

MAI 310.02 [2016 New] EYEWITNESS IDENTIFICATION TESTIMONY

(Approved December 16, 2015; Effective January 1, 2016)

Eyewitness identification must be evaluated with particular care.

In order to determine whether an identification made by a witness is reliable or mistaken, you should consider all of the factors mentioned in Instruction No. 1 concerning your assessment of the credibility of any witness. You should also consider the following factors.¹

One, the witness's eyesight;

Two, the lighting conditions at the time the witness viewed the person in question;

Three, the visibility at the time the witness viewed the person in question;

Four, the distance between the witness and the person in question;

Five, the angle from which the witness viewed the person in question;

Six, the weather conditions at the time the witness viewed the person in question;

Seven, whether the witness was familiar with the person identified;

Eight, any intoxication, fatigue, illness, injury or other impairment of the witness at the time the witness viewed the person in question;

Nine, whether the witness and the person in question are of different races or ethnicities;

Ten, whether the witness was affected by any stress or other distraction or event, such as the presence of a weapon, at the time the witness viewed the person in question;

Eleven, the length of time the witness had to observe the person in question;

Twelve, the passage of time between the witness's exposure to the person in question and the identification of the defendant;

Thirteen, the witness's level of certainty of [his] [her] identification, bearing in mind that a person may be certain but mistaken;

Fourteen, the method by which the witness identified the defendant, including whether it was

[i. at the scene of the offense;]

[ii. (In a live or photographic lineup.) In determining the reliability of the identification made at the lineup, you may consider such factors as the time elapsed between the witness's opportunity to view the person in question and the lineup, who was in the lineup, the instructions given to the witness during the lineup, and any other circumstances which may affect the reliability of the identification;]

[iii (In a live or photographic show-up.) A "show-up" is a procedure in which law enforcement presents an eyewitness with a single suspect for identification. In determining the reliability of the identification made at the show-up, you may consider such factors as the time elapsed between the witness's opportunity to view the person in question and the show-up, the instructions given

to the witness during the show-up, and any other circumstances which may affect the reliability of the identification;]

Fifteen, any description provided by the witness after the event and before identifying the defendant;

Sixteen, whether the witness's identification of the defendant was consistent or inconsistent with any earlier identification(s) made by the witness; and

Seventeen, [other factors.] [any other factor which may bear on the reliability of the witness's identification of the defendant.]²

It is not essential the witness be free from doubt as to the correctness of the identification. However the state has the burden of proving the accuracy of the identification of the defendant to you, the jury, beyond a reasonable doubt before you may find [him] [her] guilty.

Notes on Use [2016 New]

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Notes on Use

1. Use only those factors that apply to the evidence presented at trial, appropriately renumbering the paragraphs and subparagraphs.

2. In *Perry v. New Hampshire*, 132 S.Ct. 716 (2012), the Supreme Court faced the issue of whether the Due Process Clause required preliminary judicial inquiry into the reliability of an eyewitness identification made under suggestive circumstances not arranged by law enforcement. While holding that due process does not require a trial court to screen such evidence absent improper state conduct, the Court also addressed the more general issue of the reliability of eyewitness identification. Recognizing both the “importance” and “fallibility” of eyewitness identifications, *Perry*, 132 S.Ct. at 728, the Court noted the “safeguards” built into the judicial system that “caution juries against placing undue weight on eyewitness testimony of questionable reliability.” *Id.* Such protections include the Sixth Amendment right to confront the eyewitness, the defendant’s right to effective counsel who can expose flaws in the eyewitness’ testimony during cross-examination, the ability of counsel to focus the jury’s attention on the fallibility of such testimony during opening and closing arguments, and rules of evidence which permit trial courts to exclude relevant evidence if its probative value is outweighed by either its prejudicial impact or potential for misleading the jury. *Id.* at 728-29. Another of these systemic safeguards, the Court explained, are “[e]yewitness specific jury instructions, which . . . likewise warn the jury to take care in appraising identification evidence,” giving as an example, *United States v. Telfaire*, 469 F.2d 552, 558-59 (C.A.D.C. 1972). *Id.* The Court noted that among the “factors [that] bear on ‘the likelihood of misidentification’” are “the passage of time between exposure to and

identification of the defendant, whether the witness was under stress when he first encountered the suspect, how much time the witness had to observe the suspect, how far the witness was from the suspect, whether the suspect carried a weapon, and the race of the suspect and the witness.” *Id.* at 727. This instruction addresses the concerns the Supreme Court raised in *Perry*. See also *United States v. Telfaire*, 469 F.2d 552, 559-59 (D.C. Cir. 1972).