

4.11 EYEWITNESS IDENTIFICATION

You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may consider the various factors mentioned in these instructions concerning credibility of witnesses.

In addition to those factors, in evaluating eyewitness identification testimony, you may also consider:

- (1) the capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation, including lighting and distance;
- (2) whether the identification was the product of the eyewitness's own recollection or was the result of subsequent influence or suggestiveness;
- (3) any inconsistent identifications made by the eyewitness;
- (4) the witness's familiarity with the subject identified;
- (5) the strength of earlier and later identifications;
- (6) lapses of time between the event and the identification[s]; and
- (7) the totality of circumstances surrounding the eyewitness's identification.

Comment

Generally, the Ninth Circuit has not required a cautionary instruction regarding eyewitness testimony. *See People of the Territory of Guam v. Dela Rosa*, 644 F.2d 1257, 1261 (9th Cir.1981); *United States v. Cassasa*, 588 F.2d 282, 285 (9th Cir.1978). Since 1989, the Committee has recommended against the giving of an eyewitness identification instruction because it believes that the general witness credibility instruction is sufficient. *See, e.g.*, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT, Instruction 4.13 (1989). If the district court determines that an eyewitness identification instruction is appropriate, in addition to the general witness credibility instruction, the Committee recommends that this instruction be given.

The Ninth Circuit has approved the giving of a comprehensive eyewitness jury instruction where the district court has determined that proffered expert witness testimony regarding eyewitness identification should be excluded. *See, e.g., United States v. Hicks*, 103 F.3d 837, 847 (9th Cir.1996) ("The district court may exercise its discretion to exclude expert testimony if it finds that . . . the trier of fact . . . [would] be better served through a . . . comprehensive jury

instruction.”); *United States v. Rincon*, 28 F.3d 921, 925-26 (9th Cir.1994).