



# Virginia Department of Criminal Justice Services

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## Model Policy on Eyewitness Identification

Original: November 16, 2011

**Revisions: July 1, 2012**

**September 24, 2013**

A law enforcement agency should attach the highest priority to the protection of the citizens that they serve. Recognizing that innocent persons may occasionally be wrongfully implicated in criminal matters, we attach equal importance to clearing innocent persons as that attached to arresting the guilty. Ten of thirteen DNA exonerations in Virginia involved eyewitness misidentifications. Few cases in Virginia have been suitable for DNA testing, since the policy until the last decade was that crime scene evidence would be destroyed post-conviction. Those Virginia eyewitness identifications involved suggestive and unreliable eyewitness identification procedures.<sup>1</sup>

According to a 1999 National Institute of Justice report, over 75,000 people a year become criminal defendants based on eyewitness identification.<sup>2</sup> Research of cases in which DNA evidence has been used to exonerate individuals previously convicted of crimes, leads many

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<sup>1</sup> "Convicting the Innocent" Professor Brandon L. Garrett, University of Virginia School of Law

<sup>2</sup> "Mistaken Eyewitness Identification: The Problem." Available at <http://www.innocenceproject.org/causes/mistakenid.php>.

experts to conclude that improved, more reliable methods of handling eyewitness identifications may promote higher standards of justice.

Misidentification, for instance, has plagued 74% of the nation's first 273 DNA exonerations. There was at least one misidentification in 203 of the nation's 273 wrongful convictions proven by DNA testing. DNA-proven exonerations, however, only begin to describe the scope of the misidentification problem. Criminalists estimate that biological evidence that has the power to establish guilt or innocence is available in approximately 10% of criminal cases and the total number of DNA exonerations only represent those cases of innocence that have come to light thus far. Nearly  $\frac{3}{4}$  of the nation's wrongful convictions proven through DNA testing involved a misidentification.

Misidentification not only results in harm caused to the wrongfully convicted and their loved ones; it also harms all members of the criminal justice system and greater society. Misidentifications can hinder investigations when the wrong person is focused upon, harming police work. When a witness misidentifies someone, even when the investigation is re-focused, the competency of that witness might be brought into question, thereby harming prosecutions. Crime victims are also traumatized in the face of a misidentification, experiencing guilt not only for a wrongful conviction, but also feelings of culpability for all of the crimes committed by the real perpetrator that could have been prevented if the right person was identified in the first place. It also adversely affects the credibility of the police in the community and erodes the trust between the public and the community, which is fundamental to effective policing and a safe community.

Of the nation's 273 DNA exonerations, the process of settling the claim of innocence led to the identification of the real perpetrators in 123 cases. A total of 107 real perpetrators have been identified<sup>3</sup> and these individuals – while the innocent were wrongfully behind bars – went on to be convicted of more than 60 rapes, 24 murders and several other violent crimes.

Therefore, there are many reasons to re-visit the traditional methods of identifying perpetrators of crime. Outdated methods – and not the members of law enforcement using those methods – are the cause of many of these misidentifications. Fortunately, more than 30 years of peer-reviewed research can inform how we can set about improving these outmoded methods so that the system can achieve both reliable and accurate identification evidence.

The Department of Criminal Justice Services would like to thank the following individuals for their professional contributions to this policy:

Ms. Rebecca Brown, The Innocence Project  
Professor Brandon Garrett, University of Virginia School of Law  
Sheriff Steve Dempsey, King George County Sheriff's Office  
Chief William Hodges, Town of West Point Police Department  
Acting Assistant Chief Charles Mason, Roanoke County Police Department  
Captain William Dean, City of Virginia Beach Police Department  
Captain Ken Caldwell, City of Fairfax Police Department  
Captain Anthony Meredith, Town of Pulaski Police Department

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<sup>3</sup> This number is lower because some perpetrators were connected with multiple crimes.

Lieutenant David Ashby, Grayson County Sheriff's Office  
Lieutenant David Pughes, Dallas, Texas Police Department  
Sergeant Frank Myrtle, City of Winchester Police Department

<b>POLICE/SHERIFF'S OFFICE</b>		<b>GENERAL ORDERS</b>	
<b>SUBJECT: Eyewitness Identification</b>		<b>NUMBER: 2-39</b>	
<b>EFFECTIVE DATE: 09-24-13</b>		<b>REVIEW DATE: (annually)</b>	
<b>AMENDS/SUPERSEDES: 2-39 – 7/1/05, 11/16/11, 07/01/12</b>		<b>APPROVED: _____ Chief of Police/Sheriff</b>	
<b>VLEPSC STANDARDS: OPR.02.03, OPR.02.07, OPR.02.08</b>			

**NOTE**

This order is for internal use only and does not enlarge an officer's civil or criminal liability in any way. It should not be construed as the creation of a higher standard of safety or care in an evidentiary sense, with respect to third-party claims. Violations of this directive, if proven, can only form the basis of a complaint by this department, and then only in a non-judicial setting.

**INDEX WORDS**

*Eyewitness Evidence: A Guide for Law Enforcement*

- eyewitness identification
- fillers (non suspects)
- lineup
- lineup Identification Form
- lineup identification number
- live lineup
- mugshots
- photo Lineup
- right to counsel
- sequential Lineup
- show-up

**I. POLICY**

Given that the traditional system for conducting eyewitness identification procedures is not infallible and that the procedures did not incorporate the growing body of psychological study of eyewitness memory and behavior, the National Institute of Justice (Department of Justice), the International Association of Chiefs of Police, the Commission on Accreditation of Law Enforcement Agencies, the Police Executive Research Forum, the American Bar Association and others have issued reports and/or directives responding to a need for change in this area of police practice. These reports

and recommendations attempt to take the basic elements of police investigations and suggest workable changes in order to achieve more consistent eyewitness results.

The following procedures for use in Virginia incorporate many of the recommendations issued by the United States Department of Justice in its *Eyewitness Evidence: A Guide for Law Enforcement* and also include those practices that have gained the support of social scientists and law enforcement practitioners since its publication. An identification obtained through a lineup composed in this manner should minimize the risk of misidentification and have stronger evidentiary value than one obtained without these procedures. Specifically, use of these procedures should maximize the reliability of identifications, minimize unjust accusations of innocent persons and establish evidence that is reliable and conforms to established legal procedure.

## **II. PURPOSE**

To establish a policy for the preparation and presentation of photographic and in-person lineups.

## **III. DEFINITIONS**

### **A. Lineup**

A lineup is any procedure in which a victim or witness to a crime or other incident is asked to identify a suspect from among a group of persons in order to determine or confirm the identity of the suspect. Such procedures involve either actually viewing of persons (in live line-ups or show-ups) or viewing of photographs (in a photo lineup).

### **B. Photo Lineup**

An identification procedure in which an array of photographs, including a photograph of the suspected perpetrator of an offense and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness either in hard copy form or via computer for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.

### **C. Sequential Lineup**

A method of administration where photographs are shown to the victim/witness one at a time, with an independent decision on each, before the next photo is shown.

### **D. Blind Administrator**

The person administering the line-up has no knowledge of which person in the photo/live line-up is the suspect.

E. Blinded Administration

This is a lineup procedure in which the administrator may know the identity of the suspect, but by virtue of the use of procedures and/or technology to accomplish this purpose, does not know which lineup member is being viewed by the eyewitness.

F. Confidence Statements

A statement in the victim/witness' own words, articulating their level of confidence in the identification taken at the time the identification is made.

G. Fillers

Non-suspect photographs or line-up members.

H. Folder Shuffle Method

A method requiring the lineup administrator to place a photograph of the suspect and filler photographs into blank folders with one photograph per folder. The folders are then "shuffled" before being presented individually to the witness.

I. Show-up

A show-up procedure is an identification procedure in which an eyewitness is presented with a single suspect for the purpose of determining whether the eyewitness identifies this individual as the perpetrator.

#### IV. **PROCEDURES - General responsibilities**

A. Department personnel shall strictly adhere to established procedures for conducting suspect lineups in order to avoid the possibility of error or of undue suggestiveness to witnesses.

B. Department personnel shall receive initial and refresher training in lineup procedures to establish uniformity and consistency of such procedures and to establish a high level of competence in carrying out this important aspect of a criminal investigation. *[VLEPSC-accredited agencies must specify the frequency of the refresher training]*

C. Department personnel shall report any known errors, flaws or non-conformance with established procedures in the conduct of a suspect lineup that they may observe or become aware of to their supervisor in order that corrective actions may be taken and safeguards established to protect the innocent.

- D. The Department will confer with the Office of the Commonwealth's Attorney in establishing lineup procedures in order to assure the best use of this type of evidence and to assure that procedures established are compatible with the prosecution of criminal cases. Likewise, instructions given to witnesses during a lineup procedure will be those established and approved in consultation with the Commonwealth's Attorney.

## **V. PROCEDURES**

Prior to a photo or live lineup, the investigating officer should record as complete a description as possible of the perpetrator provided by the eyewitness and in the eyewitness's own words. This statement should also include information regarding conditions under which the eyewitness observed the perpetrator including location, time, distance, obstructions, lighting, weather conditions and other impairments, including, but not limited to alcohol, drugs, stress, the presence of a weapon and any other relevant conditions. The eyewitness should also be asked if s/he needs glasses or contact lenses and whether s/he was wearing them at the time of the offense.

### Show-up Procedure

- A. Show-ups should only be performed using a live suspect and only in exigent circumstances that require the immediate display of a suspect to an eyewitness.
- B. Investigators should not conduct a show-up with a single photograph; if investigators want to determine if an eyewitness can make an identification using a photo, a photo lineup should be employed.
- C. The eyewitness should be transported to a neutral, non-law enforcement location where the suspect is being detained for the purposes of a show-up.
- D. The eyewitness should be provided with the following instructions:
1. The perpetrator may or may not be the person that is presented to the eyewitness;
  2. The eyewitness should not feel compelled to make an identification;
  3. The investigation will continue regardless of whether an identification is made;
  4. The procedure requires the investigator to ask the eyewitness to state, in his or her own words, how certain s/he is of the identification s/he has made; and
  5. The eyewitness should not discuss the identification procedure with other eyewitnesses involved in the case and should not speak to the media.
- E. If there are multiple eyewitnesses, only one eyewitness at a time should participate in the show-up procedure, independent of the others. If a positive identification is made,

and an arrest is justified, additional eyewitnesses should be shown live or photo lineups.

- F. If identification is made, the investigator should seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified is the perpetrator.
- G. Investigators should photograph a suspect at the time and place of the show-up to preserve a record of his or her appearance at the time of the show-up.

[Agencies are encouraged to video record the show-up procedure. This assists agencies in demonstrating that they conducted the show-up at a neutral location and without any additional suggestion.]

### Folder Shuffle Method

The "Folder System" was devised to address concerns surrounding limited personnel resources while allowing for blind administration. Should the investigating officer of a particular case be the only law enforcement personnel available to conduct a photo lineup, the following instructions are recommended:

- Obtain one (1) suspect photograph that resembles the description of the perpetrator provided by the witness.
  - Obtain five (5) filler photographs that match the description of the perpetrator, but do not cause the suspect photograph to unduly stand out.
  - Obtain ten (10) file folders. [four of the folders will not contain any photos and will serve as 'dummy folders'].
1. Number the outside of each folder #1 through #10.
  2. Affix one (1) **filler** photograph to the inside folder "#1".
  3. The individual administering the lineup should affix the **suspect photograph** and the other **four (4) filler photographs** into Folders #2-6 and shuffle the folders so that the administrator is unaware of which folder the suspect is in.
  4. The remaining folders (Folders #7-10) will contain a page with the following text: "THIS FOLDER INTENTIONALLY LEFT BLANK". *[This is done so that the witness does not know when he has seen the last photo. Agencies may choose to include up to eight (8) photographs instead of the recommended six (6). When increasing the number of photographs, it is necessary to increase the number of blank folders. The intent is that the witness is not aware of when the last photo is being presented.]*
  5. The administrator should provide instructions to the witness. The witness should be informed that the perpetrator may or may not be contained in the photos he is about to see and that the administrator does not know which folder contains the

suspect.

6. Without looking at the photo in the folder, the administrator is to hand each folder to the witness individually. The witness must view the photo in the folder and then return it to the administrator before being presented with the next folder. The order of the photos should be preserved, in a facedown position, in order to document in Step 7. ***[The witness may be permitted to review the folders a second time, but it is imperative that all folders are provided in the same order as the original presentation.]***
7. Instruct the witness that the procedure – only if identification is made - requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification at the time that the identification is made.
8. The administrator should then document and record the results of the procedure. This should include: the date, time and location of the lineup procedure; the name of the administrator; the names of all of the individuals present during the lineup; the number of photos shown; copies of the photographs themselves; the order in which the folders were presented; the sources of all of the photos that were used; a statement of confidence *in the witness's own words* as to the certainty of his identification, taken immediately upon reaction to viewing; and any additional information the administrator deems pertinent to the procedure. ***[It is important for the administrator to not ask the witness for a numerical rating of their confidence level.]***

#### Lineup Procedures (both photo and live)

- A. The investigator in charge should select an individual to serve as the blind administrator. The blind administrator must not know which member of the lineup is the “true” suspect to conduct any lineups in order to avoid inadvertent signs or body language that may lead or cause a witness to make an incorrect identification. The blind administrator should be thoroughly familiar with this procedure. ***[Alternatively a ‘blinded’ administrator may be used, namely an individual who knows the suspect’s identity but is not in a position to see which members of the line-up are being viewed by the eyewitness. This can be accomplished, for instance, through the use of the folder shuffle method or via laptop technology.]***

[Blind administration is preferable to the folder shuffle method, but it is also a perfectly acceptable alternative when blind administration is not feasible, i.e. there was not an officer available to act as an administrator. It is important to document why blind administration was not feasible.]

- B. Assure that law enforcement and/or prosecutorial personnel present and involved in the case are knowledgeable about the procedure so that they will not interfere or influence any witness during the process. Unnecessary personnel should be removed from the location where the process is being conducted.

- C. A photo or live lineup should be composed so the fillers generally resemble the eyewitness's description of the perpetrator, while ensuring that the lineup is comprised in such a manner that the suspect does not unduly stand out from the fillers. However, complete uniformity of features is not required. Avoid reusing filler photos/ live lineup members. If the eyewitness has previously viewed a photo or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup should be different from the fillers used in prior lineups.
- D. When there are multiple suspects, each identification procedure should include only one suspect.
- E. Avoid mixing color and black and white photos. Photos should be either all black and white or all color.
- F. Cover any portions of mugshots or other photographs that provide identifying information. Ensure that no writings or information concerning previous arrest(s) will be visible to the witness. If it is necessary to block-out or cover a notation, such as a name on one photo, then similar blocking-out or covering marks should be placed on all photos so that they will appear alike.
- G. Use photos of the same size and basic composition, and never mix mugshots with other snapshots or include more than one photo of the same suspect.
- H. Select fillers (non suspects) who generally fit the witnesses' description of the offender. When there is a limited or inadequate description of the offender provided by the witness, or when the description of the offender differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.
- I. Select a photo that resembles the suspect's description or appearance at the time of the incident, if multiple photos of the suspect are reasonably available to the investigator.
- J. Ensure that the photos are reasonably contemporary.
- K. Include a minimum of five fillers (non-suspects) per photo identification procedure and a minimum of four fillers per live lineup.
- L. Create a consistent appearance between the suspect and fillers so that the photos depict individuals who are reasonably similar in age, height, weight and general appearance, and are of the same sex and race. However, avoid using 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.

- M. If there are multiple eyewitnesses, each eyewitness should view the lineup independently and separately and the suspect should be placed in a different position in the photo or live lineup for each eyewitness.
- N. Review the array, once completed, to ensure that the suspect does not unduly stand out.
- O. Assign each photo/person a lineup identification number. Record the identification number on the back of each photo. Refer to that photo/person only by that number. The nature of the identification number should be purposely complex to the witness, so that any inadvertent glance should not significantly hinder the identification process or alert the witness as to the identity of the actual suspect.
- [Note: Some departments use the assigned case number and simply add a series of numbers and or letters at the beginning, end or in the middle of the case number. For example, with a case number such as 2005 – 12345, one could create ID numbers like A 2005 – 12345, or 2005 – 12345 B, or 2005 – C – 12345.]
- P. After each photo/person has been assigned an identification number, record the number along with all other pertinent information on the Lineup Identification Form.
- Q. Record the presentation order of each lineup and ensure that a complete written record of the identification proceeding is made and retained. The record should include: all identification and non-identification results obtained during the procedure and signed by the eyewitness, including the eyewitness's confidence statement; the names of all of the persons present at the identification procedure, the date and time of the identification procedure, and the sources of all photos or persons used in the identification procedure. In addition, the photos themselves should be preserved in their original condition. For live lineups, a group photo should be taken of all persons in the lineup together to illustrate size differences among the lineup participants. This photo must not be shown to the witness, but will be included with the completed case file.
- R. There is a right to have counsel present at a live line-up, where the defendant-suspect has been charged.
- S. Advise the accused that he may take any position in the live lineup that he prefers and may change positions prior to summoning a new witness.
- T. Ensure that witnesses are not permitted to see nor are they shown any photographs of the accused immediately prior to the live lineup.
- U. Ensure that no more than one witness views each live lineup at a time and that they are not permitted to speak with one another during live lineup proceedings.

## **VI. PROCEDURES - Conducting the Identification Procedure**

- A. The identification procedure should be conducted in a manner that promotes the accuracy, reliability, fairness and objectivity of the witness' identification. These steps are designed to ensure the accuracy of identification or non-identification decisions.
- B. Assure that all law enforcement and/or prosecutorial personnel present and involved in the case are knowledgeable about the procedure so that they will not interfere or influence any witness during the process. Unnecessary personnel should be removed from the location where the process is being conducted.
- C. When presenting the lineup, the person administering the lineup should use the approved standard instructions for witnesses prior to the lineup that the offender might or might not be among those in the photo array or live lineup, and therefore, the witness should not feel compelled to make identification.
- D. Assure the witness prior to the lineup that regardless of whether identification is made, the police will continue to investigate the incident.
- E. Instruct the witness that if the offender is seen in the lineup, he/she might not appear exactly the same as on the date of the incident because features such as clothing, head or facial hair can change. Additionally, photos do not always depict the true complexion of a person, which might be lighter or darker than shown in the photo. Be careful not to imply or lead the witness to believe that the suspect's appearance has actually changed in any way.

[Note: For example, saying to a witness that "The suspect's appearance could be different, for example if he has since gotten a tattoo", may imply to the witness that the police know the suspect got a tattoo. If uncertain about identity, this could lead the witness to pick out someone in the line-up with a tattoo simply for that reason.]

- F. Provide the following additional viewing instructions to the witness:
  - 1. Individual photos/persons will be viewed one at a time.
  - 2. Photos/persons are in random order.
  - 3. Take as much time as needed in making a decision about each photo/person.
  - 4. All photos will be shown, even if identification is made prior to viewing all photos.
  - 5. The administrator does not know who the perpetrator is.
- G. Confirm that the witness understands the nature of the sequential procedure.
- H. Instruct the witness that the procedure – only if identification is made - requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification at the time that the identification is made.
- I. Present each photo to the witness separately, in a previously determined order, as documented on the lineup worksheet, removing those previously shown.

- J. Care should be taken to avoid the witness turning over the photo and reading the identification number recorded on the back.
- K. Avoid saying anything to the witness that may influence the witness' selection.
- L. If identification is made, avoid reporting or confirming to the witness any information regarding the individual he or she has selected, until the entire process (including obtaining a confidence statement and obtaining required signatures and paperwork) has been completed.
- M. If the witness requests to view the photo/person sequence again, (or specific photos/persons again), they may be shown a second time, but must be shown again in the same sequence in its entirety even if the witness makes an identification during this second showing.
- N. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

[Agencies are encouraged to video record the identification procedure]

## **VII. PROCEDURES - Recording Identification Results**

- A. When conducting an identification procedure, the person administering the lineup shall preserve the outcome of the procedure by documenting any identification or non-identification results obtained from the witness. A complete and accurate record of the outcome of the identification procedure is crucial. This record can be a critical document in the investigation and any subsequent court proceedings.
- B. When documenting the identification procedure, the person administering the lineup should record both identification and non-identification results, including a statement of confidence, in the eyewitness's own words. ***[The results should not be ranked]***
- C. If the eyewitness makes an identification, the administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given identification procedure. ***[It is important for the administrator to not ask the witness for a numerical rating of their confidence level.]***
- D. If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning such person before the administrator obtains the eyewitness's confidence statement about the selection. After the eyewitness' confidence statement is obtained, the administrator shall not tell the eyewitness information about how accurate they were in their identification or provide additional information about the defendant.

- E. Document in writing the photo lineup procedures, including identification information and sources of all photos used, names of all persons present at the lineup, and date and time of the identification procedure.
- F. Ensure that the results are signed and dated by the witness and the person administering the lineup.
- G. Ensure that no materials indicating previous identification results are visible to the witness.
- H. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures.

[Agencies are encouraged to video record the identification/confidence statement procedure. Audio recording is an acceptable alternative if video recording is not practical.]