



VSP-DIR-529

Eyewitness Identification

1.0 PURPOSE

1.1 To establish guidelines for conducting eyewitness identification of criminal suspects.

2.0 POLICY

2.1 Eyewitnesses will be given specific instructions prior to being shown a suspect;

2.2 Photo line-ups and live line-ups will be conducted using sequential rather than simultaneous presentation; and

2.3 Photos line-ups, live line-ups and voice identifications will be conducted using blind administration.

3.0 DEFINITIONS

3.1 Show-up:

The presentation of one suspect to an eyewitness shortly after the commission of a crime.

3.2 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.

3.3 Photo Line-up:

The showing of a sequence of photographs of eight (8) different individuals to an eyewitness for the purpose of obtaining an identification.

3.4 Live Line-up:

The live presentation of at least six (6) 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.

3.5 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.

3.6 Blind Administrator:

A Blind Administrator is a member of the Vermont State Police or other Vermont Law Enforcement Officer, who does not know the identity of the suspect and who is unaware of which photograph depicts the suspect. The blind administrator shall actually show the photographs. This technique is required by Vermont law and is intended to ensure that the witness does not interpret a gesture or facial expression by the member 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 member showing the photographs to indicate to the witness, intentionally or unintentionally, which photograph he/she should select.

4.0 PROCEDURES

4.1 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 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.

4.2 General Considerations

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.

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

(B) If practicable, the member should record the procedure and the witness' statement of certainty. If not, the member should note 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.

4.3 Reporting

(A) A report of every show-up, photo line-up, line-up or voice identification procedure, whether an identification is made or not, shall be completed. The report shall include a summary of the procedure, the persons who were present for it, instructions given to the witness by the member (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.

4.4 Witness Instructions

(A) A member conducting an identification procedure will read the witness a set of instructions from a departmental form (show-up, or photo line-up or line-up instruction form). Those instructions shall 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 member to ask you to state, at the time of the line-up, in your own words and without using a numerical scale, how confident you are of any identification.

(6) If you do select someone, please do not ask the member questions about the person you have selected, as no information can be shared with you at this stage of the investigation.

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

4.5 Show-ups

(A) 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 in-person whenever possible and not photographically. Members should not attempt to obtain identifications using Department of Motor Vehicle photos on their cruiser MDT's (Mobile Data Terminals), unless a dire emergency exists.

(B) Prior to the show-up, members should obtain a detailed description of the suspect from the witness, along with information related to how far away the witness was when seeing the suspect, how well lit the area was, how long the witness was able to see the suspect. Also document how much time has elapsed from the time the witness saw the suspect to the time of the show-up.

(C) 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.

(D) Every show-up must be as fair and non-suggestive as possible. 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 members or others, the suspect should not be viewed when he/she is inside a police vehicle, or in a cell.

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

(F) The investigating member shall carefully instruct the witness by reading from a departmental Show-up Instruction Form, and the witness shall be asked to sign the form indicating that he/she understands the instructions. The member shall also sign and date the form.

(G) If the witness fails to make a positive identification and sufficient 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 member's report.

(H) If a suspect is stopped within a short time after the commission of the crime and within a short distance of the crime scene, he/she may be taken to a location where he/she can be viewed by a witness for possible identification, although this is NOT the preferred method of conducting a show-up. In the alternative, 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.

(I) 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.

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

(J) 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.

(J) Where multiple witnesses are available to identify the subject, members 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 line-up or line-up.

(K) Members may transport victims or witnesses in police vehicles to survey the area where a crime has just occurred in order for them to attempt to point out the perpetrator. While checking the area, members must be careful not to make any statements or comments to the witnesses which could be considered suggestive.

(L) Members 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 member should ask the witness how certain he/she is of the identification. Members 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 members' report.

4.6 Preparing a photo line-up

(A) Photo line-ups should be shown to witnesses as soon as possible after the commission of a crime.

(B) Shall include one suspect and seven fillers (non-suspects) in each array. Mark the back of each photo with numbers one through eight.

(C) Try to use photographs of the same size and basic composition. Do not include

more than one photograph of the same person.

(D) Use a photo of the suspect that closely depicts his/her current appearance.

(E) Members shall select fillers who generally fit the witness' description of the offender, giving consideration to factors such as face, weight, build or skin tone.

(F) Ensure that photos bear no markings indicating previous arrests.

(G) 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.

(H) Once the array has been assembled, examine it to ensure that nothing about the suspect's photo makes him/her stand out.

(I) Consider changing the order of photos from one witness to the next, or when a witness asks to see the array a second time.

(J) When showing a witness an array containing a new suspect, avoid using fillers from a previous array.

4.7 Showing a photo line-up

(A) The procedure must be conducted in a manner that promotes reliability, fairness and objectivity.

(B) Allow each witness to view the photographs independently, out of the presence and hearing of the other witnesses.

(C) Never make suggestive statements that may influence the judgment or perception of the witness.

(D) The blind administrator shall show the photo line-up.

(E) The blind administrator shall carefully instruct the witness by reading from a departmental photo line-up Instruction Form, and the witness should be asked to sign the form indicating that he/she understands the instructions. The investigating member and the administrator should also sign and date the form.

(F) For the reasons above, the members shall explain to the witness that the blind administrator showing the array does not know the identity of the people in the photographs. The investigating member shall leave the room while the array is being shown by the administrator.

(G) The blind administrator shall show the photographs to the witness one at a time and ask the witness whether or not he/she recognizes the person.

(H) When the witness signals for the next photograph, the blind administrator shall move the first photograph so that it is out of sight and ask the witness whether he/she recognizes the next photograph.

(I) The procedure shall be repeated until the witness has viewed each photograph. If the witness identifies a subject before all the photographs have been viewed, the blind

administrator shall remind the witness that he/she is required to show the rest of the photographs.

(J) If the witness fails to make an identification, but asks to view the array a second time, the blind administrator administering the identification shall 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 shall be shuffled before the array is shown for the second time. An array shall not be shown more than twice. The blind administrator shall note any statements made by the witness during the identification.

(K) If the witness identifies the suspect, the blind administrator shall ask the witness how confident he/she is of the identification. This shall be done at the time of identification. The blind administrator shall ask the witness not to use a numerical scale, but rather his/her own words and record all statements.

(L) The photo line-up shall be preserved as evidence in the same configuration as when the identification was made.

(M) 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.

(N) If, due to limited staffing, you are unable to find a member who lacks knowledge as to the subject's identity and therefor cannot serve as a blind administrator, you shall adopt the following procedure:

1. Each photo shall be placed in a separate folder;
2. Each photograph shall be randomly numbered and shuffled; and
3. Each photograph shall be presented to the eyewitness in a manner in which the member cannot see or track which photograph is being presented to the witness until the procedure is completed.

4.8 Live Line-ups

(A) Live line-ups shall be conducted under the direction of a supervisor and when feasible, after consultation with the State's Attorney's office.

(B) A suspect cannot be detained and compelled to participate in a live line-up without probable cause to arrest. If a suspect refuses to participate in a live line-up, the State's Attorney's Office may be asked to apply for a court order to compel the suspect to cooperate.

(C) Before any suspect who has been arraigned or indicted is shown to eyewitnesses in a live line-up or other live identification procedure, he/she must be informed of his/her right to have an attorney present at the live 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 or otherwise recorded, no such identification may proceed without the presence of the suspect's attorney.

(D) Select a group of at least five fillers who fit the description of the subject as provided by the witness(es). Because live line-ups will be administered by a member who does not know the identity of the suspect, the fillers selected shall not be known to the member administering the line-up. In selecting live line-up fillers, abide by the guidelines for photo line-up fillers as described above.

(E) All persons in the live line-up shall carry cards that identify them only by number and shall be referred to only by their number. As with photo line-ups, each witness must view the live line-up independently, out of the presence and hearing of the other witnesses.

(F) The investigating member shall explain to the witness that a second member (the live line-up administrator) will be conducting the live line-up, and that he/she does not know the identity of the people in the line up.

(G) The investigating member shall carefully instruct the witness by reading from a departmental Live Line-up Instruction Form, and the witness shall be asked to sign the form indicating that he/she understands the instructions. The member shall also sign and date the form.

(H) The investigating member shall leave the room while the blind administrator conducts the live line-up.

(I) The live line-up shall 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.

(J) The procedure for showing the participants to the witness and for obtaining a statement of certainty is the same as for photo line-ups. If practicable, the member shall record the procedure.

(K) When an attorney for the suspect is present, the attorney shall be permitted to make reasonable suggestions regarding the composition of the live line-up and the manner in which it is to be conducted. Any suggestions made by the suspect's attorney shall be included as part of the live line-up report.

(L) Allow counsel representing the accused sufficient time to confer confidentially with his/her client prior to the line-up. Once the live line-up is commenced, attorneys shall function primarily as observers and he/she shall not be permitted to converse with the live line-up participants, or with the witnesses, while the live 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 live line-up begins. The attorney may observe via video monitoring if that option is available.

(M) The suspect's attorney is not legally entitled to the names or addresses of the witnesses attending a live line-up if the suspect has not yet been arraigned or indicted. If an attorney in such a situation insists on having information about live line-up witnesses, advise him/her to direct his/her request to the State's Attorney's Office.

(N) During a live 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. If members are to ask the participants to wear an article of clothing, they must guard against circumstances where the article only fits the suspect. All live line-up participants shall be asked to perform the same actions.

(O) Live 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.)

(P) After a person has been arrested, he/she may be required to participate in a live line-up regarding the crime for which he/she was arrested. After arrest, a suspect may lawfully refuse to participate in a live 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.

4.9 Voice Identification

(A) 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 the witness was never in the same room with the perpetrator but heard his/her voice. If members wish to conduct a voice identification procedure with a witness who also saw the subject, they must first consult with a Detective Lieutenant, or in his/her absence the station commander or Captain of the Criminal Division and, when feasible, the State's Attorney's Office.

(B) 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.

(C) Where a voice identification is attempted, the following procedures should be employed to the extent possible:

1. As in a line-up, there shall 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 a member who does not know the identity of the suspect, the fillers should not be known to the member administering the procedure, and members should abide by the guidelines for photo line-up and line-up fillers as described above;
2. The suspect and other participants shall not be visible to the witness; this can be done by using a partition, or by similar means;
3. All participants, including the suspect, shall be instructed to speak the same words in the same order;
4. 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;
5. When both a visual and voice line-up are conducted, the witness shall be informed that the line-up participants will be called in a different order and by different numbers.
6. 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.

(D) As with any identification procedure, police officers shall 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.

(E) The investigating member 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 member shall also sign and date the form. If practicable, the member shall record the procedure.

(F) Adhere to the principles of blind administration as described above. As is the case with photo line-ups and live line-ups, the investigating member shall leave the room while the administrator conducts the procedure.

5.0 Courtroom Identification

Prior to conducting any courtroom identification procedure, members should consult with the State's 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 barracks and courtroom identifications.

(A) If the suspect has been arraigned or indicted, he/she has a right to have counsel present at any in-person identification/confrontation.

(B) Live confrontations and informal viewings of the suspect by witnesses must be conducted in such a manner as to minimize any undue suggestiveness.

(C) Members shall not tell a witness or otherwise suggest to a witness 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, in a barracks or in a 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.

6.0 Drawings and Identi-Kit Composites

An artist's sketch, computerized drawing, composite, or other depiction can sometimes aid an investigation. They are most effective when a witness has a good recollection of the offender's facial features. However, research has shown that a person identified by a witness based on a resemblance to a 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, members should take from the witness and document a full description of the offender.

(A) A sketch prepared by a trained artist is preferred over a composite.

(B) Sketches and composites should not be attempted prior to the showing of a photo line-up or line-up.

(C) Once the sketch or composite has been completed, the witness shall be asked to state in his/her own words how accurately the composite reflects how the suspect appeared during the crime and a report shall be prepared regarding the sketch or composite procedure.

(D) The fact that a suspect resembles a sketch or composite is not, without more, probable cause

to believe that the suspect is the offender.

7.0 Mug Shots

When an investigation has failed to identify a suspect, it may be advisable to have eyewitnesses come to the barracks to look through photographic files. However, members shall not resort to this procedure until other investigative avenues have been exhausted.

(A) Remove or hide any information on the photographs that might in any way influence the witness;

(B) Ensure that the files contain only one photograph of each individual and that the photographs are reasonably current;

(C) Do not refer to the photographs as "mug shots";

(D) If photographs of various formats are used, ensure that several of each format are used;

(E) Permit the witness to look at a number of photographs before making his/her selection;

(F) Do not call to the attention of the witness any particular photograph;

(G) 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).

(H) Members should be extremely cautious before charging a subject based on this type of identification alone.

8.0 Hypnotically Aided Identification

(A) Hypnotically aided testimony is not admissible at trial. Memory recalled prior to hypnosis which was the subject of a hypnotic session may be excluded as hypnotically aided.

(B) In light of the serious consequences which could result from asking or permitting a witness to undergo a hypnotic session, such a procedure shall not be undertaken until the entire matter has been reviewed by the Director, the State's Attorney's Office, and appropriate hypnosis experts.

Examples of the instructions forms are below; however, refer to the following materials in Power DMS when conducting any of the above investigative procedures:

Instruction Card for Line Up

Instruction Card for photo line-up

Instruction Card for Show Up

Instruction Card for Voice Identification

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The Vermont State Police Manual is not intended to apply in any criminal or civil proceeding outside of internal Department proceedings. No policy included in this publication should be construed as creating a higher legal standard of safety or care in an evidentiary sense with respect to third party claims. Violations of law will form the basis for civil and criminal sanctions in a recognized judicial setting.