



IACP LAW ENFORCEMENT POLICY CENTER

Eyewitness Identification

Model Policy
Concepts & Issues Paper
Need to Know....

September 2016

Publications of the IACP Law Enforcement Policy Center
44 Canal Center Plaza, Suite 200, Alexandria, VA 22314

These documents are the result of work performed by the IACP Law Enforcement Policy Center. The views and opinions expressed in these documents are sanctioned by the center's advisory group and do not necessarily represent the official position or policies of the International Association of Chiefs of Police.



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Need to Know.....

Eyewitness Identification

Human memory is inherently flawed; therefore the potential for erroneous eyewitness identifications is significant. However, law enforcement agencies can take steps to help improve the accuracy of these investigations.

- In addition to eyewitness identification, all **appropriate investigative steps** and methods should be employed to uncover evidence that either supports or eliminates the suspect identification.
- **Showups**, where a single suspect is presented to an eyewitness within a short time frame following the commission of a crime, should be avoided.
- Whenever possible, a **blind** (administrator does not know the identity of the suspect) lineup or photo array presentation should be utilized. When this is not feasible, a **blinded** presentation should be used, where the administrator may know the identity of the suspect, but does not know which lineup or photo array member is being viewed by the eyewitness at any given time.
- Lineups or photo arrays should consist of at least **six** individuals or photographs.
- **Fillers** should be carefully chosen – this includes ensuring they have the same basic characteristics as the suspect, to include age, height, weight, and race.
- The witness should be given a copy of **instructions** prior to viewing the lineup or photo array. These instructions should outline, among other items, the fact that he or she does not need to make an identification and that it is just as important to clear innocent persons from suspicious as it is to identify guilty parties.
- Officers should scrupulously avoid the use of statements, cues, casual comments, or providing unnecessary or irrelevant information that in any manner may **influence** the witnesses' decision-making process or perception.
- A suspect's **legal counsel** should be present during a lineup.
- Following an identification, the administrator should ask the witness to provide a **confidence statement**.
- Lineup and photo array procedures should be video and audio **recorded**.

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Model Policy

Eyewitness Identification

September 2016

I. PURPOSE

It is the purpose of this policy to establish guidelines for eyewitness identification procedures involving showups, photo arrays, and lineups. Erroneous eyewitness identifications have been cited as the factor most frequently associated with wrongful convictions. Therefore, in addition to eyewitness identification, all appropriate investigative steps and methods should be employed to uncover evidence that either supports or eliminates the suspect identification.

II. POLICY

Officers shall strictly adhere to the procedures for conducting eyewitness identifications set forth herein, in order to maximize the reliability of identifications, minimize erroneous identifications, and gather evidence that conforms to contemporary eyewitness identification protocols. This policy recognizes that the sequential and simultaneous approaches are both valid methods of conducting an identification procedure and does not recommend one over the other. However, regardless of the method that an agency decides to utilize, the basic procedures outlined in this document should be followed.

III. DEFINITIONS

Showup: The presentation of a suspect to an eyewitness within a short time frame following the commission of a crime to either confirm or eliminate him or her as a possible perpetrator. Showups, sometimes referred to as field identifications, are conducted in a contemporaneous time frame and proximity to the crime.

Lineup: The process of presenting live individuals to an eyewitness for the purpose of identifying or eliminating suspects.

Photo Array: A means of presenting photographs to an eyewitness for the purpose of identifying or eliminating suspects.

Administrator: The law enforcement official conducting the identification procedure.

Blind Presentation: The administrator conducting the identification procedure does not know the suspect's identity.

Blinded Presentation: The administrator may know the identity of the suspect, but does not know which lineup or photo array member is being viewed by the eyewitness at any given time.

Confidence Statement: A statement in the witness's own words taken immediately after an identification is made stating his or her level of certainty in the identification.

Filler: A live person, or a photograph of a person, included in an identification procedure who is not considered a suspect.

Sequential: Presentation of a series of photographs or individuals to a witness one at a time.

Simultaneous: Presentation of a series of photographs or individuals to a witness all at once.

IV. PROCEDURES

A. Showups

The use of showups should be avoided whenever possible in preference to the use of a lineup or photo array procedure. However, when circumstances require the prompt presentation of a suspect to a witness, the following guidelines shall be followed to minimize potential suggestiveness and increase reliability.

1. Document the witness's description of the perpetrator prior to conducting the showup.
2. Conduct a showup only when the suspect is detained within a reasonably contemporaneous time frame after the commission of the offense and within a close physical proximity to the location of the crime.
3. Do not use a showup procedure if probable cause to arrest the suspect has already been established.

4. Transport the witness to the location of the suspect whenever possible, rather than bringing the suspect to the witness.
 5. If possible, avoid conducting a showup when the suspect is in a patrol car, handcuffed, or physically restrained by officers, unless safety concerns make this impractical.
 6. Do not take a suspect to the witness's residence unless it is the scene of the crime.
 7. Caution the witness that the person he or she is about to see may or may not be the perpetrator—and it is equally important to clear an innocent person. The witness should also be advised that the investigation will continue regardless of the outcome of the showup.
 8. Do not conduct the showup with more than one witness present at a time.
 9. Separate witnesses and do not allow communication between them before or after conducting a showup.
 10. If one witness identifies the suspect, use a lineup or photo array for remaining witnesses.
 11. Do not present the same suspect to the same witness more than once.
 12. Do not require showup suspects to put on clothing worn by, speak words uttered by, or perform other actions of the perpetrator.
 13. Officers should scrupulously avoid words or conduct of any type that may suggest to the witness that the individual is or may be the perpetrator.
 14. Ask the witness to provide a confidence statement.
 15. Remind the witness not to talk about the showup to other witnesses until police or prosecutors deem it permissible.
 16. Videotape the identification process using an in-car camera or other recording device where available.
 17. Document the time and location of the showup, the officers present, the result of the procedure, and any other relevant information.
- B. Basic Procedures for Conducting a Lineup or Photo Array
1. Whenever possible, a blind presentation shall be utilized. In cases where a blind presentation is not feasible, a blinded presentation should be used.
 2. The lineup or photo array should consist of a minimum of six individuals or photographs. Use a minimum of five fillers and only one suspect.
 3. Fillers should be reasonably similar in age, height, weight, and general appearance and be of the same sex and race, in accordance with the witness's description of the offender.
 4. Avoid the use of fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.
 5. Create a consistent appearance between the suspect and the fillers with respect to any unique or unusual feature (e.g., scars, tattoos, facial hair) used to describe the perpetrator by artificially adding or concealing that feature on the fillers.
 6. If there is more than one suspect, include only one in each lineup or photo array.
 7. During a blind presentation, no one who is aware of the suspect's identity should be present during the administration of the photo array. However, during a lineup, the suspect's attorney should be present.
 8. Place suspects in different positions in each lineup or photo array, both across cases and with multiple witnesses in the same case.
 9. Witnesses should not be permitted to see or be shown any photos of the suspect prior to the lineup or photo array.
 10. The witness shall be given a copy of the following instructions prior to viewing the lineup or photo array and the administrator shall read the instructions aloud before the identification procedure.

You will be asked to look at a series of individuals.

The perpetrator may or may not be present in the identification procedure.

It is just as important to clear innocent persons from suspicion as it is to identify guilty parties.

I don't know whether the person being investigated is included in this series.

Individuals present in the series may not appear exactly as they did on the date of the incident because features such as head hair and facial hair are subject to change.

You should not feel that you have to make an identification. If you do identify someone, I will ask you to describe in your own words how certain you are.

The individuals are not configured in any particular order.

(If presenting the lineup or photo array sequentially): If you make an identification, I will continue to show you the remaining individuals or photos in the series.

Regardless of whether you make an identification, we will continue to investigate the incident.

Since this is an ongoing investigation, you should not discuss the identification procedures or results.

11. The lineup or photo array should be shown to only one witness at a time; officers should separate witnesses so they will not be aware of the responses of other witnesses.
12. Multiple identification procedures should not be conducted in which the same witness views the same suspect more than once.
13. Officers should scrupulously avoid the use of statements, cues, casual comments, or providing unnecessary or irrelevant information that in any manner may influence the witnesses' decision-making process or perception.
14. Following an identification, the administrator shall ask the witness to provide a confidence statement and document the witness's response.
15. The administrator shall ask the witness to complete and sign a lineup or photo array form.
16. Lineup and photo array procedures shall be video and audio recorded, unless doing so is not possible. If a procedure is not recorded, a written record shall be created and the reason for not recording shall be documented. In the case of lineups that are not recorded, officers shall take and preserve a still photograph of each individual in the lineup.

C. Photographic Arrays

1. Creating a Photo Array

- a. Use contemporary photos.
- b. Do not mix color and black and white photos.
- c. Use photos of the same size and basic composition.
- d. Never mix mug shots with other photos.
- e. Do not include more than one photo of the same suspect.
- f. Cover any portions of mug shots or other photos that provide identifying information on the subject—and similarly cover other photos used in the array.

2. Conducting the Photo Array

- a. For both sequential and simultaneous procedures, the photo array should be preserved, together with full information about the identification process as part of the case file.
- b. The following are additional considerations that apply solely to sequential photo arrays:
 - (1) If a blind administrator is not available, the administrator shall ensure that a blinded presentation is conducted using the following procedures.
 - Place the suspect and at least five filler photos in separate folders. Include two additional folders each containing a blank sheet of paper, for a total of eight (or more depending on the number of fillers used).
 - The administrator will take one folder containing a known filler and place it to the side. This will be the first photo in the series. The administrator should separately set aside the two blank folders, which will be added to the end of the sequence. The administrator should then shuffle the remaining folders (containing one suspect and the remainder of fillers) such that he or she cannot see how the lineup members are ordered. These shuffled folders will follow the first filler photo and precede the two blank folders. The stack of photos is now ready to be shown to the witness.
 - The administrator should position himself or herself so that he or she cannot see inside the folders as they are viewed by the witness.
 - (2) The witness should be asked if he or she recognizes the person in the photo before moving onto the next photo. If an identification is made before all of the photos are shown, the administrator should tell the witness that he or she must show the witness all of the photos and finish showing the sequence to the witness, still asking after each photo if the witness recognizes the person in the photo.

- (3) If possible, the array should be shown to the witness only once. If, upon viewing the entire array the witness asks to see a particular photo or the entire array again, the witness should be instructed that he or she may view the entire array only one additional time. If a second viewing is permitted, it must be documented.

D. Lineups

1. Conducting the Lineup
 - a. If a blind administrator is unavailable, the administrator shall take all reasonable precautions to avoid giving any unintentional cues to the witness.
 - b. Ensure that all persons in the lineup are numbered consecutively and are referred to only by number.
2. The primary investigating officer is responsible for the following:
 - a. Scheduling the lineup on a date and at a time that is convenient for all concerned parties, to include the prosecuting attorney, defense counsel, and any witnesses.
 - b. Ensuring compliance with any legal requirements for transfer of the subject to the lineup location if he or she is incarcerated at a detention center.
 - c. Making arrangements to have persons act as fillers.
 - d. Ensuring that the suspect's right to counsel is scrupulously honored and that he or she is provided with counsel if requested.
 - e. Obtaining proper documentation of any waiver of the suspect's right to counsel.
 - f. Allowing counsel representing the suspect sufficient time to confer with his or her client prior to the lineup and to observe the manner in which the lineup is conducted.

Every effort has been made by the IACP Law Enforcement Policy Center staff and advisory group to ensure that this document incorporates the most current information and contemporary professional judgment on this issue. Readers outside of the United States should note that, while this document promotes procedures reflective of a democratic society, its legal basis follows United States Supreme Court rulings and other federal laws and statutes. Law enforcement administrators should be cautioned that no "model" policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered, and should therefore consult its legal advisor before implementing any policy. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities among other factors. This document is not intended to be a national standard.

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This document was developed by the IACP Law Enforcement Policy Center in conjunction with Chief William Brooks of the Norwood (MA) Police Department and The Innocence Project.



IACP LAW ENFORCEMENT POLICY CENTER

Eyewitness Identification

Concepts and Issues Paper

September 2016

I. INTRODUCTION

A. Purpose of Document

This document was designed to accompany the *Model Policy on Eyewitness Identification* established by the IACP Law Enforcement Policy Center. This paper provides essential background material and supporting documentation to provide greater understanding of the philosophy and implementation requirements for the model policy. This material will be of value to law enforcement executives in their efforts to tailor the model policy to the requirements and circumstances of their communities and their law enforcement agencies.

B. Background

Although the evidence provided by eyewitnesses can be tremendously helpful in the development of leads, identifying criminals, and exonerating the innocent—it is subject to error. Eyewitnesses frequently prove to be unreliable observers, and erroneous identifications are sometimes the result.

Misidentifications by eyewitnesses are normally the product of a combination of factors. Human perception tends to be inaccurate, especially under stress. The average citizen, untrained in observation and placed under significant stress as a victim of or witness to a crime, may not be able to describe a perpetrator accurately, sometimes even after coming face-to-face with the individual.

Also, a witness, particularly one who is not certain what the perpetrator actually looked like, may be easily influenced by suggestive information conveyed to him or her during the identification process. In *United States v. Wade*, the Supreme Court of the United States recognized these facts in saying:

*The influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor. Perhaps it is responsible for more such errors than all other factors combined.*¹

Law enforcement officers may unintentionally facilitate misidentifications by using suggestive words or engaging in behavior that may result in suggestive cues. The average witness, anxious to make an identification and influenced by the officer's image as an authority figure, can be very sensitive to any suggestion, however inadvertent, made by law enforcement regarding the identity of the perpetrator. Officers may, totally unintentionally, convey to the witness by word or behavioral cue, that a particular person being viewed is the suspect. It is likely that most officers are unaware of such unintentional signals or "tells."

Consequently, great care must be taken by officers conducting any type of eyewitness identification to avoid actions that might lead to an inaccurate identification. Scrupulously adhering to the procedures and precautions outlined in this document will help avoid misidentifications that might lead to unjust accusations or even erroneous convictions of innocent persons, while diverting the investigation away from the real culprit. In addition, even if the actual perpetrator is caught and brought to trial, using improper identification procedures during the investigation may result in the suppression of identification evidence at trial, leading to dismissal of the charges or otherwise making it impossible to convict the guilty party.

¹ *United States v. Wade*, 388 U.S. 218, 229 (1967).

In evaluating the admissibility of an identification procedure, the courts will generally be concerned with whether it was unduly suggestive. If the court finds that the procedure was unduly suggestive, it will then proceed to determine whether, despite the suggestiveness, the identification was reliable when considering the totality of the circumstances.² If a court determines that an identification procedure was unduly suggestive, the court may prohibit introduction of the evidence in question. It may rule that any in-court identification of the accused by the victim is inadmissible or suppress other evidence that was obtained as a result of an improper pretrial identification procedure or both.

It is estimated that some 77,000 people nationwide are put on trial every year because eyewitnesses have identified them in a lineup or photo array.³ Recently, reforms in eyewitness identification procedures have been spurred by the fact that, as of 2015, more than 300 people have been cleared of crimes through DNA evidence, most of whom were convicted based on eyewitness identification.⁴

Research in this field has provided much information on the reliability of eyewitness identification. Over the past 30 years, various laboratory and field studies, including those conducted in a four-city test by the American Judicature Society, have identified phenomena that can impact the accuracy of an eyewitness identification procedure and ways that law enforcement can reduce unintentional eyewitness influence.⁵ A landmark report was issued by the National Academy of Science (NAS) in October 2014.⁶ This report sought to settle any lingering debate regarding which law enforcement practices

² This determination, in turn, is to be achieved by analyzing six factors. These are (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; (5) the length of time between the crime and the confrontation; and (6) whether the witness was a casual observer or the victim of the crime. If in view of these various factors, it appears that the identification was reliable despite the suggestiveness of the procedure, evidence of the identification will be admissible to bolster a subsequent in-court identification. *Neil v. Biggers*, 409 U.S. 188 (1972). See also *Manson v. Brathwaite*, 432 U.S. 98 (1977). (*Biggers* test applied to photo identifications.)

³ Kate Zernike, "Study Fuels Debate Over Police Lineups," *The New York Times*, April 19, 2006, http://www.nytimes.com/2006/04/19/us/19lineup.html?fta=y&_r=0 (accessed August 1, 2016).

⁴ See The Innocence Project, "The Causes of Wrongful Convictions," <http://www.innocenceproject.org/causes-wrongful-conviction> (accessed August 1, 2016).

⁵ Gary Wells, Nancy Steblay, and Jennifer Dysart, *A Test of the Simultaneous vs. Sequential Lineup Methods: An Initial Report of the AJS National Eyewitness Identification Field Studies* (Des Moines, IA: American Judicature Society, 2011), <http://www.popcenter.org/library/reading/PDFs/lineupmethods.pdf> (accessed August 1, 2016).

⁶ *Identifying the Culprit: Assessing Witness Identification* (Washington, D.C.: The National Academies Press, 2014).

would produce the most solid, accurate, and reliable identifications.

C. DEFINITIONS

For purposes of this document, identification procedures may be categorized as showups, lineups, or photo arrays. In a showup, witnesses are shown one live suspect only. Showups, sometimes referred to as field identifications, are conducted in a contemporaneous time frame and proximity to the crime. By contrast, in a lineup or photo array, eyewitnesses are presented with a number of individuals, including one suspect. Lineup or photo array procedures generally involve showing a series of persons or photographs, respectively, to a witness, either sequentially (one at a time) or simultaneously (all at once), for the purpose of identifying a suspect. The individual, often an officer, who is conducting the identification procedure is referred to as the administrator. In an effort to improve the validity and accuracy of identification procedures and to limit the possibility of even unintended influence by the administrator on the eyewitness, a blind procedure is recommended. This refers to a lineup or photo array where the administrator does not know the identity of the suspect. In situations where the administrator is aware of the identity of the suspect, a blinded procedure should be utilized where the administrator does not know which individual or photograph the witness is viewing at a particular moment. Additional discussion on suggested identification procedures can be found later in this document.

A lineup or photo array should contain only one suspect and a number of other individuals or photos, referred to as fillers. More information on selecting appropriate fillers is provided below. Finally, following any eyewitness identification procedure, the administrator should take a statement from the witness stating his or her level of certainty in the identification. This is referred to as a confidence statement.

II. PROCEDURES

A. Showups

The showup identification has been widely disfavored by courts and by experts in law, law enforcement, and law enforcement identification procedures.⁷ While courts have not held showups to be categorically improper, they have ruled that the determination of whether a specific showup was unduly suggestive will be made based upon the totality of the circumstances of that particular showup. In practice, evidence deriving from showups is frequently suppressed because the showup procedure is so inherently suggestive.

⁷ See *Stovall v. Denno*, 388 U.S. 293 (1967).

Consequently, the use of showups should be avoided where possible, particularly when a lineup or photo array procedure can be used.

It is recognized however, that a showup conducted close in time and proximity to the commission of a crime may provide sufficient probable cause to help avoid the escape of a suspect. It may also facilitate the release of an innocent person, thus redirecting law enforcement investigations in a potentially more productive direction. Therefore, where use of a showup is reasonable and appropriate, certain guidelines must be followed to minimize the suggestiveness of the procedure and the risk of suppression of any resultant identification evidence.

Showups should conform to the following guidelines:

- Prior to the showup, the witness should provide officers with as complete a description of the perpetrator as possible. This description should be documented.
- Showups should be used only when the suspect is detained within a reasonably contemporaneous time frame after the offense and within close physical proximity to the location of the crime.
- If probable cause exists to arrest a suspect, officers should employ a lineup or photo array procedure to address identification, rather than a showup.
- Before showing the suspect, caution the witness that the person he or she is about to see, may or may not be the perpetrator and it is equally important to clear an innocent person. The witness should also be advised that the investigation will continue regardless of the outcome of the showup.
- When possible, the witness should be taken to the location of the suspect rather than bringing the suspect to the witness.
- The suspect should not be taken to the witness's residence unless it is the scene of the crime.
- Showups should not be conducted when the suspect is in a patrol car, handcuffed, or physically restrained by officers, unless safety concerns make this impractical. In addition, showups conducted in the station house or jail are the most suggestive and hence the most objectionable.
- Showups should not be conducted with more than one witness present at a time. If showups are conducted separately for multiple witnesses, the witnesses should not be permitted to communicate before or after the showup regarding the identification of the suspect.
- The same suspect should not be presented to the same witness more than once.
- If one witness identifies the suspect, officers should use a lineup or photo array for any remaining witnesses.

- Showup suspects should not be required to put on clothing worn by the perpetrator, speak words uttered by the perpetrator, or perform other actions mimicking those of the perpetrator.⁸
- Words or conduct by law enforcement that may suggest to the witness that the individual is or may be the perpetrator should be scrupulously avoided. For example, officers should never tell the witness that the individual was apprehended near the crime scene, that the evidence points to the individual as the perpetrator, or that other witnesses have identified the individual as the perpetrator.
- Following the showup, ask the witness how confident he or she is in the identification. Document the exact words used by the witness.
- Remind the witness not to discuss the showup with other witnesses until police or prosecutors deem it permissible.
- Document the time and location of the showup, the officers present, and the outcome of the procedure. If possible, the showup should be videotaped using an in-car camera or other recording device.

B. Sequential Versus Simultaneous

The issue of whether subjects in a lineup or photo array should be seen one at a time (sequentially) or all at once (simultaneously) has been the subject of much study and debate. The proponents of sequential viewing maintain that when witnesses view photo arrays or lineups simultaneously, they tend to make comparative judgments; that is, they try to determine which of those persons present appears to look the most like their memory of the suspect by comparing the images to each other rather than comparing each image to their mental image of the perpetrator. If the actual suspect is not present in the lineup or photo array, a witness may still make an identification based on the best fit among those present. This can lead to misidentification. Therefore, some studies suggest that sequential presentation of suspects in both photo arrays and lineups is the better approach because witnesses tend to make absolute rather than comparative judgments when viewing suspects individually.⁹

The NAS report concluded that additional study would benefit this discussion. Agencies are encouraged to work with their respective prosecution agencies and legal counsel in deciding whether to implement a sequential or simultaneous identification procedure. The NAS report

⁸ Although such requirements sometimes may properly be utilized during a lineup, the showup is so inherently suggestive that a court that might approve of such requirements in a lineup may find them excessively suggestive when employed during a showup.

⁹ See *Test of the Simultaneous vs. Sequential Lineup Methods: An Initial Report of the AJS National Eyewitness Identification Field Studies*.

did, however, identify certain best practices that are recommended for any type of identification procedure, including providing training to law enforcement officers on eyewitness identification; conducting blind or blinded administration of lineups or photo arrays; audio or video recording lineup and photo array procedures; giving standardized instructions to witnesses prior to viewing; and taking a confidence statement from a witness who makes an identification at the time an identification is made.

C. General Procedures for Conducting a Lineup or Photo Array

A lineup or photo array, if properly conducted, is significantly less suggestive than a showup and hence is generally preferable. Nevertheless, officers conducting a lineup or photo array must use caution to avoid suggestive influences. Many witnesses, in an effort to please, feel obligated to select someone rather than disappoint the investigating officers. Such witnesses are often sensitive to, and strongly influenced by, subtle cues conveyed by the officers that may indicate to the witness that the officer believes that a particular individual in the lineup or photo array is the perpetrator. This makes it incredibly important that the administrator conducts the lineup or photo array—and conducts himself or herself—in a nonsuggestive manner. To prevent any potential for unintentional or inadvertent suggestion, lineups and photo arrays should be conducted in a blind manner, meaning by an administrator who does not know which person or photograph is the actual suspect. During a photo array, no one who is aware of the suspect's identity should be present. However, when a lineup is being conducted, the suspect's attorney should attend. It may also be advisable to position any legal counsel in attendance behind the witness, with instructions not to speak during the procedure, so as not to exercise any influence on the process.

Studies of witness psychology reveal that eyewitnesses tend to believe that the guilty party must be one of the individuals in the lineup or photo array. Consequently, some witnesses select the person in the lineup or photo array who most closely resembles their perception of the perpetrator, even though the perpetrator may not in fact be present. Prior to the lineup or photo array procedure, witnesses should be given the following instructions, which can facilitate an identification and help avoid misidentification.

You will be asked to look at a series of individuals.

The perpetrator may or may not be present in the identification procedure.

It is just as important to clear innocent persons from suspicion as it is to identify guilty parties.

I don't know whether the person being investigated is included in this series.

Individuals present in the series may not appear exactly as they did on the date of the incident because features such as head hair and facial hair are subject to change.

You should not feel that you have to make an identification. If you do identify someone, I will ask you to describe in your own words how certain you are.

The individuals are not configured in any particular order.

(If presenting the lineup or photo array sequentially): If you make an identification, I will continue to show you the remaining individuals or photos in the series.

Regardless of whether you make an identification, we will continue to investigate the incident.

Since this is an ongoing investigation, you should not discuss the identification procedures or results.

A wealth of research specifically on confidence levels of witnesses has demonstrated that the level of certainty of a witness is easily influenced by a variety of factors that have nothing to do with accuracy, including the most casual of comments from an officer such as "Good job." If the suspect is innocent, an inflated confidence level of a witness can derail an investigation by directing focus on the wrong person, while the true perpetrator escapes detection. At the trial level, an eyewitness who expresses complete confidence as a result of outside influence has a powerful ability to sway jurors. Criminal justice practitioners generally agree that the degree of confidence shown during testimony with regard to eyewitness identification is the single greatest factor in affecting whether jurors or a court believe that the identification is accurate, underscoring the importance of capturing the certainty a witness feels post-identification as soon as possible.

As Chief Justice William J. Brennan wrote in his dissent to the Supreme Court's decision in *Watkins v. Sowders*,

[E]yewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than

a live human being who takes the stand, points a finger at the defendant, and says "That's the one!"(emphasis in original)¹⁰

Essentially, a confidence statement is designed to improve the accuracy of an investigation by providing a more precise and comprehensive picture of the perspective of the eyewitness. It provides information to law enforcement regarding how confident a witness is about an identification, while also protecting an innocent suspect from a witness whose confidence was artificially bolstered, even if unintentionally.

Additionally, proper construction of lineups and photo arrays, including selection of fillers, has been identified as an important factor in creating a reliable eyewitness identification procedure. In determining which fillers should be presented to the witnesses in a lineup or photo array, the following principles should be observed:

- The lineup or photo array should consist of at least six live persons or photos with a minimum of five fillers.
- If there is more than one suspect, include only one in each lineup or photo array.
- Place suspects in different positions in each lineup or photo array, both across cases and with multiple witnesses in the same case.
- The lineup or photo array should consist of individuals who match the description of the perpetrator provided by the eyewitness while also assuring that individuals are of similar physical characteristics. Witnesses tend to select those who stand out from the rest of the group in any significant way. In addition, agencies are strongly cautioned against the use of plainclothes law enforcement officers in lineups or photo arrays because they may have been seen by the witness in the community, upon visits to the police station, and therefore look familiar.
- The individuals who appear in the lineup or photo array should be reasonably similar with respect to age; height; weight; hair color, length, and style; facial hair; clothing; and other characteristics such as glasses or visible tattoos. Of course, the individuals must be of the same race and sex. Absolute uniformity of the lineup or photo array participants is obviously unattainable and is not procedurally necessary.¹¹
- Create a consistent appearance between the suspect and the fillers with respect to any unique or unusual feature (e.g., scars, tattoos, facial hair) used to

describe the perpetrator by artificially adding or concealing that feature to the fillers.

- Lineups or photo arrays should avoid using fillers who so closely resemble the suspect that the witness cannot correctly identify the actual perpetrator.

Preparing a witness for viewing the lineup or photo array is another important consideration. Preparation should be limited to nonsuggestive statements, such as those explaining the procedure that will be used and making it clear that, in the case of lineups, the individuals in the lineup will be unable to see the witness. Officers should avoid taking any action or making any statement that will adversely affect the validity of the lineup or photo array. In particular, before a lineup or photo array procedure, officers should avoid showing the witness any photos of the suspect,¹² conducting a showup with the suspect, or allowing the witness—accidentally or otherwise—to see the suspect, such as in an office or holding cell prior to the lineup or photo array.

Whenever possible, a blind procedure should be utilized. That is, the procedure should be conducted by an administrator who is not familiar with the case or the identity of the suspect. As previously discussed, this helps to minimize the possibility that officers conducting the investigation will, in their strong desire to solve the case, convey (inadvertently or otherwise) cues to the witness regarding which person is the suspect or put pressure on the witness to choose somebody. If it is not possible to use a blind administrator, steps should be taken to ensure that the administrator conducting the procedure cannot see the individual or photo being viewed by the eyewitness, in what is referred to as a blinded procedure.

As previously mentioned, the eyewitness may be greatly influenced by the actions, intentional or not, of the administrators or other individuals present during the procedure. Statements that encourage the witness to make an identification should be avoided. Witnesses are anxious to please the officers, so they should not be made to feel that they should or are expected to make an identification. For example, urging a hesitant witness to make an identification or to try harder would be improper. Statements that may cause the witness to focus on a particular individual should be avoided. The same sort of statements discussed in regard to witness preparation should be avoided throughout the procedure. Officers must never prompt a hesitant witness to make an identification.

Witnesses should not be praised, congratulated, or otherwise given any affirmation for identifying the suspect. To do so may serve to reinforce a shaky identification,

¹⁰ *Watkins v. Sowders*, 449 U.S. 341 (1981).

¹¹ *United States v. Lewis*, 547 F.2d 1030, 1035 (8th Cir. 1976).

¹² Even a photo array should be avoided. This is especially true if the suspect is the only person in the photo array who is also in the live lineup.

convincing the witness that he or she has picked out the perpetrator when the witness actually has doubt. In addition to increasing the chances of a miscarriage of justice, this may lead to suppression of a later in-court identification of the perpetrator by the same witness.

The following should also be observed in conducting lineups or photo arrays:

- The lineup or photo array shall be presented to one witness at a time. Courts, including the U.S. Supreme Court, have disapproved of multiple-witness lineups.¹³ If more than one witness is to view a lineup, the witnesses should be kept separated prior to the procedure and should not be permitted to discuss the case with each other, compare descriptions, and so forth. While discussions between witnesses following a lineup or photo array will presumably not render any previously made identification invalid, it may affect the admissibility of a subsequent in-court identification of the defendant by these witnesses during the trial itself and, hence, should be discouraged.
- If multiple identification procedures are conducted with the same witnesses, officers should not include the same suspect in more than one procedure with the same witness. Seeing the same face in a second lineup or photo array may cause the witness to erroneously recognize the person as the perpetrator, merely because the face is familiar from another identification procedure.¹⁴ Because of this possibility, the courts have disapproved of the practice of conducting multiple lineups or photo arrays with the same suspect and witness.¹⁵
- The administrator should document any statements made by the witness before, during, and after the lineup or photo array procedure. Most critically, at the time an identification is made, a confidence statement should be elicited from the witness in his or her own words. The administrator should also ask the witness to complete and sign a lineup or photo array form.
- The lineup or photo array procedure should be video or audio recorded in its entirety. Recording the procedure provides an accurate record of the proceeding in the event the identification procedure is called into question, or the actual identification process is necessary to assist the prosecution at trial. In addition, a written record should be created

including the administrator's name; procedures used; date, time, and location of the procedure; number of fillers; names of those present during the procedure; in the case of sequential procedures, whether the lineup or photo array was viewed more than once by the same witness; and an explanation for the lack of recording, if appropriate. If a lineup is not video recorded, officers should take and preserve a still photograph of each individual in the lineup.

D. Photographic Arrays

In addition to the preceding guidelines, the following recommendations are made specifically regarding photo arrays:

- The photographs themselves should be similar. For example, color photographs and black and white photographs should not be mixed; they should be of approximately the same size and composition.
- Mug shots should not be mixed with snapshots since they are generally recognizable as such.
- If mug shots are used, or if the photographs otherwise include any identifying information regarding the subject of the photograph, this information should be covered so that it cannot be seen by the witness. If only some of the photos have such information, the corresponding portions of photos should be covered so that none of the photos look different.
- The array should not include more than one photo of the same suspect.
- In cases where a sequential photo array is utilized, the following additional considerations apply;
 - If a blind administrator is not available, the following alternative blinded procedure may be used:
 - ♦ Place the suspect and at least five filler photos in separate folders. Include two additional folders each containing a blank sheet of paper, for a total of eight (or more depending on the number of fillers used).
 - ♦ The administrator will take one folder containing a known filler and place it to the side. This will be the first photo in the series. The administrator should separately set aside the two blank folders, which will be added to the end of the sequence.¹⁶

¹³ See *Gilbert v. California*, 388 U.S. 263 (1967).

¹⁴ "The problem is that successive views of the same person create uncertainty as to whether an ultimate identification is based on memory of the original observation or memory from an earlier identification procedure." *State v. Henderson*, 208 N.J. 208, 255 (2011).

¹⁵ See *Foster v. California*, 394 U.S. 440 (1969).

¹⁶ As mentioned previously, the witness often feels compelled to select an individual from a photo array or lineup in order to please the investigator. Understanding this desire, the blank folders are included at the end of the photo array in an effort to prevent the witness from selecting the final photograph due to concerns that there are no additional photos from which to choose.

The administrator should then shuffle the remaining folders (containing one suspect and the remainder of fillers) such that he or she cannot see how the lineup members are ordered. These shuffled folders will follow the first filler photo and precede the two blank folders. The stack of photos is now ready to be shown to the witness.

- ♦ The administrator should position himself or herself so that he or she cannot see inside the folders as they are viewed by the witness.
- The witness should be asked if he or she recognizes the person in the photo before moving onto the next photo. If an identification is made before all of the photos are shown, the administrator should tell the witness that he or she must show the witness all of the photos and finish showing the sequence to the witness, still asking after each photo if the witness recognizes the person in the photo.
- If possible, the array should be shown to the witness only once. If, upon viewing the entire array the witness asks to see a particular photo or the entire array again, the witness should be instructed that he or she may view the entire array only one additional time. If a second viewing is permitted, it must be documented.
- The photo array should be preserved for future reference. In fact, in some states, failure to preserve the array will lead to suppression of the identification process.

E. Lineups

In addition to the guidelines provided above, there are two additional procedures recommended for lineups. These include

- if a blind administrator is unavailable, the administrator shall take all reasonable precautions to avoid giving any unintentional cues to the witness; and
- that officers should ensure that all persons in the lineup are numbered consecutively and are referred to only by number.

With regard to asking live lineup participants to speak or move in a certain way, the U.S. Supreme Court has held that requiring a lineup participant to speak, even to utter the same words used by the criminal does not violate the Fifth Amendment, since such action is not “testimonial.”¹⁷ Other actions, such as standing, walking, gesturing, and the like are similarly not violative of the suspect’s rights within the meaning of the Fifth Amendment. Similarly,

requiring lineup participants to wear certain clothing has been held to be outside of the protections afforded by the Fifth Amendment.

The most significant difference between the lineup and photo array procedures is that suspects in a lineup have a right to the presence of counsel during that procedure, whereas suspects depicted by a photograph in an identification procedure do not. In 1967, the Supreme Court held that a suspect has a right to the presence of counsel at a post-indictment lineup.¹⁸ Subsequently, the Court expanded this ruling to provide for a right to counsel at any lineup conducted after formal adversary proceedings have been initiated against the suspect, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.¹⁹ There is, however, no right to have counsel present at a lineup conducted before such adversary proceedings have been initiated. These same rules apply to showups. By contrast, there is no right to counsel during the administration of a photo array.²⁰

The purpose of having counsel present at a lineup is to enable counsel to detect any suggestiveness or other irregularities in the procedure. It should be recognized, however, that the presence-of-counsel requirement may actually help law enforcement in certain instances. First, the agency’s goal should be to avoid any possibility of an erroneous identification and a resultant miscarriage of justice. Therefore, the presence of counsel may be regarded as a positive step in preventing any such occurrence. In addition, if counsel is present and acquiesces to the procedure being employed, this may preclude any subsequent defense contention that suggestiveness or other impropriety occurred. This scrutiny or consent will strengthen the prosecution’s case.

To the extent that defense counsel is responsible and objective, cooperation with counsel in constructing and conducting a nonsuggestive and otherwise proper identification procedure may benefit all concerned. Therefore, it is the responsibility of the primary investigating officer to do the following:

- Schedule the lineup on a date and at a time that is convenient for all concerned parties, including the prosecuting attorney, defense counsel, and any witnesses.

¹⁸ *Wade*, 388 U.S. 218; *Gilbert*, 388 U.S. 263.

¹⁹ *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972).

²⁰ *United States v. Ash*, 413 U.S. 300 (1973). At least one state supreme court has held that where simulated lineups are filmed or videotaped for later exhibition, there is no right to have counsel present when the film or videotape is subsequently shown to witnesses, *People v. Lawrence*, 481 P.2d 212 (1971). Showing witnesses a film or tape of a previously recorded simulated lineup has become known as a “*Lawrence* lineup.”

¹⁷ Certain states may prohibit this practice, such as Massachusetts.

- Ensure compliance with any legal requirements for transfer of the subject to the lineup location if he or she is incarcerated at a detention center.
- Ensure that the suspect’s right to counsel is scrupulously honored and that he or she is provided with counsel if requested.
- Obtain proper documentation of any waiver of the suspect’s right to counsel.
- Allow counsel representing the suspect sufficient time to confer with his or her client prior to the lineup and to observe the manner in which the lineup is conducted.

F. Summary

Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work. Proper precautions must be followed by officers if they are to use eyewitness identifications effectively and accurately.

Acknowledgment

This document was developed by the IACP Law Enforcement Policy Center in conjunction with Chief William Brooks of the Norwood (MA) Police Department and The Innocence Project.

Every effort has been made by the IACP Law Enforcement Policy Center staff and advisory group to ensure that this document incorporates the most current information and contemporary professional judgment on this issue. Readers outside of the United States should note that, while this document promotes procedures reflective of a democratic society, its legal basis follows United States Supreme Court rulings and other federal laws and statutes. Law enforcement administrators should be cautioned that no “model” policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered, and should therefore consult its legal advisor before implementing any policy. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities among other factors. This document is not intended to be a national standard.

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