

4.35.3 Identification Made for the First Time in Court

(1) When the People expect to call a witness who may make a first-time, in-court identification, they must notify the defendant of that possibility as early as practicable so that the defendant has a meaningful opportunity to request alternative identification procedures.

(2) Upon a defendant’s explicit request for an alternative identification procedure, a trial court may exercise its discretion to fashion any measures necessary to reduce the risk of misidentification, including an alternative identification procedure, or in the court’s discretion, the exclusion of a first-time in-court identification pursuant to the criteria set forth in Guide to New York Evidence rule 4.06, and upon consideration of “the danger of misidentification from the suggestiveness of a first-time, in-court identification, and whether there are independent assurances of the identification’s reliability that outweigh this risk.”

Note

This rule is derived from the Court of Appeals opinion in *People v Perdue* (— NY3d —, 2023 NY Slip Op 06404 [2023]). Pertinent excerpts from the *Perdue* opinion include:

“We hold that, when the People call a witness who may make a first-time, in-court identification, they must ensure that the defendant is aware of that possibility as early as practicable so that the defendant has a meaningful opportunity to request alternative identification procedures. If the defendant explicitly requests such procedures, a trial court may exercise its discretion to fashion any measures necessary to reduce the risk of misidentification. The ultimate determination of whether to admit a first-time, in-court identification, like any evidence, rests within the evidentiary gatekeeping discretion of the trial court. The court must balance the probative value of the identification against the dangers of misidentification and other prejudice to the defendant. . . .

“Thus, to counteract the heightened risk of misidentification in the first-time, in-court identification context, defendants should be afforded a meaningful opportunity to request additional procedures that would (1) demonstrate the reliability of a subsequent in-court identification—such as granting an adjournment for a non-suggestive identification procedure to test the witness’s identification—or (2) reduce the suggestiveness of the in-court identification procedure itself. . . .

“We emphasize that the court’s obligation to take any action regarding a first-time, in-court identification is dependent upon a timely request made by the defendant, as the defendant may not wish to seek protective measures that would bolster or draw further attention to the identification. . . .

“Trial courts may ‘exclude relevant evidence if its probative value is outweighed by the prospect of trial delay, undue prejudice to the opposing party, confusing the issues[,] or misleading the jury’ (*People v Primo*, 96 NY2d 351, 355 [2001]). . . .

“In exercising this discretion in the context of a first-time, in-court identification, the court must consider the danger of misidentification from the suggestiveness of a first-time, in-court identification, and whether there are independent assurances of the identification’s reliability that outweigh this risk. Such considerations may include: the witness’s familiarity with the defendant, the quality of the witness’s opportunity to observe the defendant before the incident in question, the witness’s ability to provide accurate descriptive details regarding the defendant, the time between the crime and the testimony, and whether there is other, reliable trial evidence corroborating the identification. In evaluating the danger of misidentification, the court may also take into account the suggestiveness of the in-court identification procedure itself.

“When a defendant is not given advance notice of the identification, the trial court may also consider whether there was any reason for the failure to provide notice and the extent to which it has prejudiced the defendant. In general, to limit the risk that a trial court will exclude an identification for lack of notice, the People should provide explicit notice at the earliest possible juncture. . . . We acknowledge, though, that situations may arise where the People, through no fault of their own, are not themselves aware of a witness’s ability or willingness to make an identification during their trial testimony. Trial courts must assess how to proceed in such

scenarios on a case-by-case basis” (— NY3d at —, 2023 NY Slip Op 06404, *1, *3 [citations omitted]).