

# I Object!

– James Eckert, Esq.

## Testifying to Showups at Trial

Showup identification procedures - where police display only one person to the witness to test their ability to distinguish between cops and robbers - are "generally disfavored", but the jury is allowed to hear about them nevertheless. The important distinction is this: when is the **identifying witness** allowed to repeat his ID, and when are the **police** permitted to testify to their successful use of a one-man lineup. Short answer: if the witness can ID the defendant from the witness stand, he can repeat his showup ID (but police cannot); if he cannot ID the defendant at trial, the witness and the cops can testify that they had better luck at the showup.

Criminal Procedure Law 60.25 deals with a person who observed the defendant at a time and place "relevant to the case", and identified the defendant at a showup, but who is unable to testify at trial that the defendant is the same person. In such circumstances, the witness may testify to having observed the defendant at a later time, i.e. the lineup. In addition, the fact that the witness "observed and recognized [the defendant] on the second occasion" (i.e. the showup) "may be established by testimony of another person or persons to whom the witness promptly declared his recognition on such occasion" (60.25[1][b]). This means that the police may testify the identifying witness's earlier successful identification of the defendant (*People v Robinson*, 39 AD3d 772 [2nd Dept 2007]).

CPL 60.30 permits the prosecution witness to testify to having seen the defendant at showup **in addition** to testifying that the defendant is the person seen committing the crime, or having been present at some place relevant to the case. CPL 60.30 requires that a) the witness observed the defendant at a time relevant to the case; b) the witness knows that the defendant is that person based on present recollection; and c) "on a subsequent occasion [i.e. the showup] he observed the defendant, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, and then also recognized him as the same person whom he had observed on the first or incriminating occasion". If the witness is able to ID the defendant at trial, then other witnesses are not permitted to repeat the results of the one-man lineup (*see e.g. People v Mattis*, 46 AD3d 929 [3d Dept][recognizing a failure to follow the rule, but ruling that it was not preserved]).

Testimony regarding picking the defendant out of a photo array is still inadmissible (*People v Jones*, 51 AD3 690 [2nd Dept 2008]), both 60.25 and 60.30 require actual observations of the defendant, not his photograph.