

USE OF PHOTOGRAPHS IN OUT-OF-COURT IDENTIFICATIONS

Refresher and Discussion of Best Practices



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“A pint of sweat saves a
gallon of blood.”
- Gen. George S. Patton

Brathwaite Test

The Due Process right compels exclusion of eyewitness identification evidence that:

1. Was obtained by an unnecessarily suggestive police procedure;
and
2. Lacks reliability under the totality of the circumstances

Manson v. Brathwaite, 432 U.S. 98 (1977)

Step 1: Unnecessarily Suggestive?

- The defendant has the burden to establish that police used an unnecessarily suggestive procedure.
 - Burden of proof: Preponderance of the Evidence
 - Suggestive: Procedure suggests that person shown is the perpetrator
 - Unnecessary: Lack of emergency or other justification
 - Current Science: The court should consider current, widely accepted scientific data concerning the fallibility of eyewitness identification

Step 2: Nevertheless Reliable?

- If the court finds that an unnecessarily suggestive procedure was used, it then examines the reliability of the identification under the *Biggers* factors (aka aspects of reliability).
 1. The opportunity of the witness to view the criminal at the time of the crime
 2. The witness' degree of attention
 3. The accuracy of the witness' prior description of the criminal
 4. The level of certainty demonstrated at the procedure
 5. The time between the crime and the identification procedure

Niel v. Biggers, 409 U.S. 188 (1972)

State v. Derri, 199 Wn.2d 658 (2022)

Three bank robberies:

1. 3/1/17 Chase Bank
2. 3/7/17 Homestreet Bank
3. 3/11/17 Homestreet Bank

3/1/17 Chase Bank Robbery Investigation

- Surveillance photos disseminated among law enforcement with a physical description provided by witness 1.
- Field show-up: Witness 2 exonerated a suspect who police had detained nearby.
- Other officers suggested the photos looked like Derri (aka Stites)
- Photo montages:
 1. Neither witness made a pick from the first montage
 2. During the second montage, Witness 1 picked Derri with 90% certainty. Witness 2 did not make a pick.

3/7/17 Homestreet Bank Robbery Investigation

- Witnesses recognized the robber from earlier interactions
- Derri (aka Stites) gave his name during an earlier visit
- Witnesses gave specific details about suspect's facial features
- Manager, who was not a witness, asked SPD about the investigation.
 - SPD told him Stites was a suspect.
 - Manager knew Stites from childhood, found a Facebook pic, and showed it to the witnesses

3/7/17 Homestreet Bank Robbery Investigation (continued)

- SPD administered a photo montage
 - Witness 1 picked Derri, recognizing him by his neck tattoo
 - Derri was the only subject shown with a neck tattoo
 - Tattoo was not visible during robbery, but was during the previous visit
 - Tattoo was not included in the description provided to police
 - Confidence level: 100%
 - Witness 2 picked Derri, also recognizing the tattoo
 - Prior to the montage, SPD showed witness 2 surveillance photos from the 3/1/17 Chase Bank robbery, saying “I’m going to show you some pictures from a March 1 bank robbery.” Witness said the subject “look[ed] like the same guy.”
 - “The tattoo definitely gives it away”
 - Confidence level: 98-99%

3/11/17 Homestreet Bank Robbery Investigation

- Same witnesses as the 3/7/17 robbery
 - Recognized the robber from the previous incident
 - Recognized him as he reached the door and pushed silent alarm button
 - Robber had not pulled his mask on yet when they saw him at the entrance
 - Witnesses told SPD they recognized the robber
 - One of the witnesses referred to the Facebook photo the manager had shown them after the previous robbery
 - No photo montage was administered

Derri: UNNECESSARILY SUGGESTIVE?

Witness 1

Witness 2

3/1/2017

3/7/2017

3/11/2017

Unique Physical Features

A photomontage is impermissibly suggestive if it “directs undue attention to a particular photo.” This occurs “when the defendant is the only possible choice given the witness’ earlier description.”

- A unique feature (such as a neck tattoo) is not enough on its own. If the witness did not describe the characteristic in question, there is no requirement that multiple photographs depict people with the same or similar characteristics.

Double Exposure

Double Exposure occurs when the witness is exposed to photos of the same person more than once during the identification procedure.

SINGLE-SUBJECT IDENTIFICATION: The witness is shown only one photograph and asked if the subject is the perpetrator.

- “It is hard to imagine a situation more clearly conveying the suggestions to the witness that the one presented is believed guilty by the police.”

REPETITION: The witness is shown multiple montages, with a subject appearing in more than one.

Avoiding Suggestive Procedures

1. Procedure should be administered in double-blind fashion (administrator does not know who the suspect is).
2. Pre-identification admonitions that the perpetrator may or may not be in the montage and the witness is not compelled to make a selection
3. No double-exposure
4. Suspect should not be the only one in the montage who closely matches the description of the perpetrator
5. Police should not give any feedback to witnesses that could affect confidence levels.

Step 2: Reliability

The *Biggers* factors (again):

1. The opportunity of the witness to view the criminal at the time of the crime
2. The witness' degree of attention
3. The accuracy of the witness' prior description of the criminal
4. The level of certainty demonstrated at the procedure
5. The time between the crime and the identification procedure

Derri: NONETHELESS RELIABLE?

Witness 1

Witness 2

3/1/2017

3/7/2017

3/11/2017

Recommendation: Don't gamble if you don't have to.

- Unnecessarily suggestive procedures are unnecessary.
 - Emergency situations (e.g., violent perpetrator at large and likely to harm others, witness is dying, etc.) create unique necessities.
- The reliability assessment is a chance to rehabilitate the evidence.
 - This is a second chance. Why skip straight to it if you don't have to?
 - Law Enforcement should not rely on this to justify cutting corners.



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