IACP National Law Enforcement Policy Center

Eyewitness Identification

Concepts and Issues Paper

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I. INTRODUCTION

A. Purpose of Document

This document was designed to accompany the Model Policy on Eyewitness Identification established by the IACP National Law Enforcement Policy Center. This paper provides essential background material and supporting documentation to provide greater understanding of the developmental philosophy and implementation requirements for the model policy. This material will be of value to law enforcement executives in their efforts to tailor the model to the requirements and circumstances of their communities and their law enforcement agencies.

B. Background

Although the evidence provided by eyewitnesses can be tremendously helpful in the development of leads, identifying criminals, and exonerating the innocent—it is subject to error. Civilian eyewitnesses frequently prove to be unreliable observers, and erroneous identifications are sometimes the result. Misidentifications by eyewitnesses are normally the result of a combination of factors.

For example, human perception tends to be inaccurate, especially under stress. The average citizen, untrained in observation and placed under extreme stress as a victim of or witness to a crime, may not be able to describe a perpetrator accurately, sometimes even after coming face-to-face with the individual.

Also, a witness, particularly one who is not really sure what the perpetrator actually looked like, may be easily influenced by suggestions conveyed to him or her during the identification process. In United States v. Wade, the Supreme Court of the United States recognized these facts in saying:

The influence of improper suggestions upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor. Perhaps it is responsible for more such errors than all other factors combined.1

Law enforcement officers may unwittingly facilitate misidentifications by using suggestive words or engaging in certain types of suggestive behavior. The average witness, anxious to make an identification and influenced by the police officer’s image as an authority figure, can be very sensitive to any suggestion made by the police regarding the identity of the perpetrator. Officers may, totally unintentionally, convey to the witness by word or behavioral cue, that a particular person being viewed is the suspect.

Consequently, great care must be taken by officers conducting any type of eyewitness identification to avoid any action that might lead to an erroneous identification. Scrupulously adhering to the procedures and precautions outlined in this document will help avoid misidentifications that may lead to unjust accusations or even erroneous convictions of innocent persons and divert the investigation away from the real culprit. In addition, even if the actual perpetrator is caught and brought to trial, using improper identification procedures during the investigation will often cause the suppression of identification evidence at trial, resulting in dismissal of the charges or otherwise making it impossible to convict the guilty party.

It is estimated that some 77,000 people nationwide are put on trial because eyewitnesses pick them out of lineups or photo arrays. Recently, changes in eyewitness identification procedures have been spurred by the fact that nearly 200 people have been cleared of crimes through DNA evidence, most of whom were convicted based on eyewitness identification.²

Research in this field has provided much information on the dynamics of eyewitness identification. For example, the manner in which suspects are presented to witnesses has bearing on whether identification will be made and which individual is more likely to be pinpointed by the witness. In the wake of these and many other research findings, the American Bar Association (ABA) issued a resolution containing Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures in August 2004. The document has subsequently prompted states such as Wisconsin and California to conduct similar reviews of eyewitness identification practices and to issue recommendations for change in their respective jurisdictions that generally mirror the ABA suggestions.³ No doubt, these findings will continue to influence reforms around the nation. Officers may find that these best practices may also be cited during court proceedings as models for conducting eyewitness identification.

If a court determines that an identification procedure was excessively suggestive, the court may prohibit introduction of the evidence in question. It may rule that any in-court identification of the accused by the victim is inadmissible or suppress other evidence that was obtained as a result of an improper pretrial identification procedure or both. Of course, any of these actions...
may be fatal to a case.

Today, in evaluating proper identification procedure, the courts will generally be concerned with whether it was suggestive. If the court finds that the procedure was suggestive, it will then proceed to determine whether, despite the suggestiveness, the identification was reliable when considering the totality of the circumstances.4

For purposes of this document, identification procedures may be categorized as showups, lineups, or photo arrays. In a showup, witnesses are shown one suspect only. By contrast, in a lineup, eyewitnesses are presented with a number of individuals. Photo array procedures generally involve showing several photographs to a witness for the purpose of obtaining identification.

II. PROCEDURES

A. Showups

The showup has been widely condemned by the courts and by experts in law, law enforcement, and law enforcement identification procedures.5 While the courts have not held showups to be experts in law, law enforcement, and law enforcement identification procedures.5 While the courts have not held showups to be inherently suggestive, they have ruled that the determination of whether a specific showup was excessively suggestive will be made based upon the totality of the circumstances attending that particular showup. In practice, evidence deriving from showups is frequently suppressed because the showup is so inherently suggestive. Consequently, the use of showups should be avoided where possible, particularly when photo arrays or lineups could be used.

It is recognized however, that a showup early in an investigation may provide sufficient probable cause to help avoid the escape of a prime suspect. Conversely, it may facilitate the release an innocent person thus redirecting police investigations in potentially more productive areas. Therefore, where use of a showup seems reasonable and appropriate, certain guidelines should be followed to minimize the suggestiveness of the procedure and the risk of suppression of any resultant identification evidence.

Showups conducted in the station house or jail are the most unreliable and hence the most objectionable. Showups should, whenever reasonably possible, conform with the following guidelines:

- Showups should only be used when the suspect is detained within a reasonably short time following the offense.
- Showups should not be used when independent probable cause exists to arrest a suspect.
- Prior to the showup, the witness should provide officers with as complete a description of the suspect as possible.
- Before showing the suspect, the following statement should be read to the witness. The statement should include the following:

  In a moment I am going to ask you to view a person. This individual may or may not be the person who committed the crime.

  It is just as important to clear innocent persons from suspicion as to identify guilty parties.

  Regardless of whether you make an identification, we will continue to investigate the incident.

- Document the time and location of the showup, the officers present, and the outcome of the procedure. If possible, the showup should be videotaped using an in-car camera or other recording device.

Do you understand these instructions?

- When possible, the witness should be taken to the location of the suspect rather than bringing the suspect to the witness.
- Showups should not be conducted when the suspect is in a cell, handcuffed, or dressed in jail clothing.
- Showups should not be conducted with more than one witness present at a time. If showups are conducted separately for multiple witnesses, the witnesses should not be permitted to communicate before or after the showup regarding the identification of the suspect.
- The same suspect should not be presented to the same witness more than once.
- Showup suspects should not be required to put on clothing worn by the perpetrator, speak words uttered by the perpetrator, or perform other actions mimicking those of the perpetrator.
- Words or conduct by the police that may suggest to the witness that the individual is or may be the perpetrator should be scrupulously avoided. For example, one should never tell the witness that the individual was apprehended near the crime scene, that the evidence points to the individual as the perpetrator or that other witnesses have identified the individual as the perpetrator. Unfortunately, the mere fact that the individual has been presented to the witness for identification strongly suggests that the officers believe him to be the guilty party.
- Following the showup, ask the witness how confident he or she is in the identification. Document the exact words used by the witness. Often, the confidence of the eyewitness in his or her identification is the primary determinant of whether people will assume the identification to be accurate.
- Document the time and location of the showup, the officers present, and the outcome of the procedure. If possible, the showup should be videotaped using an in-car camera or other recording device.

B. Lineups

The lineup, if properly conducted, is significantly less suggestive than the showup and hence is generally preferable. Nevertheless, police officers conducting a lineup must also use caution to avoid suggestive influences. Studies of witness psychology reveal that lineup witnesses tend to believe that the guilty party must be one of the individuals in the lineup. Consequently, witnesses tend to pick out the person in the lineup who most closely resembles their perception of the perpetrator, even though the perpetrator may not in fact be present.

Prior to the lineup, witnesses should be given the following instructions, which can facilitate an identification and help avoid misidentification.

You will be asked to view a series of individuals.

It is just as important to clear innocent persons from suspicion as it is to identify guilty parties.

I don’t know whether the person being investigated is included in this series.

Individuals present in the series may not appear exactly as they did on the date of the incident because features such as head hair and facial hair are subject to change.
You should not feel that you have to make an identification. If you do identify someone, I will ask you to describe in your own words how certain you are.

The individuals will be shown to you one at a time and are not in any particular order. Take as much time as you need to examine each individual. If you make an identification, I will continue to show you the remaining individuals in the series.

Regardless of whether you make an identification, we will continue to investigate the incident.

Since this is an ongoing investigation, you should not discuss the identification procedures or results.

Many witnesses, in an effort to please the police officers conducting the lineup, feel obligated to pick out someone from the lineup rather than disappoint the officers. Such witnesses are often sensitive to, and strongly influenced by, subtle clues conveyed by the officers that may indicate to the witness that the officer believes that a particular individual in the lineup is the perpetrator. This makes it doubly important that officers conduct the lineup—and conduct themselves—in a nonsuggestive manner. To prevent these suggestive techniques, police lineups should be administered by an officer who does not know which person in the lineup is the actual suspect. Other than the suspect’s attorney, who should attend the lineup, no one who is aware of the suspect’s identity should be present during the lineup.

Additionally, it has been recommended in the studies cited by the ABA and others that a lineup should be administered sequentially rather than all at once (simultaneously). When witnesses view photos or lineups simultaneously, they tend to make comparative judgments; they try to determine which of those persons present appears to make the best fit to their memory of the suspect. When the suspect is present in the lineup or photo array, they will likely be identified in this manner and no harm is caused. But, if the actual suspect is not present, witnesses still tend to make an identification based on the best fit among those present. This can lead to misidentification. Therefore, studies suggest that sequential presentation of suspects in both photo arrays and lineups is the better approach because witnesses tend to make absolute rather than comparative judgments when viewing suspects individually. In this process, suspects and fillers are presented one at a time and then move out of site as the next person is brought into view.

Preparing for a lineup may be as important to the validity of the procedure as actually conducting it. Selecting individuals as fillers for the lineup is a particularly important issue. In determining which fillers should be presented to the witnesses in a lineup, the following principles should be observed:

- The lineup should consist of at least five or six persons. The smaller the lineup, the less objective it is. A lineup with only two or three persons is little better than a showup, and suggestive factors become excessively influential. In addition, some authorities caution against the use of plainclothes police officers in lineups because they do not naturally look or act like suspects, a factor that causes witnesses to reject them as possibilities. They also may have been seen by the witness in the community, upon visits to the police station, or in similar contexts.

Preparing a witness for viewing the lineup is another important consideration. Preparation should be limited to nonsuggestive statements, such as explaining the procedure that will be used and making it clear that the individuals in the lineup will be unable to see the witness. Officers should avoid taking any action or making any statement that will adversely affect the validity of the lineup. In particular, before a lineup, officers should avoid:

1. Showing the witness any photos of the suspect.
2. Conducting a showup with the suspect, or allowing the witness—accidentally or otherwise—to see the suspect, such as in an office or holding cell prior to the lineup.
3. In conducting the lineup, officers who are not familiar with the case should handle the procedure if possible. This helps to minimize the possibility that the officers who are conducting the investigation will, in their zeal to solve the case, convey (inadvertently or otherwise) clues to the witness as to which person to select, or put pressure on the witness to choose somebody. The following should also be observed in conducting lineups:
   - Statements that put pressure on the witness to make an identification should be avoided. Witnesses are anxious to please the officers conducting the lineup, so they should not be made to feel that they are expected to make an identification. For example, urging a hesitant witness to make an identification or to try harder would be improper.
   - Statements that may cause the witness to focus on a particular individual should be avoided. The same sort of statements discussed in regard to witness preparation should be avoided during actual conduct of the lineup. Officers are often tempted to prompt a witness when someone in the lineup is a prime suspect and the witness is hesitant to make an identification.
   - The lineup should be presented to one witness at a time. The common practice of having a group of witnesses view a lineup simultaneously should not be permitted. Courts, including the U.S. Supreme Court, have disapproved multiple-witness lineups. If more than one witness is to view a lineup, the witnesses should be kept separated prior to the lineup and should not be permitted to discuss the case with each other, compare descriptions, etc. While discussions between witnesses following a lineup will presumably not render any previously made identification invalid, it may affect the admissibility of a subsequent in-court identification of the defendant by these witnesses during the trial itself.
   - If possible, conduct a blank lineup. Conducting two or more lineups, where one lineup includes the suspect and the others do not, assists the prosecution in...
later refuting any claim by the defense that the lineup was too small or was suggestive.

- If multiple lineups are to be conducted for the same witnesses, do not put the suspect in more than one. Seeing the same face in a second lineup may cause the witness to erroneously recognize the person as the perpetrator, merely because the face is familiar from the first lineup. Because of this, the courts have disapproved this practice.\(^1\)

4. Document any statements made by the witness before, during, and after the lineup.

5. Videotape and audiotape the lineup whenever possible. This procedure provides a historical record of the proceeding should the identification or the process used come into question, or the actual identification process is necessary to assist the prosecution at trial.

In another context, the Court has held that requiring a suspect participating in a lineup to speak, even to the extent of uttering the same words used by the criminal does not violate the Fifth Amendment, since it is not “testimonial self-incrimination.” Other actions, such as standing, walking, gesturing, and the like are similarly not self-incriminating within the meaning of the Fifth Amendment. Similarly, requiring the suspect to wear certain clothing has been held to be outside of the coverage of the Fifth Amendment.

 Witnesses should not be praised or congratulated for identifying the suspect. This may serve to reinforce a shaky identification, convincing the witness that he or she has picked out the perpetrator when the witness actually has doubt. In addition to increasing the chances of a miscarriage of justice, this may lead to suppression of a later in-court identification of the perpetrator by the same witness.

C. Photographic Identifications

Photographic identifications may take a number of forms. If a single photo is shown to the witness, the photo identification has all of the vices of the showup and is generally regarded by the courts as improper. Consequently, multiple-photo arrays are preferable. In such procedures, the photos should be shown individually, one at a time. Simultaneous photo arrays, where all the photos are shown at once, should be avoided whenever possible. Photo arrays are similar to a lineup, and virtually all of the cautions set forth for lineups in the preceding discussion apply to multiple-photo identification procedures as well.

Specifically, the following recommendations are made regarding photographic identifications:

- There should be at least six photographs.
- The photographs should be of people who are reasonably uniform in age; height; weight and general appearance; and of the same sex and race. If scars or tattoos were present on the suspect, all in the photo array should be similarly marked or the area of the body should be covered for all.
- The photographs themselves should be similar. For example, color photographs and black and white photographs should not be mixed; they should be of approximately the same size and composition.
- Mug shots should not be mixed with snapshots since they are generally recognizable as such and have an immediate tendency to brand an individual.
- If mug shots are used, or if the photographs otherwise include any identifying information regarding the subject of the photograph, this information should be covered so that it cannot be seen by the witness. If only some of the photos have such information, the corresponding portions of photos should be covered so that none of the photos will look different.
- The array should not include more than one photo of the same suspect.
- The individual administering the photo array should not have any knowledge as to the identity of the suspect. If such an independent administrator is not available, the following functional equivalent procedures should be used:
  1. Place the suspect and filler photos in a folder. Include four blank folders, for a total of ten.
  2. Shuffle the folders before giving them to the witness.
  3. The officer administering the array should position himself or herself so that he or she cannot see inside the folders as they are viewed by the witness.
- The photo array should be shown to only one witness at a time.
- If possible, the array should only be shown to the witness once. Subsequent viewings have been shown to negatively affect the credibility of the identification in future proceedings.
- As with showups and lineups, no suggestive statements should be made. For example, witnesses should not be told that the suspect’s photo is in the group, or that someone else has already picked out one of the photos as being the criminal. Similarly, nothing should be said or done to direct the witness’s attention to any particular photograph. For example, pointing to a particular photo and saying, “Is this the guy?” is improper and may lead to suppression.
- The photo array should be preserved for future reference. In fact, in some states, failure to preserve the array will lead to suppression of the identification process. Additionally, as in lineups, full details about the identification process should be recorded and preserved—such as the administrator’s name; procedures used; date, time and location of the procedure; number of fillers; names of those present during the procedure; and whether the array was viewed more than once by the same witness. Assuming that the photo identification has been properly conducted and that the array itself was not in any way suggestive, preserving this information helps the prosecution refute any claims by the defense to the contrary.

The proper use of photographs to obtain identification of a perpetrator has been approved by the courts.\(^1\) However, the courts appear to prefer that photographic identification procedures be used only to develop investigative leads. Some courts have criticized the practice of using photographic identifications once the suspect has been arrested, preferring that once the suspect is in custody and therefore readily available, a lineup be employed for eyewitness identifications.\(^1\)

D. The Right to Counsel at Eyewitness Identifications

In 1967, the U.S. Supreme Court held that a suspect has a right to counsel at a post-indictment lineup.\(^1\) Subsequently, the Court expanded this ruling to provide for a right to counsel at any lineup conducted after formal adversary proceedings have been ini-
tiated against the suspect, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.\textsuperscript{15} There is, however, no right to have counsel present at a lineup conducted before such adversary proceedings have been initiated. These same rules apply to showups. However, there is no right to counsel at photo identification sessions.\textsuperscript{16} The purpose of having counsel present at the identification is to enable counsel to detect any suggestiveness or other irregularities in the procedure. It should be recognized, however, that the presence-of-counsel requirement may actually help the police in certain instances. First, the department’s goal should be to avoid any possibility of an erroneous identification and a resultant miscarriage of justice. Therefore, the presence of counsel may be regarded as a positive step in preventing any such occurrence. In addition, if counsel is present and acquainted to the procedure being employed, this may preclude any subsequent defense contention that suggestiveness or other impropriety occurred. This will strengthen the prosecution’s case. Therefore, to the extent that defense counsel is responsible and objective, cooperation with counsel in constructing and conducting a nonsuggestive and otherwise proper identification procedure may benefit all concerned.

E. Summary

Of all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erro\-raneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work. Proper precautions must be followed by officers if they are to use eyewitness identifications effectively and accurately.

Endnotes

\textsuperscript{1} 388 U.S. 218, 229 (1967).
\textsuperscript{4} This in turn is to be achieved by analyzing six factors. These are (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; (5) the length of time between the crime and the confrontation and (6) whether the witness was a casual observer or the victim of the crime. If in view of these various factors, it appears that the identification was reliable despite the suggestiveness of the procedure, evidence of the identification will be admissible to bolster a subsequent in-court identification. Neil v. Biggers, 409 U.S. 188 (1972). See also Manson v. Brathwaite, 432 U.S. 98 (1977). (Biggers test applied to photo identifications.)
\textsuperscript{5} See Stovall v. Denno, 388 U.S. 293 (1967).
\textsuperscript{6} Although such requirements sometimes may properly be imposed during a lineup, the showup is so inherently suggestive that the same court that would approve their use in a lineup may find them excessively suggestive when employed during a showup.
\textsuperscript{7} Although it may surprise many officers to hear it, the average citizen still sees the police officer as a benevolent father figure (or perhaps, in the case of a female officer, a mother figure), with the result that the lineup witness is often extremely anxious to please the officer by making an identification—even though the citizen is not at all certain that the person chosen is the guilty party.
\textsuperscript{8} United States v. Lewis, 547 F.2d 1030, 1035 (8th Cir. 1976).
\textsuperscript{9} Even a photo array should be avoided. This is especially true if the suspect is the only person in the photo array who is also in the lineup.
\textsuperscript{10} See Gilbert v. California, 388 U.S. 263 (1967).
\textsuperscript{12} Simmons v. United States, 390 U.S. 377 (1968).
\textsuperscript{13} It has been said that once a witness has identified a photo, this influences subsequent identifications. The contention is that the witness thereafter is really only recognizing the previously seen photograph, not the actual criminal. For this reason, the practice of showing a witness a photograph of the defendant just prior to trial to “refresh the witness’s memory” should be avoided.