

A store owner whose jewelry store had recently been robbed was shown by a police detective a photograph of the defendant, who previously had committed other similar crimes. The store owner examined the photograph and then asked the detective whether the police believed that the man pictured was the robber. After the detective said, "We're pretty sure," the store owner stated that the man in the photograph was the one who had robbed her.

The defendant was indicted for the robbery. His counsel moved to suppress any trial testimony by the store owner identifying the defendant as the robber.

Should the court grant the motion and suppress the store owner's trial testimony identifying the defendant as the robber?

- A. No, because suppression of in-court testimony is not a proper remedy, even though the out-of-court identification was improper.
- B. No, because the out-of-court identification was not improper.
- C. Yes, because the improper out-of-court identification has necessarily tainted any in-court identification.
- D. Yes, unless the prosecution demonstrates that the in-court identification is reliable.

Explanation:

Due process requires the suppression of unreliable testimony identifying the defendant as the perpetrator of the charged crime (ie, identification testimony) since it may inhibit the defendant's right to a fair trial. In-court identification testimony may be unreliable if it stems from **unnecessarily suggestive out-of-court identification procedures** arranged by police. Therefore, such **in-court identification testimony** is only admissible if the prosecution demonstrates that it is **sufficiently reliable** and poses no substantial likelihood of misidentification.

Here, the police detective showed the store owner a photograph of the defendant and explained that the police were "pretty sure" that the defendant was the robber. After this unnecessarily suggestive out-of-court identification procedure, the store owner identified the defendant as the robber **(Choice B)**. As a result, the court should suppress the store owner's in-court testimony identifying the defendant as the robber *unless* the prosecution proves that her testimony is reliable despite the improper identification procedure.

(Choice A) Suppression of in-court identification testimony *is* a proper remedy if (1) that testimony stems from an unnecessarily suggestive out-of-court identification procedure and (2) the prosecution cannot prove that the in-court testimony is reliable.

(Choice C) An improper out-of-court identification does not *always* taint an in-court identification—eg, a witness's in-court testimony may be reliable despite a suggestive identification procedure if he/she could accurately describe the perpetrator before that procedure. Therefore, in-court identification testimony will only be suppressed if it is rendered *unreliable* by an improper out-of-court identification.

Educational objective:

Due process requires the suppression of in-court identification testimony that was rendered unreliable (ie, substantially likely to result in misidentification) by an unnecessarily suggestive out-of-court identification procedure.

References

U.S. Const. amends. V & XIV (due process).

Neil v. Biggers, 409 U.S. 188, 197 (1972) (holding that unnecessarily suggestive identification procedures violate due process if they create a substantial likelihood of misidentification).

Perry v. New Hampshire, 565 U.S. 228, 240–244 (2012) (stating that the reliability of identification testimony stemming from improper identification procedures must be assessed before admitting that testimony at trial).

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Admissibility of in-court identification testimony

