

2022
EDITION

CHALLENGING IDENTIFICATION EVIDENCE

A Quick-Reference Trial Guide
for
South Carolina Criminal Defense Attorneys



This quick-reference guide is general in nature and is for informational purposes only. It is not intended to be relied upon as legal advice or as a substitute for proper legal research. In the event of any conflict, real or apparent, between this guide and any applicable law, rule, or other governing authority, that authority will control.

Challenging Identification Evidence

Public Defense 101
Fundamentals of the Profession

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Does the identification meet the requirements of Due Process?

Due process concerns arise when law enforcement officers use an identification process that is both suggestive and unnecessary.

If the procedures were both suggestive and unnecessary, then the court must determine “whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.”

State v. Wyatt, 421 S.C. 306; 806 S.E.2d 708 (2017)

Two Prong Test:

1. Unnecessarily Suggestive Police ID Procedure?

If yes:

2. Is it **reliable** despite the suggestive procedure - no substantial likelihood of misidentification? Totality of the circumstances.

Neil v. Biggers, 409 U.S. 188, 195, 93 S. Ct. 375, 380, 34 L. Ed. 2d 401 (1972).

Prong 1 - What is an unnecessarily suggestive police ID procedure?

1. Show-Up IDs are inherently suggestive

- Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d. 1199 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned).
- State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law).

2. Other Unduly Suggestive Police ID Procedures

- a. Physical Characteristics – height, weight, age, hairstyle, race, clothing, etc.
- b. Lighting
- c. Shadows

Unnecessarily Suggestive Police ID Procedure = Move for a Hearing (If you're going to trial, you're always going to move for a hearing.)

May be called, Identification Hearing, Neil v. Biggers Hearing, Biggers Hearing, etc.

Pre-Trial

In-camera - Outside the presence of the jury

Rule 104(c) SCRE - Hearings on the admissibility of confessions or statements by an accused, and pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

The Hearing

Witnesses:

- Investigating Officer
- Officer who compiled lineup
- Officer who showed lineup
- Identifying witness

Exhibits

- The 6-pack lineup
- The Report
- ★ ***MAKE SURE ALL EXHIBITS ARE MARKED AS COURT'S EXHIBITS FOR ERROR PRESERVATION!***

How the Judge Should Apply the Test:

PRONG 1:

Was the ID Procedure Suggestive?

YES = Proceed to Next Test

NO = Stop – ID Comes In

Was the Suggestive Procedure Necessary Under the Circumstances?

YES = Stop – ID Comes In

NO = Proceed to Prong 2

PRONG 2:

Nevertheless, Is the ID So Reliable that No Substantial Likelihood of Misidentification exists?

YES = ID comes in

NO = ID Is Excluded

State v. Wyatt, 421 S.C. 306; 806 S.E.2d 708 (2017)

Prong 2 – Reliability

5 Factors of Reliability

- a. The witness's opportunity to view the perpetrator at the time of the crime
- b. The witness's degree of attention
- c. The accuracy of the witness's prior description of the perpetrator
- d. The level of certainty demonstrated by the witness at the confrontation
- e. The length of time between the crime and the confrontation.

A. Witness Opportunity to View Perpetrator at Time of Crime

- Lighting – it was dark, etc.
- Perpetrator wearing a mask, sunglasses, other obscuring clothing
- Distance or Angle
- Time frame -the crime took place very quickly or over some time

B. Degree of Attention

- Eyes open or closed? Eyesight?
- Distractions? – trying to get the attention of others, worried about your children in next room, etc.

C. Accuracy of Prior Description

- Broad general descriptions
- Discrepancies in the description

D. Level of certainty

- Confidence statements – “He looked most like the person who carjacked me and tried to kill me.” Not very confident!
- If no confidence statement – then argue that State failed to prove that witness was certain.

E. Length of time between crime and ID

- Fading memory
- Were any intervening lineups shown to the witness?

Cross Examine the Officers

- Double-Blind Administration?
- Proper Lineup Composition – how was it done?
- Instructions to the witness?
- Confidence Statements?
- Record the ID procedure?
- Sequential Presentation?

Consider Hiring an Expert

- Memory fallibility/ Cross-Racial ID
- Educate the judge

Motion to Suppress

Argue that, in addition to the 5 reliability factors, the failure to follow proper procedures resulted in an inherently unreliable ID conducive to irreparable mistaken identification.

1. Move to Suppress out-of-court identification procedure and testimony

AND

2. Move to Suppress any in-court identification as being tainted by the suggestive and unreliable identification procedure

If the judge allows the ID in at Trial – What do I do?

1. Challenge the witnesses with the reliability factors:

- Opportunity
- Degree of Attention
- Accuracy of Prior Description
- Level of Certainty
- Length of time

2. Challenge the procedure

- Double Blind Administration
- Proper Lineup Composition – how was it done?
- Instructions to the witness
- Confidence Statements
- Record the ID procedure
- Sequential Presentation

3. Use your expert to educate the JURY

4. Convince the jury that:

- a. The ID is not reliable

And

- b. The procedure used resulted in the misidentification of your client

Just in case you don't convince the jury

5. Preserve the ID issue for Appellate Review

- Object to all **out-of-court** identification testimony and evidence from all witnesses at the time they testify – Contemporaneous Objection

- Object to any **in-court** Identification of your client