Cross-References:

Defendant's appearance at trial, ch.28
Discovery of identification procedures, § 16.6J
Forensic identification evidence, ch. 12
Form and requirements of motions, ch.15
Identification interview checklist, § 11.10B
Obtaining other suspects via Police Computer ID Units, § 16.6
Pretrial conference, ch.14
Right to counsel, ch.8

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).

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

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).

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).