

EYEWITNESS IDENTIFICATION

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I. GENERAL CONSIDERATIONS AND GUIDELINES

Police identification procedures are an important consideration for establishing the identity of a criminal offender. They are equally significant for clearing a suspect who has been wrongfully accused.

The identification of criminal offenders in this way must be approached with extreme caution as this evidence may be excluded by the court if it is improperly obtained. The court will carefully examine the identification procedure and the manner in which it was conducted to determine whether the witness was influenced, intentionally or unintentionally, by the police. Even in those cases where eyewitness identification is admitted by the court, the jury may still not be persuaded if sufficient doubt can be raised as to its reliability.

Officers must be careful to ensure that their identification procedures are not conducted in a suggestive manner and that they do not lead to a likelihood of misidentification.

Of all the various forms of eyewitness identification procedures, lineups are the most reliable. This is largely due to the fact that a properly conducted lineup is objective and scientific. It presents the suspect in person for examination by the witness in a comparison setting that

removes unduly suggestive elements that could contribute to a mistaken identification. At the same time, it fairly tests the witness' ability to recall the appearance of the perpetrator and identify him/her in person.

II. **POLICY**

- A. It is the policy of this department that in employing identification procedures which are intended to lead to the identification of persons who are suspected of or charged with criminal offenses that:
 - 1. The person subjected to the identification procedure is afforded his/her Sixth Amendment right to counsel, when required, and
 - 2. The Due Process provisions of the Fifth and Fourteenth Amendments, which require identification procedures utilized by the police to comply with standards of fairness so as not to be unduly suggestive, are protected.

III. **DEFINITIONS**

- A. *Showup*: The presentation of one suspect to an eyewitness in a short time frame following the commission of a crime.
- B. *Photo Array*: The showing of several photographs of different individuals to an eyewitness for the purpose of obtaining identification.
- C. *Lineup*: The presentation of a number of individuals, including the suspect, simultaneously before an eyewitness.

IV. **PROCEDURE**

- A. **Right to Counsel During Identification Procedure**
 - 1. It is important to understand the point at which a suspect's right to counsel attaches. The Supreme Court has determined that this right to counsel begins when any "adversary judicial proceeding" has been initiated "whether commenced by way of formal charge, preliminary hearing, indictment, information, or arraignment." Thus, once a suspect has been arraigned or indicted, his/her right to have

counsel present at any in-person identification procedure attaches. However, no right to the presence of counsel exists simply because a complaint has been filed nor even if an arrest warrant has issued.

2. Even though a suspect's right to the presence of counsel at an identification may not have attached, if counsel is present or readily available, it may be advisable to have counsel present (unless doing so will seriously delay the police investigation).
 - a. The presence of the suspect's attorney may contribute to a more fair and objective identification proceeding.
 - b. In addition, if counsel fails to object to certain aspects of the identification when it is conducted, the suspect may be held to have waived any objection later at a court proceeding.
3. There is no requirement for an attorney to be present when an identification in the field is made of a suspect who has been apprehended during the period immediately after the commission of a crime. Immediately in such cases is considered generally to be within two hours.
4. There is no right to counsel under circumstances where an identification takes place accidentally; i.e., in a manner that was not contrived, planned, or anticipated by the police.
5. No right to counsel attaches to non-corporal identification procedures, such as photographs, composite drawings, or hypnosis, whether conducted before or after the initiation of adversarial criminal proceedings.

B. Due Process Considerations

1. Due Process requirements dictate that identifications be made in a fair, objective, and suggestion-free manner, at least as far as police words and actions are concerned. Due Process considerations are violated when identification procedures arranged and/or conducted by the police are so impermissibly suggestive as to give rise to the likelihood of irreparable misidentification.¹

2. In determining whether a specific identification procedure is unnecessarily suggestive, all of the circumstances surrounding the procedure must be considered.
3. The factors which will influence the court's determination of whether a specific identification procedure was unduly or unnecessarily suggestive include:
 - a. Whether police conduct was reasonable in light of the circumstances, e.g., suspect under arrest or only temporarily detained.
 - b. Amount of time between incident and identification.
 - c. Isolation of the suspect; whether the suspect is singled out in some manner.
 - d. Whether the police communicate the belief that the suspect committed the crime for which identification is sought to be made.
 - e. Whether the suspect is viewed jointly by two or more witnesses.
 - f. Existence of police urging of witness to make identification.
 - g. Existence of any exigency.

C. **Showup Identification**

1. Because of the inherent suggestiveness of the practice, showup identification procedures should be used only promptly after a criminal incident where it is essential to an on-going police investigation or under exigent circumstances, such as the near death of the only available witness.
2. Every field showup or other one-on-one confrontation between a suspect and a witness that is arranged by the police must be as fair and suggestion-free as possible.² However there is no requirement that an attorney be present.³

NOTE: Unless absolutely necessary for the safety of the officers or others, the suspect should not be viewed when

[s]he is handcuffed, inside a police vehicle, in a cell, or in jail clothing.

3. If a suspect is taken into custody within a short time after the commission of the crime, [s]he may be taken to a location where [s]he can be viewed by a witness for possible identification; or, [s]he may be detained at the site of the arrest and the witness taken there to view him/her.
 - a. In all such cases, the suspect should be viewed by one witness at a time and out of the presence or hearing of other witnesses.
 - b. Those witnesses who have confronted the suspect should not be permitted to communicate with those who have not.
 - c. The same suspect should not be presented to any witness more than once.
4. Police officers must not do or say anything that might convey to the witnesses that the suspect has admitted guilt, that stolen property has been recovered, that any weapons used have been seized, or that they believe that the suspect is the guilty offender.
5. Detaining a person who fits the description of a suspect in order to arrange a field showup with a witness has been held to constitute a part of an officer's right to conduct a threshold inquiry where the officer has reason to believe the suspect has committed a crime, but probable cause to arrest has not yet developed. See department policy on **Stop, Frisk and Threshold Inquiries**.
 - a. As with any threshold inquiry situation, if the officer has reason to believe the suspect is armed, the officer may conduct a pat-frisk for weapons.
 - b. If the witness fails to make a positive identification and sufficient other evidence has not developed to provide probable cause to make an arrest, the suspect must be permitted to leave. However, his/her name, address and identification should be obtained, if the suspect is willing to provide them.

6. Officers may transport victims or witnesses in police vehicles to cruise the area where a crime has just occurred in order for them to point out the perpetrator, if possible. While cruising the area, officers must be careful not to make any statements or comments to the witnesses which could be considered suggestive.
7. When a showup identification is arranged in an emergency situation, where either a witness or a victim is in imminent danger of death or in critical condition in a hospital, and the circumstances are such that an immediate confrontation is imperative, the emergency identification procedure shall be conducted in a manner consistent with the critical physical condition of the patient.
 - a. Seek the permission of the hospital authorities or the patient's own physician to conduct the confrontation.
 - b. Emergency identifications are subject to all fundamental requirements of fairness and must not be tainted by any suggestive remarks or gestures by the police.
8. A full report of every attempted showup identification (whether successful or unsuccessful) shall be submitted in accordance with department procedure.
 - a. Officers shall make written notes of any identifications and any statements made by witnesses at the time of confrontation with the suspect.
 - b. Officers should be particularly alert to note any spontaneous exclamations made at that time and all statements by the witnesses should be incorporated in the officers' report.
 - c. All significant circumstances should be reported, including the time, place, and all persons present at the scene of the confrontation.

D. Photographic Identification

1. The use of photographs to establish or verify the identity of a criminal offender is a valuable investigative procedure. Although there is no right to an attorney during a

photographic identification procedure, the same Due Process considerations requiring the procedure to be fair, objective, and suggestion-free apply.⁴

2. Photographs for identification purposes should be displayed to witnesses as soon as possible after the commission of a crime. This is when their memory is still fresh and the opportunity for a positive identification is at its greatest.
3. In conducting photographic identification, officers shall:
 - a. Place the suspect's photograph in a group of at least six to eight other similar type photographs of individuals who are reasonably similar in age, height, weight, and general appearance.
 - b. Try to use photographs of the same size and basic composition and avoid mixing color and black and white photographs. Never mix mug shots with other snapshots or include more than one photograph of the same suspect, whenever possible.
 - c. Before displaying photographs of a suspect to a witness, remove or completely cover any portions of mug shots or other photographs that provide identifying information on the subject or anything that could suggest to the witness that the suspect has a criminal record and similarly cover all other photographs used in the array.
 - d. Allow each witness to view the photographs independently, out of the presence and hearing of the other witnesses.
 - e. Never make suggestive statements that may influence the judgment or perception of the witness.
4. In order to prove the fairness of the procedure and to enhance the reliability of an in-court identification, the photo array should be preserved in the exact group from which the identification was made, together with full information about the identification process. If this is not possible, keep an accurate record of the photographic display for this same purpose.

5. Once an arrest has been made as a result of a photographic identification, arrangements should be made for a lineup to test the identification if the crime is a serious one, if the suspect's appearance is still generally the same as it was at the time of the offense, and if it is practical to conduct such a lineup. If there are a number of witnesses to a particular crime and the first few witnesses identify a photograph of a suspect, the photographic display should be discontinued and arrangements made for a lineup.
6. In the investigation of a recently committed crime, when there is no definite suspect, it is advisable to have those eyewitnesses who had a good opportunity to clearly observe the criminal offender come to the police station to look through photographic files or books in an effort to discover that offender.
 - a. Remove or hide any information on the photographs that might in any way influence the witness;
 - b. Permit the witness to look at a number of photographs before making his/her selection;
 - c. Do not call to the attention of the witness any particular photograph;
 - d. Carefully note and report any identification made.

E. Lineup Identification

1. All police lineups for possible eyewitness identification shall be conducted under the direction of the appropriate supervisor and, when feasible, after consultation with the District Attorney's office.
2. A suspect cannot be detained without probable cause to arrest and be compelled to participate in a lineup.⁵
3. Before any suspect who has been arraigned or indicted is shown to eyewitnesses in a lineup for possible identification, the suspect must be specifically informed of his/her right to have an attorney present at the lineup and of his/her right to be provided with an attorney without cost if [s]he is unable to afford such legal counsel. Unless a valid waiver is voluntarily and knowingly made, in writing, if possible, no

such identification may proceed without the presence of the suspect's attorney.⁶

- a. A suspect has no right to have counsel present at a lineup if [s]he has not been arraigned or formally charged.
 - b. If the suspect has a right to have an attorney present, permit him/her to call for his/her own attorney or take him/her to court so that an attorney may be appointed.
 - c. If an attorney has been retained by the suspect or appointed by the court, such attorney shall be notified of the time and place of the identification procedure and the circumstances relating to the offense charged.
 - d. If the suspect knowingly and voluntarily waives his/her right to have an attorney present (preferably in writing), the lineup may then be held with every effort to ensure that the suspect is protected from any prejudicial procedures.
4. To conduct the lineup, select a group of at least five or six other persons of the same race, sex, and approximate height, weight, age, hair color, length and style, facial hair, clothing and other characteristics, such as glasses, as the suspect.
- a. Do not display a suspect in any lineup that is not suitable and properly composed.
 - b. Advise the accused that [s]he may take any position in the lineup which [s]he prefers and may change positions prior to summoning each new witness.
 - c. All persons in the lineup must be numbered consecutively and be referred to only by number.
 - d. A complete written record of the lineup proceedings shall be made and retained, including the name, address, and telephone number of each lineup participant.
 - e. The entire lineup procedure shall be recorded, photographed, or video taped for possible future court presentation.

- f. Ensure that witnesses are not permitted to see the accused or shown any photographs of the accused immediately prior to the lineup.
 - g. Ensure that only one witness views the lineup at a time and that witnesses are not permitted to speak with one another during the proceedings.
 - h. Scrupulously avoid using statements, clues, casual comments, or providing unnecessary or irrelevant information that in any manner may influence the witness' decision-making process or perception.
 - i. Make a written notation of any identification made (or any failure to make an identification), including any spontaneous exclamation or reaction by a witness, and incorporate all of this information in the official departmental report.
- 5. If there are two or more suspects of a particular crime, present each suspect to witnesses in separate lineups. Different people should be used to compose each lineup, to the extent possible.
- 6. When an attorney for the suspect is present, the attorney should be permitted to make reasonable suggestions regarding the composition of the lineup and the manner in which it is to be conducted. Any suggestions made by the suspect's attorney should be included as part of the lineup report.
 - a. Allow counsel representing the accused sufficient time to confer with his/her client prior to the lineup.
 - b. Once the line-up is commenced, the suspect's attorney should function primarily as an observer and [s]he should not be permitted to converse with the lineup participants, or with the witnesses, while the lineup is underway.
 - c. The suspect's attorney at a lineup is not entitled to hear any discussions between a witness and the police.

- d. The suspect's attorney is not legally entitled to the names and addresses of the witnesses attending a lineup.⁷ If an attorney insists on having information about lineup witnesses, advise him/her to direct his/her request to the District Attorney's office.
- 7. During a lineup, each participant may be directed to wear certain clothing, to put on or take off certain clothing, to take certain positions or to walk or move in a certain way.⁸ All lineup participants shall be asked to perform these same actions. Each lineup participant may also be directed to speak for voice identification purposes. See Section IV(F)
- 8. After a person has been arrested, [s]he may be required to participate in a lineup in regard to the crime for which [s]he was arrested.⁹ After arrest, a suspect may lawfully refuse to participate in a lineup only if [s]he has a right to have counsel present (post arraignment/indictment) and the counsel is absent through no fault of the suspect or his/her attorney. Otherwise, if the suspect refuses to participate, [s]he should be informed that [s]he has no legal right to do so and that his/her refusal can be used as evidence against him/her in court.
 - a. If the suspect wrongfully refuses to participate in the lineup, arrangements should be made for an alternative identification procedure.
 - b. In serious criminal cases, the District Attorney's office should be asked to apply for a court order to compel the suspect to participate in a lineup or else face a citation for contempt of that court order.

F. Voice Identification

- 1. Although considerably less common than visual identifications of the suspect's person, voice identifications may be helpful to criminal investigations where the victim or other witnesses was blind, the crime took place in the dark, where their eyes were covered by the perpetrator or they were never in the same room with the perpetrator but did hear his/her voice.

2. As with any in-person identification or confrontation, if the suspect has been arraigned or indicted, [s]he has a right to the presence of counsel at the voice identification procedure.
3. Where a voice identification is attempted, the following procedures should be employed to the extent possible:¹⁰
 - a. As in a lineup, there should be at least six persons whose voices will be listened to by the witness; one-on-one confrontations should be avoided;
 - b. The suspect and other participants shall not be visible to the voice witness; this can be done by blindfolding the witness, using a partition, having the witness turn his/her back or similar means;
 - c. All participants, including the suspect, shall be instructed to speak the same words in the same order;
 - d. If the victim or witness recalls hearing the perpetrator use specific words, those words should not be ones the suspect and other participants are instructed to speak; the lineup participants should speak neutral words in a normal tone of voice;¹¹
 - e. When both a visual and voice lineup are done, the lineup participants shall be called in a different order and by different numbers.¹²
4. As with any identification procedure, police should avoid any words or actions that suggest to the voice witness that a positive identification is expected or who they expect the witness to identify.
5. Any voice identification shall be detailed in the officer's report in accordance with departmental requirements.

G. Composite Drawings and Identi-Kit

1. An artist's sketch, computerized drawing, or other depiction should be considered in a major crime investigation when a witness displays a good recollection of the physical appearance and features of the criminal offender but has not been able to identify a suspect from available photographs.

2. A composite drawing, computer generated drawing, or Identikit sketch is admissible in court as evidence, provided a witness can testify that the sketch is a fair and accurate representation of the person seen by the witness.
3. Two or more witnesses may collaborate in preparing the drawing or sketch, provided that officers do not use procedures that are unnecessarily or unduly suggestive.

H. Station House and Court Room Identification

1. Prior to conducting any courthouse identification procedure, police shall consult the District Attorney's office.
2. The same right to an attorney and the same Due Process suggestiveness considerations that apply to all other identification procedures also apply to station house and court room identifications.
 - a. If the suspect has been arraigned or indicted, [s]he has a right to have counsel present at any in-person identification/confrontation.
 - b. One-on-one confrontations and informal viewings of the suspect by a witness must be done in such a manner as to minimize any undue suggestiveness.
 - c. In no way should the police state or suggest that the suspect has been arrested or booked or that [s]he has made any confession or incriminating statement or that any incriminating evidence has been uncovered. The witness' identification, particularly if it takes place in a police station or court room, must be a result of his/her recollection of the appearance of the perpetrator and must not be unduly influenced by information or suggestions originating from the police.

I. Hypnotically Aided Identification

1. Hypnotically aided testimony is not admissible at trial. Memory recalled prior to hypnosis which was the subject of a hypnotic session may be excluded as hypnotically aided.¹³
2. In light of the serious consequences which could result from asking or permitting a witness to undergo a hypnotic

session, such a procedure shall not be undertaken until the entire matter has been reviewed by appropriate police officials, the District Attorney's office, and appropriate hypnosis experts.

¹ *Com. v. Johnson*, 650 N.E.2d 1257, 420 Mass. 458 (1995)

² *Com. v. Storey*, 391 N.E.2d 898, 378 Mass. 312 (1979)

³ *Com. v. Bumpus*, 238 N.E.2d 343, 354 Mass. 494 (1968)

⁴ *U.S. v. Ash*, 413 U.S. 300 (1973)

⁵ *Com. v. Bumpus*, 209 N.E.2d 167, 362 Mass. 672 (1972)

⁶ *Com. v. Mendes*, 281 N.E.2d 243, 361 Mass. 507 (1972)

⁷ *U.S. v. Wade*, 388 U.S. 218 (1967)

⁸ *Id.*

⁹ *Id.*

¹⁰ *Com. v. Marini*, 378 N.E.2d 51, 375 Mass. 510 (1978)

¹¹ *Id.*

¹² *Com v. Demaria*, 703 N.E.2d 1203, 46 Mass. App. Ct. 114 (1999)

¹³ *Com. v. Kater*, 447 N.E.2d 1190, 388 Mass. 519 (1983)