

[CAPTION]

**DEFENDANT'S MOTION TO PRECLUDE FURTHER PRETRIAL
IDENTIFICATION DUE TO LACK OF DISCOVERY**

The Defendant, by counsel, respectfully requests this Court to preclude further pretrial identification. In support of the Motion, the Defendant states the following:

1. Identity is one of the primary contested issues in this cause of action.
2. Based on the discovery and information available to Defendant, it appears that no positive eyewitness identification of the Defendant has been made in this case.
3. Although the State of Indiana initially requested a line-up identification, it subsequently withdrew that request after a hearing on proper line-up procedures was held and identification of an alternative suspect in co-defendant's line-up was made.
4. Witnesses have furnished statements to the defense that numerous images of possible suspects were shown to them in this case.
5. Officer(s) investigating this case also may have numerous pictures of the Defendant that may have been shown to witnesses.
6. For over a month, the defense has been diligently trying to obtain information about who was shown these various items, what procedure was used, and the results of any such display, but to date efforts to obtain this information have been futile.
7. Without being able to ascertain just what identification procedures may have been used, or may still be in use, the defense is helpless in its efforts to assure that the Defendant's rights are not abridged through impermissibly tainted procedures.
8. The State of Indiana has had ample opportunity to pursue identification of the Defendant, most recently by seeking a lineup identification that contained proper safeguards to avoid unnecessary suggestibility. Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (because a pre-trial line up is a critical stage of the prosecution, a defendant has the right to be represented by counsel if he has already been charged); see also Bray v. State, 443 N.E.2d 310 (Ind. 1982).

9. After the State has withdrawn its line-up request, it would be unjust and potentially prejudicial to the Defendant to allow the State or its agents to proceed with identification procedures that do not contain the same safeguards against taint and suggestibility.

WHEREFORE, the Defendant, by counsel, respectfully requests the Court to grant his Motion and issue an Order that the State of Indiana and its agents be precluded from attempting to use any identification procedures regarding the Defendant, without first seeking permission from the Court after the Defendant has had an opportunity to be heard on the procedure, and for all other relief just and proper in the premises.

(Signature)

CASE LAW

Bray v. State, 443 N.E.2d 310 (Ind. 1982) (overview of Indiana cases on lineups, photo displays and the admissibility of those items; witness should not be informed that suspect is in the line up).

United States v. Miller, 795 F.3d 619, 628 (7th Cir. 2015) (“Defendants have a due process right not to be subject to unreasonably suggestive identification procedures that create a substantial likelihood of irreparable misidentification.”)

Hale v. State, 976 N.E.2d 119 (Ind.Ct.App. 2012) (due process requires the suppression of evidence when the procedure used during a pretrial identification is impermissibly suggestive).

RIGHT TO COUNSEL

Moore v. Illinois, 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977) (right to counsel was violated by corporeal identification at a preliminary hearing without counsel; failure to exclude the evidence may be harmless; footnote 5 suggests ways to avoid suggestive in-court identification).

Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (Sixth Amendment requirement of counsel does not apply to pre-indictment show-ups, but only post-indictment show ups; prohibition against unnecessarily suggestive show-up applies to all show-ups).

Little v. State, 475 N.E.2d 677 (Ind. 1985) (holding that U.S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) explicitly qualified informal right to counsel to stages of prosecution and requires determination of substantial prejudice in pretrial confrontation and ability of counsel to avoid such prejudice; there is no right to counsel when reconstruction of the Defendant's lineup (names recorded, victims' taped interviews re lineup and photograph of lineup) is available and no prejudicial or suggestive factors in here in lineup).

Davenport v. State, 536 N.E.2d 263 (Ind. 1989) (identification evidence from uncounseled lineup held after the right to counsel has attached is improper absent valid, knowing waiver by the Defendant), overruled on other grounds by Seay v. State, 698 N.E.2d 732, 735 (Ind. 1998); see also Hatcher v. State, 414 N.E.2d 561 (Ind. 1981).

SHOW-UPS

Olson v. State, 563 N.E.2d 565 (Ind. 1990) (holding one-on-one confrontations, though inherently suggestive, are not per se improper).

Wethington v. State, 560 N.E.2d 496 (Ind. 1990) (show-ups between victims and suspects 2 hrs. after robbery, and again another hour later, with prominent display of weapons taken from suspects, were impermissibly suggestive; no exigent circumstances existed which precluded setting up properly constituted lineup).

Hubbell v. State, 754 N.E.2d 884 (Ind. 2001) (a show up six hours after the confrontation was unduly suggestive; there were two witnesses at the show up who could influence one another).

Foster v. California, 394 U.S. 440, 89 S.Ct. 1127 (1969) (accused was first placed in lineup with considerably shorter men, and after no positive identification, was placed in one-to-one confrontation arranged with robbery victim; this procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification as to be denial of due process).

Lyles v. State, 834 N.E.2d 1035 (Ind.Ct.App. 2005) (upholding show-up; while the show-up identification here two and a half hours after the crime "raises some concerns," Court determined similar identifications have been upheld in the past). See also Gray v. State, 563 N.E.2d 108 (Ind.1990) (upholding show-up that occurred within 15 to 30 minutes after robbery, and where Defendant was in handcuffs during identification); Adkins v. State, 703 N.E.2d 182 (Ind.Ct.App.1998) (upholding show-up that occurred 40 minutes after robbery where witness's descriptions matched Defendant and police only informed witness that they "thought they maybe" had a suspect).

Rasnick v. State, 2 N.E.3d 17 (Ind.Ct.App. 2013) (show-up identification of Defendant by two burglary victims that occurred within 30 minutes of crime was not unduly suggestive and thus did not violate due process; appellate courts review challenges to show-up identifications by examining the totality of the circumstances surrounding the identification, including: (1) the opportunity of the witness to view the offender at the time of the crime, (2) the witness's degree of attention while observing the offender, (3) the accuracy of witness's prior description of offender, (4) the level of certainty demonstrated by witness at identification, and (5) the length of time between the crime and the identification).

Gordon v. State, 981 N.E.2d 1215 (Ind.Ct.App. 2013) (show-up identification procedure used by police one hour after attempted break-in was not unduly suggestive where witness observed Defendant and Accomplice for several minutes, witness's attention was solely focused on Defendant and Accomplice during that time, and witness was absolutely certain that Defendant was person she had seen committing attempted break-in).

LINE-UPS

Long v. State, 385 N.E.2d 191 (Ind. 1979) (it was an improper lineup where there were only four people in lineup and those four were made to say their names and addresses when witness knew the Defendant's name).

Bray v. State, 443 N.E.2d 310 (Ind. 1982) (witness may not be informed that a suspect is present in the lineup).

PHOTO ARRAYS

Carter v. State, 361 N.E.2d 1208 (Ind. 1977) (photo display was unnecessarily suggestive where witness described man to police as having goatee and only the Defendant had goatee among those in photos displayed to witness).

J.Y. v. State, 816 N.E.2d 909 (Ind.Ct.App. 2004) (it was error to admit a detective's testimony regarding complaining witness's out-of-court identification of the Defendant because the photo array was impermissibly suggestive; the remarkable difference in appearance, including clothing, demeanor, and the difference in the quality and composition of the two sets of photographs, rendered the photo array impermissibly suggestive; also the complaining witness could not identify the Defendant in Court, was unable to identify her assailants with any specificity and used the wrong name to identify a Co-Defendant).

Jackson v. State, 33 N.E.3d 1067 (Ind.Ct.App. 2015) (photo array not unduly suggestive where array contained jail intake photographs of five other individuals, while Defendant's photograph was one taken from Bureau of Motor Vehicles; each photograph was of sufficient clarity to allow examination of facial features).

IN-COURT IDENTIFICATION

Marsh v. State, 480 N.E.2d 927 (Ind. 1985) (although the identification procedure was so suggestive that any identification resulting from it should have been inadmissible, an independent basis existed for the in-court identification; here, the witness knew the Defendant's name, identified him after the Defendant's name was called and the Defendant appeared at arraignment on second robbery of same restaurant; the court looks to the totality of the circumstances to determine if an independent basis exists). See also Wrencher v. State, 635 N.E.2d 1095 (Ind. 1994).

Carter v. State, 361 N.E.2d 1208 (Ind. 1977) (photo display was unnecessarily suggestive where witness described man to police as having goatee and only the Defendant had goatee among those in photos displayed to witness; however, the trial court did not err in permitting the witness to make in-court identification of the Defendant since she had seen the Defendant at least twice prior to crime and had good opportunity to observe him during the crime).

Hyppolite v. State, 774 N.E.2d 584 (Ind.Ct.App. 2002) (although another police officer brought single photograph to officer-witness for identification, officer's in-court identification was independently supported).

Smith v. State, 553 N.E.2d 832 (Ind. 1990) (a victim's in-court identification of the Defendant was proper, even though the victim was shown a single photo of the Defendant by someone who told the victim that it was a photo of the Defendant; the fact that the witness had ample opportunity to observe the Defendant during the robbery was an independent basis for the in-court identification).

Merrifield v. State, 400 N.E.2d 146 (Ind. 1980) (where rape victim made in-court identification of the Defendant without objection, any issue concerning possible taint on this in-court identification as a result of the police's hypnotizing victim several days after incident was waived).

Pemberton v. State, 560 N.E.2d 524 (Ind. 1990) (there may not have been an independent basis for the in-court identification of the Defendant, and failure to make a trial objection to the in-court identification and testimony regarding the pre-trial show-ups was found to be ineffective assistance of counsel).

Lee v. Foster, 750 F.3d 687 (7th Cir. 2014) (neither witness's in-court identification of Defendant nor the out-of-court photo array where witness was unable to identify Defendant were unduly suggestive).

United States v. Miller, 795 F.3d 619 (7th Cir. 2015) (mere fact that witness could not positively identify Defendant in pre-trial identification procedure did not automatically render that witness's subsequent in-court identification inadmissible).