

A Picture Is Worth A Thousand Words:¹
Photographic Lineups and G.S. 15A-284.52
Legal Question of The Week
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Lately we've received some reports here in the legal office about some photographic lineups being done incorrectly. Before you think you know who I'm talking about, let me say that there has been more than one. The good news is that there have been less than 50. Since there seems to be some widespread confusion in this area, I thought it might be time for a review.

The days of the "six-pack" photo lineups are over in North Carolina. While they were certainly fun while they lasted,² a group of really smart people got together and decided that those types of photo lineups were too simple to administer (and therefore couldn't be accurate), so they proposed a much more complicated procedure. The General Assembly loves complicated laws, so they made this new procedure a requirement by passing General Statute 15A-284.52, the Eyewitness Identification Reform Act.

Special note! This photographic lineup procedure is THE LAW. It is not a suggestion for how to be a better police officer, it is not a department policy, it is not a General Order, it is a General Statute. If you fail to follow THE LAW, you are doing something illegal.³ The Legal Office encourages you to uphold the law and not to break the law.

Here are the key rules for photographic lineups under G.S. 15A-284.52:

1. Lineups must be administered by an "independent administrator." For an administrator to be "independent," two things must be true. First, he or she

¹ Rodney Dangerfield used to tell a joke that went like this: "The other night I went out and the bartender asked me 'what will you have?' So I said 'surprise me' and he showed me a naked picture of my wife. I tell ya, I get no respect." Not a particularly appropriate joke for a legal update, but it was the only joke I could think of that dealt with showing a picture to someone.

² In my days as a prosecutor, we played a little game with "six-pack" photo lineups. A prosecutor would take a lineup, show it to another prosecutor, tell the prosecutor the crime that had been charged, and ask his colleague to pick out the defendant. You would be amazed at how many times we could pick out the defendant without knowing anything else about the case. This might have something to do with the feeling that these lineups might produce inaccurate results, but I digress.

³ Translation: Against the Law.

must not be participating in the investigation of the criminal offense and second, he or she must not know which picture in the line-up is the suspect.⁴

2. The photos must be shown one at a time, with each one removed before the next is shown.
3. The lineup must contain five “fillers” in addition to the suspect and each lineup can only contain one suspect.
4. If you need to show a lineup to more than one witness, the suspect must be in a different position sequentially each time.
5. The photo of your suspect must be “contemporary.”⁵
6. The lineup administrator must give the following instructions and have the witness sign an acknowledgement that the instructions were given to him or her.
 - a. The perpetrator might or might not be presented in the lineup.
 - b. The lineup administrator does not know the suspect’s identity.
 - c. The eyewitness should not feel compelled to make an identification.
 - d. It is as important to exclude innocent persons as it is to identify the perpetrator.⁶
 - e. The investigation will continue whether or not an identification is made.⁷
7. Finally, if the witness picks the suspect out, the administrator must get a statement from the witness, in the witness’ own words, as to the eyewitness’ confidence level that the person identified is the perpetrator.⁸

Bad things will happen to you if you fail to follow these procedures. The court will consider that you didn’t follow THE LAW when deciding whether to suppress the identification of your witness. If the out of court identification is suppressed, it is a good bet that the witness will be prevented from positively identifying the defendant by

⁴ In other words, if you know the right answer – you can’t give the test.

⁵ This is not talking about whether or not the suspect is wearing the latest fashions. You can use a picture of a suspect wearing a very wide tie and bell bottoms or black socks with shorts so long as the picture was taken recently.

⁶ You must say this even if you don’t believe it at the time.

⁷ You must say this even if it isn’t true. Fortunately, there is nothing in the statute that says that the investigation actually has to continue if an identification is not made – you just have to tell them that it will. Editor’s note: Obviously, we don’t want to lie to the person – so we will continue the investigation long enough to realize that we have no more investigating we can do.

⁸ This is the worst part of this statute. Let’s say you ask the witness on a scale from 1 to 10, with 10 being absolutely positive, how certain they are and they say 7. The defense attorney then argues in court that unless they say “10” there is a reasonable doubt. What if the witness says 10? The defense attorney then argues that the witness is obviously lying because no one is 100% certain of anything! Your criminal trial now becomes a college level course in philosophy.

pointing to him or her in the courtroom as “the one that did it.”⁹ Even if the identification is allowed into evidence, the statute makes it permissible for the defense attorney to argue that the identification was mistaken because you didn’t follow the law in obtaining it. On top of all that, the jury will be instructed by the judge just prior to deliberations that they may consider the fact that you couldn’t follow the law in making their determination of whether or not the identification was reliable. Trust me – this is going to be a difficult trial for you to sit through while everyone talks about how you conducted an “illegal” lineup. My advice – do it right.

Now, having said all of that, there is a very, very specific and very, very limited, kind of, sort of, maybe, exception to this procedure. It’s very specific. It’s very limited. It should only be used in one particular circumstance. It’s kind of an exception but not really. I hope I’m being clear.

It is permissible to show the witness one photograph in the following situation: when the witness knows the perpetrator personally and you just want to make sure that you are talking about the same person.¹⁰ If the witness or victim tells you that “Fred” or “Snake” or “Man-Man” did it and they have known them for a while, you can probably get away with pulling up a picture of “Man-Man” and showing it to the witness to make sure that you aren’t going to arrest the wrong “Man-Man.”

Let me stress again, however, that this should only be done in very limited and specific circumstances. If there is any doubt in your mind about whether you need to do a full photographic lineup, either do the full photographic lineup or call your police attorney to get his advice. The wrong decision here can severely impair any further investigation in the case.

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⁹ One of the most gripping points in any criminal trial is the moment when the witness on the stand gets to point at the defendant and say, “He did it!” In fact, as a prosecutor, I believed the more times someone (either a witness or me) pointed at the defendant, the higher my chances of winning a conviction. I’m still trying to get someone to fund a study on that.

¹⁰ The fact that you know the suspect very well or immediately recognize the description as being a particular suspect does not trigger this scenario. The key is that the witness knows the perpetrator and is telling you who it was.

APPENDIX A

G. S. 15A-284.52

§ 15A-284.52. Eyewitness identification reform.

- (a) Definitions. – The following definitions apply in this Article:
- (1) Eyewitness. – A person whose identification by sight of another person may be relevant in a criminal proceeding.
 - (2) Filler. – A person or a photograph of a person who is not suspected of an offense and is included in a lineup.
 - (3) Independent administrator. – A lineup administrator who is not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspect.
 - (4) Lineup. – A photo lineup or live lineup.
 - (5) Lineup administrator. – The person who conducts a lineup.
 - (6) Live lineup. – A procedure in which a group of people is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.
 - (7) Photo lineup. – A procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.
- (b) Eyewitness Identification Procedures. – Lineups conducted by State, county, and other local law enforcement officers shall meet all of the following requirements:
- (1) A lineup shall be conducted by an independent administrator or by an alternative method as provided by subsection (c) of this section.
 - (2) Individuals or photos shall be presented to witnesses sequentially, with each individual or photo presented to the witness separately, in a previously determined order, and removed after it is viewed before the next individual or photo is presented.
 - (3) Before a lineup, the eyewitness shall be instructed that:
 - a. The perpetrator might or might not be presented in the lineup,
 - b. The lineup administrator does not know the suspect's identity,
 - c. The eyewitness should not feel compelled to make an identification,
 - d. It is as important to exclude innocent persons as it is to identify the perpetrator, and
 - e. The investigation will continue whether or not an identification is made.The eyewitness shall acknowledge the receipt of the instructions in writing. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the acknowledgement and shall also sign the acknowledgement.
 - (4) In a photo lineup, the photograph of the suspect shall be contemporary and, to the extent practicable, shall resemble the suspect's appearance at the time of the offense.
 - (5) The lineup shall be composed so that the fillers generally resemble the eyewitness's description of the perpetrator, while ensuring that the suspect does not unduly stand out from the fillers. In addition:
 - a. All fillers selected shall resemble, as much as practicable, the eyewitness's description of the perpetrator in significant features, including any unique or unusual features.
 - b. At least five fillers shall be included in a photo lineup, in addition to the suspect.
 - c. At least five fillers shall be included in a live lineup, in addition to the suspect.
 - d. If the eyewitness has previously viewed a photo lineup or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the current suspect participates shall be different from the fillers used in any prior lineups.
 - (6) If there are multiple eyewitnesses, the suspect shall be placed in a different position in the lineup or photo array for each eyewitness.
 - (7) In a lineup, no writings or information concerning any previous arrest, indictment, or conviction of the suspect shall be visible or made known to the eyewitness.
 - (8) In a live lineup, any identifying actions, such as speech, gestures, or other movements, shall be performed by all lineup participants.

- (9) In a live lineup, all lineup participants must be out of view of the eyewitness prior to the lineup.
- (10) Only one suspect shall be included in a lineup.
- (11) Nothing shall be said to the eyewitness regarding the suspect's position in the lineup or regarding anything that might influence the eyewitness's identification.
- (12) The lineup administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given lineup is the perpetrator. The lineup administrator shall separate all witnesses in order to discourage witnesses from conferring with one another before or during the procedure. Each witness shall be given instructions regarding the identification procedures without other witnesses present.
- (13) If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning the person before the lineup administrator obtains the eyewitness's confidence statement about the selection. There shall not be anyone present during the live lineup or photographic identification procedures who knows the suspect's identity, except the eyewitness and counsel as required by law.
- (14) Unless it is not practical, a video record of live identification procedures shall be made. If a video record is not practical, the reasons shall be documented, and an audio record shall be made. If neither a video nor audio record are practical, the reasons shall be documented, and the lineup administrator shall make a written record of the lineup.
- (15) Whether video, audio, or in writing, the record shall include all of the following information:
 - a. All identification and nonidentification results obtained during the identification procedure, signed by the eyewitness, including the eyewitness's confidence statement. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the results and shall also sign the notation.
 - b. The names of all persons present at the lineup.
 - c. The date, time, and location of the lineup.
 - d. The words used by the eyewitness in any identification, including words that describe the eyewitness's certainty of identification.
 - e. Whether it was a photo lineup or live lineup and how many photos or individuals were presented in the lineup.
 - f. The sources of all photographs or persons used.
 - g. In a photo lineup, the photographs themselves.
 - h. In a live lineup, a photo or other visual recording of the lineup that includes all persons who participated in the lineup.

(c) Alternative Methods for Identification if Independent Administrator Is Not Used. – In lieu of using an independent administrator, a photo lineup eyewitness identification procedure may be conducted using an alternative method specified and approved by the North Carolina Criminal Justice Education and Training Standards Commission. Any alternative method shall be carefully structured to achieve neutral administration and to prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification procedure. Alternative methods may include any of the following:

- (1) Automated computer programs that can automatically administer the photo lineup directly to an eyewitness and prevent the administrator from seeing which photo the witness is viewing until after the procedure is completed.
- (2) A procedure in which photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed.
- (3) Any other procedures that achieve neutral administration.

(d) Remedies. – All of the following shall be available as consequences of compliance or noncompliance with the requirements of this section:

- (1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification.
- (2) Failure to comply with any of the requirements of this section shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible.
- (3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications. (2007-421, s. 1.)