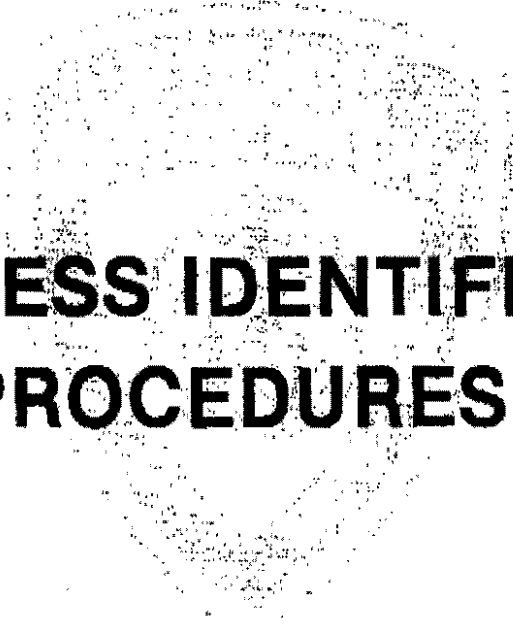


NEW YORK CITY POLICE DEPARTMENT
OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

LEGAL BUREAU

PRESENTS



EYEWITNESS IDENTIFICATION PROCEDURES

A

"CONSTITUTIONAL LAW FILM SERIES"

FORWARD

This publication has been prepared by the Legal Bureau's Criminal Justice Section as supplementary material to the "Constitutional Law Film Series" on Eyewitness Identification Procedures, entitled "DESCRIPTION AS FOLLOWS".

Copies of that training film can be secured by contacting the Police Academy or the Legal Bureau. The "Constitutional Law Film Series" is available in both 16 millimeter film as well as three-quarter inch video cassettes. Running time is 32 minutes.

Questions concerning the legal points made herein should be referred to the Legal Bureau at 374-5400.

October, 1983

INTRODUCTION

i THE NEED FOR EYEWITNESS IDENTIFICATION PROCEDURES

- A. Eyewitness identification procedures are used for those crimes where the identity of the perpetrator is at issue. Many property crimes, larceny and burglary for example, do not involve eyewitnesses, and the identity of suspects is proved by other factors, i.e., possession of stolen property, forensic evidence or confessions.
- B. Crimes where the victim and perpetrator are related, or known to each other, usually do not require eyewitness identification procedures.
- C. Eyewitness identification procedures involve lineups, use of photos, or in limited circumstances showups, (one-on-one displays of suspect to victim).

ii GENERAL RULE FOR EYEWITNESS IDENTIFICATION PROCEDURES

- A. Criminal suspects should be shown to victims along with other similar appearing persons:
 1. If the suspect is *under arrest* a lineup will be conducted.
 2. If suspect is *not in custody* a photo array (photo lineup will be used).
- B. *Showups* - The one-on-one display of a suspect to a victim is PROHIBITED *except*:
 1. prompt on the scene.
 2. hospital emergency.
- C. The general rule is to give victims or eyewitnesses a "a choice" in viewing a criminal suspect.

iii WHY COURTS REQUIRE VICTIMS TO VIEW SUSPECTS IN LINEUPS OR UNDER CIRCUMSTANCES REQUIRING A CHOICE:

- A. *Showups are extremely suggestive* in nature, and can result in Misidentification. Lineups involve a "Choice" and are therefore less suggestive than showups. In requiring "choice" the Courts were mindful of:
 1. *Human Error*
 - a. Accuracy of the witness depends upon his ability to:
 - observe
 - comprehend
 - remember
 - express facts
 - b. *Obstacles to accuracy are*:
 - physical limitations (failure to have glasses on; hearing defects; intoxication, etc.);
 - psychological limitations (fear - focusing on the weapon and not the face; emotion, etc.);
 - mental limitations (inability to judge color, weight, height, distance, etc.);
 - external conditions (lighting, weather, etc.);
 - insufficient attention (time span, caught by surprise, multiple perpetrators, etc.);
 - c. *Victims are open to suggestiveness by Police*:
 - victims want to cooperate with police;
 - victims want perpetrator caught and punished;
 - display by police of suspect alone (showup) infers that police believe suspect is guilty party;

- victims tend to believe police know what they are doing, and if in a suggestive manner, an innocent suspect is displayed to perpetrator, the victim/witness may make a wrong identification merely because he resembles the real criminal;
- words used by police ("this is the guy that did it, isn't it?");
- place where the victim sees the suspect (precinct house; cell);
- manner in which suspect is presented (handcuffed, officers surrounding him, bruised);
- bolstering the prospective identification by the victim before he sees the suspect by telling him that the suspect was caught a short distance from the scene of the crime, or that the suspect had the victim's property on him when caught, or that the suspect is a drug addict, etc.

EYEWITNESS IDENTIFICATIONS: THE PROCEDURES

I SHOWUPS

- A. The one-on-one display of a suspect to a victim is *generally prohibited* as being unnecessarily suggestive, *except*:
1. where it is conducted promptly on-the-scene; or
 2. where there is in an emergency hospital situation (witness critically injured and likely to die).
- B. Reasons why a prompt on the scene or hospital showup is allowed:
1. Witness views suspect while recollection is fresh, therefore, there is less likelihood of mistaken identification.
 2. If the suspect is *NOT* the perpetrator, he can be released with minimum delay.
 3. If the suspect is *NOT* the perpetrator, police can resume search without delay to locate the real perpetrator.

(NOTE) *ALL SHOWUPS SHOULD BE MOTIVATED BY AND CONSISTENT WITH THE ABOVE PURPOSES.*

- C. *Showup Procedures* - A police officer should consider the following factors when determining if a prompt on the scene showup is permissible:

THE TIME ELAPSED SINCE CRIME COMMITTED

1. There is no set time limit. However, if more than a few hours have elapsed since the commission of the crime, a showup should *not* be employed. Usually, the apprehension of a suspect and return to the scene for viewing will be within minutes, not hours, of the crime.

(NOTE) *THIS WOULD NOT APPLY WHERE THE VICTIM OR WITNESS IS ON HIS DEATHBED AND A LINEUP IS IMPRACTICAL.*

2. *The Area* - In order to take a suspect into custody for the purpose of bringing him back to the scene of the crime for identification, the place of apprehension must be within a distance to the crime scene that could have reasonably been reached under the circumstances (i.e., could he have gotten there in the time elapsed by foot, or using available bus or subway routes?).
3. *Detailed description or other factors warranting arrest and return to scene for identification*:
 - a. Transporting a suspect back to the scene of the crime is considered an *arrest* and must be based upon probable cause.
 - b. It is therefore very important for officers at scene of a crime to secure and broadcast a *detailed* description of the perpetrator(s).
 - c. Where a broadcast description is not detailed, or no other basis for an arrest exists, the *victim* should be brought to location where suspect is being detained, for a viewing.
4. *Showups should not be conducted at a stationhouse.*

5. *Manner in which suspect is displayed:*

- a. Never tell the witness that the perpetrator has been "caught", and that the witness must view him for identification purposes.
- b. If a witness becomes aware that a "suspect" is in custody, emphasize before the viewing that it is *only a suspect*, and that the witness must not assume it is the perpetrator before even viewing the suspect.
- c. Allow the suspect to come into the witnesses view and to comment without prompting from the police. Do not ask the witness, "Is this the man?"
- d. Request the witness to look carefully at the suspect and indicate whether or not he recognizes him, and if so, to describe what the suspect did.

D. *Group Identifications:*

1. Occasions will arise where an officer will ask a witness if he can pick out the suspect from a group of persons not in police custody.

Examples:

- Cruise area around crime and observe suspect among a group of individuals (unarranged confrontation).
- Accompany a witness to an area where suspect is likely to be with other persons, i.e., let witness watch persons coming and going from suspect's place of employment, at a park, playground, etc.

Procedures:

- a. Allow witness to view area, with instructions to look carefully at people on street, in doorways or in stores, etc.
- b. If police officer sees a possible suspect, he may draw witnesses attention in that direction.
- c. Avoid pointing out a single individual, or if necessary, do so in a non-suggestive manner. Don't say "that looks like him doesn't it?"

E. There is no right to counsel at any showup procedure.

II PHOTO IDENTIFICATION PROCEDURES:

A. The display of *SINGLE PHOTO* of suspect to a witness is *PROHIBITED*.

B. *Mug File:*

1. Used when police have *no idea* who suspect is.
2. When using mug files don't let witness know anything about the background of any person in photos.
3. Record source of photos, i.e., Mug file, CATCH and approximate number of photos viewed.

C. *Photo Arrays:*

1. Used where police have a suspect in mind, but *not* in custody.

(NOTE) *DO NOT USE A PHOTO LINEUP PROCEDURE WHEN A SUSPECT IS UNDER ARREST.*

ARRESTED PERSONS MUST BE PLACED IN A LINEUP FOR IDENTIFICATION PURPOSES.

2. Use 1 photo of the suspect and 5 other photos.
3. Persons in photos must be of similar appearance.
 - a. If suspect has a physically unique characteristic, either cover the unique feature or add it to all other photos.

- b. All photos must show suspects of similar age, race, sex, hair style, etc.
- 4. Photo themselves should be similar, so that photo of suspect does *not* stand out in any manner.
 - a. Black/white should not be shown with color photos.
 - b. Mug shots should not be shown with normal photo, unless *all* photos can be covered with tape to conceal NYSID number, so that the mug photo does not stand out.
- 5. For *all* photo ID's, officer should keep a written record of procedure including:
 - a. persons present during viewing;
 - b. if positive ID was made;
 - c. whether witness had difficulty in identifying a suspect, i.e., picked out one or more photos before picking out suspect's photo;
 - d. statements made by witness regarding photos during or after the viewing;
 - e. amount of time it took witness to identify suspect;
 - f. use photo array folder to preserve array for Court use.
- D. *Multiple witnesses rules for photo identification procedures. (Array or mug book):*
 - 1. Witnesses *must be separated* and not permitted to view photos in a group.
 - 2. Do *not* directly or indirectly give any witness assistance in picking out photos.
 - 3. Do *not* let witnesses discuss viewing among themselves.
 - 4. Do *not* tell witness whether other witness did or did not identify suspect.
- E. There is no right to counsel at a Photo Identification Procedure.

III LINEUP PROCEDURE:

A. *Prior to the lineup:*

1. *The suspect's rights:*

- a. He must be advised of his Miranda Warnings only if he is to be interrogated - whether before, during or after the "lineup".
- b. He must be advised that he is going to be placed in a lineup so that his identity may be established concerning a particular crime or crimes.
- c. There is no right to counsel at a lineup held prior to arraignment.
- d. If the suspect requests a lawyer for the lineup he should be advised that he does not have a right to a lawyer.
- e. If the suspect has a lawyer, and the lawyer requests to be present at the lineup, allow him a reasonable time to appear.
- f. If the attorney cannot, or does not appear within a reasonable amount of time, the lineup can proceed without him being present.

2. *The Attorney:*

- a. If an attorney is present at the lineup site he must be allowed to view the lineup.
- b. If the attorney for the suspect is present during the lineup, he shall be permitted to observe the manner in which the lineup is conducted. He may view the lineup in the room in which it is conducted, or, if he prefers, in a place in which he cannot be observed. (*NOTE:* if necessary, a witnesses ID may be shielded by use of a mask or face covering).

- c. The suspect's attorney shall not be permitted to talk to any of the witnesses participating in the identification of the suspect. He shall be free, however, to confer with his client. The attorney should not be permitted to hear the officer's interview of the witness after viewing the lineup.
- d. If the attorney makes suggestions to improve the fairness of the lineup, the officer conducting the lineup should follow them if he deems the suggestions reasonable and practical.
- e. The attorney should not be permitted to interfere with the conduct of the lineup but should be advised that all suggestions concerning the lineup should be addressed to the officer conducting the lineup.

3. *The Police Officer Conducting The Lineup:*

- a. The member of the service conducting the investigation should be responsible for the proper conduct of the lineup. He should personally make sure that everyone is advised as required.
- b. He should see that the identifying witnesses are interviewed prior to the lineup. If there is more than one witness, they should be interviewed separately.
- c. He should make a complete record of:
 - The details of the procedure utilized;
 - specific utterances required of any person in the lineup (e.g., speaking the words at the scene of the crime);
 - any actions of persons in lineup required to facilitate identification (e.g., trying on a hat, stand up, turning sideways);
 - all responses or statements made by viewing witnesses;
 - names, addresses/commands of all persons present, including but not limited to suspects, victims, other witnesses, police officers, assistant district attorneys, or defense counsel.
- d. He must take every necessary precaution to make sure that *no person who will participate in the lineup is seen prior to the lineup by any of the viewing witnesses*, e.g., you cannot use police officers as fillers who have had any contact with the witness.
- e. He should not tell the witness any facts concerning the apprehension of the suspect, such as possession of the weapon or recovered evidence.
- f. He should not show the victim a photo of the suspect immediately before conducting the lineup to refresh the witnesses memory.
- g. He should prepare a sheet of paper with a circle representing each person in the lineup. Each circle must bear the number which represents the positions of the persons in the lineup. Persons in the lineup occupying those positions will hold up, facing the viewers, a card bearing the number of the position he is occupying, (e.g., position number 1, 2, 3, 4, 5, or 6). This is to be used by a witness to indicate persons he recognizes. After an identification is made, this paper should be marked and retained.

B. *The Lineup Procedure*

Whether a lineup is to take place at a police facility or any other place of custody, the following procedure should be utilized (except in emergency situations and on-the-scene showups):

1. The suspect should be viewed with at least five (5) other persons (fillers). *No one can be used as a filler who may be known to any witness.*
2. All persons in the lineup must be of the same race and sex.
3. All persons in the lineup should be about the same age, height and physical makeup, e.g., an obvious 16 year old could not be shown with adults; a suspect identified as having red hair cannot be shown with black haired persons; a suspect identified as having a scar on his face cannot be shown unless all persons in the lineup have some similar markings or all persons have a bandage or something similar covering the area.
4. All persons in the lineup should be similarly clothed, e.g., if the suspect has a suit on, everyone should wear one; police officers used as fillers must not be allowed to wear any distinctive part of a

- police uniform (pants, etc.); if the suspect is dressed unusually or in a distinctive manner so as to stand out from the others, this dress should be covered in some manner.
5. The suspect should be told to select his position in the lineup. If he refuses to select his own position, he should be placed in the lineup in a fair position. Each person should hold a card bearing the number of his position in lineup, e.g., 1,2,3,4,5,6.
 6. Persons in the lineup may be in a seated position in order to equalize height variations.
 7. All non-suspect participants must be advised that they should not in any manner indicate which one of the group is the suspect, e.g., turning his head towards the suspect.
 8. There must be no interrogation of the suspect while the viewing witnesses are present.
 9. No person in the lineup may be asked to say or do anything in connection with the crime *unless all are asked to do the same thing*, e.g., say "This is a robbery" or "Put up your hands."
 10. Neither directly nor indirectly should the officers conducting the lineup, in any manner, indicate who the suspect is, nor should they assist the witnesses in their attempts to identify the suspect, e.g., "Is this the guy?" or "How about the guy in the brown coat?"
 11. Where there are two (2) or more victims or witnesses, they ***MUST NOT BE PERMITTED TO VIEW THE LINEUP AT THE SAME TIME***, nor may they be permitted to speak to each other either before or during the lineups. In addition, after one witness has viewed the lineup, he should be ***SEPARATED*** from other witnesses until all lineup procedures have been completed.
 12. No witnesses may be told that another witness did or did not make an identification of someone in the lineup.
 13. If necessary, the witnesses may be masked while viewing the lineup.
 14. If the lineup is not videotaped, a polaroid photograph should be taken of the lineup as viewed by the identifying witnesses.
 15. If at any stage of this procedure difficulties are encountered, the superior in charge should consult with the Legal Bureau or the District Attorney.

