CHAPTER 18

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Issues in Eyewitness Identification Cases

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PART I: PRETRIAL USE OF NONSUGGESTIVE IDENTIFICATION PROCEDURES

§ 18.1 COUNSEL'S ROLE IN ENSURING NONSUGGESTIVE IDENTIFICATION PROCEDURES

By their very nature, identification cases almost always present the defendant with a reasonable chance for acquittal because of the deficiencies inherent in eyewitness observation and memory. Counsel must be alert from the outset to the circumstances under which witnesses may see the defendant during various pretrial proceedings and be prepared to make critical decisions in order to avoid suggestive in-court identifications. As the U.S. Supreme Court noted in one case,

> It is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation than was employed in this case, where the victim was brought to court for defendant's arraignment, told she was going to view a suspect, and heard the prosecutor recite the evidence implicating the defendant as he stood in sight of the victim.[1]

The responsibility has been placed on counsel to request that a nonsuggestive procedure be used at preliminary hearings and court appearances of the defendant, and the failure to request a nonsuggestive procedure has been deemed a waiver of the defendant's rights in this regard.[2] However, when the Commonwealth intends to use a judicial proceeding involving the defendant as an opportunity for a witness in an unrelated case to see him, the prosecutor should notify the court and defense counsel in advance so that a nonsuggestive procedure can be devised.[3] The defendant, however, is not entitled to a pre-indictment evidentiary hearing concerning the suggestiveness of the proposed identification procedures.[4]

§ 18.1A. ARRAIGNMENT

If counsel is present at the arraignment of the defendant, she must determine immediately whether there is any possibility that identification of the defendant will be an issue in the case. A brief review of the police report, if available, or the charges themselves, such as robbery or other violent assault, often provide an early indication that identification of the perpetrator will be a contested element of the Commonwealth's case. In any case where the defendant was not apprehended in the presence of the victim/eyewitness, counsel should ensure that any confrontation that occurs at the arraignment makes use of nonsuggestive procedures.

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[1] Moore v. Illinois, 434 U.S. 220, 229–30 (1977).

[2] Commonwealth v. Jones, 375 Mass 349, 358 (1978). *See also* Commonwealth v. Cincotta, 379 Mass. 391, 394–95 (1979).

[3] Commonwealth v. Napolitano, 378 Mass. 599, 607–08 (1979).

[4] Commonwealth v. Doe, 408 Mass. 764, 767 (1990).

In many instances, counsel will have the chance to interview the defendant briefly prior to his formal arraignment. This usually takes place in the lockup area located in the courthouse. If it becomes apparent that identification may be an issue, it is imperative that counsel take steps to protect the client from being seen by witnesses at that proceeding. The prosecutor or police department representative should be asked whether any witnesses to the case are present and if so that they leave the courtroom. In addition, counsel should be alert as to whether there are newspaper photographers or television cameramen in the courtroom who might try to take the defendant's picture. If the judge will not exclude the media, counsel should request that her client be permitted to stay out of view of the cameras by remaining in the lockup, by covering his features with a jacket or other piece of clothing, or by standing so as to obstruct the sightlines of any camera.

§ 18.1B. PROBABLE-CAUSE HEARING OR BENCH TRIAL

In cases where the defendant was arrested following his identification by means of a photographic array or based on circumstantial evidence, the probable-cause hearing or bench trial frequently will be the first opportunity for a witness to see the suspect in person. Even if a prior identification in person has occurred, such as at a showup, counsel must determine whether it is in her client's best interest that a truly nonsuggestive procedure be used at the initial trial or hearing — that is, in a circumstance where the witness may have no difficulty in selecting the defendant from a lineup or from the courtroom audience.

Counsel should scrutinize the police report and determine the specificity and resemblance to the defendant of the initial identification details provided by a witness. Moreover, the photo array viewed by the witness should be reviewed, and a determination made of the similarity of the defendant to the photo selected, which may have been an outdated one. A very useful item to obtain is a recording of the police broadcast in which the initial description of the assailant was given. This often is at variance with the detailed recounting provided by the arresting officer, who has filled in the missing details with facts that correspond to the defendant.[5]

A prosecutor does not need to alert defense counsel that a witness to be called at a probable-cause hearing is likely to identify the defendant if this is obvious from the discovery that has been provided.[6] However, defense counsel is not responsible for avoiding a suggestive confrontation if the witness was summonsed by a codefendant's lawyer and the witness sees the defendant shackled in the courtroom.[7] The Commonwealth bears some responsibility for a suggestive confrontation if it summonses a witness to the courthouse knowing that a defendant in custody likely will pass by the witness in the corridor.[8] An in-court identification must be suppressed if it

[5] The recording must be sought by subpoena to the police department, and counsel must act expeditiously because most recordings are erased after 30 or fewer days have elapsed. A motion to preserve the recording and a discovery motion should be filed at arraignment or the earliest opportunity.

[6] Commonwealth v. Colon-Cruz, 408 Mass. 533, 542 (1990); Commonwealth v. Cincotta, 379 Mass. 391, 395 (1979) (counsel aware of, or having reason to anticipate, possible suggestive encounter has responsibility to act to prevent it).

[7] Commonwealth v. Jones, 423 Mass. 99, 106 (1996).

[8] Commonwealth v. Jones, 423 Mass. 99, 106 (1996).

does not have a source independent of an unnecessarily suggestive confrontation, even if improper viewing was not directly arranged by the prosecution or the police.[9]

§ 18.2 NONSUGGESTIVE PROCEDURES

§ 18.2A. OPTIONS IN A COURTROOM

Several nonsuggestive procedures can be employed prior to, during, or at the conclusion of a preliminary hearing. The procedure that often is the most favorable to the defendant is for the defendant to be out of sight of the witness, as perhaps behind a blackboard, during the direct and cross-examination of the witness and at the conclusion of these segments to be presented to the witness. She is then asked if the defendant is indeed the assailant whom she has just described. The theory involved is that one wants the witness to describe the assailant without looking directly at the defendant either in the dock or at counsel table), thereby developing possible inconsistencies, *and* to have the anticipated identification of him occur in the courtroom under extremely suggestive circumstances. This will permit counsel to later "explain" the reason that the in-person identification resulted — defendant was the only person presented to the witness, or he was the only minority person in the courtroom, etc.

Two other and more risky procedures are to conduct a lineup or to have a witness go through a crowded courtroom and be asked to select her assailant from among the audience. The difficulty is that if the defendant is selected from a fair representation of individuals in a procedure proposed by the defense counsel, the identification will not easily be subject to attack later as being unreliable. In addition, it may be difficult to round up a sufficient number of persons who resemble the description of the assailant in order to conduct a procedure that is most fair to the defendant. On the other hand, viewing a lineup or walking through a courtroom with everyone staring at you can be an intense experience for a witness, who may be unable to make an identification in her anxiousness to end the ordeal.

Beacause of the inherent disadvantages of a lineup or courtroom-audience procedure for a defendant, they should be considered only in certain circumstances. Cases that appear hopeless because an earlier identification is bolstered by significant circumstantial evidence and cases in which the only identification consists of a showup or selection from a photo array that occurred weeks or months earlier can be situations where these "go for broke" procedures are, after careful consideration, appropriate. Additional factors to consider include the degree of detail in the initial description (e.g., skimpy, reference to a distinctive feature of the defendant), reliability of the earlier identification (e.g., suggestiveness of procedure, quality of defendant's photo in array), the strength of any circumstantial evidence (e.g., defendant in possession or not in possession of victim's property), and the circumstances that day in court (e.g., few people of defendant's race present in audience).

The trial judge has discretion regarding whether to permit "the extraordinary measure of an in-court identification procedure" in the presence of the jury.[9.5]

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[9] Commonwealth v. Jones, 423 Mass. 99, 106–11 (1996). *See infra* § 18.3B.

[9.5] Commonwealth v. Dahl, 430 Mass. 813, 824–825 (2000) (although there were weaknesses in the identifications, judge did not abuse his discretion in denying an in-court identification procedure where the previous identification procedures were not impermissibly suggestive or otherwise improper).

§ 18.2B. LINEUPS

Certain steps should be taken to maximize the fairness to a defendant in the conduct of a lineup. Counsel should attempt to secure persons who resemble the defendant for placement in the lineup and should always seek to have the most persons possible appear in the lineup. A "blind" lineup, in which (unknown to the witness) the defendant does not appear, may be used prior to the second lineup in which the defendant does appear. The witness should be in the same room as the lineup participants, rather than standing behind a two-way mirror. It is advisable to videotape the witness as she views the lineup, because this adds to the pressure of the situation for the witness and tends to exaggerate the length of time that it took the witness to make a selection. In that regard, counsel should note the precise amount of time that elapses before an identification is made. Counsel should always attempt to be present at the questioning of the witness immediately after the lineup, as the witness often will make equivocal comments. Finally, the witness should be asked to rate the strength of her identification on a scale of one to ten, enabling counsel to argue later that ten (if the number) is unrealistic or that anything less constitutes a per se reasonable doubt.

§ 18.2C. PROCEDURAL CONSIDERATIONS

If counsel, after consultation with the client, decides to request a nonsuggestive procedure, a motion should be prepared accompanied by an affidavit setting out the circumstances that make such a procedure appropriate. The motion should be heard prior to the date of the preliminary hearing or trial in order to secure an advance ruling.[10] If the motion is allowed, it is advisable to secrete the defendant somewhere in the courthouse or to alert the court officers not to bring him out if he is in custody until such time as the witnesses are segregated so that there can be no inadvertent contact with the defendant. Counsel should ensure that there are people who resemble the defendant in the courtroom or the courthouse, if there is to be an audience-selection procedure or a lineup used. In addition, the judge and court officers should be informed no later than the first call of the list that a nonsuggestive procedure has previously been ordered for the hearing so that proper arrangements can be made prior to administering the nonsuggestive identifcation procedure.[11]

PART II: MOTIONS TO SUPPRESS IDENTIFICATION TESTIMONY

The identification of the perpetrator of a crime is the most frequently litigated issue of criminal trials in the Superior Court. The statement by an eyewitness that "this is the person I saw" is the product of a complex process involving abilities to observe, to remember, and perhaps most important, to distinguish that individual from the thousands of people encountered in a lifetime.[11.5] In view of the tragic consequences of

[10] The court may have the discretion to deny the request for an alternative procedure if the motion is not brought until the actual day of the scheduled hearing. *See, e.g.,* Commonwealth v. Ceria, 13 Mass. App. Ct. 232, 237 (1982).

[11] It is not advisable to use a nonsuggestive procedure (such as a courtroom audience selection) in front of a jury. An identification of the defendant in this circumstance will be virtually unassailable by defense counsel if the procedure seemed fair to the jurors.

[11.5] A number of helpful resources exist for counsel seeking to understand the complexities of eyewitness identification testimony, including *Eyewitness memory for people*

a misidentification, defense counsel is permitted great latitude at trial in the cross-examination of an eyewitness who has made an identification of the defendant.

What must be borne in mind, however, is that the critical identification usually has occurred well before the trial date: it took place at the initial presentation of the defendant to the witness by the police. An unshakeable identification at trial has little probative value if it is the result of impermissibly suggestive procedures that have preceded it. The defendant, therefore, has an absolute right to be informed of the details of any out-of-court identification procedure used by the police, even if the prosecution does not intend to offer evidence of it at the trial.[12]

Identification of a suspect can occur in many ways: from a single photograph or from an array of photographs; by presenting the suspect alone in a face-to-face encounter with the witness (a procedure known as a "one-on-one showup" or simply a "showup"); in a formal lineup or from an informal group of several individuals with similar physical characteristics; by the sound of the suspect's voice; and during a hearing or trial while the defendant is seated at counsel table, is alone in the dock, or is located among the courtroom audience. Whichever process is used, it has been held that every defendant has a due process right to an identification procedure that meets a constitutional standard of fairness.[13]

§ 18.3 DUE PROCESS VIOLATION

The due process analysis of an identification procedure considers the degree to which the procedure conveyed the impression that the defendant is the criminal being sought, and the impact that an improper procedure had on a witness's ability thereafter to make an accurate identification. For example, the presentation of a single photo to a witness while telling her that the person has been charged with the crime has been held to be an egregiously suggestive procedure that barred introduction of the identification at trial.[14]

When a defendant can point to specific aspects of an identification procedure that would suggest that he was the person suspected by the police of committing the crime, he may bring a motion to suppress two distinct categories of identification evidence: (1) the identification that occurred at the time of the suggestive procedure, e.g., at the scene of the showup, the showing of photographs, an arraignment, etc; and (2) any subsequent identification that will be tainted by the earlier improper procedure including the proposed in-court identification during the trial. If, on the other hand, the initial identification procedure used by the government was not suggestive of the defendant, then the identification that resulted is admissible even if there is significant evidence that the witness did not actually have an adequate opportunity to observe the

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and events Wells, G. L. & Loftus, E. F. (2012). In A. Goldstein, Ed. Handbook of psychology, 2nd Ed, Volume 11, Forensic psychology. New York: John Wiley and Sons and *Eyewitness Testimony: Civil and Criminal* (3d ed.) by Elizabeth F. Loftus and James M. Doyle (Lexis Law Publishing, 1997).

[12] Commonwealth v. Dougan, 377 Mass. 303, 316–17 (1979).

[13] Stovall v. Deno, 388 U.S. 293, 301–02 (1967).

[14] Commonwealth v. A Juvenile, 402 Mass. 275, 280–81 (1988).

assailant.[15] The deficiencies may be brought out through cross-examination and other evidence, and the weight to be given to the testimony will be a question for the jury.

An identification procedure that is designed to exclude suspects does not implicate the same concerns as a process which leads to the identification of an individual who committed a crime.[15.5] The judge does not have to consider the reliability of the procedure used before the evidence is offered to a jury, and the defendant can use cross-examination and closing argument to attack the methods employed by the police.[15.6]

§ 18.3A. SUPPRESSION OF THE INITIAL IDENTIFICATION

1. The Test Applied in Massachusetts

The right of a defendant to the exclusion of identification evidence that resulted from suggestive police procedures was announced by the U.S. Supreme Court in 1967 in *Stovall v. Denno*[16] and was embraced by the Supreme Judicial Court in 1976 in *Commonwealth v. Botelho*.[17] The analysis focuses on the following question: "Considering the totality of the circumstances, was the identification procedure used by the government so unnecessarily suggestive as to give rise to a very substantial likelihood of misidentification?"[18] Under this due process test, the defendant has the burden of showing that the procedures used to obtain an identification of the defendant were so unnecessarily suggestive that the identification itself must be suppressed.[19] If he does so, the Commonwealth then has the burden of proving that any subsequent identification would be untainted — that is, be based on the original observation of the perpetrator at the scene of the crime rather than on the identification procedures

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[15] Commonwealth v. Warren, 403 Mass. 137, 139 (19881 ("The question raised by a motion to suppress identification testimony is not whether the witness was or might be mistaken hut whether any possible mistake was or would be the product of improper suggestions made by the police"). *See also* Commonwealth v. Smith, 403 Mass. 1002 (1988).

The only exception to the rule arises when suggestive conduct by the police occurs *after* a tentative identification was made through a nonsuggestive procedure. If the police influence now makes the witness certain of her identification, and the nature of the suggestion is so prejudicial to the defendant that he cannot effectively cross-examine her on the matter before a jury, the judge has the discretion to exclude the initial identification. Commonwealth v. Bonnoyer, 25 Mass. App. Ct. 444 (1988) (witness told that the codefendant had confessed and admitted that the defendant was his accomplice; uncertain witness now became confident of her earlier identification of the defendant).

[15.5] Commonwealth v. Howell, 49 Mass. App. Ct. 42, 50-51 (2000)(police showed victims photos of alternate suspects suggested by defendant, and none was identified).

[15.6] Commonwealth v. Howell, 49 Mass. App. Ct. 42, 51(2000).

[16] 388 U.S. 293, 301–02 (1967). *Accord* Simmons v. United States, 390 U.S. 377, 384 (1968) (photographs).

[17] 369 Mass. 860 (1976).

[18] Stovall v. Denno, 388 U.S. 293, 301–02 (1967).

[19] Because the focus initially is on the suggestiveness of the identification procedure and not on the witness's opportunity to observe the assailant, the judge may prohibit questions concerning the lighting conditions or the witness's view of the crime scene until the defendant meets her initial burden of proof. Commonwealth v. Tanso, 411 Mass. 640, 654–55 (1992).

employed later with the defendant.[20] In the language used in the case law, the subsequent identification must have an "independent source" separate from the suggestive procedure.[21]

The *Stovall* and *Botelho* decisions held that any pretrial identification that occurred at an unnecessarily suggestive confrontation cannot be introduced at trial. This *per se* standard was substantially weakened by a 1977 Supreme Court decision, *Manson v. Braithwaite,*[22] which held that the Fourteenth Amendment requires exclusion of the evidence only if the pretrial procedure is *both* (1) unnecessarily suggestive *and* (2) unreliable. For example, a complainant attacked by her husband might be shown the most unfair photo display imaginable, but it would not make her identification unreliable. In 1995, the Supreme Judicial Court decided that under the Massachusetts Constitution an identification that is the product of an unnecessarily suggestive procedure is subject to per se exclusion at trial, regardless of its reliability.[23] It rejected the "reliability" analysis embraced by the U.S. Supreme Court in *Braithwaite* and used for eighteen years by the Massachusetts Appeals Court.[24]

2. Unnecessarily Suggestive Confrontations

The defendant bears the burden of establishing by a preponderance of the evidence that the identification procedure used by the government was "so unnecessarily suggestive and conducive to irreparable misidentification as to deprive the defendant of his due process rights."[25] Whether a procedure is unnecessarily suggestive is judged by the totality of the circumstances of the confrontation itself, without regard to the witness's prior or subsequent involvement with the case.[26]

The typical situation involves a confrontation arranged by the police, such as a showup, lineup, or photo array. However, a sighting of the defendant by a witness may be so unnecessarily suggestive that it would violate the defendant's right to due process to permit the prosecution to use it (or an identification based upon it) at trial, even if the police had no part in arranging it.[27]

Essentially, the test considers the degree to which the procedure conveyed the impression that the defendant is the criminal being sought (i.e., the suggestiveness) and whether any defect was gratuitous and not related to efficient and fair police work (i.e.,

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[20] The burden of proof on the prosecution is to show by clear and convincing evidence that the identification has an independent source. Commonwealth v. Colon-Cruz, 408 Mass. 533, 541–42 (1990).

[21] An excellent summary of Massachusetts law concerning suppression of identifications appears in Commonwealth v. Holland, 410 Mass. 248, 250–56 (1991).

[22] 432 U.S. 98, 114 (1977).

[23] Commonwealth v. Johnson, 420 Mass. 458, 462-463 (1995); see also, Commonwealth v. Walker, 460 Mass. 590, 599-607 (2011).

[24] *See, e.g.,* Commonwealth v. Hicks, 17 Mass. App. Ct. 574, 577 (1984).

[25] Commonwealth v. Thornley, 406 Mass. 96, 98–99 (19891; Commonwealth v. Botelbo, 369 Mass. 860. 866–68 (1976).

[26] Commonwealth v. Thornley, 406 Mass. 96, 98 n.3 (1989).

[27] Commonwealth v. Jones, 423 Mass. 99, 108–11 (1996) (witness who did not have a good opportunity to view the criminal saw the defendant shackled at court proceedings).

unnecessary).[28] For example, the repeated presentation of a single suspect to an uncertain witness has been held to be an impermissibly suggestive procedure.[29] It is the subtle suggestion, however, that occurs more frequently, as when the suspect's photo continues to appear in consecutive arrays or if a lineup participant is the only person wearing a piece of clothing that is identical to that worn by an assailant. The following checklist of common suggestive factors may be helpful in assessing a pretrial identification:

- Was this a one-on-one confrontation?
- Did police by words or action focus the witness's attention on the defendant?
- Did the police indicate that they had other evidence implicating the defendant or that they felt they "had the man"?
- Did the defendant or his photograph stand apart from the others in any way? Was he or his photograph the only one fitting the witness's description?
- Was the defendant or his photograph repeatedly shown to the witness, thus replacing his initial memory of the assailant with his memory of the defendant?
- Did witnesses jointly participate in the procedure?
- Did the police bolster an uncertain witness's selection (e.g., "this could be the man," "he resembles the man") by pressing for a more definite answer or repeating the procedure?

Photo: Single photo shown; defendant's photo different in his age, pose, or other physical characteristic; only defendant has ski cap, braids, or glasses that are similar to assailant; name on photo; variation in mounting, background, lighting, or markings; date of arrest apparent; all photos are mug shots except defendant's or visa versa; defendant's photo appears more than once in the array; the defendant appears in successive arrays in the same or a different photo; knowledge that another witness has made an identification from the array; joint viewing with another witness; specific photo from array is singled out by police and witness is asked if it bears a resemblance to the assailant.

Showup: Witness told prior to showup that police think they have culprit; victim told prior to showup that his property has been recovered; showup follows unsuccessful lineup that included defendant; defendant alone in back of cruiser, is handcuffed, or is surrounded by police; defendant wearing clothing that matches that of

[28] *Compare* a showup at the police station in the immediate aftermath of a crime, Commonwealth v. Bowden, 379 Mass. 472, 478–79 (1980) *with* a showup at the police station two months after the crime, Commonwealth v. Kazonis, 356 Mass. 649, 651–53 (1970).

[29] Foster v. California, 394 U.S. 440, 442–44 (1969); *but see* Commonwealth v. LaFaille, 430 Mass. 44, 47-49, S.C., 46 Mass. App. Ct. 144 (1999) (photo array shown to witness was not impermissibly suggestive where witness had previously reviewed mug books containing at least one photo of the defendant and not selected one; here, there was an eight-photo array which inadvertently included two significantly different photos of the defendant which had been taken one year apart; fact that it was not shown to witness until twenty-nine days after the incident did not negate its efficacy as an identification tool).

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assailant; joint viewing of suspect with other witness; defendant shackled to previously identified codefendant.

Voice: One-on-one confrontation; witness looking at suspect while he speaks; vulgar words of incident are used during process; confrontation occurs in midtrial after there has been an identification by sight.

Lineup: Some participants in the lineup are known to the witness; only the defendant fits the description; all participants try on piece of clothing that only fits the defendant; suspect seen in police custody before lineup; suspect pointed out by police; defendant much taller; all participants except suspect are wearing police pants; only defendant asked to speak; defendant is the only person who appears in successive lineups.

In-Court: Defendant in custody; one-on-one confrontation; shackled; evidence recited against him while witness present; suspect is the defendant in an ongoing unrelated hearing or trial.

3. Reliability of an Identification

In 1995, the Supreme Judicial Court rejected the reliability analysis employed by the U.S. Supreme Court under the federal Constitution in *Manson v. Braithwaite.*[30] Strictly speaking, the line of cases in the Massachusetts Appeals Court analyzing the reliability of an identification that resulted from an unnecessarily suggestive procedure is now irrelevant. Nonetheless, the five factors that were the focus of the analysis may be useful to consider in showing that the Commonwealth has failed to prove that a subsequent identification was independent of the suggestive procedure.[31] The *Braithwaite* [32] factors are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.

Massachusetts cases have highlighted certain of these factors. A good opportunity for the witness to view the criminal at the time of the crime has been the most significant of the five reliability factors, and its presence has consistently presaged a finding of reliability.[33] Other factors that the court has relied on include the terrifying nature of the encounter that imprinted the assailant's face on the victim's

[30] 432 U.S. 98 (1977).

[31] *See, e.g.,* Commonwealth v. Jones, 423 Mass. 99, 110 n.9 (1996) (court considered fact that witness had not given description of individual to the police as a factor that undermined the reliability of her subsequent identification of him).

[32] Manson v. Braithwaite, 432 U.S. 98, 114 (1977).

[33] *See, e.g.,* Commonwealth v. Riley, 26 Mass. App. Ct. 550 (1988) (witness saw assailant's face for eight seconds in adequate lighting); Commonwealth v. Laaman, 25 Mass. App. Ct. 354, 360–63 (1988) (witness had a fair opportunity to view the assailant in headlights of truck); Commonwealth v. Crowe, 21 Mass. App. Ct. 456, 459–69 (1986) (witness was in presence of assailants for several minutes and had chance to see their faces); Commonwealth v. Hicks, 17 Mass. App. Ct. 574 (1984) (victim had unobstructed view of robber's face for 30 seconds); Commonwealth v. Gordon, 6 Mass. App. Ct. 230, 235–40 (1978) (witness five feet from assailant in well-lighted office).

mind,[34] the detailed and accurate description provided by the witness,[35] and the unequivocal nature of the identification.[36] These aspects of the case were found to outweigh unnecessarily suggestive factors that may have excluded the identification under the traditional due process test.[37]

In contrast, a poor opportunity for the witness to view the criminal at the time of the crime creates a virtually insurmountable hurdle to reaching a finding of reliability.[38] Other factors that the court has found significant include the lack of attention by the witness,[39] an extremely general description by the witness,[40] and uncertainty expressed by the witness during the initial confrontation.[41]

4. Defendant's Waiver of His Right to a Nonsuggestive Procedure

The Supreme Judicial Court has not been receptive to the Commonwealth's contention that a defendant can waive his right to a nonsuggestive procedure, noting that it will indulge in every reasonable presumption against such a waiver.[42] Any such waiver must be made knowingly by the defendant, and this encompasses knowledge that he will be viewed in a suggestive setting or by a witness who has certain deficiencies.[43]

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[34] Commonwealth v. Riley, 26 Mass. App. Ct. 550 (1988).

[35] Commonwealth v. Riley, 26 Mass. App. Ct. 550 (1988); Commonwealth v. Laaman, 25 Mass App. Ct. 354 (1988); Commonwealth v. Crowe, 21 Mass. App. Ct. 456 (1986). *Compare* Commonwealth v. Gordon, 6 Mass. App. Ct. 230 (1978) (difference of nine inches between estimate of robber's height and height of defendant was only discrepancy and could be explained by defendant's crouching position throughout crime).

[36] Commonwealth v. Riley, 26 Mass. App. Ct. 550 (1988); Commonwealth v. Laaman, 25 Mass. App. Ct. 354 (1988); Commonwealth v. Bernard, 6 Mass. App. Ct. 499, 505–07 (1978), *aff'd sub nom.* Commonwealth v. Venios, 378 Mass. 24 (1979).

[37] *See, e.g.,* Commonwealth v. Riley, 26 Mass. App. Ct. 550 (1988) (witness told by police that another witness had selected the defendant and that the defendant was charged with a similar assault); Commonwealth v. Laaman, 25 Mass. App. Ct. 354 (1988) (witness shown a single photo of the suspect); Commonwealth v. Hicks, 17 Mass. App. Ct. 574 (1984) (victim told by police that suspect had been arrested with victim's property in his possession).

[38] *See, e.g.,* Commonwealth v. Jones, 25 Mass. App. Ct. 55 (1987) (where witness had only a limited look at the assailant, the unnecessarily suggestive identification of the defendant at the police station was unreliable); Commonwealth v. Worlds, 9 Mass. App. Ct. 162 (1980) (witness was knocked to the ground and kicked in face by assailant, offering a scant opportunity to view the attacker); Commonwealth v. Moon, 8 Mass. App. Ct. 375, 389-90 (1979), S.C., 380 Mass. 751 (1980) (short time to observe assailant in weak lighting).

[39] Commonwealth v. Worlds, 9 Mass. App. Ct. 162 (1980) (witness did not observe assailant long enough to fix his image in the witness's memory); Commonwealth v. Moon, 8 Mass. App. Ct. 375 (1979) (witness's excited state was not conducive to an accurate identification).

[40] Commonwealth v. White, 11 Mass. App. Ct. 953 (1981) (description so vague as to be virtually meaningless); Commonwealth v. Worlds, 9 Mass. App. Ct. 162 (1980) (very general description that was materially at variance with the defendant).

[41] Commonwealth v. Moon, 8 Mass. App. Ct. 375, 388 (1979) (witness had some equivocation regarding the photograph); Commonwealth v. White, 11 Mass. App. Ct. 953 (1981) (witness initially failed to identify the defendant).

[42] Commonwealth v. Santos, 402 Mass. 775, 782 (1988).

[43] Commonwealth v. Santos, 402 Mass. 775, 783 (1988).

§ 18.3B. SUPPRESSION OF SUBSEQUENT IDENTIFICATIONS INCLUDING IDENTIFICATION AT TRIAL

If the pretrial identification will be suppressed, the court must go on to consider whether to suppress subsequent identifications by the witness, including a prospective in-court identification before the jury.[44] Such evidence can be admitted only if the Commonwealth proves by clear and convincing evidence that this subsequent identification was or would be based solely on the witness's observations during the incident itself.[45] In other words, the subsequent identification must not be a fruit of the initial improper procedure but rather must have an "independent source" — that is, be based on a memory of the initial encounter with the culprit. The problem of the corrupting effect of an improper confrontation on subsequent identifications was well stated by the Supreme Court: "Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." [46]

In considering whether the Commonwealth has shown that the witness's identification of a defendant has an independent source, the judge must focus on the following factors:[47]

1. The extent of the witness's opportunity to observe the perpetrator of the crime;
2. Any discrepancies between the initial description of the perpetrator and the appearance of the defendant;
3. Whether the witness has ever identified someone other than the defendant as the perpetrator;
4. Whether the witness has ever failed to identify the defendant when confronted with him in person or by photograph;
5. The presence and weight of any actual suggestion received by the witness; and
6. The lapse of time between the crime and the subsequent identification.[47.5]

The question of whether there is an independent source free from the suggestive influence is one of law, albeit one based on subsidiary findings of fact, and therefore is subject to appellate review.[48]

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[44] This obviously can have a devastating effect on the Commonwealth's case. *See, e.g.,* Commonwealth v. Botelho, 369 Mass. 860 (1976); Commonwealth v. Moon, 380 Mass. 751 (1980). *But see* Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 232–33 (1992) (although actual identification suppressed, witness could describe person he saw, and prosecutor could argue the inference that it was the defendant because of the similarity of features).

[45] Commonwealth v. Thornley, 406 Mass. 96, 99 (1989).

[46] Simmons v. United States, 390 U.S. 377 (1968).

[47] Commonwealth v. Botelho, 369 Mass. 860, 869 (1976). *See also* Commonwealth v. Bodden, 391 Mass. 356, 361 (1984).

[47.5] Commonwealth v. LaFaille, 430 Mass. 44, 48, S.C., 46 Mass. App. Ct. 144 (1999) (delay of twenty-nine days between the incident and the showing of a photo array to the witness did not "negate its efficacy as an identification tool").

The most important of the six factors of the independent source test is the opportunity that the witness had to view the assailant initially. The Court must consider the circumstances and conditions under which the observations took place and the duration of such observations.[49] In order to prove that a subsequent identification will have an independent source, it is indispensable that the witness herself testify at the motion to suppress hearing.[50]

Where conditions during the crime inhibited a witness's ability to observe the criminal, an independent source will rarely be found following an unnecessary and highly suggestive identification procedure.[51] The additional factors considered by the Court in *Commonwealth v. Botelho, supra,* often will provide support in this situation for the exclusion of the evidence.[52]

In arguing for suppression of an identification, counsel should underscore the importance of a reliable identification, free from suggestion, and also emphasize the following points: that eyewitness identification testimony is perhaps the least trustworthy yet most believed evidence that exists; that the police procedures in the specific instance maximized rather than minimized the possibility of a tragic mistake; that if the initial identification were mistaken, the wrong man is on trial and the guilty one walks free; and that the court is not dealing with the suppression of otherwise reliable evidence indicative of the defendant's guilt (such as in search suppression) but rather with unreliable or improper police procedures that can result in the greatest injustice known to the law: incarceration of an innocent man.

§ 18.3C. APPLICATION OF THE DUE PROCESS TEST TO COMMON INSTANCES OF SUGGESTIVENESS

[48] Commonwealth v. Bodden, 391 Mass. 356, 359 (1984). *But see* Commonwealth v. Thornley, 406 Mass. 96, 98 n.2 (1989) (conclusion that the opportunity of the witness to see the perpetrator during the crime provided an independent source is characterized as a "finding of fact").

[49] *See. e.g.,* Commonwealth v. Bodden, 391 Mass. 356, 361 (1984), and cases cited; Commonwealth v. Freiberg, 405 Mass. 282, 293–95 (1989) (witness had seen the person for three minutes on a sunny day); Commonwealth v. Boiselle, 16 Mass. App. Ct. 393, 397–98 (1983) (although assailant wore a ski mask with eye and mouth openings, the scene was well lighted and the witness focused on him for four minutes from a distance of two feet); Commonwealth v. Flaherty, 1 Mass. App. Ct. 282, 287–88 (19731 (witness had robber under constant observation for five to ten minutes in daylight from close proximity under circumstances likely to fix his identity in the mind of the witness).

[50] Commonwealth v. A Juvenile, 402 Mass. 275, 280-81 (1988) (testimony necessary to meet clear and convincing evidence standard).

[51] *See, e.g.,* Commonwealth v. Johnson, 423 Mass. 99, 105 (1996) (witness had brief opportunity to see person in hotel lobby under circumstances that did not focus her attention on him); Commonwealth v. Moon, 8 Mass. App. Ct. 375, 388 (1979), S.C. 380 Mass. 751 (1980) (witness's opportunity to observe was hindered by his excited state, the Weak lighting, and the short time he had to observe the assailant); Commonwealth v. Botelho, 369 Mass. 860, 868–70 (1976) (observations of assailant were over a substantial distance in dim lighting while witness was intoxicated); Commonwealth v. Kazonis, 356 Mass. 649, 652 (1970) (witness's opportunity to observe criminal was fleeting while attention was distracted elsewhere).

[52] *See* Commonwealth v. Botelho, 369 Mass. 860 (1976) (initial description very general, hair color inconsistent with defendant's, failure to identify the defendant's photograph, and uncertainty expressed at initial face-to-face encounter); Commonwealth v. Kazonis, 356 Mass. 649 (1970) (two prior failures to identify the defendant's photo, one prior identification of someone else, and two-month lapse since incident).

In order to understand common instances of suggestiveness, counsel should be aware of the preferred procedure of the Court. The Supreme Judicial Court has recommended that a double-blind procedure be employed, (i.e., that the police administering the procedure not know the identity of the suspect included in the array in order to avoid unconscious signaling to the witness); the Court also recommends that a protocol be employed that makes clear to the witness, at a minimum, that she will be asked to view a set of photographs, the alleged wrongdoer may or may not be included, it is just as important to clear a person as it is to identify a wrongdoer, individuals in the array may not appear in the same manner as on the date of the incident, the investigation will continue regardless of whether an identification is made, and the witness should be asked to state, in her own words, how certain she is of any identification.[52.5] Many identification procedures implemented by police fall far short of this model.

1. Photo Identification

a. Single Photographs

A witness should never be shown a single photograph of a suspect as the initial attempt at an identification unless there are truly exigent circumstances.[53] The preferred means of identification of a suspect from a photograph is through use of a photographic array.[54] However, the court has upheld the showing of a single photograph when it was "to some extent a continuation of an ongoing process of looking through police photos";[55] when shown to a store employee for purposes of determining whether the

[52.5] Commonwealth v. Silva-Santiago, 453 Mass. 782, 793-799 (2009) (highlighting that the Court "expects such protocols to be used in the future"). The court does not recommend the use of sequential as opposed to simultaneous arrays because of the debate over its benefits, but the use of a simultaneous array will go to the weight of the identification; the recording of an identification procedure is not required, but notes that careful reporting by the police, including near-verbatim words of the witness, is sufficient.

[53] Commonwealth v. Jackson, 377 Mass. 319, 332 (1979). *See, e.g.,* Commonwealth v. A Juvenile, 402 Mass. 275, 280-81 (1988) (impermissibly suggestive to show a witness a single photo and tell her that the person bad been charged with the assault on her; identification suppressed); Commonwealth v. Moon, 380 Mass. 751, 756–59 (1980) (no showing of exigency that required the police to show a single photo of the defendant to a witness; identification suppressed). *Contrast* Commonwealth v. Nolin, 373 Mass. 45, 50–51 (1977) (victim of shooting was seriously wounded and near death; single photo presentation was permissible).

[54] *Cf.* Commonwealth v. Rodriguez, 378 Mass. 296, 311 (1979) ("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").

[55] Commonwealth v. Venios, 378 Mass. 24, 29 (1979) (witness had seen arrays of 24 and 150 photos over a two-day period without an identification). *See also* Commonwealth v. Cavitt, 460 Mass. 617, 631-633 (2011) (witness who had just viewed thousands of photographs saw a single photograph on police computer as he was leaving police department and police had done nothing to direct witnesses attention to computer); Commonwealth v. Austin, 421 Mass. 357, 361–64 (1995) (surveillance tape of bank robbery could be shown to witness of unrelated bank robbery to determine if same man committed both; previous photos rejected, and witness not suggestible); Commonwealth v. Porter, 384 Mass. 647, 656–58 (1981) (where witness was

suspect had been there recently;[56] and when a police officer retrieved a single photo from police files to promptly confirm that the defendant was the man he had seen.[57] In some cases, the court has upheld the adding of a new suspect's picture to an array consisting of photos previously seen and rejected by a witness.[58]

b. Fairness of the Photo Arrays

There is no constitutionally mandated minimum number of photos for an array; the court has upheld as few as five while suggesting it should have been a larger display.[59] The danger of an incorrect identification is increased where the photograph of a single individual is in some way emphasized or only one photograph resembles the witness's description.[60] The court has suppressed identifications where the defendant's photo was the only one with a distinctive feature, such as glasses, which is consistent with the description provided by the witness, although this fact alone does not make an array impermissibly suggestive.[61] The court has upheld some photo displays in which

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unable to identify murderer from photo array that included old photo of the defendant, the immediate showing of a single, more recent photo of the defendant was part of a continuing process and the identification was admissible); Commonwealth v. Nassar, 354 Mass. 249, 259–62 (1968), *habeas corpus denied sub. nom.* Nassar v. Vinzant, 519 F.2d 798 (1st Cir. 1975) (no identification when shown a photo array; presenting a single photo the following day was a criticized procedure but there is no per se rule mandating exclusion of identification); Commonwealth v. Small, 10 Mass. App. Ct. 606, 608–09 (1980) (after witness had been shown and rejected 300 photos over a 10-month period in eight visits by police, identification was made from presentation of a single photo).

[56] Commonwealth v. Shipps, 399 Mass. 820, 830–33 (1987).

[57] Commonwealth v. Martinez, 67 Mass. App. Ct. 788, 794-796 (2006) (single photograph used to confirm "accuracy of [police] investigatory information"); Commonwealth v. Russell, 19 Mass. App. Ct. 940 (1985).

[58] Commonwealth v. Smith, 414 Mass. 437, 441–43 (1993) (not suggestive that in eight-photo array, defendant's photo was only one not previously seen by witness); Commonwealth v. Funderberg, 374 Mass. 577, 581–82 (1978) (witness who failed to make an identification from 61 photos could be shown same group with four additional photos two months later; no dramatic focus to new photos, and witness unaware that remainder had been previously seen). *See also* Commonwealth v. Gernor, 13 Mass. App. Ct. 913 (1982) (12 photos from which defendant's photo selected not suggestive even though other 11 photos had been included in the 2,000 previously viewed and rejected); Commonwealth v. Andrade, 8 Mass. App. Ct. 653, 656–58 (1979) (presentation of same 70 photos as day before, with defendant's photo now added, was "scarcely akin" to a single-photo identification procedure because the witness thought that it was entirely new set of photographs).

[59] Commonwealth v. Allen, 22 Mass. App. Ct. 413, 414–17 (1986). *See also* Commonwealth v. Dietrich, 381 Mass. 458, 464 (1980) ("an array of ten photographs [of which three were of the three suspects] is not as a matter of constitutional law too small"); Commonwealth v. Mattias, 8 Mass. App. Ct. 786, 789 (1979) (seven or eight photos sufficient); Commonwealth v. Lynes, 6 Mass. App. Ct. 834, (1978) (seven photos).

[60] Simmons v. United States, 390 U.S. 377, 383 (1968). The deliberate inclusion of a suspect's picture in an array would be improper, in and of itself, only if the array were too small. Commonwealth v. Downey, 407 Mass. 472, 478 (1990). In addition, the removal of a photo which is a "look-alike" of the suspect (and which was selected from the array by a previous witness) is not improper per se. *Downey, supra,* 407 Mass. at 479.

[61] Commonwealth v. Thornley, 400 Mass. 355, 362–64 (1987) *(Thornley I)* (array of 13 photos in which the defendant was the only one wearing glasses, as described by the witness,

the persons did not resemble each other or included persons with features that did not match the assailant's description.[62]

Differences in size, shape, or type of photograph in an array do not inevitably make it suggestive.[63] There is no prohibition on the defendant's photo appearing as the first or last photo in an array handed to a witness provided that the police do not call the attention of the witness to the location of the defendant's photo.[64] It is not unduly suggestive for the defendant's photo to be the only one not contained in a previous

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was suggestive); Commonwealth v. Poggi, 53 Mass. App. Ct. 685, 689-694 (2002)(excellent analysis of deficiencies in array that were suggestive of defendant); Commonwealth v. Gordon, 6 Mass. App. Ct. 230, 239–40 (1978) (court critical of nine-photo array in which only the defendant had the braided hair style consistent with assailant, and "unimpressed' with practical difficulties of assembling a fair array when a distinctive physical characteristic or item of clothing is involved). *See also* Commonwealth v. Thornley, 406 Mass. 96, 100 (1989) *(Thornley II)* ("we disapprove of an array of photographs which distinguishes one suspect from all the others on the basis of some physical characteristics").

However, *Thornley II* at 100 notes that when the court has found that the witness did not choose the photo because of the distinguishing characteristic, the identification evidence may be admissible. *See* Commonwealth v. Melvin, 399 Mass. 201 (1987) (only defendant had his arm in a sling, the assailant having leapt from a third floor porch; police should have covered up the sling in the photo); Commonwealth v. Parker, 389 Mass. 27, 31 n.3 (1983); Commonwealth v. Hicks, 377 Mass. 1, 7 (1979) (only the defendant in five-photo array had dark hair and dark complexion); Commonwealth v. Mobley, 369 Mass. 892, 896–97 (1976) (only defendant had ski cap in six-photo array, but witness testified he was not looking for a hat when he viewed the pictures); Commonwealth v. Sheffield, 10 Mass. App. Ct. 863 (1980) (defendant somewhat stockier than others in photo array).

[62] Commonwealth v. Chase, 372 Mass. 736, 740 (1977). *See also* Commonwealth v. Merced, 81 Mass. App. Ct. 1107 (2012) (array not unnecessarily suggestive just because defendant's photograph was the only one of a "shirtless person wearing a round earring in each ear"); Commonwealth v. Napolitano, 378 Mass. 599, 602–03 (1979) (array of 44 photos not impermissibly suggestive because only three depicted heavy men with scraggly beards, consistent with assailant; when features can be altered easily, police can use a fair cross-section of individuals); Commonwealth v. Jones, 375 Mass. 349, 352–55 (1978) (police could include both light and dark complexioned males in array where no specific description by witness, provided that nothing draws attention to the defendant).

It is preferable, if possible, for the police to use a current photo of the suspect in an array. Commonwealth v. Downey, 407 Mass. 472, 478 (1990).

[63] Commonwealth v. Clark, 378 Mass. 392, 399–401 (1979) (array of 11 mug shots and two snapshots all reflecting males of same general description). *See also* Commonwealth v. Chase, 372 Mass. 736, 740–41 (1977) (less contrast between black and white of defendant's photo); Commonwealth v. Jones, 9 Mass. App. Ct. 83, 88–89 (1980) (use of seven identical hackney licenses was permissible); Commonwealth v. Howard, 8 Mass. App. Ct. 318, 323–24 (1979) (in first array, all mug shots masked with white tape except defendant with tan tape; second array contained 14 mug shots and two Polaroids, one of which was defendant; neither array impermissibly suggestive); contrast Commonwealth v. Evans, 5 Mass. App. Ct. 843 (1977) (following selection of codefendant and another person, not the defendant, from 14 mug shots, witness was shown same array with two additional Polaroid photos of codefendant and defendant; latter array impermissibly suggestive of defendant).

[64] Commonwealth v. Roberts, 362 Mass. 357, 365 (1972) (first in array); Commonwealth v. Amorin, 14 Mass. App. Ct. 553, 555 (1982) (last in array); *see also,* Commonwealth v. Merced, 81 Mass. App. Ct. 1107 (2012) (positioning of defendant's photo in same order as codefendant photo in an array that same witness viewed several days earlier).

array shown to a witness where the witness did not realize that the other photos had been in the earlier group.[64.3]

The U.S. Department of Justice has published guidelines for law enforcement officers seeking to ensure that they avoid suggestive features in composing photo arrays.[64.5] These guidelines can provide a useful contrast to a flawed array, and have been cited with approval by the Appeals Court.[64.6]

The trial judge has the discretion to preclude defense counsel from showing the witness a photo array in an altered fashion where the intent was to have the witness make a selection based solely on certain features of the persons in the array.[64.7]

c. Repetition of Defendant's Photo

Repeated showings can overemphasize the defendant and risk misidentification.[65] However, the court has upheld as not impermissibly suggestive certain arrays in which the defendant's photo appeared more than once in a single array [66] or was shown a second time in a subsequent array after having been selected [67]

[64.3] Commonwealth v. Manning, 44 Mass. App. Ct. 695, 697–700 (1998).

[64.5] *Eyewitness Evidence: A Guide for Law Enforcement*. The handbook is available from the Department of Justice, National Institute of Justice, Box 6000, Rockville, MD 20849–6000.

[64.6] Commonwealth v. Vardinski, 53 Mass. App. Ct. 307, 312 n.4 (2001), *f.a.r. granted* 436 Mass. 1101 (2002).

[64.7] Commonwealth v. Montez, 45 Mass. App. Ct. 802, 810–811 (1998) (altered array, which showed only the noses and eyes, could be excluded where the witness also saw the hair, cheeks and complexion of the bandana-wearing burglar).

[65] *See, e.g.,* Foster v. California, 394 U.S. 440 (1969) (suppression because of repeated in-person showings); Commonwealth v. Correia, 381 Mass. 65 (1980); Commonwealth v. Bowie, 25 Mass. App. Ct. 70 (1987); Commonwealth v. LaPierre 10 Mass. App. Ct. 641 (1980).

[66] Simmons v. United States, 390 U.S. 377, 384–96 (1968) (six group portraits that included the defendant, but preferable to show more photos and proportionally fewer pictures of the defendant). *See also* Commonwealth v. Kostka, 370 Mass. 516, 524–25 (1976) (defendant appeared twice in 12-photo array once with glasses and once without); Commonwealth v. LaFaille, 430 Mass. 47–49, S.C., 46 Mass. App. Ct. 144 (1999) (two significantly different photos of the defendant in an eight-photo array and witness had previously viewed mug books containing at least one photo of the defendant without selecting it); Commonwealth v. Riley, 17 Mass. App. Ct. 950, 951 (1983) (defendant appeared twice in 13-photo array in photos "markedly unlike one another" regarding size, facial hair, lighting, and print contrast); Commonwealth v. Avery, 12 Mass. App. Ct. 97, 101–03 (1981) (18-photo array criticized for three photos of defendant, but also included four photos of another person not selected by witness); Commonwealth v. Vasquez, 11 Mass. App. Ct. 261, 264–66 (1981) (two different photos of a defendant out of 20 on page of mug book); Commonwealth v. Loder, 4 Mass. App. Ct. 832, 833 (1976) (inadvertent appearance of two photos of defendant among six shown to witness).

[67] Commonwealth v. Roberts, 362 Mass. 357, 365–66 (1972). *See, e.g.,* Commonwealth v. Dinkins, 415 Mass. 715, 719–23 (1993); Commonwealth v. Scott, 408 Mass. 811, 825–26 (1990) (after selecting defendant's overexposed photo in an array, witness could be shown another array with a different photo of the defendant). Commonwealth v. Johnson, 24 Mass. App. Ct. 947, 948–49 (1987); Commonwealth v. Mayo, 21 Mass. App. Ct. 212, 213–18 (1985); Commonwealth v. Sheffield, 10 Mass. App. Ct. 863 (1980).

A successive array will not generally be significant if a previous identification was unequivocal of the defendant. *See, e.g.,* Commonwealth v. Mobley, 369 Mass. 892, 896–97

or after a failure to identify him.[68] A photo array might not be tainted by the fact that the witness had seen a composite sketch of the suspect up to twenty times over the previous five months.[68.5]

d. Showing to Witnesses Collectively

Witnesses should not view photographs in each other's presence, but the practice is not so inherently suggestive as to automatically preclude an identification made under that circumstance.[69]

e. Statements by Police

(1976); Commonwealth v. LaPierre, 10 Mass. App. Ct. 641, 642–44 (1980). *Contrast* Commonwealth v. Marini, 375 Mass. 510, 512 n.4 (1978) (impermissibly suggestive to show a witness a photo that she had selected earlier where police had added a mustache and goatee so as to resemble the witness's initial description of her assailant); United States v. Eatherton, 519 F.2d 603, 608–09 (1975) (repeated exposures to photo array from which witness had selected suspect may be impermissibly suggestive if the initial selection had been equivocal or influenced by suggestive procedures).

[68] Commonwealth v. Correia, 381 Mass. 65, 78–79 (1980). *See, e.g.,* Commonwealth v. Holland, 410 Mass. 248, 250–56 (1991) (witness could be shown identical photo of suspect in subsequent array despite failure to select him from initial array); Commonwealth v. Paszko, 391 Mass. 164, 169–72 (1984) (witness who failed to select defendant's color photo from a seven-photo array could be shown defendant's black-and-white photo in different array the following day, even though only the defendant appeared in both arrays, where substantial differences between the photos, e.g., second one was more recent); Commonwealth v. LaFaille, 430 Mass. 47–49, *S.C.,* 46 Mass. App. Ct. 144 (1999) (earlier photo in a mug book, new photo in an array); Commonwealth v. LaPierre, 10 Mass. App. Ct. 641 (1980) (witness who failed to make an identification from an array could view a new array two hours later in which a dissimilar photo of the defendant appeared; repetition of the defendant in successive arrays does not by itself taint the resulting identification). A photo array might not be tainted by the fact that the witness had seen a composite sketch of the suspect up to twenty times over the previous five months.

[68.5] Commonwealth v. Johnson, 46 Mass. App. Ct. 398, 399–401 (1999) (record did not support suggestiveness where composite was not described or made an exhibit during suppression hearing).

[69] Commonwealth v. Cofield, 1 Mass. App. Ct. 660, 665–67 (1974). *See also* Commonwealth v. Soares, 76 Mass. App. Ct. 612 (2010) (although "potentially problematic for the witnesses to be present together" for identification, suppression only required where unduly suggestive and conducive to irreparable harm); Commonwealth v. Moynihan, 376 Mass. 468, 474–77 (1978) ("close case" presented where two witnesses were simultaneously shown photo array, and one witness "verified" the other's selection of the defendant's photo; it is "highly preferable" for witnesses to view photos independently); Commonwealth v. Johnson, 46 Mass. App. Ct. 398, 399–401 (1998) (although first witness present when another witness was told by police that she had selected suspect's photo, no indication that first witness knew which photo had been selected); Commonwealth v. Worlds, 9 Mass. App. Ct. 162 (1980). *Contrast* Commonwealth v. Thornley, 400 Mass. 355, 359–61 (19871 (joint preparation of a composite drawing was not unnecessarily suggestive).

Witnesses may be in the same room when they view separate groups of photos provided that they do not communicate their respective choices to each other. Commonwealth v. Roberts, 362 Mass. 357, 365 (1972); Commonwealth v. Amorin, 14 Mass. App. Ct. 553, 555 (1982). *Contrast* Commonwealth v. Marks, 12 Mass. App. Ct. 511 (1981) (two witnesses should not have entered a courtroom together to view a suspect).

Statements or conduct by the police before, during, or after the showing of a photo array often constitute a suggestive influence. Identification by the police of a specific photo as depicting the primary suspect has been termed "reprehensible,"[70] and informing the witness that the defendant has been charged with the crime prior to showing the witness his photo has contributed to suppression of the identification.[71] It also is improper for the police to make comments following the selection of a photograph that suggest that the witness made the correct choice.[72] But cases have not found it impermissibly suggestive to tell a witness that a suspect is in a photo array, [72.5] that the witness must be "positive" of her identification,[73] to suggest that the witness should review the photos again after failing to make an identification,[74] to promise assistance or protection,[75] or to take two photos from a witness before he has actually identified them as depicting the assailants.[76] The fact that a witness learns of confirmatory facts from a friend after he has made an identification does not compel suppression.[76.5]

The court has suppressed identifications in which the witness was aware of the suspect's name and the name was on the picture,[77] but the knowledge or belief by a

[70] Commonwealth v. Toto, 15 Mass. App. Ct. 941, 942 (1983) (officer pointed to photo not selected by the witness and stated it was of the man police suspected). *Contrast* Commonwealth v. Kudish, 362 Mass. 627, 630–31 (1972) (after nonidentification, police took one photo from array and handed it to witness, who now affirmed that it was the person she had seen; not unnecessarily suggestive, but see dissent by Kaplan, J., at 632–33).

[71] Commonwealth v. A Juvenile, 402 Mass. 275, 280–81 (1988).

[72] Commonwealth v. Riley, 26 Mass. App. Ct. 550 (1988) (statements that another witness had selected the same photograph and that the defendant had been charged previously with similar crimes were "both unnecessary and suggestive"). See *also* Commonwealth v. Johnson, 46 Mass. App. Ct. 398, 399–401 (1998) (verbal confirmation by police that witness had selected the suspect did not taint later in-court identification where witness testified that she was not certain that the defendant was the robber); Commonwealth v. Ayles, 31 Mass. App. Ct. 514 (1991) ("clearly inappropriate" for police to tell witness that person she selected was suspect in other assaults on women); Commonwealth v. Bonnoyer, 25 Mass. App. Ct. 444 (1988) (highly prejudicial for police to inform witness who was uncertain of her identification that the codefendant had confessed and implicated the defendant as his partner); Commonwealth v. Loder, 4 Mass. App. Ct. 832, 833 (1976) (police told witness after selection of photo that the defendant was regarded as dangerous).

[72.5] Commonwealth v. Watson, 455 Mass 246, 250-257 (2009)

[73] Commonwealth v. Jones, 25 Mass. App. Ct. 55 (1987). *See, e.g.,* Commonwealth v. Cofield, 1 Mass. App. Ct. 660, 666 (1974) (witness told she must be absolutely positive of the identification).

[74] Commonwealth v. Benson, 17 Mass. App. Ct. 936, 937 (1983).

[75] Commonwealth v. Watson, 393 Mass. 297, 299–301 (1984) (statements that the police will assist the witness in moving from the housing project where the crime occurred did not taint the subsequent identification procedure.)

[76] Commonwealth v. Villemaire, 13 Mass. App. Ct. 947, 948–49 (1983).

[76.5] Commonwealth v. Huan Lieu, 50 Mass. App. Ct. 162, 164-165 (2000).

[77] Commonwealth v. Moon, 380 Mass. 751, 757–59 (1980) (it was impermissibly suggestive to show a witness a single photo of a suspect when the photo bore the name of the person whom the police told the witness they suspected for the crime, especially where the witness had seen the police retrieve the photo from the wallet in the suspect's car): Commonwealth v. Boiselle, 16 Mass. App. Ct. 393, 394 (1983) (identification of photo suppressed where witness recognized name of suspect under the defendant's photo before

witness that a suspect's photo will be in the array about to be viewed is only a marginally suggestive factor.[78]

f. Photos and the Right to Counsel

There is no requirement that defense counsel be present during the showing of a photo array to a witness, even if the defendant has been arraigned and counsel been appointed.[79] The fact that a more reliable in-person lineup or showup could have been used instead of a photo array does not require exclusion of the photo identification.[80] A photograph of a juvenile may be included in an array if the juvenile was arrested for a felony.[81]

g. Discovery of Photos Used

Although it is preferable for the police to segregate the photos shown to each identification witness and have the photo selected available at trial, the failure of the government to preserve them is not constitutional error.[82] The array should be

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identifying it). *But see* Commonwealth v. Laaman, 25 Mass. App. Ct. 354, 360–63 (1988) (fact that witness had heard police mention defendant's name as a suspect before he viewed a driver's license with the defendant's name and photograph on it was not unnecessarily suggestive where the witness had previously provided a detailed description of the suspect, the mention of the defendant's name was inadvertent, and the procedure more closely resembled a permissible showup); Commonwealth v. Chase, 14 Mass. App. Ct. 1032, 1034 (1982) (not suggestive if name not visible on photo).

[78] Commonwealth v. Watson, 455 Mass 246, 250-257 (2009) (investigating officer presenting the array and telling witness that a suspect was in it was not unnecessarily suggestive); Commonwealth v. Leonardi, 413 Mass. 757, 760–62 (1992) (police told witness that they had someone who matched description); Commonwealth v. Ayles, 31 Mass. App. Ct. 514 (1991) (police officer told witness he had a "good idea who did it"); Commonwealth v. Chotain, 31 Mass. App. Ct. 336, 338–41 (1991) (police told witness that suspect had gash where witness had struck intruder); Commonwealth v. Cincotta, 6 Mass. App. Ct. 812, 818, S.C. 379 Mass. 391, 393–94 (1979) (presentation of 10-photo array may carry implication that police thought culprit was included, but without further suggestion, does not offend due process). *See, e.g.,* Commonwealth v. Allen, 22 Mass. App. Ct. 413, 414–17 (1986) (knowledge that photo of suspect, whose name witness had learned, would be in array was not impermissibly suggestive); Commonwealth v. Napolitano, 378 Mass. 599, 603 n.6 (1979) (statement by police handing array to witness that "we think we have someone who fits the description" merely stated the obvious purpose of showing the photos to the witness, although comment was better left unsaid).

[79] Commonwealth v. Ross, 361 Mass. 665, 673–75 (1972) (no Sixth Amendment right to have counsel present when police show an array to a witness that includes the defendant's photo). See also United States v. Ash, 413 U.S. 300, 321 (1973).

[80] Commonwealth v. Gagne, 27 Mass. App. Ct. 425, 427–29 (1989). *See also* Commonwealth v. Purvis, 18 Mass. App. Ct. 933, 934 (1984); Commonwealth v. Mattias, 8 Mass. App. Ct. 786, 789 (1979). *Cf.* Simmons v. United States, 390 U.S. 377, 386 n.6 (1968) (reliability of identification procedure could have been increased by using a photo array with one or two witnesses, and if an identification made, using a lineup for the other witnesses; however, this sequence is not constitutionally mandated)

[81] Commonwealth v. Shipps, 399 Mass. 820, 830–33 (1987).

[82] Simmons v. United States, 390 U.S. 377, 388–99 (1968). *See, e.g.,* Commonwealth v. Brown, 376 Mass. 156, 161–64 (1978) (photo identification admissible despite unavailability

photographed so that it is available for appellate scrutiny, although recording the numbers of the photos used may be an acceptable alternative.[82.5] Due process rights to discovery of identification procedures are addressed *supra* at § 16.6J.

2. Composite Drawing

A composite drawing prepared by a witness is admissible at trial if the witness testifies at the trial and acknowledges the drawing as hers, and if the drawing were prepared under nonsuggestive circumstances.[83] Joint preparation of a composite drawing by two persons is disfavored but is not per se unnecessarily suggestive.[84]

3. Showup Identification

One-on-one confrontations, whether through use of a single photo or an in-person showup, are disfavored because of the particularly serious danger of suggestiveness that is inherent in the procedure.[85] A showup is permitted when exigent circumstances, such as a life-threatening injury, make an immediate confrontation between the suspect and the witness imperative.[86] A showup also is ordinarily permitted in the immediate aftermath of a crime under the theory that it allows the witness to view a suspect while her recollection is fresh and provides an indication to

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of remainder of array); Commonwealth v. Gibson, 357 Mass. 45, 46–47 (1970) (segregation of photos too great a burden on police); Commonwealth v.Caldwell, 36 Mass. App. Ct. 570, 579–80 (1994); Commonwealth v. Purvis, 18 Mass. App. Ct. 933, 934 (1984) (inability to produce photos does not create a presumption that the identification procedure was impermissibly suggestive); Commonwealth v. Walker, 14 Mass. App. Ct. 544, 549-50 (1982) (police not required to retain photo selected by witness as depicting assailant); Commonwealth v. Clark, 3 Mass. App. Ct. 481, 484–85 (1975) (defense counsel may ask whether the defendant's photo was in an array from which no identification was made).

[82.5] Commonwealth v. v Picher, 46 Mass. App. Ct. 409, 416 n.8 (1999).

[83] Commonwealth v. Weichell, 390 Mass. 62, 68–73 (1983).

[84] Commonwealth v. Thornley, 400 Mass. 355, 359-61 (1987).

[85] Stovall v. Denno, 388 U.S. 293, 302 (1967); Commonwealth v. Storey, 378 Mass. 312, 317 (1979); Commonwealth v. Noun, 373 Mass. 451 (1977). *See, e.g.,* Commonwealth v. Waters, 27 Mass. App. Ct. 64, 69-70 (1989) (defendant's segregated position and implication that police believe him to be the perpetrator constitutes suggestiveness that cannot be avoided in this situation); Commonwealth v. Coy, 10 Mass. App. Ct. 367, 371–72 (1980) (although suggestive, there is no rule of per se exclusion of showups; the test is simply whether the confrontation was *unnecessarily* suggestive of the defendant); Commonwealth v. Moon, 8 Mass. App. Ct. 375, 385 n.8 (1979), S.C., 380 Mass. 751 (1980), quoting Biggers v. Tennessee, 390 U.S. 404, 407 (1968) (Douglas, J. dissenting) ("Whatever may be said of lineups, showing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police suspect *this* man. That carried a powerfully suggestive thought [and] havoc is more likely to he played with the best intended recollections").

[86] Stovall v. Denno, 388 U.S. 293, 302 (1967) (stabbing victim who was about to undergo surgery). *See, e.g.,* Commonwealth v. Cox, 6 Mass. App. Ct. 968, 969 (1979) (victim was in intensive care unit at hospital 30 hours after shooting). Sufficient exigency also was presented 16 days after a crime when a witness thought she saw the suspect, who was returned for a showup. Commonwealth v. Walker, 421 Mass. 90, 94–96 (1995).

the police of whether they have arrested the actual perpetrator or should redirect their efforts elsewhere.[87]

The police may use an appropriate amount of force to effectuate a showup without turning the encounter into an arrest for which probable cause does not exist. For example, in the immediate aftermath of an armed robbery, the police could stop certain suspects, handcuff them, and force them to lie on the ground to await the arrival of an eyewitness.[88]

A showup may be used even if probable cause already exists to arrest the suspect.[89] The police may not, however, repeat a showup with the same witness if a showup identification was previously made by the witness, the defendant is under arrest, and there was ample time to conduct a lineup.[90]

The police are under no obligation to conduct a showup between a witness and a person arrested for the crime, even if the witness is readily available.[91] The critical question is not whether the procedure was highly suggestive, but rather was it unnecessarily so,[92] and cases illustrate certain precautions that can ameliorate the suggestive aspects of the procedure.[93]

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[87] Commonwealth v. Freiberg, 405 Mass. 282, 293–95 (1989] (one hour after crime). *See, e.g.,* Commonwealth v. Amaral, 81 Mass.App.Ct. 143, 145-146 (2012) (police officers had good reason to conduct one-on-one showup procedure to identify defendant as person who had attempted to rob pharmacy, and thus procedure was not so unnecessarily suggestive as to violate due process; defendant's clothing and general description matched description of victim and a witness, defendant was apprehended immediately after and in immediate vicinity of attempted robbery, showup was conducted immediately after apprehension, victim identified defendant as attempted robber by his clothes, and victim never claimed to have been able to identify defendant by his facial features); Commonwealth v. Wen Chao Ye, 52 Mass. App. Ct. 850, 855-856 (2001); Commonwealth v. Crowley, 29 Mass. App. Ct. 1, 6 (1990) (despite TV cameras, highly suggestive showup was not impermissibly so because promptly held after crime); Commonwealth v. Santos, 402 Mass. 775, 783 n.8 (1988) (immediate aftermath of crime); Commonwealth v. Bumpus, 354 Mass. 494, 500–01 (1968) (30 minutes after crime); Commonwealth v. Denault, 362 Mass. 564, 566–67 (1972) (two hours after crime). *Contrast* Commonwealth v. Johnson, 420 Mass. 458 (1995) (showup 18 hours after assault was unnecessarily suggestive when suspect wearing similar clothes as assailant was brought forward from group to present to witness).

In this situation, it is not necessary that the witness be near death or seriously injured, nor that other exigent or special circumstances exist as a prerequisite to use of a showup procedure. Commonwealth v. Coy, 10 Mass. App. Ct. 367, 371–72 (1980). In addition, it is immaterial that the witness is not the victim of the crime. Commonwealth v. Williams, 399 Mass. 60, 67 (1987).

[88] Commonwealth v. Andrews, 34 Mass. App. Ct. 324, 327–30 (1993).

[89] Commonwealth v. Libby, 21 Mass. App. Ct. 650 (1986) (photo identification has been made by witness, but police had reservations concerning its accuracy). *See also* Commonwealth v. Bowden, 379 Mass. 472, 478–79 (1980) (a showup was permissible shortly after arrest, even though the eyewitnesses was brought to the station to view the suspect sitting alone in a detention cell).

[90] Commonwealth v. Santos, 402 Mass. 775 (1988) (identification made at showup in aftermath of crime; identification at subsequent stationhouse showup by same witness suppressed because procedure was suggestive and unnecessary).

[91] Commonwealth v. Gagne, 27 Mass. App. Ct. 425, 427–49 (1989).

[92] Commonwealth v. O'Loughlin, 17 Mass. App. Ct. 972 (1984) (suggestiveness is inherent in any showup; "the evil to be avoided is *needless* suggestion"). *See, e.g.,* Commonwealth v. Freiberg, 405 Mass. 282, 293–95 (1989) (showup one hour after crime when

4. Voice Identification

The procedures used to identify the voice of a suspect prior to trial raise constitutional issues that are similar to those applied to an identification made by sight.[94] Voice identifications are suspect, although not unlawful per se, and if used should avoid one-to-one auditions, should not permit the listener to see the suspect, and should not use the words used in the incident.[95] A voice identification occurring months after the crime that violated these conditions was termed an inherently unreliable investigative technique, comparable to the disfavored one-on-one visual confrontation under similar circumstances.[96] On the other hand, more leeway has been permitted when a voice identification was made at a showup immediately following a crime.[97] In

witness knew that the defendant was in the house based on a police broadcast, and he was presented to witness while handcuffed and surrounded by police); Commonwealth v. Williams, 399 Mass. 60, 66–68 (1987) (defendant handcuffed and in the presence of four uniformed officers; although procedure was "highly suggestive," it was "not impermissibly so"); Commonwealth v. Harris, 395 Mass. 296, 298–300 (1985] (witness in hospital room told suspect would be brought in who matched the description, and suspect was handcuffed, standing between uniformed officers, and only black male in room when identified); Commonwealth v. Leaster, 395 Mass. 96 (1985) (defendant was labeled a suspect to witness prior to the showup).

[93] Commonwealth v. Perretti, 20 Mass. App. Ct. 36, 41–42 (1985) (police attempted to disguise the fact that the defendant was under arrest by taking him out of the cruiser, uncuffing him, and cautioning the witness to be certain before she made an identification). *See also* Commonwealth v. O'Neil, 14 Mass. App. Ct. 978, 979-80 (1982) (witness brought to home of suspect and observed suspect when he came onto porch at police request). However, the fact that the defendant is handcuffed during the viewing by the witness has not been deemed suggestive per se. Commonwealth v. Pandolfino, 33 Mass. App. Ct. 96, 98–99 (1992). Also, it was not unnecessarily suggestive to present three men handcuffed as a group to victim of rape where immediate aftermath of crime. Commonwealth v. Rogers, 38 Mass. App. Ct. 395, 402–405 (1995).

[94] Commonwealth v. Torres, 367 Mass. 737, 740–41 (1975). *See also* Commonwealth v. Perez, 411 Mass. 249, 262 (1991) (criteria for admissibility of telephone-voice identification are the same in civil and criminal cases).

[95] Commonwealth v. Marini, 375 Mass. 510, 515–19 (1978) (impermissibly suggestive to require the defendant to repeat in full view of the victim in midtrial the vulgar words used by her assailant); Commonwealth v. DeMaria, 46 Mass. App. Ct. 114, 116-118 (1999) (voice identification protocol generally: (1) voice identification should not be used unless the witness asks to hear the voice; (2) a one-on-one audition ought to be avoided, and an audition lineup employed instead; (3) witness should not be viewing the suspects as she listens to the voices; (4) the words ought to be different from those spoken at the scene of the crime; and (5) the voice recognition test ought to be conducted close to the time of the crime).

[96] Commonwealth v. Powell, 10 Mass. App. Ct. 57, 60–61 (1980) (witness had already identified the suspect by sight). *Contrast* Commonwealth v. Pacheco, 12 Mass. App. Ct. 109, 117–22 (1981) (an identification obtained by playing a tape of the defendant's voice in normal conversation was not impermissibly suggestive where the blind victim had well developed powers of aural perception and had listened to her assailant's voice continuously over the hour of the incident).

[97] Commonwealth v. Gauthier, 21 Mass. App. Ct. 585, 587–88 (1986) (witness had already made a positive visual identification). *See also* Commonwealth v. Burgos, 36 Mass. App. Ct. 903 (1994) (precautions recommended for formal voice identification procedure do not apply to a showup); Commonwealth v. O'Loughlin, 17 Mass. App. Ct. 972 (1984) (no

addition, if the voice identification was fortuitous and not at the request of the police, it weighs against the suggestiveness of the procedure.[97.5]

The admissibility of a voice identification rests in the discretion of the trial judge, who may admit it if the witness expresses some basic familiarity with the voice of the person whom she purports to identify.[98] If the identification is of a person other than the defendant, suggestiveness is of a lesser concern, and the defendant must rely on cross-examination and argument to illuminate any weaknesses in the procedure used.[99] A judge has the discretion to exclude expert testimony on voice identification if she concludes that the reliability of a voice identification is "within the scope of ordinary experience," despite an offer of proof that voice contacts of short duration have a high potential for inaccuracy.[99.5]

5. Lineup Identification

Lineups historically were the judicially preferred method of conducting an identification procedure. Lineups, however, are also vulnerable to a due process challenge if they unduly emphasize the defendant through repetition, dissimilarity from the other participants, or other impermissibly suggestive defects.[100] However, because of the advantages of avoiding a one-on-one confrontation while retaining the greater reliability that comes from in-person viewing, marginal elements of suggestiveness have not rendered the procedure impermissible.[100.5] Furthermore, a court may order that the defendant change his appearance for a lineup.[101]

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impropriety in allowing the witness to listen to the defendant's voice in normal conversation at a showup that occurred three hours after the assault.

[97.5] Commonwealth v. Saunders, 50 Mass. App. Ct. 865, 874 (2001)(witness heard defendant speak in police station after unsuccessful lineup), *S.C.*, 435 Mass. 691 (2002).

[98] Commonwealth v. Mezzanotti, 26 Mass. App. Ct. 552, 527–28 (1988) (the fact that the witness, who described prior occasions of hearing the defendant's voice, could not point out any particular characteristics of his voice, went to the weight and not the admissibility of the identification).

[99] Commonwealth v. Enos, 26 Mass. App. Ct. 1006 (1988).

[99.5] Commonwealth v. Pagano, 47 Mass. App. Ct. 55, 64 (1999) (decision to allow an expert to testify about the reliability of voice identifications is within the discretion of the trial judge; expert testimony was precluded in this case).

[100] Foster v. California, 394 U.S. 440, 442–44 (1969) (impermissibly suggestive to have only the suspect reappear in a second lineup after no identification had been made at the first, exacerbated by the fact that only he was wearing a jacket similar to the assailant, he was considerably taller than the others in the lineup, and the police confronted the witness with the suspect prior to the second lineup; "in effect, the police repeatedly said to the witness, '*this* is the man' ").

[100.5] Commonwealth v. Tarver, 369 Mass. 302, 312–13 (1975) (lineup at which defendant was the only bald man with a facial scar was not unduly suggestive because witness had seen his assailant eight months earlier during the crime under good light for more than a minute and a half). *See, e.g.*, Commonwealth v. Tanso, 411 Mass. 640, 651–53 (1992) (dissimilarity of lineup participants to each other wasn't suggestive); Commonwealth v. Simmonds, 386 Mass. 234, 240 (1982) (four of seven men had mustaches when assailant described as clean shaven, and several wore regulation police pants); Commonwealth v. Clifford, 374 Mass. 293, 303–04 (1978) (defendant only person in lineup with a blue jacket similar to assailant, and two of remaining four persons in lineup wore police pants with a stripe

6. In-Court Identification

The isolation of a defendant in the dock area of a courtroom does not automatically render the identification procedure impermissibly suggestive[102.5]. It is improper, however, to use a courtroom showup simply as an attempt to bolster a witness's prior identification.[102] Moreover, the addition of further elements of suggestiveness may so taint the procedure as to invalidate the resulting identification.[103] On the other hand, a witness resisting the suggestive aspects of the identification procedure can bolster the ultimate identification of the defendant.[103.5] Judges have been urged to show restraint during a trial in questioning witnesses about an identification of the defendant as the perpetrator if he has not been previously identified by the witness.[103.7]

If an identification procedure is to occur after the arraignment of the defendant, it is the responsibility of defense counsel to propose a less suggestive method than the

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down the legs); Commonwealth v. Lopez, 362 Mass. 448, 452–53 (1972) (it was "good police procedure to use a lineup"; fact that only two others in seven-person lineup were about the same age, size, and weight as the defendant did not make it impermissibly suggestive); Commonwealth v. Wilson, 357 Mass. 49, 54 (1970) (defendant's placement in a nine-person lineup directly adjacent to three policemen known to the witness was not impermissibly suggestive).

[101] Commonwealth v. Cinelli, 389 Mass. 197 (1983). A defendant does not have a right under the Fifth Amendment to refuse a court order to appear in a lineup (United States v. Wade, 388 U.S. 218, 221–22 (1967)), but he has no duty to submit to a lineup if merely requested to do so. Commonwealth v. Holland, 410 Mass. 248, 259 n.10 (1991).

Case law suggests that the defendant's refusal to submit voluntarily to a lineup cannot be introduced as consciousness of guilt. *Cf.* Commonwealth v. Lydon, 413 Mass. 309, 313–15 (1992) (refusal to permit hands to be tested for gunpowder residue not admissible); Opinion of Justices, 412 Mass. 1201 (1992) (refusal to take breathalyzer test after OUI arrest not admissible).

[102.5] *See* Commonwealth v. Napolitano, 378 Mass. 599, 604 (1979)

[102] Commonwealth v. Riley, 26 Mass. App. Ct. 550, 555 (1988) (improper but not unduly suggestive).

[103] *See, e.g.,* Moore v. Illinois, 434 U.S. 220, 229-30 (1977) ("it is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation than was employed in this case, where the victim was brought to court for defendant's arraignment, told she was going to view a suspect, and heard the prosecutor recite the evidence implicating the defendant as he stood in sight of the victim"). *Cf.* Commonwealth v. Jones, 423 Mass. 99 (1996) (viewing of defendant handcuffed to codefendant in court was unnecessarily suggestive where witness had seen suspect briefly in motel lobby); Commonwealth v. Marks, 12 Mass. App. Ct. 511 (1981) (witnesses should not walk through a courtroom together in an effort to make an identification of an assailant). *But see* Commonwealth v. Key, 19 Mass. App. Ct. 234. 240 (1985) (witness asked to walk into courtroom and determine if assailant there; although defendant was alone in dock, witness was unfamiliar with courtroom and did not realize that area reserved for prisoners).

[103.5] Commonwealth v. Daye, 435 Mass. 463, 468-469 (2001) (rejection of first person presented to her enhanced witness's subsequent identification of defendant).

[103.7] Commonwealth v. Gomes, 54 Mass. App. Ct. 1, 3-8 (2002).

one-on-one confrontation between the witness and the defendant, who is usually in the dock or at counsel table, and failure to do so may waive the issue.[104]

7. Field Confrontation

Informal prearrest identification procedures conducted in nonemergency situations well after the commission of the crime and not involving solely the witness and the defendant are constitutionally acceptable. The most common scenario is to have the witness observe a group of individuals in a public place without any suggestion that a particular person is the prime suspect in the eyes of the police.[105] Properly conducted, this procedure is viewed as the equivalent of a nonsuggestive lineup.

8. Accidental Encounters

An accidental encounter between a witness and a suspect that does not involve a deliberate attempt by the police to obtain an identification usually does not implicate due process considerations because by definition, "a confrontation does not occur unless there is a calculated move by the police to bring about pretrial observations of a suspect by an eyewitness."[106] The fact that the police could anticipate that the eyewitness might encounter the defendant in the courthouse corridor prior to a preliminary hearing does not make the circumstances suggestive if there is a crowd of

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[104] Regarding the arrangement of nonsuggestive in-court procedures, *see supra* §§ 18.1A, 18.1B.

[105] Commonwealth v. Chase, 372 Mass. 736, 744 (1977) (not improper to bring a witness to a lounge containing 25 persons to see if he recognized his assailant). *See. e.g.,* Commowealth v. Dyous, 79 Mass.App.Ct. 508, 511 (2011) (larceny victim told to ride his bicycle down street in order to determine whether his assailant was in the area was not unnecessarily suggestive identification procedure so as to deny defendant due process of law); Commonwealth v. McMaster, 21 Mass. App. Ct. 722, 723–26 (1986) (witness asked to walk through waiting room at a hospital one hour after the crime); Commonwealth v. Benson, 17 Mass. App. Ct. 936, 938 (1983) (witness waited outside courtroom and watched 20 people emerge, the "equivalent of a lineup"); Commonwealth v. Walker, 14 Mass. App. Ct. 544, 550–51 (1982) (walk through the Boston Common; the police did not direct the witness to any particular area or walk beside her).

[106] Commonwealth v. Vasquez, 11 Mass. App. Ct. 261, 267 (1981) (inadvertent 'chance encounter' at police station); Commonwealth v. Calhoun, 28 Mass. App. Ct. 949 (1990) (same). Unless police have manipulated press reports, exposure to defendant's photo is not improper. Commonwealth v. Colon-Cruz, 408 Mass. 533, 542 (1990). *See also* Commonwealth v. Cavitt, 460 Mass. 617, 631-633 (2011) (witness who had just viewed thousands of photographs saw a single photograph on police computer as he was leaving police department and police had done nothing to direct witnesses attention to computer); Commonwealth v. Peralta, 79 Mass.App.Ct. 1105 (2011) (victim's viewing of the defendant's photograph on television while in the hospital was an "accidental confrontation" that did not taint his subsequent identifications of the defendant); Commonwealth v. Odware, 429 Mass. 231, 234–236 (1999) (non-police individual showed two witnesses the defendant's picture on a flyer; a common-law notion of fairness did not warrant exclusion of subsequent identifications); Commonwealth v. Otsuki, 411 Mass. 218, 233–35 (1991) (views of wanted poster and newspaper photo); Commonwealth v. Dyer, 389 Mass. 677 (1983) (newspaper photo observed); Commonwealth v. Davis, 380 Mass. 1 (1980) (same); Commonwealth v. Howard, 46 Mass. App. Ct. 366, 369 (1999) (witness could testify that she saw the defendant on a television news clip, and he exhibited a similar "bobbing" walk to that of the robber).

similar individuals present and there is no indication that this person is the suspect.[106.5] However, even an unplanned encounter with a suspect may be so highly suggestive that even without police involvement in the confrontation, it would violate the defendant's right to due process to allow introduction of the identification.[107]

9. Inanimate Object

Constitutional principles concerning one-on-one confrontations between an eyewitness and a suspect do not apply to inanimate objects (except possibly in the "extreme case"); rather, any suggestiveness in the procedure goes to the weight to be accorded the identification, not to its admissibility.[108]

10. Witness's Mental Abilities or Impairments

Mental disabilities may aggravate the suggestiveness of an identification procedure.[109] A finding that a witness did not possess a "strong independent mind" might be a determinative factor in a close case;[110] conversely, a contrary finding might overcome marginally suggestive factors and show that the photo identification was "the product of [the witness's] independent choice and selection."[111]

§ 18.4 RIGHT TO COUNSEL VIOLATION

§ 18.4A. WHEN THE RIGHT TO COUNSEL ATTACHES

The Sixth Amendment and article 12 guarantee the right to counsel, appointed if necessary, at any "critical stage" of the proceedings. In this regard, the Supreme Court has held that the defendant is entitled to counsel when he is subjected to a lineup

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[106.5] Commonwealth v. Huan Lieu, 50 Mass. App. Ct. 162, 164 (2000).

[107] Commonwealth v. Jones, 423 Mass. 99 (1996). *See also* Commonwealth v. Day, 42 Mass. App. Ct. 242, 248–50 (1997) (where witness saw wanted poster of suspect previously identified by name as suspect, the subsequent identification from photo array containing the same photo would be suppressed). *Contrast* Commonwealth v. Walker, 370 Mass. 548, 564–65 (1976); Commonwealth v. Leaster, 362 Mass. 407, 410 (1972); Commonwealth v. Smith, 12 Mass. App. Ct. 667, 670–75 (1981). *See also* United States v. Bouthot, 878 F.2d 1506, 1514–16 (1st Cir. 1989) (due process requires suppression of identification testimony following impermissibly suggestive identification procedure that would taint the trial, even if the procedure was not orchestrated by the police).

[108] Commonwealth v. Simmons, 383 Mass. 46, 50–51 (1981) (witness's identification of the defendant's car as being that of her assailant was not improper where the police had only told her that she was being brought to look at a car). *See also* Commonwealth v. Shipps, 399 Mass. 820, 833 (1987) (identification of a gun was not unreliable); Commonwealth v. Jones, 25 Mass. App. Ct. 55 (1987) (identification of vehicle was not the product of an "extreme case" of suggestiveness).

[109] Commonwealth v. Santos, 402 Mass. 775, 781 (1988) (evidence showed that mentally retarded witness was unusually susceptible to suggestion).

[110] *Cf.* Commonwealth v. Jones, 9 Mass. App. Ct. 83, 93 (1980).

[111] Commonwealth v. DeBroskey, 363 Mass. 718, 726 (1973). *Cf.* Commonwealth v. Tanso, 411 Mass. 640, 653 (1992) (former prosecutor not shown to have special knowledge of lineup procedures that allowed him to identify defendant as suspect).

or other in-person identification procedure, but only after adversary proceedings have been initiated, either by formal charge, arraignment, preliminary hearing, indictment, or information.[112] Although the period following issuance of a complaint would seem to qualify, Massachusetts cases hold that formal adversary proceedings do not commence until the actual arraignment procedure has begun.[113]

The right to counsel does not apply to an identification procedure in which the defendant is not viewed in person.[113.5] Therefore, counsel need not be notified prior to the showing of photographs to a witness even if it occurs after the arraignment.[114]

Notice to counsel of identification procedures: If the proceedings have reached a critical stage, counsel for the defendant must be notified prior to any in-person identification procedure conducted by the government.[115]

Although the defendant does not have a right to counsel in a particular case before a formal charge is brought against him, the Supreme Judicial Court has advised prosecutors to notify the presiding judge and defense counsel when it intends to use a judicial proceeding as an opportunity for a witness in an unrelated matter to see the defendant for purposes of making an identification.[116]

§ 18.4B. SCOPE OF SUPPRESSION

If the defendant proves that his right to counsel was violated at the post-arraignment identification procedure, the resulting identification must be excluded.[117] When this evidence is suppressed, any subsequent identification by the witness, including at trial, must be suppressed as well unless the prosecution proves that it is based on a source independent of the earlier, improper confrontation.[118]

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[112] Kirby v. Illinois, 406 U.S. 682, 687–91 (1972] (showup that occurred after arrest but prior to indictment did not implicate the Sixth Amendment); United States v. Wade, 388 U.S. 218 (1967).

[113] Commonwealth v. Key, 19 Mass. App. Ct. 234, 237–39 (1985) (even though a complaint had issued against the defendant and he was placed in a dock area of a courtroom prior to arraignment, his right to counsel did not attach until the hearing commenced; no violation, therefore, when police asked witness "to look around [courtroom] to see if she recognized anyone"). *See also* Commonwealth v. Davis, 380 Mass. 1, 8–9 (1980); Commonwealth v. Smallwood, 379 Mass. 878, 884–85 (1980). For an argument that challenges even the common interpretation of *Kirby's* restriction on the right to counsel before charge, see AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 233 (4th ed. 1984).

[113.5] United States v. Ash, 413 U.S. 300. 317–21 (1973)

[114] Commonwealth v. Johnson, 371 Mass. 862, 868 (1977); Commonwealth v. Ross, 361 Mass. 655, 673-675 (1972).

[115] Commonwealth v. Donovan, 392 Mass. 647, 650–51 (1984) (defendant's right to counsel violated when police asked witness to enter courtroom prior to probable cause hearing and determine if he could identify his assailant from among the courtroom audience); United States v. Wade, 388 U.S. 218 (1967) (improper for police to conduct post-arraignment lineup without notice to defendant's counsel).

[116] Commonwealth v. Napolitano, 378 Mass. 599, 607–08 (1979) (intent is to permit counsel and the court to devise a nonsuggestive procedure for the confrontation).

[117] Commonwealth v. Donovan, 392 Mass. 647, 648–49 (1984). *Accord* Gilbert v. California, 388 U.S. 263, 273 (1967) (per se rule of exclusion).

[118] Commonwealth v. Donovan, 392 Mass. 647, 651 (1984).

§ 18.4C. COUNSEL'S ROLE AT AN IDENTIFICATION PROCEDURE

The defendant has a right to have his counsel present at the procedure, but the lawyer technically has no say in how it will be conducted or a right to be present at a later interview with the witness.[119] As a practical matter, however, counsel should attempt to make the procedure as fair to his client as possible. It is unclear whether there is a burden on defense counsel to object contemporaneously to any unnecessary suggestiveness that occurs in her presence at the out-of-court procedure, although the wiser course would be to do so.[120] If the identification will take place at a pretrial hearing, the court has the discretion to deny a motion for an alternate procedure that is requested in the first instance on the day of the hearing.[121]

§ 18.4D. WAIVER OF COUNSEL

It is possible for the defendant to waive his right to counsel at an identification procedure, but he must first be informed of his right to have counsel with him at that confrontation and then make a knowing, intelligent, and voluntary waiver.[122]

§ 18.5 FRUIT OF A FOURTH AMENDMENT VIOLATION

The Fourth Amendment to the United States Constitution and article 14 of the Declaration of Rights of the Massachusetts Constitution protect citizens from unreasonable searches, and the exclusionary rule prevents the introduction of evidence seized pursuant to an illegal stop, arrest, or search.[123] This suppression is not limited to the physical evidence seized or statements made by the defendant but also applies to an identification if it has resulted directly from this type of improper police conduct.[124]

An illegal arrest will bar the use of an identification made at a subsequent showup [125] and may affect an identification obtained at a later court-ordered lineup. In

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[119] *Cf.* Commonwealth v. Crowe, 21 Mass. App. Ct. 456, 466 nb (1986) (lawyer has no right to input in the makeup of a lineup); Commonwealth v. Charles, 397 Mass. 1, 5–7 (1986) (defense counsel does not have a right to be present at a post lineup interview with a witness). *See also* Commonwealth v. Tanso, 411 Mass. 640, 653–54 (1992) (court declines to consider counsel's assertion of a right to be at post-lineup interview in absence of contemporaneous request).

[120] *Cf.* Commonwealth v. Torres, 367 Mass. 737, 740–41 (1975) (undecided whether the defendant's silence at an identification procedure conducted by the government constitutes a waiver of his right to a fair procedure).

[121] Commonwealth v. Ceria, 13 Mass. App. Ct. 232, 237 (1982).

[122] Commonwealth v. Mendes, 361 Mass. 507, 509–10 (1972). *See also* Commonwealth v. Cooper, 356 Mass. 74, 83 (1969) (waiver by defendant of right to counsel under *Miranda* did not encompass a waiver of his right to have an attorney present at a postarraignment identification procedure).

[123] *See supra* ch. 17 (search and seizure).

[124] Commonwealth v. Crowe, 21 Mass. App. Ct. 456, 461 (1986) (after illegal arrest); Commonwealth v. Bodden, 11 Mass. App. Ct. 964 (1981) (same).

[125] *See, e.g.,* Commonwealth v. Bodden, 11 Mass. App. Ct. 964 (1981); Commonwealth v. White, 11 Mass. App. Ct. 953 (1981). *Contrast* Commonwealth v. Andrews, 34 Mass. App. Ct. 324, 327–30 (1993) (police investigating armed robbery could handcuff suspects and order

this situation, the court should consider the following factors: whether the evidence would not have been discovered but for the illegal conduct, the time between the violation and the identification procedure, any intervening circumstances, and the purpose and flagrancy of the official misconduct.[126] An order by a grand jury that the defendant appear in a lineup dissipates any taint from an illegal arrest.[127]

An arrest or search conducted in violation of the Fourth Amendment that produces evidence used to obtain eyewitness identification does not necessarily preclude use of that identification at trial.[127.5] If the illegal arrest is for the purpose of obtaining the defendant's photograph for use in an array, the resulting identification will be suppressed as the fruit of illegal police conduct.[128] However, if the photo was taken as part of a routine procedure following an illegal arrest by police officers who were unaware of the other crime, suppression of the photo is not required.[128.5] When the police violate a statute in obtaining evidence, as opposed to a constitutional right of the defendant, suppression will depend on what remedy was included or intended by the statute.[129]

If a pretrial identification is suppressed because it was the product of an illegal arrest or search, the court must employ the independent source analysis regarding any subsequent identification, including the proposed in-court identification at trial.[130]

§ 18.6 FRUIT OF A STATUTORY VIOLATION

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them to lie on ground until arrival of eyewitness for showup without converting stop pursuant to Terry v. Ohio, 392 U.S. 1 (1968), into an arrest for which there was no probable cause).

[126] Commonwealth v. Pietrass, 392 Mass. 892, 902 (1984).

[127] Commonwealth v. Crowe, 21 Mass. App. Ct. 456, 464 (1986).

[127.5] Commonwealth v. Greenwood, 78 Mass.App.Ct. 611, 613 (2011) (victim's in-court identification of defendant was grounded in an independent source, namely the victim's close and sustained observation of the defendant during the course of the robbery, prior to any unlawful police conduct, and, thus, was not tainted by prior show-up identification which was the fruit of the poisonous tree).

[128] Commonwealth v. Ramos, 430 Mass. 545, 550–551 (2000) (where the police unlawfully seized the defendant in order to take her photograph, the photograph must be suppressed pursuant to art. 14). *Cf.* Commonwealth v. Moon, 380 Mass. 751, 759B61 (1980) (court noted in dicta that in light of the illegal search by which the police obtained the photograph of the defendant, there was a "strong possibility" that the identification would have been suppressed on that basis had it not been excluded on another ground); United States v. Crews, 445 U.S. 463, 477 (1980) (arrest of defendant so that his photograph could be obtained was without probable cause, and identification from nonsuggestive photo array was suppressed).

[128.5] Commonwealth v. Manning, 44 Mass. App. Ct. 695, 697–700 (1998).

[129] *See infra* § 18.6..

[130] For a discussion of the independent source test, *see supra* § 18.3B. *Compare* Commonwealth v. Bodden, 391 Mass. 356, 359–63 (1984) (identification at showup after illegal arrest suppressed; in-court identification based on observations of assailant at the scene of the crime) *with* Commonwealth v. White, 11 Mass. App. Ct. 953, 954–55 (1981) (courtroom identification did not have a source independent from the showup after the defendant's illegal arrest where witness had provided a very general description of the assailant and had failed to identify his photograph from an array shown to her prior to the showup).

Whether identification evidence may be suppressed as the fruit of a statutory violation depends on the statute. Some statutes explicitly mandate suppression of evidence as a sanction or remedy.[131] Where the suppression remedy is not explicit in the statute, the court will examine the statute to determine whether suppression of the fruits of a violation is necessary to render the statute effective;[132] or is inherent in the statute because it is closely associated with constitutional rights or rights grounded in fundamental fairness.[133] For example, the court has ordered suppression of evidence for violation of the statutory right to use a telephone after arrest [134] or for intentional failure to arraign the defendant promptly.[135] Even if the statute does not contemplate a suppression remedy, exclusion of the evidence may be justified in some cases of intentional violations.[136]

In considering a remedy for violation of the right to use a telephone, the court has stated that where the violation is intentional, the defendant does not need to show that the subsequent confrontation with an identifying witness would not have happened but for the violation; rather, the Commonwealth must prove beyond a reasonable doubt that the confrontation would have happened anyway.[137]

§ 18.7 PROCEDURAL ASPECTS OF A MOTION TO SUPPRESS IDENTIFICATION

§ 18.7A. BURDENS OF PROOF

In a suppression motion grounded on a due process claim, the initial burden is on the defendant to show by a preponderance of the evidence that the confrontation between the defendant and the eyewitness was unnecessarily suggestive.[138] If the defendant sustains that burden, then the identification must be excluded from trial

[131] See, e.g., G.L. c. 272, §§ 99O and 99P (wiretaps); G.L. c. 276, § 1 (search incident to arrest).

[132] Commonwealth v. Jones, 362 Mass. 497, 502 (1972) (citing Commonwealth v. Bouchard, 347 Mass. 418, 419–21 (1964)).

[133] Commonwealth v. Lyons, 397 Mass. 644, 641 (1986). *See also* Commonwealth v. Upton, 394 Mass, 363, 367 n.4 (1985) (discussion with cases), Suppression has been found appropriate for violations of G.L. c. 276, § 28 (defective search warrant affidavit) and G.L. c. 94C, § 30 (defective administrative warrant).

[134] Commonwealth v. Jones, 362 Mass. 497, 502–04 (1972) (where police refused to let the defendant use the telephone to call his friends or a lawyer in violation of c. 276, § 33A, identification that occurred during a later accidental confrontation with two witnesses was suppressed because the presence of counsel might have prevented the chance encounter).

[135] *Cf.* Commonwealth v. Cote, 386 Mass. 354, 361 (1982).

[136] *See* Commonwealth v. Lyons, 397 Mass. 644, 648–49 (1986) (case for exclusion would be stronger if intentional misconduct; here, photo obtained by police despite failure to provide show-cause hearing did not mandate suppression of the subsequent identification from a photo array shown to a witness where unintentional violation).

[137] Commonwealth v. Jones, 362 Mass. 497, 503 (1972).

[138] Commonwealth v. Moon, 380 Mass. 751, 758 (1980); Commonwealth v. Botelho, 369 Mass. 860, 866–67 (1976).

under the analysis employed by the Supreme Judicial Court.[139] (As noted *supra* in § 18.3A(1), the standard used by the Appeals Court will mandate suppression of the initial identification on due process grounds only if it was also "conducive to irreparable mistaken identification"[140]).

If the initial identification has been suppressed and the prosecution wishes to introduce a subsequent identification made by the witness, or to attempt an in-court identification during the trial, it must prove by clear and convincing evidence that the identification has a source that is independent of the prior suggestive procedure. This standard is applied whether the previous identification was suppressed as unnecessarily suggestive in violation of due process,[141] as a Fourth Amendment violation,[142] or as a right to counsel violation.[143]

The phrase *clear and convincing evidence* has never been specifically defined in the context of an identification case, but a libel case[144] that discussed that standard was cited with approval by the Supreme Judicial Court in *Commonwealth v. Botelho:*[145] Clear and convincing proof involves a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases. . . . It has been said that the proof must be "strong, positive and free from doubt" . . . and "full, clear and decisive."[146]

§ 18.7B. SUFFICIENCY OF THE MOTION AND AFFIDAVIT

It is incumbent on the defendant in a motion to suppress identification to make a *prima facie* showing that the identification procedure was tainted by the improper actions of the police. When alleging a due process violation (as opposed to an improper arrest or search, or a right to counsel violation), the defendant must make specific factual contentions in the motion and accompanying affidavit that indicate that the pretrial identification may have been the result of suggestion and therefore must be suppressed.[147] It is also appropriate to request suppression of all subsequent

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[139] Commonwealth v. Thornley, 406 Mass. 96, 98–99 (1989); Commonwealth v. Botelho, 369 Mass. 860, 866 (1976). *See supra* § 18.3A.

[140] Commonwealth v. Amaral, 81 Mass.App.Ct. 143, 145-146 (2012) (defendant carry's the burden of demonstrating that the identification was unnecessarily suggestive and conducive to irreparable mistaken identification). Pre-1995decisions implied that the entire burden remains on the defendant to show that the identification procedure was both unnecessarily suggestive *and not reliable*. *See, e.g.,* Commonwealth v. Botelho, 369 Mass. 860, 872 (1976) ("suggestiveness and reliability would be interwoven and the defendant's burden would persist throughout"). With Commonwealth v. Johnson, 420 Mass. 458 (1995), the Supreme Judicial Court rejected unreliability as a requirement under article 12. For additional discussion of the burden of proof see Commonwealth v. Martin, 447 Mass. 274, 278-281 (2006).

[141] Commonwealth v. Botelho, 369 Mass. 860, 868 (1976); Commonwealth v. Underwood, 3 Mass. App. Ct. 522, 533 (1975). *See supra* § 18.3B.

[142] Commonwealth v. Bodden, 391 Mass. 356, 359-63 (1984). *See supra* § 18.5.

[143] Commonwealth v. Donovan, 392 Mass. 647, 650-51 (1984). *See supra* § 18.4.

[144] Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 871 (1975).

[145] 369 Mass. 860, 868 n.7 (1976).

[146] Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 871 (1975).

[147] Mass. R. Crim. P. 13(a)(2).

identifications, including the future in-court identification that will be elicited by the prosecutor from the witness at trial.

"The question raised by a motion to suppress identification testimony is not whether the witness was or might be mistaken, but whether any possible mistake was or would be the product of improper suggestions made by the police."[148] Failure to set out these allegations in a properly drafted affidavit in support of the motion permits the denial of the motion without an evidentiary hearing.[149]

§ 18.7C. REQUIREMENT OF AN EVIDENTIARY HEARING

The Supreme Court has held that even if sufficient facts are set forth in a motion to suppress identification, an evidentiary hearing out of the presence of the jury is not mandated by the due process clause of the U.S. Constitution.[150] Other courts have noted, however, that holding a pretrial *voir dire* is "eminently sensible,"[151] and it has been termed "the better course" by the Supreme Judicial Court.[152] An appellate court will accord weight to the hearing judge's conclusion that the defendant has not shown a preponderant case for suppression, but the underlying facts on which the conclusion is based must be borne out by the record.[153] The failure to file a motion to suppress may preclude an appellate court from considering an argument that the identification procedure was unnecessarily suggestive as the requisite testimony and findings may not be present in the record.[153.5]

§ 18.7D. RENEWAL OF OBJECTION AT TRIAL

The Supreme Judicial Court obviated the need for f the defendant to object to the admission of identification testimony at trial, after denial of a pretrial motion to suppress.[154] Given the constitutional basis of the motion to suppress and the unlikelihood that the trial judge would reconsider the motion judge's decision, the issue is now treated differently than the pretrial denial of a motion in limine.[155]

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[148] Commonwealth v. Warren, 403 Mass. 137, 139 (1988) (quoting Commonwealth v. Gordon, 6 Mass. App. Ct. 230, 237 (1978)).

[149] Commonwealth v. Walker, 421 Mass. 90 (1995) (allegations in affidavit, even if true, did not make out unnecessary suggestiveness); Commonwealth v. Riley, 17 Mass. App. Ct. 950, 951 (1983); Commonwealth v. Chase, 14 Mass. App. Ct. 1032, 1034 (1982); but see, Commonwealth v. Simmons, 386 Mass. 46, 47 (1981) (noting that a hearing is "the better course").

[150] Watkins v. Sowders, 449 U.S. 341, 349 (1981).

[151] *See, e.g.,* Nassar v. Vinzant, 519 F.2d 798, 802 n.4 (1st Cir. 1975).

[152] Commonwealth v. Simmons, 383 Mass. 46, 47 (1981).

[153] *Compare* Commonwealth v. Waters, 27 Mass. App. Ct. 64, 69–70 (1989) *with* Commonwealth v. Santos, 402 Mass. 775, 782 (1988) (evidence contradicted judge's finding that the witness was not a suggestible individual).

[153.5] Commonwealth v. Poggi, 53 Mass. App. Ct. 685, 695 (2002).

[154] Commonwealth v. Martin, 447 Mass. 274 (2006) (abrogating Commonwealth v. Hill, 38 Mass. App. Ct. 982 (1995)).

[155] *Contrast* Commonwealth v. Acosta, 416 Mass. 279, 283–85 (1993) (amended opinion) (pretrial denial of motion to suppress statements did not require renewal of objection at trial in order to preserve issue for appellate review) *with* Commonwealth v. Good, 409 Mass.

§ 18.7E. INEFFECTIVE ASSISTANCE OF COUNSEL

Defense counsel will not be considered ineffective in failing to file a motion to suppress an identification if the result of a tactical decision[155.5] or if the method employed by the police to secure an identification was not suggestive of the defendant.[156] When a motion to suppress was not filed and no objection was made to the identification testimony, appellate review is limited to whether there was a substantial risk of a miscarriage of justice.[156.5]

PART III: IDENTIFICATION ISSUES AT TRIAL

§ 18.8 "MUG SHOT" ISSUES

§ 18.8A. EXCLUDING OR SANITIZING MUG SHOTS

In many criminal matters, there will be evidence that a witness selected the defendant's photograph from an array shown to the witness by the police. When the presence of the defendant at the scene of an incident is conceded by the defense, testimony concerning an identification of the defendant from photographs possessed by the police has little, if any, probative value and tends to show that the defendant has had prior involvement with the criminal law. This evidence should not be admitted at trial unless the identification of the defendant as the perpetrator of the crime is a live issue.[157]

If the correctness of the identification of the defendant is disputed, the judge may admit evidence of a prior identification from a photographic array if it was not suppressed. The judge and prosecutor must take steps, however, to avoid alerting the jury to the source of the photographs contained in the array shown to the witness.[158] It

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612, 620 n.6 (1991) (pretrial denial of motion in limine requires renewal of objection at trial to preserve issue for normal appellate review).

[155.5] Commonwealth v. Tevlin, 433 Mass. 305, 316-318 (2001) (counsel was not ineffective in failing to file a motion to suppress a possibly suggestive identification, as this was a reasoned tactical decision, discussed with the defendant; additionally, permitting the identification and then attacking it to show the police rush to judgment and use of questionable procedures became a cornerstone of the defense).

[156] Commonwealth v. Levasseur, 32 Mass. App. Ct. 629, 635–37 (1992).

[156.5] Commonwealth v. Johnson, 46 Mass. App. Ct. 398, 402 (1999).

[157] Commonwealth v. Weaver, 400 Mass. 612, 620–21 (1987) (admission of photo identification was error but did not require reversal where the testimony was brief, the photos were not introduced as exhibits, and the evidence was not mentioned by the prosecutor in opening statement or closing argument). *Accord* Commonwealth v. Barrett, 386 Mass. 649, 652 (1982); Commonwealth v. McCray, 40 Mass. App. Ct. 936, 937 (1996) (testimony that defendant identified by photo array was error where victim had known him by name as an acquaintance for many years). *Contrast* Commonwealth v. Smith, 29 Mass. App. Ct. 449, 450–53 (1990) (introduction of photo array proper where identification an issue, photos sanitized, and no reference to them as mug shots).

[158] Commonwealth v. Perez, 405 Mass. 339, 344–45 (1989) (prosecutors should avoid "references in testimony to the files from which [the photographs] were obtained"); Commonwealth v. Francis, 391 Mass 369, 374–75 (1984) (same); Commonwealth v. Key, 21

is appropriate for the judge to give a limiting instruction to the jury that indicates that the police can obtain photographs of people in noncriminal circumstances and that the jury should not draw any adverse inference from the fact that the police had one of the defendant.[159] In addition, witnesses should be cautioned prior to taking the stand that they cannot refer to the photos as "mugshots."[160] It also is seriously prejudicial to permit a police officer to testify that he included the defendant's photo in an array because he believed that the defendant resembled the description of the assailant provided by the victim.[161]

Any police photographs that are admitted into evidence should be sanitized to every reasonable degree possible in order to disguise the fact that they came from police files.[162] The following steps have been recommended to achieve this purpose: cropping the photographs to remove the identification placards commonly worn by the defendant during the booking process; covering securely with tape or obliterating any notations on the photos that would suggest their origins, such as the crime charged, height and weight, or other background data that commonly appears on the reverse of the photo; severing the front and side profile views in dual-pose mugshots.[163] The profile view of the defendant should be excluded if there is affirmative evidence that the witness only saw a frontal view of the assailant.[164] The failure of defense counsel to

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Mass App. Ct. 293 (1985) (reversible error to admit evidence that the defendant's photograph taken following arrest on unrelated charge).

[159] The Court has instructed, "You shall draw no inference adverse to the defendant by virtue of the fact that the police had access to a photograph of him. There are many reasons why police departments have photographs of individuals. People apply for licenses. People apply for permits. People apply to become taxi drivers. People apply for all sorts of things. When they apply for those positions they must have their photographs taken. You shall draw no inference adverse to the defendant by virtue of the fact that there was a photograph of him available to the police department," Commonwealth v. Johnson, 27 Mass. App. Ct. 746, 752-753 (1989). .. *See also* Commonwealth v. Hoilett, 430 Mass. 369, 373 (1999) (instruction that police have access to photographs of private citizens through the Registry of Motor Vehicles and the licensing of taxicab drivers and common victualers); Commonwealth v. Pullum, 22 Mass. App. Ct. 485, 490 (1986) (police have photographs of people arrested but later found not guilty, of people who apply for id cards, hackney licenses, or gun permits, and that it is therefore unfair for the jury to speculate on the source of photos); Commonwealth v. Blaney, 387 Mass. 628, 636 n.7 (1982) (jury should be left with the impression, if possible, that the photograph of the defendant was obtained after his arrest on the charge before the court). *Cf.* Commonwealth v. Rodriguez, 378 Mass. 296, 309 (1979) (defendant not entitled to instruction that he had been acquitted in the incident which led to police's taking his photograph, but entitled to have mug shot sanitized).

[160] Commonwealth v. Perez, 405 Mass. 339, 344 n.7 (1989).

[161] Commonwealth v. Key, 21 Mass. App. Ct. 293, 298 (1985) (such testimony "might improperly stamp a kind of official imprimatur upon the supposed resemblance").

[162] Commonwealth v. Blaney, 387 Mass. 628, 634–40 (1982); Commonwealth v. Rodriguez, 378 Mass. 296 (1979). Reversible error has occurred when the mug shots have not been properly sanitized. *See, e.g.,* Commonwealth v. Thayer, 39 Mass. App. Ct. 396 (1995); Commonwealth v. Gee, 36 Mass. App. Ct. 154 (1994).

[163] Commonwealth v. Blaney, 387 Mass. 628, 638 (1982). *See* also Commonwealth v. Lockley, 381 Mass. 156, 166 (1980). However, the inability to sanitize a photo does not preclude its admission. Commonwealth v. Austin, 421 Mass. 357, 361–64 (1996) (videotape of defendant committing a bank robbery was basis for identification in another crime).

[164] Commonwealth v. Pullum, 22 Mass. App. Ct. 485, 490 (1986).

take steps to sanitize a photograph of the defendant may constitute ineffective assistance.[165]

There may be instances where the defense does not want the mug shot sanitized in order to have the jury see the exact picture and any writing next to it which was seen by the witness. This is done in order to show its suggestibility, and it can be reversible error for the judge to redact this information over the defendant's objection.[165.3]

18.8B. LOSS OF THE PHOTO ARRAY

The loss of the photo array shown to an eyewitness can be prejudicial to the defendant if part of his misidentification defense is that the photo array was unnecessarily suggestive of the defendant. In this regard, the array could constitute exculpatory evidence, even if the Court had previously ruled that the procedure used was not so constitutionally infirm as to require suppression of the identification.[165.5]

The absence of the photo array does not require dismissal of the case if the defendant nonetheless is able to mount a forceful defense.[165.6] This can include discrepancies between the initial description of the assailant and the appearance of the defendant, the failure to conduct more reliable procedures, and the inability of the jurors to view the array for themselves. The defendant may also request an instruction that if the jury has an unresolved question concerning the missing evidence, any doubt should be resolved in favor of the defendant.[165.7]

§ 18.9 TESTIMONY CONCERNING PRIOR IDENTIFICATION PROCEDURES

§ 18.9A. EVIDENCE OF PRIOR IDENTIFICATIONS

An identification made prior to trial by a witness may be offered by the Commonwealth for three possible purposes: as substantive evidence to which the jury may give probative value; as corroborative evidence regarding an in-court identification; or as impeachment evidence when the witness disclaims the earlier procedure.[166] The defendant always has the right to offer the procedure, whether

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[165] Commonwealth v. Day, 42 Mass. App. Ct. 242, 245–47 (1997) (wanted poster of the defendant described him as armed and dangerous, a member of the Devil's Disciples, suggested that he was wanted on other charges, and that photo taken during a prison term; judge is not relieved of her obligation to sanitize prejudicial evidence even if it is offered without objection).

[165.3] Commonwealth v. Vardinski, 438 Mass. 444 (2003), S.C., 53 Mass. App. Ct. 307 (2001) (error in armed robbery case for the judge to sanitize a mugshot over the defendant's objection; when defendant seeks to forego a usual protection afforded a defendant, such as sanitization, judge should hold a colloquy with the defendant to ensure he agrees and to negate a later claim of ineffective assistance).

[165.5] Commonwealth v. Rodriguez, 50 Mass. App. Ct. 405, 411-412 (2000)(defendant can argue that suggestive array led to the in-court identification).

[165.6] Commonwealth v. Rodriguez, 50 Mass. App. Ct. 405, 412-413 (2000).

[165.7] See, e.g., Commonwealth v. Rodriguez, 50 Mass. App. Ct. 405, 408-409 (2000).

[166] Commonwealth v. Bonnoyer, 25 Mass. App. Ct. 444, 448 n.3 (1988). *See also* Commonwealth v. Weichell, 390 Mass. 62, 68–73 (1983) (identification may be admitted for its full probative value).

suppressed or not, as evidence impeaching the credibility of the identification,[167] although this may in some circumstances open the door to use by the prosecutor of the suppressed identification testimony.[168]

For a prior identification to be admissible substantively at trial and therefore be considered for its truth by the jury, the identifying witness must be present in court, available for cross-examination, and most importantly, must acknowledge having made the out-of-court identification.[169] Even if the witness is unable or unwilling to make an identification of the defendant during the trial, the prior identification will be admissible provided that the witness can identify that person or photograph she selected during the earlier process.[170] In this circumstance, a second witness also will be able to offer probative testimony concerning the out-of-court identification made by the eyewitness.[171]

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[167] *See, e.g.,* Commonwealth v. Paszko, 391 Mass. 164, 172 (1984); Commonwealth v. Rodriguez, 378 Mass. 296 (1979); Commonwealth v. Flanagan, 20 Mass. App. Ct. 472 (1985); Commonwealth v. Smith, 7 Mass. App. Ct. 879 (1979).

[168] Commonwealth v. Redmond, 357 Mass. 333 (1970).

[169] Commonwealth v. Young, 73 Mass. App. Ct. 479, 484 (2009) (out-of-court statement of witness that the defendant had shot him was admissible substantively pursuant to Mass. R. Evid. § 801(d)(1)©, where witness testified at trial and was subject to cross examination concerning the statement); Commonwealth v. Morgan, 30 Mass. App. Ct. 685, 690–91 (1991); Commonwealth v. Warren, 403 Mass. 137, 141 (1988); Commonwealth v. Daye, 393 Mass. 55, 58–63 (1984) (where the witness acknowledges the prior identification, it is admissible substantively); Commonwealth v. Dinkins, 415 Mass. 715, 719–23 (1993); Commonwealth v. Muse, 35 Mass. App. Ct. 466 (1993); Commonwealth v. Bassett, 21 Mass. App. Ct. 713, 718–20 (1986) (error to permit police officer to testify that the witness had made an identification of the defendant through a photo array when the eyewitness had not stated this during her testimony). *Contrast* the situation where the identification was given during the course of a probable-cause hearing at which the witness was cross-examined by the defendant; in this case, the prior testimony is admissible even if the witness now is unavailable. Commonwealth v. Furtick, 386 Mass. 477, 480 (1982).

[170] Commonwealth v. Sullivan, 436 Mass. 799, 806-808 (2002) (extrajudicial identification may be offered as substantive evidence even when the witness repudiates that identification at trial as long as there is no dispute that the prior identification in fact was made. Whether to credit the earlier statement or the one made on the stand is for the jury); Commonwealth v. Clements, 436 Mass. 190, 192-197 (2002), S.C., 51 Mass. App. Ct. 508 (2001); Commonwealth v. Carrasquillo, 54 Mass. App. Ct. 363, 369-371 (2002). *Contrast* Commonwealth v. Seminara, 20 Mass. App. Ct. 789, 795–97 (1985) (where witness testified that she had selected a photo of her assailant from an array shown to her by the police but was not asked to indicate which photograph she had selected or to select the photo again at trial, it was error to permit a police officer to identify the photograph which the witness purportedly had selected at the earlier procedure). *See also* Commonwealth v. Cappellano, 17 Mass. App. Ct. 272, 275–78 (1983) (witness "vague and forgetful" at trial, but acknowledged prior identification); Commonwealth v. Fitzgerald, 376 Mass. 402, 405–13 (1978] (inference reasonable that witness, who had made prior identification that she acknowledged, now was fearful of making an in-court identification).

Where a witness had made a pretrial identification of the defendant, which she acknowledged at trial, but not an in-court identification of him, this was sufficient to support a conviction. Commonwealth v. Jones, 407 Mass. 168 (1990).

[171] Commonwealth v. Rivera, 397 Mass. 244, 249 (1986) ('the clear lesson of *Daye* is that a nonidentifying witness may give probative testimony concerning an extrajudicial identification made by another witness who corroborates that identification at trial"). Of course, the second witness's testimony will not be admissible if the eyewitness's out-of-court

Prior inconsistent testimony before a grand jury concerning an identification may be admitted substantively at trial if the witness can be effectively cross-examined regarding the accuracy of the statement, and if the original testimony was more than a mere confirmation or denial of statements by the prosecutor.[171.5] A similar rule applies to prior inconsistent testimony offered at a probable cause hearing.[171.6] A prior identification may also be admitted substantively as a hearsay exception,[171.7] or as a dying declaration.[171.8]

A prior identification also may be admitted to corroborate the identification made by the witness at the trial.[172] Finally, when a witness denies having made a prior identification, evidence of the out-of-court identification may be admitted through other witnesses in order to impeach the witness, and it may be considered substantively by the jury.[173]

§ 18.9B. EVIDENCE OF PRIOR MISIDENTIFICATIONS

identification was suppressed. *See* Commonwealth v. Riccard, 410 Mass. 718, 722–23 (1991). The same principles apply to extrajudicial descriptions made by a witness. *Cf.* Commonwealth v. Morgan, 30 Mass. App. Ct. 685, 690 (1991) (where a witness did not relate the description he gave of assailant's clothing, police officer could not supply it). However, hearsay documents such as 209A affidavit and order cannot be used to prove that the "boyfriend" identified by the victim (during a spontaneous utterance) was the defendant. Commonwealth v. Kirk, 39 Mass. App. Ct. 225 (1995).

[171.5] Commonwealth v. Clements, 436 Mass. 190, 192-197 (2002), *s.c.,* 51 Mass. App. Ct. 508 (2001)(prior identification of assailant); Commonwealth v. Sullivan, 436 Mass. 799, 806-808 (2002)(prior identification of caller's voice). *See also* Commonwealth v. Daye, 393 Mass. 55, 73-74 (1984)(substantive use of inconsistent grand jury testimony).

[171.6] Commonwealth v. Newell, 53 Mass. App. Ct. 119, 125-128 (2002). *See also* Commonwealth v. Sineiro, 432 Mass. 735 (2000)(substantive use of inconsistent probable cause hearing testimony).

[171.7] Commonwealth v. Adams, 458 Mass. 766, 770-774 (2011)(pretrial statements of defendant's 12-year old brother identifying defendant as one of the shooters fell within hearsay exception for statements identifying a person after perceiving him, and were thus admissible for substantive purposes in defendant's murder trial, even though the brother's identification was not made from a photographic array, a showup, or other identification procedure, including a lineup, but was simply the articulation of defendant's name based on the brother's familiarity with defendant); Commonwealth v. Ivy, 55 Mass. App. Ct. 851, 856-859 (2002) (spontaneous utterance); Commonwealth v. Carrasquillo, 54 Mass. App. Ct. 363, 368-369 (2002)(same).

[171.8] Commonwealth v. Moses, 436 Mass. 598, 601-602 (2002).

[172] The former rule that an out-of-court identification was admissible *only* for corroboration was abrogated by Commonwealth v. Weichell, 390 Mass. 62, 68–73 (1983), which held that the identification also may be admitted for its full probative value. *See, e.g.,* Commonwealth v. Crowley, 29 Mass. App. Ct. 1, 6–7 (1990).

[173] Commonwealth v. Le, 444 Mass. 431 (2005) (overruling part of *Daye* that restricts admissibility of out-of-court identification to impeachment when witness denies identification during trial); *see also*, Commonwealth v. Ragland, 72 Mass. App. Ct. 815, 827-829 & n.11 (2008) (out-of-court identification admissible as substantive evidence provided that witness testifies at trial and is subject to cross-examination); Commonwealth v. Machorro, 72 Mass. App. Ct. 377, 379-380 (2008), *review denied,* 452 Mass. 1105 (2008) (examining *Le* and concluding substantive admission of identification permitted). *Contrast* Commonwealth v. Morgan, 30 Mass. App. Ct. 685, 690 (1991).

A defendant has the right to bring out the fact at trial that an eyewitness has changed her identification of one of the perpetrators of the crime, even if it is of the codefendant. For example, in *Commonwealth v. Franklin,*[174] the victims had a similar opportunity to view the two perpetrators of the crime, and both identified the same two men prior to the trial. On the eve of trial, however, they withdrew their identification of the second man, conceding they were incorrect. Exclusion of cross-examination of this fact was reversible error.

§ 18.9C. EVIDENCE OF PRIOR NON-IDENTIFICATIONS

Evidence that a witness was shown a photograph, and failed to make an identification, is admissible at trial. This includes a specific process designed to *exclude* a suspect. For example, if the defendant suggests during an interview or while testifying at trial that another individual resembles him and could be the perpetrator, the police could show this person's photograph to the eyewitness.[174.5] The police can then testify that no identification was made. There is no requirement that the judge consider the reliability of the process if no identification occurred.[174.6] The defendant must rely on cross-examination and closing argument to attack any unfairness in the procedure used to exclude someone as a suspect.

§ 18.9D. IDENTIFICATIONS FOLLOWING HYPNOSIS

Hypnosis is not currently accepted in the scientific community as a reliable method of enhancing memory, and as a result, a witness may not testify to facts remembered only after hypnosis.[175] The witness is limited to events remembered prior to hypnosis, and steps have been mandated by the court to segregate this information.[176] Therefore, where the witness is able to identify the defendant only after hypnosis, the identification must be excluded.[177]

§ 18.10 MOTION FOR A REQUIRED FINDING IN IDENTIFICATION CASES

A motion for a required finding of not guilty pursuant to Mass. R. Crim. P. 25(b)(2) should always be brought at the close of the Commonwealth's case and

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[174] 366 Mass. 284 (1974).

[174.5] Commonwealth v. Howell, 49 Mass. App. Ct. 42, 50-51 (2000).

[174.6] Commonwealth v. Howell, 49 Mass. App. Ct. 42, 51 (2000).

[175] Commonwealth v. Kater, 409 Mass. 433 (1991) (*Kater III*); Commonwealth v. Kater, 388 Mass. 519, 520–21 (1983) (*Kater I*). The prosecution bears the burden of proving that testimony is based on pre-hypnotic memory.

[176] Commonwealth v. Kater, 409 Mass. 433, 441 (1991) (*Kater III*); Commonwealth v. Kater, 388 Mass. 519, 529 (1983) *(Kater I). See also* Commonwealth v. A Juvenile, 381 Mass. 727, 732 (1980).

[177] The S.J.C. has not decided whether to exclude all posthypnotic identifications per se, or to let the trial judge decide whether the witness's prehypnotic memory is adequate to justify admission of a posthypnotic identification. Commonwealth v. Kater, 409 Mass. 433, 438, n.3 (1991) (*Kater III). See also* Commonwealth v. Dodge, 391 Mass. 636 (1984); Commonwealth v. Brouillet, 389 Mass. 605, 607–09 (1983).

renewed at the close of all the evidence.[178] Generally, the weight of an identification is a matter solely for the jury.[178.5] When the defendant's case is supported by strong documentary proof in support of an alibi or where the Commonwealth's case is weak and inconsistent on the issue of identification, the court should enter a finding of not guilty. Appellate courts have ordered the entry of an acquittal or a new trial in this circumstance even in the face of an allegedly positive identification at trial.[179]

A conviction may be based solely on an identification related during grand jury testimony, but recanted at the trial, if the prerequisites for the admission of grand jury testimony substantively are met.[179.2] These include that the witness can be effectively cross-examined at trial regarding the accuracy of the statement, and that the grand jury testimony was more than a mere confirmation or denial of an assertion by the prosecutor.[179.3] Since identification of the defendant is an element of the crime, there also must be corroborating evidence on the issue, and a prior identification by the witness of the defendant in a photo array is sufficient in this regard.[179.4]

§ 18.11 PRESENTATION OF THE DEFENDANT TO THE JURY

The defendant may be required to present himself to the jury at the request of the prosecution in order to illustrate some personal characteristic. Because the defendant is not required to offer testimony, his privilege against self-incrimination is not implicated.[179.8] Similarly, the defendant can be presented to the jury during the defense case in order to illustrate a distinctive feature, such as a tattoo, that was not described when an eyewitness recounted the appearance of the perpetrator. The defendant need not testify if the foundation for the evidence is offered through another witness, e.g., that the defendant had the tattoo on the date of the incident.[179.9]

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[178] Where the Commonwealth's proof deteriorates between the time that the Commonwealth rests and the close of all the evidence, the defendant has the right to have the Court reassess his motion for a required finding of not guilty. *See* Commonwealth v. Nhut Huynh, 452 Mass. 481, 485-486 (2008); Commonwealth v. Amazeen, 375 Mass. 73, 80 n. 5 (1978); Commonwealth v. Kelley, 370 Mass. 147, 150 n.1 (1976).

[178.5] Commonwealth v. Johnson, 46 Mass. App. Ct. 398, 403 (1999) ("It is permissible for jurors to accord weight and probative value to an identification based solely on a defendant's eyes, rather than a full view of a defendant's face.").

[179] *See, e.g.,* Commonwealth v. Lane, 27 Mass. App. Ct. 527 (1989) (defendant was in custody at the jail when victim claimed to have seen the assailant a second time); Commonwealth v. Vaughn, 23 Mass. App. Ct. 40 (1986) (photographs showed that person who robbed supermarket returned two months later and robbed it again under similar circumstances at a time when the defendant was in jail); Commonwealth v. Woods, 382 Mass. 1 (1980) (documentary proof defendant was in custody).

[179.2] Commonwealth v. Clements, 436 Mass. 190, 192-197 (2002), *S.C.,* 51 Mass. App. Ct. 508 (2001).

[179.3] Commonwealth v. Daye, 393 Mass. 55, 73-74 (1984).

[179.4] Commonwealth v. Clements, 436 Mass. 190, 192-197 (2002), *S.C.*, 51 Mass. App. Ct. 508 (2001).

[179.8] *Cf.* Commonwealth v. Doe, 408 Mass. 764, 768 (1990); Commonwealth v. Burke, 339 Mass. 521, 534-535 (1959).

[179.9] Commonwealth v. Poggi, 53 Mass. App. Ct. 685, 687-690 (2002).

§ 18.12 EXPERT TESTIMONY

Given the recent evolution of scientific study regarding eyewitness identification, the use of experts regarding memory, suggestibility, and identification has resulted in defense counsel seeking expert assistance before and at trial. It has been held not to be an abuse of discretion for a judge to exclude expert testimony offered by the defendant on the issue of eyewitness identification.[180] A different circumstance might prevail if the witness has an identifiable physical or mental disability that could interfere with her ability to make an identification.[181] In addition, when there is little or no corroborating evidence, expert testimony may be warranted; the converse is also true.[182] Judges should conduct hearings on motions for funds for experts by indigent defendants and consider not only admissibility and cost, but also "desirability and necessity" for the defense.[182.3] A judge has the discretion to exclude expert testimony on voice identification if she concludes that the reliability of a voice identification is "within the scope of ordinary experience," despite an offer of proof that voice contacts of short duration have a high potential for inaccuracy.[182.5] Use of an expert to highlight flaws in identifcation procedure can also have the reverse effect and mitigate the impact on a jury.[182.6]

A judge has the discretion to admit a layperson's opinion that the person depicted in a photograph or videotape is the defendant when (1) the image is of poor quality, (2) the witness has a long familiarity with the defendant that enables him to identify an indistinct photo of him, and (3) there is some change in the appearance of the defendant at trial from how he generally presented himself in everyday life outdoors.[182.7] The relationship between the witness and the defendant should not appear

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[180] Commonwealth v. Santoli, 424 Mass. 837 (1997); Commonwealth v. Francis, 390 Mass. 89 (1983) (case contains an excellent summary of the nature of the expert testimony that was offered at a *voir dire* during the trial). *See also* Commonwealth v. Walker, 421 Mass. 90, 94–96 (1995); Commonwealth v. Hyatt, 419 Mass. 815, 818–19 (1995); Commonwealth v. Rodriguez, 378 Mass. 296 (1979); Commonwealth v. Middleton, 6 Mass. App. Ct. 902 (1978).

[181] *See, e.g.,* Commonwealth v. Sowers, 388 Mass. 207, 214–18 (1983) (ophthalmologist could testify for the Commonwealth that a witness with severely impaired vision nonetheless had the ability to identify a person or select his photograph where the testimony was limited to the witness's visual acuity).

[182] Commonwealth v. Santoli, 424 Mass. 837 (1997). *See also* Commonwealth v. Ashley, 427 Mass. 620, 624 n.3 (1998) (court declines to establish a per se rule that eyewitness identification testimony fails to meet the standards required for expert opinion evidence, and that expert testimony concerning the reliability of eyewitness identification testimony is not admissible in any circumstances).

[182.3] Commonwealth v. Zimmerman, 441 Mass. 146 (2004) (motion judge only focused on expense and not "desirability and necessity" to the requesting party; in concurring opinion, Justice Cordy noted that "expert testimony concerning cross-racial identification should generally be admaissible to challenge the reliability of a witness's identification").

[182.5] Commonwealth v. Pagano, 47 Mass. App. Ct. 55, 64 (1999).

[182.6] Commonwealth v. Silva-Santiago, 453 Mass. 782, 799 (2009) (Court notes that jurors were able to reasonably assess the weight of identification testimony, especially because they heard expert testimony detailing the alleged flaws in the identification procedure).

[182.7] Commonwealth v. Pleas, 49 Mass. App. Ct. 321 (2000) (police officer testified he was a longtime social acquaintance of the defendant's family, and recognized the defendant in the photo taken during an assault in an ATM booth). *See also* Commonwealth v. Vitello, 376 Mass. 426 (1978) (police officer permitted to testify that the person in the photo selected by the

to be based on past criminal activity of the defendant. On the other hand, it has been held error to permit a lay witness to make an identification of a person depicted in a videotape of a bank robbery as being the defendant when the jury members are capable of viewing the videotape and drawing their own conclusions.[183]

§ 18.13 JURY INSTRUCTIONS

The defendant has a right to have the jury instructed on the possibility of mistaken identification by a witness.[184] The Supreme Judicial Court has suggested a model instruction that is to be given in any case where identification is a contested issue and the defendant requests that such an instruction be given.[185] Although the Court does not require that the instruction be in the exact words of the model instruction, the failure to give its substance or the omission of an important component has been found to be reversible error.[186] In addition, "[f]airness to the defendant

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robbery victim was the defendant, whom the victim could not identify in court); Commonwealth v. Pearson, 75 Mass. App. Ct. 95 (2010); Commonwealth v. Gagnon, 16 Mass. App. Ct. 110 (1983), S.C., Commonwealth v. Bourgeois, 391 Mass. 869 (1984) (police officer identified the defendant in bank security photo where the defendant had altered his appearance by the time of trial).

[183] Commonwealth v. Austin, 421 Mass. 357, 365B66 (1995).

[184] Commonwealth v. Rodriguez, 378 Mass. 296, 302 (1979). *Cf.* Commonwealth v. Rosado, 428 Mass. 76 (1998), S.C., 43 Mass. App. Ct. 381 (1997) (where an eyewitness made an identification of the defendant based solely on the similarity of his clothing to that of the perpetrator, the defendant was entitled to an identification instruction which included a caution regarding the possibility of an honest mistake by the witness).

[185] Commonwealth v. Cuffie, 414 Mass. 632, 639–40 (1993) (court sets out model identification instruction in Appendix to opinion at 640–41; this replaces instruction recommended in Commonwealth v. Rodriguez, 378 Mass. 296, 302 (1979), and it also incorporates the change suggested in Commonwealth v. Fitzpatrick, 18 Mass. App. Ct. 106, 109–11 (1984).

The judge should delete from the model instruction the statement that the jury may take into account "the strength of the identification," because research has shown that a witness's confidence in her identification has little correlation with the accuracy of her recollection. Commonwealth v. Santoli, 424 Mass. 837, 845–46 (1997).

[186] Commonwealth v. Richards, 53 Mass. App. Ct. 333, 338-342 (2001)(describing testimony as "very high quality information" that has been "filtered" by the judge was error); Commonwealth v. Monteiro, 51 Mass. App. Ct. 552 (2001)(omission of factors to be weighed by the jury was reversible error); Commonwealth v. Caramanica, 49 Mass. App. Ct. 376, 379-380 (2000)("fatal flaw" to state that few people intend to mislead, and that credibility refers to accuracy rather than honesty); Commonwealth v. Hallet, 427 Mass. 552, 556–59 (1998) (omission of a portion of model Rodriguez charge was reversible error). *Contrast* Commonwealth v. Wen Chao Ye, 52 Mass. App. Ct. 850, 856-857 (2001). *See also* Commonwealth v. DiFonzo, 31 Mass. App. Ct. 921 (1991) (reversible error to fail to give identification instruction where issue was whether defendant was a participant in assault and not merely a bystander); Commonwealth v. Pressley, 390 Mass. 617 (1983) (failure to charge on dangers of misidentification reversible error even when witness claimed to have known the defendant previously); Commonwealth v. Delrio, 22 Mass. App. Ct. 712, 719-21 (1986) (same). *Contrast* Commonwealth v. DiBenedetto, 427 Mass. 414, 420 n.6 (1998) (judge need not instruct that memories fade over time, people under stress do not acquire information as well as others, and that people tend unconsciously to resolve apparent inconsistencies between

compels the trial judge to give an instruction on the possibility of an honest but mistaken identification when the facts permit it and the defendant requests it."[187] Failure to provide such an instruction may constitute reversible error.[188]

It is discretionary with the judge whether to instruct the jurors that they may consider that a cross-racial identification may be less reliable than an identification by a person of the same race.[188.5] Counsel should also be aware of the model alibi instruction suggested by the Supreme Judicial Court that places the burden on the Commonwealth to rebut evidence of an alibi beyond a reasonable doubt, and any instruction should include the language that an alibi may be the "only refuge of the innocent".[189]

PART IV: TACTICS IN IDENTIFICATION CASES

§ 18.14 WHETHER TO FILE A MOTION TO SUPPRESS IDENTIFICATION

memories and after-acquired facts); Commonwealth v. Conceicao, 388 Mass. 255, 265B66 (1983) (judge covered charge in substance); Commonwealth v. Brewster, 46 Mass. App. Ct. 746, 749–750 (1999) (omission from model charge regarding greater reliability of selecting defendant from a group didn't mandate reversal when identification was from a nonsuggestive photo array).

[187] Commonwealth v. Pressley, 390 Mass. 617, 620 (1983). In future cases, a judge should include the language of ***Pressley*** on the possibility of "an honest but mistaken identification by the witness. This will supplement Rodriguez, 378 Mass. 296 (1979), as modified by Cuffie, 414 Mass. 632 (1993) and Santoli, 424 Mass. 837 (1997). Commonwealth v. Pires, 453 Mass. 66, 68-72 (2009) (evidence in this case was sufficient to make the point). *See also* Commonwealth v. Williams, 54 Mass. App. Ct. 236, 239-244 (2002); Commonwealth v. Richards, 53 Mass. App. Ct. 33, 337-342 (2001); Commonwealth v. Rosado, 428 Mass. 76 (1998), S.C., 43 Mass. App. Ct. 381 (1997); Commonwealth v. Brewster, 46 Mass. App. Ct. 746, 751 n.4 (1999). If the only issue is whether the witness is telling the truth or lying, e.g., in a situation where he professes to know the defendant well, the jury need not receive this instruction. Commonwealth v. Stoddard, 38 Mass. App. Ct. 45 (1995). *Cf.* Commonwealth v. Walker, 33 Mass. App. Ct. 915, 916-917 (1992) (not error to give identification instruction although issue in rape case was consent).

[188] Commonwealth v. Spencer, 45 Mass. App. Ct. 33 (1998) (failure to give the requested instruction was reversible error); *contrast* Commonwealth v. Rosado, 428 Mass. 76 (1998) (failure to give instruction was error, but did not sway the outcome of the case). *See also* Commonwealth v. Caparrotta, 34 Mass. App. Ct. 473 (1993); Commonwealth v. DiFonzo, 31 Mass. App. Ct. 921 (1991); Commonwealth v. Pressley, 390 Mass. 617, 620 (1983). *Cf.* Commonwealth v. Diaz, 453 Mass. 266, 284 (2009) ("good faith error" instruction not required where parties are so well known to each other that identification is either true or the defendant is lying); Commonwealth v. Crowley, 29 Mass. App. Ct. 1, 7–8 (1990) (failure to give instruction on possibility of good faith mistake not error because defendant did not request one).

[188.5] Commonwealth v. Hyatt, 419 Mass. 815, 818-819 (1995); Commonwealth v. Engram, 43 Mass. App. Ct. 804, 805–08 (1997); Commonwealth v. Burgos, 36 Mass. App. Ct. 903 (1994). *But see* Commonwealth v. Herve Jean-Jacques, 46 Mass. App. Ct. 909 (1999) (acknowledging that the trial judge "should consider a request for such an instruction with a measure of favorable inclination to grant it").

[189] Commonwealth v. McLeod, 367 Mass. 500 (1975) ("unwise" to refer to alibi as a "defense" because it would shift the burden of proof).

Generally, a motion to suppress identification has little likelihood of success because of the significant hurdles that face the defendant. There are, however, several other advantages that may accrue from pressing the claim. First, an evidentiary hearing may provide important discovery or impeachment material by generating inconsistencies at the motion hearing from what the witness has said at an earlier hearing or will say at the trial.[190] It also allows counsel to size up a witness whom she has never cross-examined because of a direct indictment or the witness's absence at a prior probable-cause hearing.

It may be useful in a direct indictment case to have the defendant confronted with the strength of the Commonwealth's case in order to make him receptive to a favorable plea offer. Alternatively, deficiencies that are apparent with the witness at the hearing may induce a prosecutor to lower her recommendation in order to secure a conviction. Another fact of life is that a lazy or overburdened prosecutor, or a judge with a heavy docket, may be inclined to offer a plea incentive to the defendant in order to forego the motion hearing.

The most critical drawback to pressing a futile motion to suppress identification is that it provides the prosecutor and the witness with a rehearsal of the expected trial testimony. This can be a tremendous advantage to a prosecutor who may be somewhat unfamiliar with the facts of her case and also is a confidence-booster to a worried witness. If the hearing has this effect, it will have a corresponding negative impact on the defendant's plea bargaining leverage.

There can also be situations where the defendant does indeed have a meritorious motion to suppress an identification, but foregoes it as part of the overall trial strategy. For example, the cornerstone of the defense can be that the police were under such intense pressure to solve the crime that they engaged in unfair procedures which led to the arrest of the defendant.[190.5] It is not ineffective assistance for the defense counsel at trial to highlight the suggestiveness of the identification procedure as opposed to seeking its suppression, especially if the defendant acquiesces in this strategic choice.[190.6]

§ 18.15 CROSS-EXAMINATION OF THE EYEWITNESS

§ 18.15A. AT PRETRIAL HEARINGS

The cross-examination of an eyewitness at a pretrial hearing is completely different from that at a subsequent jury trial. If a probable-cause hearing, suppression hearing, or district court bench trial has discovery goals, counsel should treat the preliminary hearing as one would a deposition with two overriding purposes in mind: to acquire as many details as possible concerning all facts of the incident and to get the witness to acknowledge that she knows or remembers nothing beyond the facts to which she has testified at that hearing.

A cardinal rule of cross-examination — that one only asks leading questions should be disregarded at the probable-cause hearing. Defense counsel must ask open-ended questions in order to encourage the witness to elaborate on the events. The

[190] In this regard, the motion hearing should be scheduled sufficiently in advance of the trial so that a transcript can be obtained of the witness's testimony.

[190.5] *See, e.g.,* Commonwealth v. Tevlin, 433 Mass. 305, 316-319 (2001).

[190.6] Commonwealth v. Tevlin, 433 Mass. 305, 316-317 (2001).

witness often will relate some fact that is completely unexpected, such as an element of unusual suggestiveness by the police or a candid admission by the witness of her mental state at a showup, which can be the basis for the defense at trial. The major danger of this wide-open approach occurs if the witness is unavailable at the trial and the prosecutor seeks to offer the damaging testimony given at the probable-cause hearing. This is a rare situation, however, and should not chill counsel's use of an open-ended style of examination.

At the outset of the cross-examination at a pretrial hearing, one should attempt to learn some facts about the witness's background. This technique is less threatening to the witness, may relax her for the remaining cross-examination, and may uncover details that would warrant further scrutiny by a private investigator. Counsel should next explore the circumstances prior to the incident. The witness's activities could affect her ability to make an accurate observation of a person due to fatigue, use of alcohol or medication, or even being late for an appointment.

It is critical for defense counsel to review in often excruciating detail the facts surrounding the incident and the description of the assailant. Do not let a witness relate that the entire incident took "ten or fifteen minutes" if you can show that its component parts add up to ninety seconds. Seek to increase distances referred to by the witness. When people estimate by feet, they tend to overestimate, so do not ask the witness to gauge a distance by reference to an object in the courtroom after she has provided a specific figure in feet unless you are confident that the answer will be in the defendant's favor. Explore any deficiencies that existed in the witness's opportunity to observe, including the lack of adequate lighting, adverse whether conditions, movement by the assailant, limitation to profile views, clothing that obscured his facial features, or the insignificance of the event at the time to the eyewitness if she did not realize that it was the prelude to or aftermath of a crime. Counsel should confirm the fact that the perpetrator was a complete stranger to the witness. Reference to items seen or taken during the incident should emphasize their generic nature, for example, regular United States currency without any distinctive markings on it.

Every detail concerning a possible identification of a person should be explored, with specific questions concerning facial features, voice, physical size, and clothing.[191] Counsel should ask the witness if the assailant "could have been . . . "in an effort to expand on the height, weight, and other variables in a description. Even a failure to observe some detail can be significant because one proven tenet in identification cases is that what is *not* present is often as significant as what is present. Therefore, the absence of certain details that the witness could have observed but did not may develop into the core of a reasonable doubt argument to a jury regarding the reliability of an identification.

Another useful approach is to ask a witness these questions: "What was the most distinctive feature of the assailant?" and "What do you remember most about the crime?" The questions often elicit startling responses from witnesses, such as that the assailant's most distinctive feature was that he was black or that all the witness could think about during the crime was her children or the weapon threatening her. The

[191] Counsel also is entitled as a matter of right to cross-examine a witness concerning identification details that relate to a second assailant, even if this person has not been arrested. *Cf.* Commonwealth v. Franklin, 366 Mass. 284, 288 (1974); Commonwealth v. Smith, *7* Mass. App. Ct. 879, 880 (1979). A sharp contrast between the precise details that a witness provides concerning the arrested defendant and the vague generalities of the second (unarrested) robber can support an argument that the witness is basing her identification on the man presented to her at a showup and not on her independent memory of the criminals.

thoughts racing through a person's mind should be considered, emphasizing shock, fear, wanting the incident to end, hurt or pain, and concern for others.

Another area to explore at a pretrial hearing relates to contacts with police. The witness must be asked to state as precisely as possible the description initially provided to the police. The police procedures in seeking an identification must be explored in detail in order to uncover any elements of suggestiveness. In addition, counsel should elicit everything told to the witness by the police.[192] For example, if the police told the witness that she had to be positive before they would arrest the defendant, and the witness then said, "I'm positive," this response can be portrayed as the answer of a witness who wants to be cooperative rather than the accurate depiction of the witness's mental state at the time. Moreover, the conduct of the defendant at a showup should be developed to show his consciousness of innocence, such as a failure to hide his face or his statements asking the witness to look closely at him.

Counsel should always ask about occasions subsequent to the incident when the witness has seen the assailant. Witnesses sometimes believe that they have seen the person in a store or on the subway in the weeks following the defendant's arrest, and yet this may have occurred at a time when the defendant was in custody. This alleged subsequent sighting may be enough to mandate that a required finding of not guilty be entered at trial.[193] If subsequent viewings occurred in the courthouse, it should be noted that this was on days when the witness expected the person whom she had previously identified to be present at the court.

Perhaps the most important practice tip for defense counsel to bear in mind at a pretrial hearing is the importance of locking in the testimony of the witness by repeatedly asking such questions as, "Is there any other detail of the assailant's face that you can remember?" or "Did you tell the police anything else beyond what you've just said?" Unless counsel establishes that absolutely everything known by the witness was related at the hearing, the prosecutor will be able to add additional details at the trial without fear of impeachment of the witness. It is common that when asking thorough questions in a motion hearing that counsel will receive multiple details in one answer. In the face of an answer that contains helpful details or inconsistencies, counsel should ask the witness each specific, helpful detail in an individual question so as to have each fact available for clean impeachment later.

A final consideration involves the cross-examination of the police officer who was present when the witness initially related her description of the assailant or who was present at a subsequent identification. The elicitation of details from him at the pretrial hearing is as important as with the eyewitness, and the need to lock in the testimony is, if anything, more critical. One must constantly ask if there is anything else the police officer can remember concerning certain details so that surprise answers given at a later trial can effectively impeached with prior testimony.

§ 18.15B. AT TRIAL

Cross-examining an eyewitness at a trial is handled quite differently than cross-examination at a pretrial hearing. Counsel must control the witness, use carefully prepared questions in favorable areas, and avoid uncharted territory. Techniques for cross-examining witnesses at trial are discussed in detail *infra* at ch. 32, but certain

[192] This does not constitute hearsay because it is not offered for its truth but rather for the effect that these statements may have had on the listener.

[193] *See, e.g.,* Commonwealth v. Lane, 27 Mass. App. Ct. 527 (1989).

points are particularly relevant to identification cases. *First*, it is important that counsel never imply during the cross-examination that the eyewitness is a liar (unless there is a solid basis for making this allegation). The better tack is to be polite and respectful to the witness and actually appear sympathetic to the witness in light of the trauma of the incident. This ensures that one does not antagonize the jury, whose natural sympathies will be with a crime victim, and yet permits a closing argument that concedes that the eyewitness was making a sincere effort to identify her assailant but is simply mistaken.

Second, always refer to the culprit as the "assailant" or "man you had never seen before." Be vigilant to object to the prosecutor's reference on direct examination to "the defendant" in his questions, even if the witness has identified him in her testimony, as some judges will insist that the prosecutor be more neutral in references to the assailant since the identity of that person is the ultimate issue for the jury.[193.5]

Third, counsel may impeach an identification by introducing evidence of the suggestive pretrial procedures that were used and of fairer procedures that could have been employed by the police but were not.[194]

Finally, it is inexcusable to not have a transcript of the probable- cause hearing at the trial for use as impeachment, and the skills related to use of a prior inconsistent statement must also be mastered because they are always critical in an identification case, where details are so important.

§ 18.16 PREPARATION AND PRESENTATION OF ALIBI TESTIMONY

Defense counsel should determine from the client as soon as possible whether any potential alibi witnesses exist, and contact them immediately.[195] One should meet with the alibi witnesses in person, being prepared to go to where they work or live if they are not family members or close friends of the defendant. It is advisable to interview them with an investigator present, if at all possible, but not with the defendant present so as to deflect an appearance of pressure being put on the witnesses. Counsel should also be aware of ethical constraints in suggesting answers to the witnesses or in simply providing the defendant's version of the alibi and asking the witness if he agrees with it.[196] Counsel should be prepared, however, to cajole and

[193.5] *Cf.* Commonwealth v. Hoilett, 430 Mass. 369, 374 (1999)(reference to the armed assailant as "the defendant" was improper prior to his identification by any of the witnesses).

[194] Commonwealth v. Rodriguez, 378 Mass. 296, 308 (1979); Commonwealth v. Flanagan, 20 Mass. App. Ct. 472, 473–74 (1985). However, the trial judge can preclude the use of an altered array, which showed only the noses and eyes, where the witness also saw the hair, cheeks and complexion of the bandana-wearing burglar. Commonwealth v. Montez, 45 Mass. App. Ct. 802, 810-811 (1998).

[195] The concept of an "alibi" witness should not only include someone who says that your client was elsewhere at the time of the incident but also someone who says that she saw the incident and your client *was* not there. In this regard, the defendant should seek through discovery a list of witnesses who were interviewed by the police but whose names do not appear in the police report. Police officers tend to include in the report only persons whose testimony is supportive of the government's case, and obtaining the names of other persons can he an excellent starting point for an investigator.

[196] Some counsel suggest a polygraph examination in an effort to flush out a perjuring witness or to give confidence to a truthful one, even though the results of the examination are inadmissible at trial.

coddle the alibi witnesses, especially if they are not related to the defendant, because their cooperation will be critical at trial.

If the alibi is supported by convincing documentary evidence, it may be in the defendant's interest to be forthcoming with all particulars with the prosecutor. In other instances, it is wise to avoid unnecessary prosecutorial discovery by alerting the witnesses that they do not have to speak to the prosecutor or the police investigator if they prefer not to do so. Similarly, it is rarely appropriate to present alibi testimony at a probable-cause hearing unless one believes that the witness might not be available for the trial and the testimony must be preserved.

In preparing an alibi witness for trial, counsel must not encourage the witness to be more exact than she really can be, as she will be most vulnerable to cross-examination by a skillful prosecutor if she overextends herself. Counsel must focus on two questions: Is there a particular event that allows the witness to remember precisely when the defendant was present? And are there any documents that in any way corroborate the witness, even collaterally?

Simply because alibi testimony is available does not mandate that it be presented at trial if the inherent deficiencies in the Commonwealth's case support a strong reasonable doubt argument. When alibi witnesses are presented and are not believed by the jury, it often has the effect of bolstering the Commonwealth's case.

If the decision is reached to present an alibi defense, it may be done by presenting the witnesses alone and not the defendant, but if he is to be called, he should be called last so that he has the benefit of hearing the prior testimony.[197] Deficiencies in an alibi witness's testimony can be explained by reference to the statement's having the "ring of truth" because every single fact is not precise. A detailed offer of proof should be made if the judge precludes the defendant from calling an alibi witness.

A prosecutor usually will attempt to impeach an alibi witness through cross-examination by suggesting that the witness was remiss in not bringing the information to the attention of the police or district attorney at an earlier date and that the testimony is a recent fabrication.[197.5] In order to advance these arguments, however, the prosecutor is required to show, customarily in a *voir dire* out of the presence of the jury, that "the witness knew of the pending charges in sufficient detail to realize that he possessed exculpatory information, that the witness had reason to make the information available, that he was familiar with the means of reporting it to the proper authorities, and that the defendant or his lawyer, or both, did not ask the witness to refrain from doing so."[198]

§ 18.17 RIGHT TO PRESENT EVEIDENCE THAT SOMEONE ELSE COMMITTED THE CRIME

[197] It is improper in this circumstance for the prosecutor to suggest that the defendant was "tailoring" his testimony to the prior evidence. Commonwealth v. Person, 400 Mass. 136, 138–43 (1987).

[197.5] Commonwealth v. Hassey, 40 Mass. App. Ct. 806, 811 (1996) (scope of cross should be limited with the appropriate foundation: (1) that the witness knew of the pending charges and realized she possessed exculpatory information, (2) that the witness had reason to make the information available, (3) the witness is familiar with the means to report the information and (4) the defendant and his counsel did not ask the witness to refrain from reporting).

[198] Commonwealth v. Brown, 11 Mass. App. Ct. 288, 295–97 (1981). *Accord* Commonwealth v. Berth, 385 Mass. 784, 790 (1982).

The defendant has the right to demonstrate that crimes of a similar nature have been committed by some other person when the acts are so closely related in time and *modus operandi* so as to cast doubt upon the identification.[199] Courts have given wide latitude to the admission of relevant evidence that someone other than the defendant might have committed the charged crime and tend to resolve questions of probative value in favor of admissibility.[200] A time-honored defense method,[201] the demonstration that a third party committed a crime requires substantial links between the crime or similar crime committed by a third party and the crime with the alleged mistaken identification.[202] The defendant need not produce the true criminal actor, as long as sufficient similarity exists between the two incidents and "the evidence [goes] beyond a mere showing. . .and [is]. . . sufficient to permit the jury to draw an inference. . .of mistaken identity."[203]

[199] Commonwealth v. Keizer, 377 Mass. 264, 267 (1979) (substantial links between robbery charged and another robbery in which D could not have participated).

[200] Commonwealth v. Conkey, 443 Mass. 60, 66 (2004) (quoting Keizer); but see, Commonwealth v. Smith, 461 Mass. 438, 445 (2012) (noting that there still exist limitations to such evidence: judicial discretion regarding admissibility of hearsay and the need for a rational tendency to prove the issue that the defense raises).

[201] *See, e.g.,* Commonwealth v. Abbott, 130 Mass. 472, 475 (1881)

[202] Commonwealth v. Brown, 27 Mass. App. Ct. 72, 76 (1989) (factors include proximity in time, location, singular features or striking resemblances of method); *Contrast* Commonwealth v. Rosa, 422 Mass. 18, 22-25 (1996) (evidence that defendant's own former attorney misidentified him as another man who lived in same neighborhood at time of murder precluded despite look-alike's criminal history, violence, and proximity).

[203] See Commonwealth v. Jewett, 17 Mass. App. Ct 354, 358, *affirmed* and *discussed*, 392 Mass. 558, 562-563 (1984).