

## 1.12 EYEWITNESS IDENTIFICATION

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# EYEWITNESS IDENTIFICATION

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Chief Nathan C. Hagglund			

## I. GENERAL CONSIDERATIONS AND GUIDELINES

The identification of a suspect by an eyewitness can be an important component of a criminal investigation, but can be equally significant in clearing an innocent suspect. Many people who have been convicted of serious crimes, only to later be exonerated by scientific evidence, were originally convicted based in large part on mistaken identification by a witness. Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in over 75% of convictions overturned through DNA testing.<sup>1</sup> The West Brookfield Police Department recognizes that it is as much the responsibility of the police to protect the innocent from conviction as it is to assist in the conviction of the guilty.

The identification of criminal offenders must be approached with extreme caution as the court may exclude eyewitness evidence if it determines that police methods were unnecessarily suggestive.

Due process requires that identifications be conducted in a fair, objective, and non-suggestive manner. Due process is violated when identification procedures arranged and/or conducted by the police are unnecessarily suggestive and conducive to irreparable mistaken identification.<sup>2</sup>

Prior to conducting an identification procedure, officers should take from the witness and document a full description of the offender.

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If practicable, the officer should audio and/or video record the procedure and the witness' statement of certainty. If not, the officer should jot down the witness' exact words and incorporate them into his/her report. The witness should be asked to initial and date the front of the photograph selected.

A report of every show-up, photo array, line-up or voice identification procedure, whether an identification is made or not, shall be submitted. The report shall include a summary of the procedure, the persons who were present for it, instructions given to the witness by the officer (this should be accomplished by submitting the appropriate witness instruction form), any statement or reaction by the witness, and any comments made by the witness regarding the identification procedure.

## II. POLICY

It is the policy of the West Brookfield Police Department that:

1. Eyewitnesses will be given specific instructions prior to being shown a suspect;
2. Photo arrays and line-ups will be conducted using sequential rather than simultaneous presentation; and
3. Photos arrays, line-ups and voice identifications will be conducted using blind administration.

## III. DEFINITIONS

**SHOW-UP:** The presentation of one suspect to an eyewitness shortly after the commission of a crime.

**FIELD VIEW:** The exposure of an eyewitness to a group of people in a public place on the theory that the subject may be among the group. A field view differs from a show-up in that it may be conducted well after the commission of the crime, and may be conducted with or without a suspect in the group.

**PHOTO ARRAY:** The showing of photographs of several individuals to an eyewitness for the purpose of obtaining an identification.

**LINE-UP:** The live presentation of a number of people to an eyewitness for the purpose of obtaining an identification. A line-up differs from a field view in that it is conducted in a controlled setting, such as a police station, a known suspect is in the mix, and the participants are aware that an identification procedure is being conducted.

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**VOICE LINE-UP:** A procedure whereby a witness is permitted to hear the voices of several people for the purpose of obtaining an identification of a suspect's voice.

### IV. PROCEDURES

#### **RIGHT TO COUNSEL DURING IDENTIFICATION PROCEDURE**

Once a suspect has been arraigned or indicted, his/her right to have counsel present at an in-person identification procedure attaches. No right to the presence of counsel exists simply because a complaint has been filed, even if an arrest warrant has issued.

No right to counsel attaches for non-corporeal identification procedures, such as those involving photographs or composite drawings, whether conducted before or after the initiation of adversarial criminal proceedings.

#### **WITNESS INSTRUCTIONS [42.2.11(3-D)] [42.2.12(2-D)]**

An officer conducting an identification procedure will read the witness a set of instructions that include the following:

1. The person who committed the crime may or may not be (the person, or in the set of photographs) you are about to view.
2. You should remember that it is just as important to clear innocent persons from suspicion as to identify guilty parties.
3. The individuals you view may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change. (Not for use during show-ups or voice identifications.)
4. Regardless of whether or not you select someone, the police department will continue to investigate the incident.
5. The procedure requires the officer to ask you to state, in your own words and without using a numerical scale, how certain you are of any identification. **[42.2.12(2-E)]**
6. If you do select someone, please do not ask the officer questions about the person you have selected, as no information can be shared with you at this stage of the investigation. **[42.2.12(2-F)]**

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7. Regardless of whether you select a person, please do not discuss the procedure with any other witnesses in the case.

These instructions are available on the department's show-up card, photo array instruction form, and line up instruction form. These documents shall be used whenever possible and are available both electronically and in hard copy in the department's forms files.

### **SHOW-UPS**

Show-up identification procedures should only be used soon after a crime has been committed, typically within two hours, or under exigent circumstances, such as the near death of the only available witness. Show-ups should be conducted live whenever possible and not photographically. Officers should not attempt to obtain identifications using RMV photos on their cruiser MDT's, unless a dire emergency exists.

When a show-up 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 non-suggestive manner. **[42.2.12(2-A)]**

Every show-up must be as fair and non-suggestive as possible.<sup>3</sup> Specifically, if the suspect is handcuffed, he/she should be positioned so that the handcuffs are not visible to the witness. Unless necessary for the safety of the officers or others, the suspect should not be viewed when he/she is inside a police vehicle, in a cell, or in jail clothing.

Detaining a person who fits the description of a suspect in order to arrange a show-up is lawful where the officer has reasonable suspicion that the suspect has committed a crime, even if probable cause to arrest has not yet developed.

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. His/her identity should be recorded and included in the officer's report.

If a suspect is stopped within a short time after the commission of the crime, he/she may be taken to a location where he/she can be viewed by a witness for possible identification; or, he/she may be detained at the site of the stop and the witness taken there to view him/her. Transporting the witness to the site of the stop is preferred if circumstances permit.

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Suspects should not be brought into a crime scene as contamination may result. For the same reason, clothing articles found at the crime scene should not be placed on or in contact with a suspect. A suspect should not be brought back to the home of a victim or witness unless that was the scene of the crime.

Police officers must not do or say anything that might convey to the witnesses that they have evidence of the suspect's guilt. Officers should turn down their radios so that the witness they are transporting does not pick up information about the stop of the suspect. **[42.2.12(2-F)]**

The suspect should be viewed by one witness at a time and out of the presence or hearing of other witnesses. Witnesses who have viewed the suspect should not be permitted to communicate with those who have not. **[42.2.12(2-C)]**

Where multiple witnesses are available to identify the subject, officers should permit the subject to be identified by only one or two. Once one or two witnesses have identified the subject during a show-up, further identifications should be attempted by means of a photo array or line-up.

Officers may transport victims or witnesses in police vehicles to cruise the area where a crime has just occurred in order for them to attempt to point out the perpetrator. While checking the area, officers must be careful not to make any statements or comments to the witnesses which could be considered suggestive. **[42.2.12(2-B)]**

Officers should make written notes of any identifications and any statements made by witnesses at the time of confrontation with the suspect. Once a witness has indicated his/her opinion regarding the identity of the subject, the officer should ask the witness how certain he/she is of the identification. Officers should ask the witness not to use a numerical scale, but rather to indicate certainty in his/her own words. All statements by the witnesses should be incorporated into the officers' report. **[42.2.12(2-E,G)]**

### **PREPARING A PHOTO ARRAY [42.2.11(3-A)]**

Photo arrays should be shown to witnesses as soon as possible after the commission of a crime using the following procedures:

1. Include one suspect and seven fillers (non-suspects) in each array. Mark the back of each photo with numbers one through eight.
2. Try to use photographs of the same size and basic composition. Do not include more than one photograph of the same person.

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3. Use a photo of the suspect that closely depicts his/her current appearance.
4. Select fillers who generally fit the witness' description of the offender. Avoid fillers who so closely match the suspect that a person familiar with the suspect would have difficulty distinguishing the filler.
5. Ensure that photos bear no markings indicating previous arrests.
6. Create a consistent appearance between the suspect and fillers with respect to any unique or unusual feature such as facial scars or severe injuries by adding or covering the feature.
7. Once the array has been assembled, examine it to ensure that nothing about the suspect's photo makes him/her stand out.
8. Consider changing the order of photos from one witness to the next, or when a witness asks to see the array a second time.
9. When showing a witness an array containing a new suspect, avoid using fillers from a previous array.

### **SHOWING A PHOTO ARRAY**

The following procedure must be conducted in a manner that promotes reliability, fairness and objectivity:

1. Allow each witness to view the photographs independently, out of the presence and hearing of the other witnesses.
2. Never make suggestive statements that may influence the judgment or perception of the witness. **[42.2.11(3-F)]**
3. A second officer who is unaware of which photograph depicts the suspect should actually show the photographs. This technique, called blind administration, has been recommended by the National Institute for Justice, and is intended to ensure that the witness does not interpret a gesture or facial expression by the officer as an indication as to the identity of the suspect. The technique also allows the prosecution to demonstrate to the judge or jury at trial that it was impossible for the officer showing the photographs to indicate to the witness, intentionally or unintentionally, which photograph he/she should select.
4. The investigating officer or the second officer (the administrator) shall carefully read the witness instructions, using a departmental Photo Array Instruction Form if possible, and the witness should be asked to sign the form indicating that he/she understands the

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instructions. The investigating officer and the administrator should also sign and date the form.

5. For the reasons above, the officers should explain to the witness that the officer showing the array does not know the identity of the people in the photographs. The investigating officer should leave the room while the array is being shown by the administrator.
6. The officer should show the photographs to a witness one at a time and ask the witness whether or not he/she recognizes the person.
7. When the witness signals for the next photograph, the officer should move the first photograph so that it is out of sight and ask the witness whether he/she recognizes the next photograph.
8. The procedure should be repeated until the witness has viewed each photograph. If the witness identifies a subject before all the photographs have been viewed, the officer should remind the witness that he/she is required to show the rest of the photographs.
9. If the witness fails to make an identification, but asks to view the array a second time, the officer administering the identification should ask the witness if he/she was able to make an identification from the original viewing. If the witness is unable to make an identification, but feels that it would be helpful to repeat the procedure, then it is permissible to show the entire array a second time. The order of the photographs should be shuffled before the array is shown for the second time. An array should not be shown more than twice.
10. If the witness identifies the suspect, the officer should ask the witness how certain he/she is of the identification. Officers should ask the witness not to use a numerical scale, but rather his/her own words.
11. The photo array should be preserved as evidence in the same configuration as when the identification was made. **[42.2.11(3-G)]**
12. If more than one witness is to view an array and a witness has already marked one of the photos, a separate unmarked array shall be used for each subsequent witness. **[42.2.11(3-C)]**

### **LINE-UPS**

Line-ups shall be conducted under the direction of supervisor, or in their absence the Chief of Police and, when feasible, after consultation with the District Attorney's Office.

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A suspect cannot be detained and compelled to participate in a line-up without probable cause to arrest. <sup>4</sup> If a suspect refuses to participate in a line-up, the District Attorney's Office may be asked to apply for a court order to compel the suspect to cooperate.

Before any suspect who has been arraigned or indicted is shown to eyewitnesses in a line-up or other live identification procedure, he/she must be informed of his/her right to have an attorney present at the line-up and of his/her right to be provided with an attorney without cost if he/she 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.<sup>5</sup>

After a person has been arrested, he/she may be required to participate in a line-up regarding the crime for which he/she was arrested.<sup>6</sup> After arrest, a suspect may lawfully refuse to participate in a line-up only if he/she 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.

The following procedures will be used when conducting a line-up **[42.2.11(3-D)]**:

1. Select a group of at least five fillers who fit the description of the subject as provided by the witness(es). Because line-ups will be administered by an officer who does not know the identity of the suspect, the fillers selected should not be known to the officer administering the line-up. In selecting line-up fillers, abide by the guidelines for photo array fillers as described above.
2. All persons in the line-up should carry cards that identify them only by number and should be referred to only by their number. As with photo arrays, each witness must view the line-up independently, out of the presence and hearing of the other witnesses.
3. The investigating officer should explain to the witness that a second officer (the line-up administrator) will be conducting the line-up, and that he/she does not know the identity of the people in the photographs.
4. The investigating officer shall carefully read the witness instructions, using a departmental Line-up Instruction Form if possible, and the witness should be asked to sign the form

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indicating that he/she understands the instructions. The officer should also sign and date the form.

5. The investigating officer should leave the room while the line-up administrator conducts the line-up. The administrator is prohibited from providing feedback. **[42.2.11(3-F)]**
6. The line-up should be conducted so that the suspect and fillers do not actually line up, but rather so that they are displayed to the witness one at a time. This can be accomplished either by having them stand with their back to the witness and then face the witness one at a time, or by having them enter the room individually and leave before the next one enters.
7. The procedure for showing the participants to the witness and for obtaining a statement of certainty is the same as for photo arrays. If practicable, the officer should audio and video record the procedure. **[42.2.11(3-B,G)]**
8. When an attorney for the suspect is present, the attorney should be permitted to make reasonable suggestions regarding the composition of the line-up 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 line-up report.
9. Allow counsel representing the accused sufficient time to confer with his/her client prior to the line-up. Once the line-up is commenced, attorneys should function primarily as observers and he/she should not be permitted to converse with the line-up participants, or with the witnesses, while the line-up is underway. The concept of blind administration requires that no one be present who knows the identity of the suspect. For this reason, the attorney should leave the room before the line-up begins.
10. The suspect's attorney is not legally entitled to the names or addresses of the witnesses attending a line-up if the suspect has not yet been arraigned or indicted.<sup>7</sup> If an attorney in such a situation insists on having information about line-up witnesses, advise him/her to direct his/her request to the District Attorney's Office.
11. During a line-up, 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.<sup>8</sup> If officers are to ask the participants to wear an article of clothing, they must guard against circumstances where the article only fits the suspect. All line-up participants shall be asked to perform the same actions.

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12. Line-up participants must not speak during the line-up. If identification of the suspect's voice is desired, a separate procedure must be conducted. (See section on voice identification below.)

### **VOICE IDENTIFICATION**

Although considerably less common than visual identifications, voice identifications may be helpful to criminal investigations where the victim or other witness was blind, the crime took place in the dark, the subject was masked, the witness' eyes were covered by the perpetrator, or they were never in the same room with the perpetrator but heard his/her voice. If officers wish to conduct a voice identification procedure with a witness who also saw the subject, they must first consult with the a detective supervisor, or in his/her absence the Chief of Police or the Deputy Chief and, when feasible, the District Attorney's Office.

As with any in-person identification or confrontation, if the suspect has been arraigned or indicted, he/she has a right to the presence of counsel at the voice identification procedure.

As with any identification procedure, police officers 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.

Where a voice identification is attempted, the following procedures should be employed to the extent possible: <sup>9</sup>

1. The investigating officer should carefully instruct the witness by reading from a departmental Voice Identification Line-up Instruction Form, and the witness should be asked to sign the form indicating that he/she understands the instructions. The officer should also sign and date the form. If practicable, the officer should record the procedure.
2. As in a line-up, there should be at least six persons whose voices will be listened to by the witness; one-on-one confrontations should be avoided. Because line-ups will be administered by an officer who does not know the identity of the suspect, the fillers should not be known to the officer administering the procedure, and officers should abide by the guidelines for photo array and line-up fillers as described above;
3. The suspect and other participants shall not be visible to the witness; this can be done by using a partition, or by similar means;

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4. All participants, including the suspect, shall be instructed to speak the same words in the same order;
5. The words recited by the participants shall not be the ones spoken by the offender during the crime; the line-up participants should speak neutral words in a normal tone of voice;<sup>10</sup>
6. When both a visual and voice line-up are conducted, the witness should be informed that the line-up participants will be called in a different order and by different numbers;<sup>11</sup>
7. If there are two or more suspects of a particular crime, present each suspect to witnesses in separate line-ups. Different fillers should be used to compose each line-up.

Adhere to the principles of blind administration as described above. As is the case with photo arrays and line-ups, the investigating officer should leave the room while the administrator conducts the procedure.

### **COURTROOM IDENTIFICATION**

Prior to conducting any courtroom identification procedure, officers should consult the District Attorney's Office. The same right to an attorney and the same due process considerations that apply to all other identification procedures also apply to station house and courtroom identifications.

1. If the suspect has been arraigned or indicted, he/she has a right to have counsel present at any in-person identification/confrontation.
2. Live confrontations and informal viewings of the suspect by witnesses must be conducted in such a manner as to minimize any undue suggestiveness.
3. Officers shall not state or suggest that the suspect has been arrested or booked or that he/she 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 courtroom, 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.

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### **DRAWINGS AND IDENTI-KIT COMPOSITES**

An artist's sketch, computerized drawing, composite, or other depiction can sometimes aid an investigation, but are most effective when a witness has a good recollection of the offender's facial features. However, research has shown that a person selected based on resemblance to composite is more likely to be mistakenly identified. Additionally, building a composite has been shown to lower a witness' accuracy for identifying the original face.

Prior to attempting a sketch or composite, officers should take from the witness and document a full description of the offender. The following guidelines should be used when attempting a sketch or composite:

1. A sketch prepared by a trained artist is preferred over a composite.
2. Sketches and composites should not be attempted prior to the showing of a photo array or line-up.
3. Once the sketch or composite has been completed, the witness should be asked to state in his/her own words how accurately the composite reflects how the suspect appeared during the crime and a report should be prepared regarding the sketch or composite procedure.
4. The fact that a suspect resembles a sketch or composite is not, without more, probable cause to believe that the suspect is the offender.

### **MUG SHOTS**

When an investigation has failed to identify a suspect, it may be advisable to have eyewitnesses come to the police station to look through photographic files. However, officers should not resort to this procedure until other investigative avenues have been exhausted. If this procedure is used the officer should:

1. Remove or hide any information on the photographs that might in any way influence the witness;
2. Ensure that the files contain only one photograph of each individual and that the photographs are reasonably current;
3. Do not refer to the photographs as "mug shots";
4. If photographs of various formats are used, ensure that several of each format are used;

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5. Permit the witness to look at a number of photographs before making his/her selection;
6. Do not call to the attention of the witness any particular photograph;
7. Be extremely cautious before charging a subject based on this type of identification alone.

A report shall be filed following the procedure, regardless of whether an identification is made. The report should describe the photographs viewed by the witness(s).

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<sup>1</sup> The Innocence Project

<sup>2</sup> *Com. v. Ellis*, 432 Mass. 746 (2000); *Com. v. Odware*, 429 Mass. 231, 235 (1999)

<sup>3</sup> *Com. v. Storey*, 391 N.E.2d 898, 378 Mass. 312 (1979)

<sup>4</sup> *Com. v. Bumpus*, 209 N.E.2d 167, 362 Mass. 672 (1972)

<sup>5</sup> *Com. v. Torres*, 442 Mass. 554 (2004)

<sup>6</sup> *Id.*

<sup>7</sup> *U.S. v. Wade*, 388 U.S. 218 (1967)

<sup>8</sup> *Id.*

<sup>9</sup> *Com. v. Marini*, 378 N.E.2d 51, 375 Mass. 510 (1978)

<sup>10</sup> *Id.*

<sup>11</sup> *Com v. Demaria*, 703 N.E.2d 1203, 46 Mass. App. Ct. 114 (1999)