

**ANSWER TO QUESTION NO. 6**

Peter's counsel may file a motion to suppress Wendy Witness' identification of Peter and request the trial court conduct a pretrial evidentiary hearing to determine whether the lineup procedures employed in Wendy's identification of Peter violated Peter's due process rights. *United States v Wade*, 388 US 218 (1967). It is unlikely that Wendy Witness' identification of Peter will be suppressed.

A lineup may be found to be so suggestive and susceptible to misidentification that it denies a criminal defendant due process of law. *Stovall v Denno*, 388 US 293, 301-302 (1967); *People v Hickman*, 470 Mich 602, 607 (2004); *People v Lee*, 391 Mich 618 (1974). To challenge an identification on the basis of lack of due process, "a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302 (1993) ; *People v Williams*, 244 Mich App 533, 540 (2001). Where a defendant raises a credible argument that the lineup procedure is constitutionally suspect, a trial court should conduct an evidentiary hearing to decide the matter.

Here, there are many facts Peter's counsel can cite to support his argument that the lineup was unduly suggestive. First, the persons used to participate in the lineup featured many physical characteristics that varied greatly from the physical characteristics initially cited by Wendy to describe the assailant to the police. Wendy described the assailant as having short black hair, wearing a white sweatshirt, 5'8" tall, 150 pounds and between 20 and 22 years of age. No person in the lineup wore a white sweatshirt and no person, other than Peter, was less than 5' 11" tall. The persons participating in the lineup other than Peter, who weighed 160 pounds, weighed between 170 and 180 pounds--substantially more than the 150-pound description Wendy initially offered to police. Three of the lineup participants had brown hair rather than black hair, as described by Wendy. And all but one of the lineup participants fell outside the age range cited by Wendy to describe the assailant.

Further, the participants in the lineup featured many physical characteristics that varied from the physical characteristics of Peter. Peter was the shortest person in the lineup at 5'10" tall. Peter was also the lightest person in the lineup, weighing 160

pounds. These facts are arguably significant because Wendy described the assailant as being only 5'8" tall and 150 pounds. Thus, counsel may argue, the witness may have concluded that the shortest and lightest person in the lineup (Peter) must be the assailant. Counsel should also point out that Peter was the only person in the lineup wearing a white tee shirt--clothing very similar to a white sweatshirt Wendy indicated the assailant was wearing during the commission of the crime. Finally, only one of the lineup participants was older than Peter, and two of the lineup participants were substantially younger than Peter (5 and 6 years younger).

The fairness of an identification procedure is evaluated in light of the total circumstances. *Kurylczyk, supra* at 311-312, 318; *People v Murphy* (On Remand), 282 Mich App 571, 584 (2009). Discrepancies between the physical characteristics of an accused, the description of the assailant provided police by the witness, and the persons who participated in the lineup do not necessarily render the lineup procedure defective. *Id.* at 289, 312, 318; *People v Hornsby*, 251 Mich App 462, 466 (2002). There is no requirement that the lineup participants approximate the description of the assailant that the witness provided to police. All that is required is that the lineup participants approximate the culprit's description. *Id.* at 312; *People v Holmes*, 132 Mich App 730, 746 (1984). Differences in the appearances of lineup participants generally pertain to the weight of an identification and not to its admissibility. *Hornsby, supra*, at 466. Differences are significant only to the extent that they are apparent to the identifying witness and substantially distinguish the defendant from the other lineup participants. *Kurylczyk, supra* at 312; *Hornsby, supra* at 466.

Here, nothing in the differences cited by defense counsel would make it apparent to Wendy Witness that Peter Perpetrator was the assailant. While not all the lineup participants had black hair, all of them had short dark hair. Thus, this subtle distinction in hair color will not render the lineup invalid. Also, Michigan courts have held that minor variations in height will not render a lineup unduly suggestive. *People v Rivera*, 61 Mich App 427 (1975) (concluding difference in height of up to 4 inches is legally insignificant). Here, there was only a 2-inch difference in height between Peter Perpetrator and the other lineup participants. Similarly, differences in the clothing worn by lineup participants generally will not render the lineup procedure defective. Here, Peter was presented in the lineup wearing the same clothing he was wearing at the time of his arrest. This was permissible. *People v Gunter*, 76 Mich App 483 (1977).

A court reviewing the fairness of a lineup will also consider the opportunity of the witness to view the culprit at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the culprit, the level of certainty demonstrated by the witness at the identification, and the length of time between the crime and the identification. *Neil v Biggers*, 409 US 188, 199 (1972); *People v Solomon*, 391 Mich 767 (1974). Applying these factors to the facts presented in this case, there is little doubt that the court would conclude the lineup did not violate Peter's constitutional rights. Wendy observed the crime without obstruction from 30 feet away, at noon on a sunny day. While there are some variations between the description of the assailant that Wendy provided to police and the physical appearance of Peter Perpetrator, these variations are minor. Peter has short black hair, as described by Wendy. In addition, Wendy described an assailant that featured the approximate age and weight of Peter. While Peter is 5'10" tall and Wendy described the assailant as being 5'8" tall, given all the other similarities between Peter and Wendy's description of the assailant, this minor difference in weight will not taint the identification. Further, the length of time that passed between the crime and the lineup was very short--the lineup was held only one day after the crime. Significantly, Wendy proclaimed certainty in her identification. These factors weigh strongly in favor of concluding the lineup procedures withstand constitutional challenge.

Peter's counsel may argue that the lineup is unduly suggestive because police informed Wendy that "a suspect was in custody and would be in the lineup." However, the fact that the complainant was told that the culprit would be in the lineup is not unduly suggestive as a matter of law. *People v McElhaney*, 215 Mich App 269, 287 (1996).

Additionally, counsel may argue that the absence of defense counsel during the lineup process creates an inference that the process was unduly suggestive. However, an accused is not entitled to be represented by counsel at identification procedures conducted before the initiation of adversarial judicial criminal proceedings. *Hickman, supra* at 609. Given the analysis provided above, the prosecutor will have little problem meeting its burden.