

Rule 617. Eyewitness Identification

(a) Definitions

(1) “Eyewitness Identification” means witness testimony or conduct in a criminal trial that identifies the defendant as the person who committed a charged crime.

(2) “Identification Procedure” means a lineup, photo array, or showup.

(3) “Lineup” means a live presentation of multiple individuals, before an eyewitness, for the purpose of identifying or eliminating a suspect in a crime.

(4) “Photo Array” means the process of showing photographs to an eyewitness for the purpose of identifying or eliminating a suspect in a crime.

(5) “Showup” means the presentation of a single person to an eyewitness in a time frame and setting that is contemporaneous to the crime and is used to confirm or eliminate that person as the perceived perpetrator.

(b) Admissibility in General. In cases where eyewitness identification is contested, the court shall exclude the evidence if a factfinder, considering the factors in this subsection (b), could not reasonably rely on the eyewitness identification. In making this determination, the court may consider expert testimony and other evidence on the following:

(1) Whether the witness had an adequate opportunity to observe the suspect committing the crime;

(2) Whether the witness’s level of attention to the suspect committing the crime was impaired because of a weapon or any other distraction;

(3) Whether the witness had the capacity to observe the suspect committing the crime, including the physical and mental acuity to make the observation;

(4) Whether the witness was aware a crime was taking place and whether that awareness affected the witness’s ability to perceive, remember, and relate it correctly;

(5) Whether a difference in race or ethnicity between the witness and suspect affected the identification;

(6) The length of time that passed between the witness’s original observation and the time the witness identified the suspect;

(7) Any instance in which the witness either identified or failed to identify the suspect and whether this remained consistent thereafter;

(8) Whether the witness was exposed to opinions, photographs, or any other information or influence that may have affected the independence of the witness in making the identification; and

(9) Whether any other aspect of the identification was shown to affect reliability.

(c) Identification Procedures. If an identification procedure was administered to the witness by law enforcement and the procedure is contested, the court must determine whether the identification procedure was unnecessarily suggestive or conducive to mistaken identification. If so, the eyewitness identification must be excluded unless the court, considering the factors in subsection (b) and this subsection (c), finds that there is not a substantial likelihood of misidentification.

(1) Photo Array or Lineup Procedures. To determine whether a photo array or lineup is unnecessarily suggestive or conducive to mistaken identification, the court should consider the following:

(A) Double Blind. Whether law enforcement used double blind procedures in organizing a lineup or photo array for the witness making the identification. If law enforcement did not use double blind procedures, the court should consider the degree to which the witness's identification was the product of another's verbal or physical cues.

(B) Instructions to Witness. Whether, at the beginning of the procedure, law enforcement provided instructions to the witness that

(i) the person who committed the crime may or may not be in the lineup or depicted in the photos;

(ii) it is as important to clear a person from suspicion as to identify a wrongdoer;

(iii) the person in the lineup or depicted in a photo may not appear exactly as he or she did on the date of the incident because features such as weight and head and facial hair may change; and

(iv) the investigation will continue regardless of whether an identification is made.

(C) Selecting Photos or Persons and Recording Procedures. Whether law enforcement selected persons or photos as follows:

(i) Law enforcement composed the photo array or lineup in a way to avoid making a suspect noticeably stand out, and it composed the photo array or lineup to include persons who match the witness's description of the perpetrator and who possess features and characteristics that are

reasonably similar to each other, such as gender, race, skin color, facial hair, age, and distinctive physical features;

(ii) Law enforcement composed the photo array or lineup to include the suspected perpetrator and at least five photo fillers or five additional persons;

(iii) Law enforcement presented individuals in the lineup or displayed photos in the array using the same or sufficiently similar process or formatting;

(iv) Law enforcement used computer generated arrays where possible; and

(v) Law enforcement recorded the lineup or photo array procedures.

(D) Documenting Witness Response. Whether law enforcement asked the witness how certain he or she was of any identification and documented all responses, including initial responses.

(E) Multiple Procedures or Witnesses. Whether or not law enforcement involved the witness in multiple identification procedures wherein the witness viewed the same suspect more than once and whether law enforcement conducted separate identification procedures for each witness, and the suspect was placed in different positions in each separate procedure.

(2) Showup Procedures. To determine whether a showup is unnecessarily suggestive or conducive to mistaken identification, the court should consider the following:

(A) Whether law enforcement documented the witness's description prior to the showup.

(B) Whether law enforcement conducted the showup at a neutral location as opposed to law enforcement headquarters or any other public safety building and whether the suspect was in a patrol car, handcuffed, or physically restrained by police officers.

(C) Whether law enforcement instructed the witness that the person may or may not be the suspect.

(D) Whether, if the showup was conducted with two or more witnesses, law enforcement took steps to ensure that the witnesses were not permitted to communicate with each other regarding the identification of the suspect.

(E) Whether the showup was reasonably necessary to establish probable cause.

(F) Whether law enforcement presented the same suspect to the witness more than once.

(G) Whether the suspect was required to wear clothing worn by the perpetrator or to conform his or her appearance in any way to the perpetrator.

(H) Whether the suspect was required to speak any words uttered by the perpetrator or perform any actions done by the perpetrator.

(I) Whether law enforcement suggested, by any words or actions, that the suspect is the perpetrator.

(J) Whether the witness demonstrated confidence in the identification immediately following the procedure and law enforcement recorded the confidence statement.

(3) Other Relevant Circumstances. In addition to the factors for the procedures described in parts (1) and (2) of this subsection (c), the court may evaluate an identification procedure using any other circumstance that the court determines is relevant.

(d) Admissibility of Photographs. Photographs used in an identification procedure may be admitted in evidence if:

(1) the prosecution has demonstrated a reasonable need for the use;

(2) the photographs are offered in a form that does not imply a prior criminal record; and

(3) the manner of their introduction does not call attention to their source.

(e) Expert Testimony. When the court admits eyewitness identification evidence, it may also receive related expert testimony upon request.

(f) Jury Instruction. When the court admits eyewitness identification evidence, the court may, and shall if requested, instruct the jury consistent with the factors in subsections (b) and (c) and other relevant considerations.

Committee Note: This rule ensures that when called upon, a trial court will perform a gatekeeping function and will exclude unreliable eyewitness identification evidence in a criminal case. Several organizations, including the Department of Justice and the ABA, have published best practices for eyewitness identification procedures when a witness is asked to identify a perpetrator who is a stranger to the witness.

Subsection (a) defines terms commonly used in the eyewitness identification process.

Subsection (b) addresses estimator variables (circumstances at the time of the crime). According to the National Research Council of the National Academies, the most-studied estimator variables include: weapon focus, stress and fear, race bias, exposure, duration, and retention. The literature talks about how stress, fear, and anxiety may affect memory storage and retrieval. The ABA recognizes that high and low levels of stress may harm performance in identifying suspects, while moderate levels may enhance memory performance. A stressed victim may encode information differently and be more affected by stress than a passerby, unless the passerby is unaware that a crime is taking place. In addition, the cross-race effect will depend on the circumstances; and the participation of law enforcement and others may influence a witness's perceptions and memory retrieval. Expert evidence may be necessary to elucidate these factors for the court, and where the evidence is admissible, expert evidence and/or an instruction may further elaborate on the factors for the jury.

Subsection (c)(1) reflects some of the best practices in the context of photo array and lineup procedures, including use of double blind procedures; providing instructions to the witness at the beginning of the procedure; displaying photos or presenting a lineup with individuals who generally fit the witness's description of the suspect and who are sufficiently similar so as not to suggest the suspect to the witness; documenting the procedures, including the witness's responses; and guarding against influencing the witness through use of multiple procedures or when multiple witnesses are involved.

Use of double blind procedures. The literature, including the National Academies of Science report, supports that whenever practical, the person who conducts a lineup or organizes a photo array and all those present (except defense counsel) should be unaware of which person is the suspect through use of double blind procedures. Use of double blind procedures provides assurance that an administrator who is not involved in the investigation does not know what the suspect looks like and is therefore less likely to suggest or confirm that the perpetrator is in the lineup or the photo array. At times, double blind procedures may not be practical. In such cases, the administrator should adopt blinded procedures, such as a "folder shuffle," to prevent him or her from knowing which photo a witness is viewing at a given time and to ensure that he or she cannot see the order or arrangement of the photographs viewed by the witness. Blinded procedures may be necessary to use in smaller agencies with limited resources or in high profile cases where all officers are aware of the suspect's identity. As a practical matter, blinded procedures work only for photo arrays and are not recommended for use in lineups. Lineups must be conducted using double blind procedures.

Providing instructions to the witness. The person conducting the lineup or photo array should not disclose or convey to the witness that a suspect is in custody. Rather, the person should read instructions to the witness that are neutral and detached and should allow the witness to ask questions about the instructions before the process begins. The witness should sign and date the instructions. Organizations have published instructions for use in lineup or photo array procedures that may be used by agencies. While a witness is viewing the photo array, the person conducting the procedure should not interrupt the witness or interject.

Displaying photos or presenting a lineup. In selecting fillers or individuals for the photo array or lineup procedure, at least five fillers—or non-suspects—should be used with the suspect photo. Fillers should generally fit the witness’s description of the perpetrator as opposed to match a specific suspect’s appearance. Fillers should not make the suspect noticeably stand out. Photos should be of similar size with similar background and formatting. They should be numbered sequentially or labeled in a manner that does not reveal identity or the source of the photo, and they should contain no other writing. More recent literature supports that where practical, agencies should employ a simultaneous procedure, which allows the witness to observe at one time all of the photos in an array for a single suspect.

Documenting witness responses. Law enforcement should clearly document by video or audio recording a witness’s level of confidence verbatim at the time of an initial identification. New research shows that a witness’s confidence at the time of an initial identification is a good indicator of accuracy. A recording will ensure that investigators and fact-finders fully understand a witness’s level of confidence.

Multiple procedures and multiple witnesses. According to the literature, multiple identification procedures create a “commitment effect” in which the witness might recognize a lineup member or photo from a previous procedure, rather than from the crime scene. In addition, when multiple witnesses are involved, a procedure that ensures the suspect is not in the same position for each procedure guards against witnesses influencing one another.

Subsection (c)(2) addresses showup procedures. While several organizations discourage showup procedures as inherently suggestive, the procedures may be necessary to law enforcement in assessing eyewitness identification. In that regard, the International Association of Chiefs of Police (IACP) and other organizations recommend that witnesses should not be shown suspects while they are in suggestive settings such as a patrol car, handcuffs, or other physical restraints. Such settings can lead to a prejudicial inference by the witness. Notwithstanding the suggestive nature of showups, subsection (c)(2) addresses factors to consider in those circumstances. Once law enforcement has probable cause to arrest a suspect, however, a witness should not be allowed to participate in showup proceedings but should participate only in lineup or photo array procedures.

Subsection (c)(3) addresses other factors that may be relevant to the analysis. Those factors may include whether there was no unreasonable delay between the events in question and the identification procedures, among other things.

Subsection (d) addresses the use of photographs at trial that were used by law enforcement in identification procedures.

Subsections (e) and (f) are included because the National Academies of Science (NAS) report recommends both expert testimony and jury instructions due to the fact that many scientifically established aspects of eyewitness identification memory are counterintuitive and jurors will need assistance in understanding the factors that may affect the accuracy of an identification.

Sources: National Academies of Science, *Identifying the Culprit: Assessing Eyewitness Identification* (2014), available at <https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification>; U.S. D.O.J., *Eyewitness Identification: Procedures for Conducting Photo Arrays* (2017); ABA Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (2004); IACP National Law Enforcement Policy Center, *Eyewitness Identification: Model Policy* (2010).