



## EYEWITNESS IDENTIFICATION

<b>POLICY &amp; PROCEDURE NO.</b> <b>1.12</b>	<b>ISSUE</b> <b>DATE: 11/21/13</b>
	<b>EFFECTIVE</b> <b>DATE: 11/21/13</b>
<b>MASSACHUSETTS POLICE</b> <b>ACCREDITATION STANDARDS</b> <b>REFERENCED: 1.2.3, 42.2.3(e)</b>	<b>REVISION</b> <b>DATE: 05/26/17</b>

### GENERAL CONSIDERATIONS

Eyewitness identification procedures must be conducted in a fair, objective, and non-suggestive manner. When identification procedures conducted by the police are unnecessarily suggestive, and conducive to irreparable mistaken identification, it is a violation of due process that may result in a wrongful conviction, or the exclusion of evidence.<sup>1</sup> Therefore, the identification of criminal offenders must be approached with extreme caution to ensure the proper administration of justice, and to prevent the court from excluding or limiting eyewitness evidence if it determines that police methods were unnecessarily suggestive.

The identification of a suspect by an eyewitness can be compelling evidence. However, many people that have been convicted of serious crimes based on mistaken eyewitness identification have later been exonerated by scientific evidence. Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in approximately 75% of all convictions overturned through DNA testing.<sup>2</sup> The Norwood Police Department recognizes that it is as much the responsibility of the police to protect the innocent from misidentification, as it is to assist in the conviction of the guilty.

### DEFINITIONS:

**Suspect:** A person who officers believe may have committed a crime.

**Offender:** The perpetrator of the crime.

Filler: A person, or a photograph of a person, that is included in a line-up or photo array, but who is not a suspect.

Show-up: The live presentation of a suspect to an eyewitness shortly after the commission of a crime.

Field View: An eyewitness viewing of a group of people in a public place based on the theory that the offender may be among the group. A field view differs from a show-up in that it may be conducted well after the commission of the crime, and may be conducted with or without a suspect in the group.

Photo Array: A group of photographs shown to an eyewitness for the purpose of identifying an offender.

Line-up: The live presentation of a group of people to an eyewitness for the purpose of identifying an offender. 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 present, and the participants are aware that an identification procedure is being conducted.

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 the offender's voice.

Blind Administration: A procedure whereby the officer showing a photo array or conducting a line-up cannot tell when the witness is viewing the suspect.

### **POLICY:**

It is the policy of the Norwood Police Department that:

1. An officer may show a single photograph of a suspect to a witness for the purpose of confirming the suspect's identity in a case where the suspect and witness know each other.
2. Eyewitnesses will be given specific instructions prior to being shown a suspect.
3. Photo arrays and line-ups will be conducted by displaying the suspect and fillers sequentially.
4. Photo arrays, line-ups, and voice identifications will be conducted using blind administration.
5. When an eyewitness identifies a suspect, the officer will immediately ask the witness how certain he or she is of the identification.
6. The Department will avoid multiple identification procedures featuring any one suspect with the same witness.
7. The Department does not use composites, and the use of artist sketches is only permitted under strict guidelines.

8. If an eyewitness identifies a suspect, officers will attempt to gather additional evidence to confirm or dispel the identification.
9. The Department will provide training in eyewitness identification to all sworn personnel.

**PROCEDURES:**

1. When questioning an eyewitness, officers should avoid the use of leading questions and should refrain from providing the witness with information that could affect the witness's memory.
2. Prior to conducting an identification procedure, officers should obtain and document a full description of the offender from the witness. Officers should not take an offender's description from one eyewitness in the presence of another witness. [42.2.11 c]
3. Whenever practicable, the officer should videotape or audiotape a photo array or line-up. If not, the officer should write down the witness' exact words and incorporate them into his report. The witness should be asked to initial and date the front of any photograph selected. [42.2.11 b]
4. A report of every identification procedure, whether an identification is made or not, shall be submitted. The report shall include a summary of the procedure, the persons who were present for it, instructions given to the witness by the officer (this should be accomplished by submitting the appropriate witness instruction form), any statement or reaction by the witness, and any comments made by the witness regarding the identification procedure. When submitting reports about photo arrays, officers should include a copy of the array.
5. A 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 until the identification procedure is completed. [42.2.11]

***Right to Counsel During Identification Procedure***

1. Once a suspect has been arraigned or indicted, his right to have counsel present at an in-person identification procedure attaches. Suspects have no right to the presence of counsel simply because a complaint has been filed, even if an arrest warrant has issued.
2. No right to counsel attaches for non-corporeal identification procedures, such as those involving photographs, whether conducted before or after the initiation of adversarial criminal proceedings.

***Witness Instructions***

Whenever practicable, an officer conducting an identification procedure shall read the witness a set of instructions from a departmental form (show-up card, or photo array or line-up instruction form). Those instructions include the following: [42.2.12 d]

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

### ***Show-ups***

1. Detaining a suspect who fits the description of an offender in order to arrange a show-up is lawful where the officer has reasonable suspicion that the suspect has committed a crime, even if probable cause to arrest has not yet developed. [42.2.12 a]
2. A show-up should not be conducted more than two hours after the witness's observation of the offender. Show-ups should be conducted live whenever possible and not photographically. Officers should not attempt to obtain identifications using RMV photos on the computers in their cruisers, unless a dire emergency exists. [42.2.12 a]
3. 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, for example, and the circumstances are such that an immediate confrontation is imperative, the emergency identification procedure shall be conducted in a non-suggestive manner. [42.2.12 a]
4. Every show-up must be as fair and non-suggestive as possible.<sup>3</sup> Specifically, if the suspect is handcuffed, he should be positioned so that the handcuffs are not visible to the witness. Show-ups should not be conducted if the suspect is seated in the rear of a police cruiser, in a cell, or in any other enclosure associated with custody.

5. If the witness(es) fail(s) to make a positive identification, and sufficient other evidence has not developed to provide probable cause to make an arrest, the suspect must be permitted to leave. His identity should be recorded and included in the officer's report.
6. A suspect stopped within a short time after the commission of the crime may be taken to a location where he can be viewed by a witness for possible identification, or be detained at the site of the stop and the witness taken there to view him. Transporting the witness to the site of the stop is preferred if circumstances permit. [42.2.12 b]
7. Suspects should not be brought into a crime scene as contamination may result. For the same reason, clothing articles found at the crime scene should not be placed on or in contact with a suspect. A suspect should not be brought back to the home of a victim or witness unless that was the scene of the crime.
8. Police officers must not do or say anything that may convey to the witnesses that they have evidence of the suspect's guilt. Officers should turn down their radios to reduce the likelihood that the witness they are transporting may overhear information about the stop of the suspect.
9. 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 until the identification procedure is completed. [42.2.12 b]
10. Once a witness has positively identified the suspect at a show-up, officers should not conduct additional show-ups with the same suspect. Subsequent identifications may be attempted by means of a photo array or line-up.
11. Officers may transport victims or witnesses in police vehicles to cruise the area where a crime has just occurred in order for them to attempt to point out the offender. While checking the area, officers must be careful not to make any statements or comments to the witnesses which could be considered suggestive. [42.2.12 b]
12. Officers should make written notes of any identifications and any statements made by witnesses at the time of confrontation with the suspect. Once a witness has indicated his opinion that the suspect is the offender, the officer should ask the witness how certain he is of the identification. Officers should ask the witness not to use a numerical scale, but rather to indicate certainty in his own words. All statements by the witnesses should be incorporated into the officers' report.

### ***Preparing a Photo Array***

1. When assembling a photo array, officers should endeavor to use a current and accurate photograph of the suspect. They should select filler photographs based on their similarity to the witness's description of the offender, not to the

appearance of the suspect. Nothing about the suspect or his photo should make him stand out.

2. An array should contain seven fillers, but in no event fewer than five, and only one suspect photograph<sup>4</sup>. All photographs should be of the same general size and basic composition. Officers must not repeat fillers with the same witness from one array to next and should mark the back of each photo with numbers one through eight. None of the photos may bear markings indicating previous arrests.
3. If the suspect has a unique or unusual feature, such as facial scars or severe injuries, the officer preparing the array should create a consistent appearance between the suspect and fillers by adding the feature to the fillers or by covering the area on every photograph.
4. Once the array has been assembled, the officer should examine it to ensure that nothing about the suspect's photo makes him unduly stand out.

### ***Showing a Photo Array***

1. The showing of a photo array must be conducted in a manner that promotes reliability, fairness and objectivity.
2. Whenever practicable, officers should videotape or audiotape the showing of a photo array.
3. Each witness must view the photographs independently and out of the presence and hearing of the other witnesses. [42.2.11 c]
4. Officers must avoid suggestive statements that may influence the judgment or perception of the witness.
5. A second officer who is unaware of which photograph depicts the suspect, known as a blind administrator, should actually show the photographs to the witness. This technique, called double-blind administration, is intended to ensure that the witness does not interpret a gesture or facial expression by the officer as an indication as to the identity of the suspect. It also allows the prosecution to demonstrate to the judge or jury that it was impossible for the officer showing the photographs to indicate to the witness, intentionally or unintentionally, which photograph he should select.
6. If it is not practicable to use double-blind administration, a blinded technique such as the folder shuffle should be used. In all cases, officers shall employ techniques that ensure that no officer present for the showing of an array can tell when the witness is viewing a photograph of the suspect.
7. The investigating officer or the second officer (the administrator) should carefully instruct the witness by reading from a departmental Photo Array Instruction Form, and the witness should be asked to sign the form indicating that he understands the instructions. The investigating officer and the administrator should also sign and date the form.

8. When the double-blind technique is used, the officers should explain to the witness that the officer showing the array does not know the identity of the people in the photographs.
9. The officer shall show the photographs to the witness one at a time and ask the witness whether or not he recognizes the person.
10. When the witness signals for the next photograph, the officer should move the first photograph so that it is out of sight and ask the witness whether he recognizes the next photograph. The procedure should be repeated until the witness has viewed each photograph.
11. If the witness identifies a photograph, the officer should ask the witness how certain he is of the identification. Officers should ask the witness not to use a numerical scale, but rather his own words.
12. If the witness identifies a photograph before all the photographs have been viewed, the officer should remind the witness that he is required to show the rest of the photographs.
13. Witnesses who ask to see a photo or line-up participant a second time should be shown the entire array or lineup. Array or lineups shall not be shown more than two times.
14. The photo array should be preserved as evidence in the same order as when the identification was made.
15. 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.
16. When an officer is showing a photographic array or lineup to a subsequent witness in the same investigation, officers should shuffle the order to demonstrate that there could be no collusion between the two witnesses.

### ***Line-ups***

1. Line-ups shall be conducted under the direction of a detective supervisor, or in his absence the Chief of Police, and when feasible, after consultation with the District Attorney's Office.
2. A suspect cannot be detained and compelled to participate in a line-up without probable cause to arrest.<sup>5</sup> If a suspect refuses to participate in a line-up, the District Attorney's Office may be asked to apply for a court order to compel the suspect to cooperate.
3. Before any suspect who has been arraigned or indicted is shown to eyewitnesses in a line-up, or other live identification procedure, he must be informed of his right to have an attorney present at the line-up and of his right to be provided with an attorney without cost if he is unable to afford legal counsel.

Unless a valid waiver is voluntarily and knowingly made, in writing if possible, no such identification may proceed without the presence of the suspect's attorney.<sup>6</sup>

4. Officers must select a group of at least five fillers who fit the description of the offender as provided by the witness(es). Because the line-up will be administered by an officer who does not know the identity of the suspect, the fillers selected should not be known to the officer administering the line-up. In selecting line-up fillers, abide by the guidelines for photo array fillers as described above. [42.2.11 a]
5. 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 until the identification procedure is completed. [42.2.11 c]
6. All persons in the line-up should carry cards that identify them only by number and should be referred to only by their number. As with photo arrays, each witness must view the line-up independently, out of the presence and hearing of the other witnesses.
7. The investigating officer should explain to the witness that a second officer (the line-up administrator) will be conducting the line-up, and that the administrator does not know the identity of the people participating. [42.2.11 d, f]
8. The investigating officer must carefully instruct the witness by reading from a departmental Line-up Instruction Form, and the witness should be asked to sign the form indicating that he understands the instructions. The officer should also sign and date the form. [42.2.11 d, f]
9. The investigating officer must leave the room while the line-up administrator conducts the line-up. [42.2.11 d, f]
10. The line-up should be conducted so that the suspect and fillers do not actually line up, but rather so that they are displayed to the witness one at a time. This can be accomplished by having them enter the room individually and leave before the next one enters.
11. The procedure for showing the participants to the witness and for obtaining a statement of certainty is the same as for photo arrays. Whenever practicable, the police should videotape or audiotape a line-up. [42.2.11 e]
12. When an attorney for the suspect is present, the attorney should be permitted to make reasonable suggestions regarding the composition of the line-up and the manner in which it is to be conducted. Any suggestions made by the suspect's attorney, and any actions taken by the officer on those suggestions, should be included as part of the line-up report.
13. Counsel representing the suspect should be afforded sufficient time to confer with his client prior to the line-up. Once the line-up has commenced, attorneys should function primarily as observers, and should not be permitted to converse with the line-up participants, or with the witnesses, while the line-up is underway.

The concept of blind administration requires that no one be present who knows the identity of the suspect. For this reason, the any attorney who knows the suspect should leave the room before the line-up begins. An attorney who does not know the suspect may attend the line-up on behalf of defense counsel or the assistant district attorney.

14. The suspect's attorney is not legally entitled to the names or addresses of the witnesses attending a line-up if the suspect has not yet been arraigned or indicted.<sup>7</sup> If the suspect's attorney insists on having information about line-up witnesses, they should be advised to contact the District Attorney's Office.
15. During a line-up, each participant may be directed to wear certain clothing, to put on or take off certain clothing, to take certain positions, or to walk or move in a certain way.<sup>8</sup> If officers ask the participants to wear an article of clothing, they must guard against circumstances where the article only fits the suspect. All line-up participants shall be asked to perform the same actions.
16. 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.)
17. After a person has been arrested, he may be required to participate in a line-up regarding the crime for which he was arrested.<sup>9</sup> After arrest, a suspect may lawfully refuse to participate in a line-up only if he has a right to have counsel present (post arraignment/indictment) and counsel is absent through no fault of the suspect or his attorney.

#### ***Voice Identification***

1. Although considerably less common than visual identifications, voice identifications may be helpful to criminal investigations where the victim or witness was blind, the crime took place in the dark, the subject was masked, the witness's eyes were covered by the perpetrator, or they were never in the same room with the perpetrator but heard his voice. If officers wish to conduct a voice identification procedure with a witness who also saw the subject, they must first consult with a detective supervisor, or in his absence the Chief of Police and, when feasible, the District Attorney's Office.
2. As with any in-person identification or confrontation, if the suspect has been arraigned or indicted, he has a right to the presence of counsel at the voice identification procedure.
3. Where a voice identification is attempted, the following procedures should be employed to the extent possible:<sup>10</sup>
  - a. As in a line-up, there should be at least six persons whose voices will be listened to by the witness; one-on-one confrontations should be avoided. Because line-ups will be administered by an officer who does not know the identity of the suspect, the fillers should not be known to the officer administering the procedure;

- b. The suspect and other participants shall not be visible to the witness; this can be done by using a partition, or by similar means;
  - c. All participants, including the suspect, shall be instructed to speak the same words in the same order;
  - d. The words recited by the participants shall not be the ones spoken by the offender during the crime; the line-up participants should speak neutral words in a normal tone of voice;<sup>11</sup>
  - e. When both a visual and voice line-up are conducted, the witness should be informed that the line-up participants will be called in a different order and by different numbers;<sup>12</sup>
  - f. If there are two or more suspects of a particular crime, officers must present each suspect to witnesses in separate line-ups. Different fillers should be used to compose each line-up.
4. As with any identification procedure, police officers should avoid any words or actions that suggest to the voice witness that a positive identification is expected, or who they expect the witness to identify.
5. The investigating officer should carefully instruct the witness by reading from a departmental Voice Identification Line-up Instruction Form, and the witness should be asked to sign the form indicating that he understands the instructions. The officer should also sign and date the form. Whenever practicable, officers should videotape or audiotape the procedure.
6. Officers must adhere to the principles of blind administration as described above. As is the case with photo arrays and line-ups, the investigating officer must leave the room while the administrator conducts the procedure.

### ***Courtroom Identification***

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

If the suspect has been arraigned or indicted, he has a right to have counsel present at any in-person identification. Live confrontations, and informal viewings of the suspect by witnesses, must be conducted in such a manner as to minimize any undue suggestiveness.

### ***Sketches and Composites***

An artist's sketch, computerized drawing, composite, or other depiction can sometimes aid an investigation, but are most effective when a witness has a good recollection of the offender's facial features. However, research suggests that building a composite can reduce a witness's accuracy for identifying the original face.<sup>13</sup>

For these reasons, the Department does not employ composites in criminal investigations and the use of sketches is severely restricted. No officer may arrange for an artist's sketch except under the following circumstances:

1. Any sketch must be prepared by a trained artist;
2. A sketch may only be authorized by the Detective Sergeant, the Investigations Commander or the Chief of Police;
3. A sketch may only be employed with a witness who provides a clear description of specific facial features;
4. A sketch should not be attempted immediately prior to the showing of a photo array or line-up;
5. Once the sketch has been completed, the witness should be asked to state in his own words how accurately it reflects how the suspect appeared during the crime;
6. The fact that a suspect resembles a sketch or composite is not, without more, probable cause to believe that the suspect is the offender; and
7. A report must be submitted regarding any sketch procedure.

### ***Mug Shots***

Officers will not show large numbers of random photographs to eyewitnesses. If officers decide to show photographs of people from a particular group who are suspected of involvement in the offense, but where no specific suspect has emerged, the following guidelines shall be followed:

1. Officers will ensure there is only one photograph of each individual;
2. Officers shall not refer to the photographs as "mug shots";
3. If photographs of various formats are used, officers will ensure that several of each format are used;
4. The witness's attention should not be drawn to any particular photograph;
5. A report shall be filed following the procedure, regardless of whether identification is made. The report should describe the photographs viewed by the witness(s).
6. Officers should be extremely cautious before charging a suspect based on this type of identification alone.

### ***Inanimate Objects***

Officers who seek to have an eyewitness identify an inanimate object should adhere to the following procedures:

1. An identification of an inanimate object must be conducted in a nonsuggestive manner,<sup>14</sup> and officers must not make extraneous remarks or provide information to the witness about the circumstances surrounding the discovery of the object;
2. It is permissible to show a witness a single object or a photo of the object, so an array of objects is not required,<sup>15</sup> but an officer might elect to conduct an object lineup to avoid an allegation of a suggestive procedure, especially if identification of an object effectively identifies the defendant as the offender;
3. The officer should document the witness's complete description of the object before the object or a photograph of it is shown to the witness;<sup>16</sup>
4. The officer should tell the witness that objects will be shown, and that they may or may not be the object the witness described;
5. Where any identification is made, the officer should ask the witness to state, in his or her own words, how certain he or she is of the identification;
6. The officer should obtain clarification from the witness as to whether the object is the actual object he or she saw, whether it simply looks like the object he or she saw, or whether the witness is unsure;
7. If a piece of clothing similar to that described by a witness is found in the area where a suspect has been stopped, the article should not be placed on the suspect prior to a show-up. Rather, a show-up should be conducted first, and identification of the clothing item afterwards; and
8. Whenever practicable, the officer should videotape or audiotape the identification of an inanimate object. If not, the officer should write down the witness' exact words and incorporate them into his report.

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<sup>1</sup> *Com. v. Ellis*, 432 Mass. 746 (2000); *Com. v. Odware*, 429 Mass. 231, 235 (1999)

<sup>2</sup> The Innocence Project (last visited Oct. 28, 2013)

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

<sup>4</sup> *Com. V. Watson*, 915 N.E.2d 1052, 455 Mass. 246 (2009)

<sup>5</sup> *Com. v. Bumpus*, 209 N.E.2d 167, 362 Mass. 672 (1972)

<sup>6</sup> *Com. v. Torres*, 442 Mass. 554 (2004)

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

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

<sup>9</sup> *Id.*

<sup>10</sup> *Com. v. Marini*, 378 N.E.2d 51, 375 Mass. 510 (1978)

<sup>11</sup> *Id.*

<sup>12</sup> *Com v. Demaria*, 703 N.E.2d 1203, 46 Mass. App. Ct. 114 (1999)

<sup>13</sup> Gary L. Wells, Steve D. Charman, Elizabeth A. Olson, *Building Face Composite Can Harm Lineup Identification Performance*, *Journal of Experimental Psychology* (2005)

<sup>14</sup> *Commonwealth v. Simmons*, 383 Mass. 46 (1981)

<sup>15</sup> *Commonwealth v. Bresilla*, 470 Mass. 422, 427, 431 (2015)

<sup>16</sup> *Commonwealth v. Thomas*, SJC-12055 (2017)