

#### **4.35. Identification of a Defendant**

##### **Part I. Definition of blind or blinded procedure [CPL 60.25 (1) (c)]**

**For purposes of this section, a “blind or blinded procedure” is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproduction under circumstances where, at the time the identification is made, the public servant administering such procedure: (i) does not know which person in the array is the suspect, or (ii) does not know where the suspect is in the array viewed by the witness.**

##### **Part II. Identification by means of previous recognition, in addition to present identification [CPL 60.30]**

**(1) In any criminal proceeding in which the defendant’s commission of an offense is in issue, a witness who testifies that (a) he or she observed the person claimed by the People to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case, and (b) on the basis of present recollection, the defendant is the person in question, and (c) on a subsequent occasion he or she observed the defendant, or, where the observation is made pursuant to a blind or blinded procedure as defined in [part I of this rule], a pictorial, photographic, electronic, filmed or video recorded reproduction of 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 or her (the defendant) or the pictorial, photographic, electronic, filmed or video recorded reproduction of him or her as the same**

person whom he or she had observed on the first or incriminating occasion, may, in addition to making an identification of the defendant at the criminal proceeding on the basis of present recollection as the person whom he or she (the witness) observed on the first or incriminating occasion, also describe his or her previous recognition of the defendant and testify that the person whom he or she observed or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed on such second occasion is the same person whom he or she had observed on the first or incriminating occasion. Such testimony and such pictorial, photographic, electronic, filmed or video recorded reproduction constitutes evidence-in-chief.

**Part III. Identification by means of previous recognition, in absence of present identification [CPL 60.25]**

**(1) In any criminal proceeding in which the defendant's commission of an offense is in issue, testimony as provided in subdivision two may be given by a witness when:**

**(a) Such witness testifies that:**

**(i) He or she observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case; and**

**(ii) On a subsequent occasion he or she observed, under circumstances consistent with such rights as an accused person may derive under**

**the Constitution of this State or of the United States, a person or, where the observation is made pursuant to a blind or blinded procedure as defined in [part I of this rule], a pictorial, photographic, electronic, filmed or video recorded reproduction of a person whom he or she recognized as the same person whom he or she had observed on the first or incriminating occasion; and**

**(iii) He or she is unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question; and**

**(b) It is established that the defendant is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction the witness observed and recognized on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his or her recognition on such occasion and by such pictorial, photographic, electronic, filmed or video recorded reproduction.**

**(2) Under circumstances prescribed in subdivision one of this section, such witness may testify at the criminal proceeding that the person whom he or she observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion is the same person whom he or she observed on the first or incriminating occasion. Such**

**testimony, together with the evidence that the defendant is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion, constitutes evidence-in-chief.**

#### **Note**

Part I is a verbatim reproduction of CPL 60.25 (1) (c), which applies to that section and by a cross-reference to CPL 60.30. At the end of the definition of “blind or blinded procedure,” the statute continues as follows:

“The failure of a public servant to follow such a procedure shall be assessed solely for purposes of this article and shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not constitute a legal basis to suppress evidence made pursuant to subdivision six of section 710.20 of this chapter. This article neither limits nor expands subdivision six of section 710.20 of this chapter.” (CPL 60.25 [1] [c].)

Part II is a verbatim reproduction of CPL 60.30.

Part III is a verbatim reproduction of CPL 60.25.

Consistent with the constitutional and statutory procedures, a witness may testify to (1) an in-court identification of a defendant that is relevant to the offense charged and that is based on present recollection at the time of the in-court identification and (2) his or her recognition of the defendant made at a relevant time prior to testifying based upon a personal viewing of the defendant or the viewing of a pictorial, photographic, electronic, filmed, or video recorded reproduction of the defendant.

If a witness cannot on the basis of present recollection make an in-court identification, consistent with the constitutional and statutory procedures, the witness may testify to his or her identification of the defendant that is relevant to the offense charged and that was made at a relevant time before testifying based upon a personal viewing of the defendant or the viewing of a pictorial, photographic, electronic, filmed, or video recorded reproduction of the defendant; provided, there is independent proof that the person viewed personally or by a pictorial, photographic, electronic, filmed or video recorded reproduction was the defendant.