant.⁹⁵

While it seems that the proposed jury instructions favor defendants, they can also work in plaintiffs' favor.⁹⁶ The instructions can work to discredit a defendant's witness that believes the defendant was misidentified.⁹⁷ They can also work to strengthen the plaintiff's eyewitness and explain what makes the testimony reliable.⁹⁸ The advantage of course changes on a case by case basis, as the type of evidence introduce changes. Therefore, there does not seem to be any favoritism between the two sides since they both can take full advantage of the benefits the modified jury instructions provide.⁹⁹

⁹² See Smalarz & Wells, *supra* note 70, at 21 ("Generally speaking, a good eyewitness-identification expert is one who has published research on eyewitness issues in peer-reviewed journals and regularly reviewed the published research of other eyewitness experts.").

⁹³ See Simonsen, *supra* note 3; see generally Bornstein & Hamm, *supra* note 3, at 49.

⁹⁴ See Simonsen, *supra* note 3 (explaining expert testimony educates jury about factors and circumstances making eyewitness testimony reliable or unreliable).

⁹⁵ See Simonsen, *supra* note 3; Bornstein & Hamm, *supra* note 3; *supra* note 9.

⁹⁶ See Simonsen, *supra* note 3.

⁹⁷ See *Eyewitness Evidence Report Comments*, *supra* note 9, at Letter from Daniel F. Conley, District Attorney of Suffolk County, to the Justices of the Supreme Judicial Court (February 4, 2014) (identifying scenarios where recommended jury instructions place defendant at a disadvantage).

⁹⁸ See Simonsen, *supra* note 3 1088-91.

⁹⁹ See Simonsen, *supra* note 3, at 1067-69.

C. Minimizing the Role of Cross-Examination

Cross examinations vary in style and length, but one thing that all successful cross examinations have in common is the ability to discredit a witness's testimony.¹⁰⁰ However, if the jury analyzes the testimony using its common sense, the jury may also be using incorrect assumptions to determine whether the eyewitness is credible, leading to an incorrect assessment.¹⁰¹ The modified jury instructions work to discredit testimony while correcting the jury's assumptions, in conjunction with cross-examinations.¹⁰² For example, where a case involves armed robbery, the fact that a weapon is involved and the witness or victim sees that weapon, can come out during cross-examination.¹⁰³ The jury, however may not be able to gather from the cross examination that science has shown the presence of a weapon actually makes identification less reliable.¹⁰⁴ The modified jury instructions however can make that connection for the jury and that information, along with the witness' testimony, will help to reduce wrongful convictions due to inaccurate or questionable eyewitness

¹⁰⁰ See Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 728 (2007) (explaining purpose of cross examination to discredit witness testimony). Some jurisdictions believe cross-examination is the proper time to introduce the jury to how unreliable eyewitness testimony is. See *United States v. Smith*, 122 F.3d 1355, 1358 (11th Cir. 1997) (finding cross-examination sufficient); *United States v. Larkin*, 978 F.2d 964, 971 (7th Cir. 1992) (holding defense counsel had "ample opportunity" to discuss hazards of eyewitness identification and "cast doubt upon witnesses' eyewitness identification"); *Jackson v. Ylst*, 921 F.2d 882, 886 (9th Cir. 1990) (holding cross-examination sufficient); *Moore v. Tate*, 882 F.2d 1107, 1111 (6th Cir. 1989) (holding cross-examination sufficient); *United States v. Christophe*, 833 F.2d 1296, 1300 (9th Cir. 1987) (holding cross-examination sufficient).

¹⁰¹ See *United States v. Jones*, 762 F. Supp. 2d 270, 277 (D. Mass. 2010) (explaining ineffectiveness of cross-examination when jury uses incorrect assumptions to analyze evidence).

¹⁰² See Dufraimont, *supra* note 12, at 287 ("Skillful cross-examination and argument may reveal the case-specific circumstances that make testimony unreliable, but they are not enough to equip juries to grasp the significance of those circumstances."); Overbeck, *supra* note 12, at 1905; see also Berman, *supra* note 11, at 78 ("An experiment was conducted to examine the effectiveness of this cross-examination strategy. Subjects viewed a simulated cross-examination and rendered judgments about the eyewitness and defendant. The type of inconsistent testimony was manipulated between subjects. Subjects exposed to inconsistent recall testimony about either central or peripheral details perceived the eyewitness as less credible (as evidenced by ratings on multiple dimensions) and the defendant as less culpable. Inconsistency on central details led to fewer convictions. Results point to the effectiveness of this cross-examination strategy.").

¹⁰³ See Dufraimont, *supra* note 12, at 287 (explaining "Skillful cross-examination and argument" can reveal important information about a specific case); Overbeck, *supra* note 12, at 1905 (explaining how cross-examination can demonstrate inaccuracies in an eyewitness testimony).

¹⁰⁴ See Dufraimont, *supra* note 12, at 287; Overbeck, *supra* note 12, at 1905.

testimony.¹⁰⁵

IV. CONCLUSION

The proposed jury instructions by the SJC committee made significant changes to the current Massachusetts jury instructions with regards to eyewitness testimony.¹⁰⁶ The goal of the committee was to educate jurors on the science behind eyewitness testimony so as to avoid a miscarriage of justice when a defendant is wrongfully convicted because of an unreliable identification.¹⁰⁷ While the recommended jury instructions cost little to implement, the instructions fail because they place unnecessary burdens on judges and lawyers, and undermine traditional techniques for discrediting a witness.¹⁰⁸

The instructions place judges in the role of experts by having them instruct the jury regarding the science of eyewitness testimony.¹⁰⁹ The modified jury instructions also tend to favor the defense because it discredits a witness's testimony when the jury hears all the different reasons why their testimony is not reliable.¹¹⁰ The instructions undermine the role of traditional trial techniques, like cross-examination, which have always served as a perfect and legitimate way to discredit an eyewitness and illustrate to the jury that the identification is inaccurate.¹¹¹

If the SJC wants to rework the current jury instructions in order to meet their aim at preventing wrongful convictions, they must first address the concerns discussed above. Otherwise, not only would there be a miscarriage of justice for defendants, but also for the legal community as a whole.

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¹⁰⁵ See *supra* Part III; see also Simmons, *supra* note 3, at 1063-64 (using instructions to educate jurors on factors affecting eyewitness testimony).

¹⁰⁶ See *supra* Part II.

¹⁰⁷ See *supra* Part II.

¹⁰⁸ See *supra* Part III.

¹⁰⁹ See *supra* Part III.A.

¹¹⁰ See *supra* Part III.

¹¹¹ See *supra* Part III.

¹¹² I would like to thank my mother, brother and the rest of my family for all their support. I would also like to thank all the professors, judges, attorneys, and editors who have helped me during the writing process.