

1 **Rule 617. Eyewitness Identification**

2
3 **(a) Definitions**

4
5 **(1) “Eyewitness Identification”** means witness testimony or conduct in a criminal trial
6 that identifies the defendant as the person who committed a charged crime.

7
8 **(2) “Identification Procedure”** means a lineup, photo array, or showup.

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

12
13 **(4) “Photo Array”** means the process of showing photographs to an eyewitness for the
14 purpose of identifying or eliminating a suspect in a crime.

15
16 **(5) “Showup”** means the presentation of a single person to an eyewitness in a time frame
17 and setting that is contemporaneous to the crime and is used to confirm or eliminate that
18 person as the perceived perpetrator.

19
20 **(b) Admissibility in General.** In cases where eyewitness identification is contested, the court
21 shall exclude the evidence if the party challenging the evidence shows that a factfinder,
22 considering the factors in this subsection (b), could not reasonably rely on the eyewitness
23 identification. In making this determination, the court may consider, among other relevant
24 factors, expert testimony and other evidence on the following:

25
26 **(1) Whether the witness had an adequate opportunity to observe the suspect committing**
27 **the crime;**

28
29 **(2) Whether the witness’s level of attention to the suspect committing the crime was**
30 **impaired because of a weapon or any other distraction;**

31
32 **(3) Whether the witness had the capacity to observe the suspect committing the crime,**
33 **including the physical and mental acuity to make the observation;**

34
35 **(4) Whether the witness was aware a crime was taking place and whether that awareness**
36 **affected the witness’s ability to perceive, remember, and relate it correctly;**

37
38 **(5) Whether a difference in race or ethnicity between the witness and suspect affected the**
39 **identification;**

40
41 **(6) The length of time that passed between the witness’s original observation and the time**
42 **the witness identified the suspect;**

43
44 **(7) Any instance in which the witness either identified or failed to identify the suspect**
45 **and whether this remained consistent thereafter;**

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

50
51 (9) Whether any other aspect of the identification was shown to affect reliability.
52

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

59
60 **(1) Photo Array or Lineup Procedures.** To determine whether a photo array or lineup is
61 unnecessarily suggestive or conducive to mistaken identification, the court should
62 consider the following:

63
64 **(A) Double Blind.** Whether law enforcement used double blind procedures in
65 organizing a lineup or photo array for the witness making the identification. If law
66 enforcement did not use double blind procedures, the court should consider the
67 degree to which the witness's identification was the product of another's verbal or
68 physical cues.

69
70 **(B) Instructions to Witness.** Whether, at the beginning of the procedure, law
71 enforcement provided instructions to the witness that

72
73 (i) the person who committed the crime may or may not be in the lineup or
74 depicted in the photos;

75
76 (ii) it is as important to clear a person from suspicion as to identify a
77 wrongdoer;

78
79 (iii) the person in the lineup or depicted in a photo may not appear exactly
80 as he or she did on the date of the incident because features such as weight
81 and head and facial hair may change; and

82
83 (iv) the investigation will continue regardless of whether an identification
84 is made.

85
86 **(C) Selecting Photos or Persons and Recording Procedures.** Whether law
87 enforcement selected persons or photos as follows:

88
89 (i) Law enforcement composed the photo array or lineup in a way to avoid
90 making a suspect noticeably stand out, and it composed the photo array or
91 lineup to include persons who match the witness's description of the
92 perpetrator and who possess features and characteristics that are

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

95
96 (ii) Law enforcement composed the photo array or lineup to include the
97 suspected perpetrator and at least five photo fillers or five additional
98 persons;

99
100 (iii) Law enforcement presented individuals in the lineup or displayed
101 photos in the array using the same or sufficiently similar process or
102 formatting;

103
104 (iv) Law enforcement used computer generated arrays where possible; and

105
106 (v) Law enforcement recorded the lineup or photo array procedures.

107
108 **(D) Documenting Witness Response.**

109
110 (i) Whether law enforcement timely asked the witness how certain he or
111 she was of any identification and documented all responses, including
112 initial responses; and

113
114 (ii) Whether law enforcement refrained from giving any feedback
115 regarding the identification.

116
117 **(E) Multiple Procedures or Witnesses.**

118
119 (i) Whether or not law enforcement involved the witness in multiple
120 identification procedures wherein the witness viewed the same suspect
121 more than once; and

122
123 (ii) Whether law enforcement conducted separate identification procedures
124 for each witness, and the suspect was placed in different positions in each
125 separate procedure.

126
127 **(2) Showup Procedures.** To determine whether a showup is unnecessarily suggestive or
128 conducive to mistaken identification, the court should consider the following:

129
130 **(A) Whether law enforcement documented the witness's description prior to the**
131 **showup.**

132
133 **(B) Whether law enforcement conducted the showup at a neutral location as**
134 **opposed to law enforcement headquarters or any other public safety building and**
135 **whether the suspect was in a patrol car, handcuffed, or physically restrained by**
136 **police officers.**

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

140
141 (D) Whether, if the showup was conducted with two or more witnesses, law
142 enforcement took steps to ensure that the witnesses were not permitted to
143 communicate with each other regarding the identification of the suspect.

144
145 (E) Whether the showup was reasonably necessary to establish probable cause.

146
147 (F) Whether law enforcement presented the same suspect to the witness more than
148 once.

149
150 (G) Whether the suspect was required to wear clothing worn by the perpetrator or
151 to conform his or her appearance in any way to the perpetrator.

152
153 (H) Whether the suspect was required to speak any words uttered by the
154 perpetrator or perform any actions done by the perpetrator.

155
156 (I) Whether law enforcement suggested, by any words or actions, that the suspect
157 is the perpetrator.

158
159 (J) Whether the witness demonstrated confidence in the identification
160 immediately following the procedure and law enforcement recorded the
161 confidence statement.

162
163 (3) Other Relevant Circumstances. In addition to the factors for the procedures
164 described in parts (1) and (2) of this subsection (c), the court may evaluate an
165 identification procedure using any other circumstance that the court determines is
166 relevant.

167
168 (d) Admissibility of Photographs. Photographs used in an identification procedure may be
169 admitted in evidence if:

170
171 (1) the prosecution has demonstrated a reasonable need for the use;

172
173 (2) the photographs are offered in a form that does not imply a prior criminal record; and

174
175 (3) the manner of their introduction does not call attention to their source.

176
177 (e) Expert Testimony. When the court admits eyewitness identification evidence, it may also
178 receive related expert testimony upon request.

179
180 (f) Jury Instruction. When the court admits eyewitness identification evidence, the court may,
181 and shall if requested, instruct the jury consistent with the factors in subsections (b) and (c) and
182 other relevant considerations.

183

184 **Effective November 1, 2019**

185
186 **2019 Advisory Committee Note:** This rule ensures that when called upon, a trial court will
187 perform a gatekeeping function and will exclude unreliable eyewitness identification evidence in
188 a criminal case. Several organizations, including the Department of Justice and the ABA, have
189 published best practices for eyewitness identification procedures when a witness is asked to
190 identify a perpetrator who is a stranger to the witness. As scientific research advances, other
191 factors in addition to those outlined in Subsection (b) may be considered.

192
193 **Subsection (a)** defines terms commonly used in the eyewitness identification process.

194
195 **Subsection (b)** addresses estimator variables (circumstances at the time of the crime). According
196 to the National Research Council of the National Academies, the most-studied estimator
197 variables include: weapon focus, stress and fear, race bias, exposure, duration, and retention. The
198 literature talks about how stress, fear, and anxiety may affect memory storage and retrieval. The
199 ABA recognizes that high and low levels of stress may harm performance in identifying
200 suspects, while moderate levels may enhance memory performance. A stressed victim may
201 encode information differently and be more affected by stress than a passerby, unless the
202 passerby is unaware that a crime is taking place. In addition, the cross-race effect may impact the
203 accuracy of identifications; and the participation of law enforcement and others may influence a
204 witness's perceptions and memory retrieval. Expert evidence may be necessary to elucidate these
205 factors for the court, and where the evidence is admissible, expert evidence and/or an instruction
206 may further elaborate on the factors for the jury.

207
208 **Subsection (c)(1)** reflects some of the best practices in the context of photo array and lineup
209 procedures, including use of double blind procedures; providing instructions to the witness at the
210 beginning of the procedure; displaying photos or presenting a lineup with individuals who
211 generally fit the witness's description of the suspect and who are sufficiently similar so as not to
212 suggest the suspect to the witness; documenting the procedures, including the witness's
213 responses; and guarding against influencing the witness through use of multiple procedures or
214 when multiple witnesses are involved.

215
216 **Use of double blind procedures.** The literature, including the National Academies of
217 Science report, supports that whenever practical, the person who conducts a lineup or
218 organizes a photo array and all those present (except defense counsel) should be unaware
219 of which person is the suspect through use of double blind procedures. Use of double
220 blind procedures provides assurance that an administrator who is not involved in the
221 investigation does not know what the suspect looks like and is therefore less likely to
222 suggest or confirm that the perpetrator is in the lineup or the photo array. At times,
223 double blind procedures may not be practical. In such cases, the administrator should
224 adopt blinded procedures, such as a "folder shuffle," to prevent him or her from knowing
225 which photo a witness is viewing at a given time and to ensure that he or she cannot see
226 the order or arrangement of the photographs viewed by the witness. Blinded procedures
227 may be necessary to use in smaller agencies with limited resources or in high profile
228 cases where all officers are aware of the suspect's identity. As a practical matter, blinded

229 procedures work only for photo arrays and are not recommended for use in lineups.
230 Lineups must be conducted using double blind procedures.

231
232 **Providing instructions to the witness.** The person conducting the lineup or photo array
233 should not disclose or convey to the witness that a suspect is in custody. Rather, the
234 person should read instructions to the witness that are neutral and detached and should
235 allow the witness to ask questions about the instructions before the process begins. The
236 witness should sign and date the instructions. Organizations have published instructions
237 for use in lineup or photo array procedures that may be used by agencies. While a witness
238 is viewing the photo array, the person conducting the procedure should not interrupt the
239 witness or interject.

240
241 **Displaying photos or presenting a lineup.** In selecting fillers or individuals for the
242 photo array or lineup procedure, at least five fillers—or non-suspects—should be used
243 with the suspect photo. Fillers should generally fit the witness’s description of the
244 perpetrator as opposed to match a specific suspect’s appearance. Fillers should not make
245 the suspect noticeably stand out. Photos should be of similar size with similar background
246 and formatting. They should be numbered sequentially or labeled in a manner that does
247 not reveal identity or the source of the photo, and they should contain no other writing.

248
249 **Documenting witness responses.** Law enforcement should clearly document by video or
250 audio recording a witness’s level of confidence verbatim at the time of an initial
251 identification.

252
253 **Multiple procedures and multiple witnesses.** According to the literature, multiple
254 identification procedures create a “commitment effect” in which the witness might
255 recognize a lineup member or photo from a previous procedure, rather than from the
256 crime scene. In addition, when multiple witnesses are involved, a procedure that ensures
257 the suspect is not in the same position for each procedure guards against witnesses
258 influencing one another.

259
260 **Subsection (c)(2) addresses showup procedures.** While some jurisdictions consider showup
261 procedures to be highly suggestive, the procedures may be necessary to law enforcement in
262 assessing eyewitness identification. In that regard, the International Association of Chiefs of
263 Police (IACP) and other organizations recommend that witnesses should not be shown suspects
264 while they are in suggestive settings such as a patrol car, handcuffs, or other physical restraints.
265 Such settings can lead to a prejudicial inference by the witness. Subsection (c)(2) addresses
266 factors to consider in showup procedures. Once law enforcement has probable cause to arrest a
267 suspect, however, a witness should not be allowed to participate in showup proceedings but
268 should participate only in lineup or photo array procedures.

269
270 **Subsection (c)(3) addresses other factors that may be relevant to the analysis.** Those factors may
271 include whether there was no unreasonable delay between the events in question and the
272 identification procedures, among other things.

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

276
277 **Subsections (e) and (f)** are included because the National Academies of Science (NAS) report
278 recommends both expert testimony and jury instructions due to the fact that many scientifically
279 established aspects of eyewitness identification memory are counterintuitive and jurors will need
280 assistance in understanding the factors that may affect the accuracy of an identification.

281
282 **Sources:** National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification*
283 (2014), available at [https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-](https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification)
284 *eyewitness-identification*; U.S. D.O.J., *Eyewitness Identification: Procedures for Conducting*
285 *Photo Arrays* (2017); ABA Statement of Best Practices for Promoting the Accuracy of
286 *Eyewitness Identification Procedures* (2004); IACP National Law Enforcement Policy Center,
287 *Eyewitness Identification: Model Policy* (2010).