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## Massachusetts high court casts doubt on in-court identifications

Even if you're not a criminal defense lawyer, you've certainly seen it in a movie. It's the moment at trial when the prosecutor asks the witness, "Now, as you look over the courtroom today, do you see the man who [shot, robbed, attacked, kidnapped] you?"

The witness' eyes scan the room and settle on a person at the defense table. The witness points and says, "Yes, that is the man. I am positive."

If you find the moment dramatic while you're eating popcorn at the multiplex, imagine the effect it has on jurors who may be viewing their very first criminal trial. The moment is not only good; it may actually be too good.

Several weeks ago, the Massachusetts Supreme Judicial Court issued a decision concerning in-court identifications that is truly unprecedented. Relying on its constitution, the state's highest court held that a prosecutor will henceforth be forbidden to have a witness make an in-court identification of the defendant unless that witness has previously made a positive out-of-court identification of the defendant in a non-suggestive procedure.

If the witness has not previously done that, then the in-court identification will be considered nothing more than a suggestive one-on-one show-up, and it will be found inadmissible.

If you're involved in criminal law, it's important you read *Commonwealth v. Walter Crayton*, 2014 Mass. LEXIS 947, and *Commonwealth v. Michael Collins*, 2014 Mass. LEXIS 948, both decided Dec. 14.

The *Crayton* case involved in-court identifications made by two witnesses who named Walter Crayton as the man they had seen viewing child pornography on a computer in a public library. The in-court identifications were made more than two years after

the incident. Before trial, neither witness was ever asked to view either a lineup or a photo array.

The Massachusetts high court had previously held that an out-of-court one-on-one show-up was generally too suggestive to be admissible unless it could be justified by a good reason, such as the need to immediately apprehend a wanted criminal.

In *Crayton*, the court extended the rule by holding that where a prosecutor asks a witness to identify the perpetrator, and the defendant is sitting at counsel's table, then the in-court identification is just as suggestive as an out-of-court show-up.

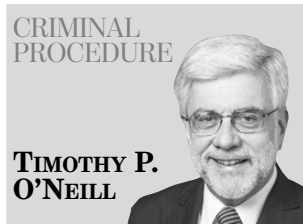
The court held that the new rule it was promulgating would hold an in-court identification generally to be impermissibly suggestive and thus inadmissible. But it provided the state two ways to overcome this presumption of inadmissibility.

First, the in-court identification will be nonetheless admissible if the state can prove that the witness had previously made an out-of-court identification of the defendant under proper, constitutional, non-suggestive circumstances. In that case, the in-court identification is merely corroborating a prior, proper out-of-court identification.

*In-court identifications have always been good theater. But now courts are questioning whether they're also good law.*

Second, an in-court identification will be admissible if the state can provide a "good reason" why there was no prior out-of-court identification.

For example, if the victim was acquainted with the defendant before the commission of the crime, as in a case of domestic violence, there would be no need



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to conduct an out-of-court identification procedure. Or if the witness was the arresting officer who also was an eyewitness to the incident, the in-court identification would be proper since the officer is merely confirming that the defendant is the one he arrested for the crime.

"In both of these situations," the court noted, "the in-court show-up is understood by the jury [merely] as confirmation that the defendant sitting in the courtroom is the person whose conduct is at issue, rather than as identification evidence."

The court summarized its holding thusly: "Where an eyewitness has not participated before trial in an identification procedure, we shall treat the in-court identification as an in-court show-up and shall admit it in evidence only where there is 'good reason' for its admission."

The companion case of Michael Collins adds a gloss to the *Crayton* rule. Here, about a month after the crime, an eyewitness was asked to look at an array of eight photos to see whether she could identify the perpetrator. The witness selected two of the photos, including the defendant's.

At trial, the officer stated that the witness told him her choice "was between" these two. The

witness testified, however, that she had told the officer that one picture "looked more like" the person she had seen, and that picture was the defendant's. Regardless, when asked if the perpetrator was in the courtroom, she pointed to the defendant.

Unlike *Crayton*, here the police conducted a pre-trial, non-suggestive identification procedure. But what troubled the court is that, although the pre-trial procedure did not produce "an unequivocal positive identification," the prosecutor nonetheless asked the witness to make an in-court identification of the defendant.

Unless there is "good reason" for the suggestive in-court identification, the prosecutor will be limited to introducing evidence only of the less positive, out-of-court identification.

The movement to reform eyewitness identification procedure has been gathering momentum during the last few decades. Of the 325 exonerations caused by post-conviction DNA evidence since 1989, 70 percent of the cases included mistaken eyewitness identifications.

Equally troubling, in half of those cases, the eyewitness testimony was not corroborated by confessions, forensic evidence or informants. In fact, it has been estimated that about 7,500 of every 1.5 million annual convictions in the U.S. may be based on misidentifications.

Massachusetts has taken a bold move forward in characterizing the traditional in-court identification as being a possible source of serious prejudice.

As a final note, the *Crayton* court remarked that the in-court identifications of the witnesses would not have been very difficult to make. When the witnesses were asked to point out the man they saw, there were only two people at the defense table: the witness and his female attorney.

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