

STATE BAR OF MICHIGAN  
Eyewitness Identification Task Force

**LAW ENFORCEMENT  
AND EYEWITNESS  
IDENTIFICATIONS:**

**A Policy Writing Guide**

2012



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## OVERVIEW

The purpose of this policy writing Guide is to provide assistance to those writing departmental policies and procedures (P&P) regarding eyewitness identification in live lineups or by photographic display. Organizational policies and procedures represent the standard of care expected of law enforcement officials. The intent is to provide agency members with guiding principles in order to conduct fair and unbiased investigations. Suspects and defendants must be afforded constitutional due process and law enforcement officials must work to eliminate potential mistaken eyewitness identifications.

Departmental regulations and procedures define an organization's values. Law enforcement officials attempt to influence decision making and discretion in a positive way by seeking ways to reduce the ambiguities of a situation through official regulations. Such regulations contain the procedures or behaviors expected of law enforcement officials in certain situations. Often, policies are written in terms of what law enforcement officials may *not* do rather than what they *should* do. Written directives can be difficult to create and may address only part of the total decision making process during eyewitness identifications. Most law enforcement officials will, of course, conform to agency requirements and administrators must immediately address deviations from official policy.

Writing valid procedures requires research and study—a P&P cannot be created overnight—but this document can provide some assistance to those creating policies in eyewitness identifications. Unquestionably, each local jurisdiction in Michigan is unique, but the essential elements of this Guide can be adapted to local needs and professional best practices. Agency policies should be written within the context of local protocols, organizational culture, and available community resources.

This Guide offers sample language for those writing departmental policies and procedures in the area of eyewitness identification. The Guide is written primarily for law enforcement agencies, but those in other disciplines may find it useful as well. In this Guide, most major headings are accompanied by a **commentary**, which is intended to help clarify the intent of each section and to provide further guidance during the writing process.

The preference is for law enforcement officials to use the sequential, double-blind procedure when practicable in both photographic and live lineups.

### A Note on Terminology

As used in this policy writing guide, a *double-blind* presentation or lineup means the law enforcement official (and witness) do not know which photograph or person is the suspect. A *sequential* presentation is a display of photographs or persons one at a time, where the law enforcement official retrieves one before presenting another. A *simultaneous* presentation is a display of photographs or persons presented at the same time, either manually constructed or computer generated. A *showup* is the presentation of a live person in the field who is close in time and proximity to the incident under investigation. A *confidence statement* is a witness's statement about his or her selection and the confidence with which it is made. It is taken immediately after the selection has been made.

## PURPOSE

The purpose of this policy is to provide procedures for obtaining objective results when preparing and conducting lineups and showups. Eyewitness identifications include both photographic displays and live in-person presentations. This policy defines the agency's commitment and the law enforcement official's responsibility in maintaining constitutional protections and due process of law during investigations involving eyewitness testimony. The overall purpose of this policy and procedure is to offer guidance when conducting eyewitness identification. This policy identifies the most fair and unbiased set of procedures that is applicable to eyewitness identifications, regardless of the complexity of the investigation. The establishment of this policy is intended to help mitigate ambiguity in the minds of law enforcement officials and to engender confidence when exercising judgment in the performance of their duties.

## Goals

The overall goals of the agency's eyewitness identification policy include:

- Documentation by the law enforcement officials during eyewitness identifications;
- Photographic lineup presentations;
- Live lineup presentations;
- Instructions to witnesses; and
- Post-presentation interview and documentation.

## POLICY

It is the policy of this agency that eyewitness identifications be conducted in a manner most likely to assess witnesses' true and reliable recollections in compliance with state and federal constitutional requirements. Agency members shall afford witnesses, suspects, and defendants all legal rights that are afforded any citizen. The core objectives of this policy are to ensure constitutional rights by improving the ability of law enforcement officials to act appropriately during eyewitness identifications. Further, this policy is intended to reduce misidentifications, improve the reliability of identifications, and establish evidence that conforms to legal precedent. The sequential double-blind procedure is the preferred method. Since law enforcement officials are responsible for investigating many types of criminal incidents, if a law enforcement official believes an alternative method of presentation is appropriate to the investigation, the alternative method may be employed. However, justification for the alternative and a detailed description of the method shall be described in the investigative report.

### Commentary for Writers:

The exploration of police lineup credibility is not new. Researchers have been attempting to find ways to reduce errors in eyewitness identifications for decades. The concept of a double-blind lineup was first introduced in 1988. Professor Gary Wells of Iowa State University proposed the idea that neither the witness nor the investigator should know the identity of the suspect, thereby eliminating any opportunity for inadvertent cues to affect the outcome. Sequential lineups work best if coupled with a blind administration.

In *State v. Henderson*, 27 A.3d 872 (2011), a New Jersey case, the judges assessed eyewitness identification evidence. While not directly endorsing a specific method of lineup delivery, the decision, "Spelled out a new set of rules that makes it easier for defendants to challenge the reliability of an eyewitness identification and requires juries to be instructed on a range of variables that could lead to a mistaken identification."

The US Supreme Court recently explored the reliability of eyewitness identification in *Perry v. New Hampshire*, 132 S. Ct. 716 (2012). The issue in question addressed the accuracy of lineup identifications, rather than the use

of specific methods. The Court held, “The Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.”

## PROCEDURES

### Document Eyewitness Identification Procedures

- Instructions to witnesses shall be read from the *Eyewitness Identification* form, which shall also include a witness’s affirmation of his or her confidence statements.
- A video record with audio is the preferred method of documenting the presentations.
- Presentations, forms, and video records shall be treated as evidence, with documentation included in the investigative file, whether or not the witnesses made identifications.
- If a photo lineup is developed electronically, the lineup shall be printed for documentation.
- Law enforcement officials shall provide a written justification for using a live or photographic presentation other than a double-blind sequential presentation.

### Commentary for Writers:

Preparing a complete and accurate record of the outcome of the identification procedure is important to preserve the evidentiary value of the live or photo lineup. Video record documentation (with audio) is the preferred method. Documentation and records are important for any subsequent court hearing or legal proceeding. Law enforcement officials shall protect as evidence photo lineup pictures and the order of presentation.

Most individuals have not participated in an eyewitness identification procedure. They will be nervous and will feel under subtle pressure to contribute to the investigation by identifying a suspect. They may have assumptions and expectations that may contribute to suspect misidentifications.

Documentation must be fair and clearly represent the lineup and its procedures. And, the documentation shall include identification information of the participants, the names of all persons present at the lineup, and the date and time the identification procedure was conducted.

Law enforcement officials must provide written justification when deviating from the procedures outlined in this policy. For example, requiring more than one law enforcement official for every lineup, as is required by the double-blind procedure, may not be logistically achievable for all agencies. And, the protocols for live lineups may be particularly challenging for smaller agencies and for cases with multiple perpetrators.

### Organize a Photographic Lineup

- Law enforcement officials shall determine when a photographic lineup is appropriate.
- Law enforcement officials shall obtain a thorough suspect description from each witness prior to presenting the photo lineup.
- A photo lineup shall consist of no fewer than six photographs, including one of the suspect.
- All photos shall be similarly sized and none shall be easily distinguished from the others. Filler photographs (not of suspect) should generally fit the description of the suspect.
- The photographs shall be numbered and shall be loose or in individual folders.
- When conducting a single lineup for multiple witnesses, photographs shall be renumbered for each witness.

**Commentary for Writers:**

When a photo lineup is used for suspect identification a blind or double-blind, sequential presentation should be made. Yet there may be instances when a simultaneous lineup is used instead. In such instances, the reason(s) for using a simultaneous lineup shall be documented in the investigative report.

When selecting a photographic array, there should be consistency in personal features across all pictures. Consider scars, tattoos, or other distinctive features. Recognize that some photos may have identification numbers or other markings on them. And, ensure that the photographs are reasonably contemporary and never include more than one photograph of the same subject.

If a witness to a criminal offense does not fluently speak the English language or otherwise has difficulty communicating (e.g. hearing impaired), officers should make reasonable efforts to arrange for an interpreter before proceeding with an eyewitness identification.

Before the interpreter is permitted to discuss any matter with the witness, the law enforcement official should explain the process to the interpreter. Once it is determined the interpreter comprehends the process and can explain it to the witness, the eyewitness identification may proceed as provided in this policy.

**Conduct a Photographic Lineup**

- Prior to a presentation, the law enforcement official shall read the witness instructions from the form, ensuring and documenting the witness understands the instructions.
- In a blind presentation, the law enforcement official shall display the photographs to the witness sequentially, with one photograph replacing another so that no two are presented at the same time.
- The law enforcement official shall present each photograph to the witness, even if the witness identifies a previous photograph as the suspect, and:
  - a. at the request of the witness, the law enforcement official may present the photographs again;
  - b. each photograph must be presented and presented sequentially; and
  - c. witnesses shall be allowed to take as much time as needed before moving on.
- If the law enforcement official knows who the suspect is, an extra measure should be taken to prevent the law enforcement official from knowing which photo is being shown to the witness, and:
  - a. the photos shall be placed in identical folders;
  - b. the folders shall be shuffled and numbered; and
  - c. only the witness shall see the photograph.

**Commentary for Writers:**

The research tends to support the sequential double-blind procedure for photographic presentations.

Research findings indicate that the sequential method may help ensure the witness does not compare the suspect to others in the array and instead compares the potential suspect to what was observed at the scene. This may lead to lower rates of misidentifications.

Witnesses must be aware that the suspect may not be among those in the photographic lineup and that they should not feel compelled to make an identification.

## Organize a Live Lineup

- Law enforcement officials shall determine when a live lineup is appropriate by considering the availability of witnesses and lookalikes.
- A live lineup shall include only one suspect in each identification procedure.
- Non-suspects shall be selected who generally fit the description of the suspect. When the descriptions differ from the suspect, non-suspects shall resemble the suspect in significant features.
- When conducting more than one lineup due to multiple witnesses, consider placing the suspect in different display positions.
- Include a minimum of four fillers (non-suspects) per identification procedure.
- Avoid reusing non-suspects in lineups shown to the same witness when showing a newsuspect.

### Commentary for Writers:

The participants in the live lineup, as with photographic lineups, should be of the same sex and race. They should be similar in age, height, weight, and general appearance. And, the non-suspect participants should be similar in appearance to the descriptions provided by the witnesses. No participant should stand out in the lineup.

It is therefore crucial to develop procedures through policy that are fair, unbiased, and do not influence the selection made by the witness. Constitutional safeguards must be preserved. Despite a growing body of evidence regarding the unreliability of eyewitness identifications, they continue to be a significant component of many criminal investigations. Agency procedures must be followed by all law enforcement officials to make sure the process works as intended.

## Conduct a Live Lineup

- Prior to a presentation, the law enforcement official shall read the witness instructions from the form, ensuring and documenting the witness understands the instructions.
- Begin with all lineup participants out of view of the witnesses.
- Present each individual to the witness separately, in a previously determined order, removing those previously shown.
- If an identification is made, avoid reporting to the witness any information regarding the individual selected, prior to obtaining the witness's statement of clarity.
- The law enforcement official shall present each participant to the witness, even if the witness identifies a previous participant as the suspect, and
  - a. at the request of the witness, the law enforcement official may present the participants again;
  - b. each participant must be presented and presented sequentially.
- When conducting a lineup procedure, the law enforcement official shall preserve the outcome of the procedure through thorough documentation.

### Commentary for Writers:

It is important to ensure the composition of the lineup is not suggestive in any way. Behaviors by the law enforcement official must be taken into account as well. Identifications must be plausible and not influenced by outside factors.

If the witness makes an identification, the law enforcement official should present the remaining participants. This helps ensure objectivity and reliability. Any identification actions, for example speaking or moving, must be performed by all participants. Witnesses may view the lineup a second time, if they request to do so. Witnesses must be aware that the suspect may not be among those in the live lineup and that they should not feel compelled to make an identification.

## Conduct a Showup

- Consider if a photo lineup can be conducted instead of a showup for:
  - a. increased control;
  - b. minimizing nervousness; and
  - c. improved logistics.
- Obtain a thorough description of the suspect from each witness prior to the showup.
- Ensure all law enforcement officials avoid suggestive words or conduct while preparing for the presentation.
- If possible, avoid tarnishing the suspect by, for example, presenting a suspect in handcuffs or from the backseat of a patrol car.
- Transport the witness, not the suspect, when possible.
- Separate witnesses to avoid communication between them.
- Read the instructions to the witness, ensuring and documenting that the witness understands the instructions.
- Document the witness's statement on the appropriate forms.
- If possible, video record (with audio) the presentation.

## Commentary for Writers:

Showups allow law enforcement officials to conduct an immediate eyewitness identification procedure in situations where they have temporarily detained a suspect. Showups benefit innocent suspects since the law enforcement officials have the potential to clear an innocent person from suspicion.

Showups are allowed when a limited period of time has elapsed since the crime was committed to eliminate innocent suspects. Although showups can be inherently suggestive, they are intended to minimize the level of governmental intrusion. The suspect should be presented as neutral as possible.

# Eyewitness Identification Form: **PHOTO LINEUP**

Case Number: \_\_\_\_\_

Law Enforcement Official Name: \_\_\_\_\_

Date and Time of Presentation: \_\_\_\_\_

Witness Name: \_\_\_\_\_

Attorney Name & P-Number, if present: \_\_\_\_\_

**INSTRUCTIONS** *(read by law enforcement official to witness)*

In a moment I'm going to show you some photographs. A photograph of the person who is involved in the crime may or may not be among them. You will be shown all of the photographs and you may take your time looking at them.

If you see the person who committed the crime or was present at the scene of the crime, pick that photograph. If not, don't pick any photograph.

If you pick a photograph, I'm going to ask you to explain why you picked that photograph and to describe how confident you are in your selection.

Do you understand these instructions? \_\_\_\_\_

**WITNESS STATEMENT** *(written by law enforcement official)*

Witness picked photograph number:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I, \_\_\_\_\_, affirm that

I read or was read the instructions above,

I understood the instructions, and

The statement written by the law enforcement official accurately reflects what I said.

Finally, I understand that I should not talk to other people about the photos or tell them which photo I picked, if any.

Signature of Witness \_\_\_\_\_

**(Commentary for Writers:** Depending on context, questions may need to be altered to cover the circumstances).

# Eyewitness Identification Form: **LIVE LINEUP**

Case Number: \_\_\_\_\_

Law Enforcement Official Name: \_\_\_\_\_

Date and Time of Presentation: \_\_\_\_\_

Witness Name: \_\_\_\_\_

Attorney Name & P-Number: \_\_\_\_\_

### **INSTRUCTIONS** *(read by law enforcement official to witness)*

In a moment I'm going to present individuals to you. A person who is involved in the crime may or may not be among them. You will be shown all of the individuals and you may take your time looking at them.

If you see the person who committed the crime or was present at the scene of the crime, select that individual. If not, don't pick any individual.

If you pick an individual, I'm going to ask you to explain why you picked that individual and to describe how confident you are in your selection.

Do you understand these instructions? \_\_\_\_\_

### **WITNESS STATEMENT** *(written by law enforcement official)*

Witness picked individual number:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I, \_\_\_\_\_, affirm that

I read or was read the instructions above,

I understood the instructions, and

The statement written by the law enforcement official accurately reflects what I said.

Finally, I understand that I should not talk to other people about the live lineup or tell them which person I picked, if any.

Signature of Witness \_\_\_\_\_

**(Commentary for Writers:** Depending on context, questions may need to be altered to cover the circumstances).

**SBM**

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STATE BAR OF MICHIGAN

MICHAEL FRANCK BUILDING  
306 TOWNSEND STREET  
LANSING, MI 48933-2012

[www.michbar.org](http://www.michbar.org)