

105.65 PHOTO LINEUP REQUIREMENTS.

*NOTE WELL: 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. See N.C. Gen. Stat. § 15A-284.52(d)(3).*

The evidence in this case shows that a photo lineup was conducted. A photo lineup is 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.<sup>1</sup> A photo lineup conducted by a local law enforcement agency is required to meet all of the following requirements:

- (1) A photo lineup shall be conducted by an independent administrator.<sup>2</sup> An independent administrator is person who administers a lineup, and who is not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspect.
- (2) Photos shall be presented to witnesses sequentially, with each photo presented to the witness separately, in a previously determined order, and removed after it is viewed and before the next photo is presented.
- (3) Before a lineup, the eyewitness<sup>3</sup> 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) 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 photographs of persons who are not the suspect, called "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. 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 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) Only one suspect shall be included in a lineup.

(9) 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.

(10) 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.

(11) 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 photographic identification procedure who knows the suspect's identity, except the eyewitness and counsel as required by law.

(12) 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 acknowledgement 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 used.

g. The photographs themselves.

Evidence has been presented concerning compliance or noncompliance with the requirements for administration of a photo lineup to an eyewitness. You may consider what evidence you find to be credible concerning compliance or noncompliance with such requirements in determining the reliability of eyewitness identification.

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1. N.C. Gen. Stat. § 15A-284.52(a)(7).

2. N.C. Gen. Stat. § 15A-284.52(c): 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:

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.

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.

Any other procedures that achieve neutral administration.

3. An eyewitness is a person whose identification by sight of another person may be relevant in a criminal proceeding.