

 <b>Lexington Police Department</b>	<b>Subject: Eyewitness Identification</b>					<b>Policy Number:</b>	
	<b>Accreditation Standards:</b> Reference: 42.2.11; 42.2.12					<b>41N</b>	
<input type="checkbox"/> New <input checked="" type="checkbox"/> Revised		<b>Revision Dates:</b>	1/24/19				<b>Effective Date:</b> 7/1/12
<b>By Order of:</b> Mark J. Corr, Chief of Police							

*The Municipal Police Institute, Inc. (MPI) is a private, nonprofit charitable affiliate of the Massachusetts Chiefs of Police Association. MPI provides training and model policies and procedures for police agencies. This policy is an edited version of MPI Policy 1.12, "Eyewitness Identification" and guidelines provided by the Middlesex District Attorney's Office dated July 2004.*

*In October 1999 the National Institute of Justice developed and approved of guidelines for eyewitness evidence procedures, these reform procedures are the foundation for this policy.*

## GENERAL CONSIDERATIONS AND GUIDELINES

Police identification procedures are an important consideration for establishing the identity of a criminal offender. They are equally significant in clearing an innocent suspect. Many people who have been convicted of serious crimes, only to later be exonerated by scientific evidence, were originally convicted based in large part on mistaken identification by a witness.

The identification of criminal offenders must be approached with extreme caution as the court may exclude evidence if it is improperly obtained. If improper identification procedures are used, a court not only may exclude the out-of-court identification, but can in certain circumstances exclude subsequent in-court identification. The court will carefully examine the identification procedure and the manner in which it was conducted to determine whether the police influenced the witness, intentionally or unintentionally. Even in those cases where eyewitness identification is admitted by the court, the jury may still not be persuaded if sufficient doubt can be raised as to its reliability.

Officers must be careful to ensure that their identification procedures are not conducted in a suggestive manner and that they are not conducive to irreparable misidentification.

It is the policy of the Lexington Police Department that:

- The person subjected to the identification procedure is afforded his/her Sixth Amendment right to counsel, when required, and
- When a witness makes identification, regardless of the identification method used, the officer should not convey to the witness that he/she has or has not identified the individual the officer believes is responsible for the crime.
- The Due Process provisions of the Fifth and Fourteenth Amendments, which require identification procedures utilized by the police to comply with standards of fairness so as not to be unduly suggestive, will be followed.

## DEFINITIONS

- **Show-up:** The presentation of one suspect to an eyewitness in a short time frame following the alleged commission of a crime.
- **Field Identification:** When the police arrange for the witness to observe a group of individuals in a public place.
- **Photo Array:** The showing of several photographs of different individuals to an eyewitness for the purpose of obtaining identification.
- **Lineup:** The presentation of a number of individuals to an eyewitness for the purpose of obtaining identification.
- **Voice Lineup:** The presentation of a number of individuals to a witness for the purpose of obtaining an identification of a suspect's voice.
- **Mug shot:** Photographic identification of a person's face, typically from the top of the shoulders to the top of the subjects head.

## LEGAL CONCERNS

### A. Right to Counsel During Identification Procedure

1. The U.S. Supreme Court has determined that the right to counsel begins when any "adversarial judicial proceeding" has been initiated "whether commenced by way of formal charge, preliminary hearing, indictment, information, or arraignment." Thus, once a suspect has been arraigned or indicted, his/her right to have counsel present at any in-person identification procedure attaches. However, no right to the presence of counsel exists simply because a complaint has been filed, even if an arrest warrant has issued.
2. There is no requirement for an attorney to be present when identification in the field is made of a suspect who has been apprehended during the period immediately after the commission of a crime.
3. No right to counsel attaches to intangible identification procedures, such as those involving photographs or composite drawings, whether conducted before or after the initiation of adversarial criminal proceedings.

B. Due Process Considerations

1. Due process requirements dictate that identifications be conducted in a fair, objective, and non-suggestive manner. Due process considerations are violated when identification procedures arranged and/or conducted by the police are as unnecessarily suggestive and conducive to irreparable mistaken identification as to deny the defendant due process of law.<sup>i</sup>
2. In determining whether a specific identification procedure is unnecessarily suggestive, all of the circumstances surrounding the procedure must be considered.
3. Officers should consider case law and the U.S. Department of Justice's publication: *Eyewitness Evidence: A Guide for Law Enforcement 1999*, which identifies procedures and practices that, will produce more reliable and accurate eyewitness evidence.
  - a. Whether police conduct was reasonable in light of the circumstances.
  - b. Amount of time between incident and identification.
  - c. Isolation of the suspect; whether the suspect is singled out in some manner.
  - d. Whether the police communicate to the witness their belief that the suspect committed the crime.
  - e. Whether the suspect is viewed by two or more witnesses simultaneously.
  - f. Existence of police urging of witness to make identification.
  - g. Exigent circumstances

## PROCEDURES

A. Show-ups and Field Identification

1. Deciding to Conduct a Show-Up [\[42.2.12\(a\)\]](#)
  - a. Every field show-up or other one-on-one confrontation between a suspect and a witness that is arranged by the police must be as fair and non-suggestive as possible.<sup>ii</sup>
  - b. One-on-one or show-up identifications are, by their very nature, inherently suggestive. While show-ups are not per se unconstitutional, they are disfavored. However, courts will admit show-up identification evidence when there is "good reason" or "exigency." Officers should assess the circumstances of the situation and determine whether there is sufficient justification to conduct a show-up.

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- i. **Good Reason** to conduct a show-up must be based on one of three considerations, to be assessed by the court after the fact:
  - (a) The nature of the crime involved and corresponding concerns for public safety.
  - (b) The need for efficient police investigation in the immediate aftermath of a crime.
  - (c) The usefulness of prompt confirmation of the accuracy of investigatory information, which, if in error, will release the police quickly to follow another track.
- ii. **Exigent Circumstances** also justify conducting a show-up, particularly when the witness is in grave medical danger, often in the hospital. Exigency is not required when “good reason” exists.

### 2. Logistics of a Show-Up

- a. Conduct the show-up promptly after the crime; although courts have not established an exact time limit, to be safe, officers should try to conduct a show-up within **two hours** of the offense.
- b. Be aware of and, when possible given any safety considerations, minimize the impact of visual cues of custody, such as removing or covering handcuffs, removing the suspect from the cruiser, or minimizing the number of officers surrounding the suspect.
- c. Officers must have either reasonable suspicion (threshold inquiry requiring rapid response), probable cause to arrest, or consent in order to hold the suspect while conducting the show-up. A witness description reflective of a suspect who is stopped in a proximate time and place in the relation to the crime may provide sufficient reasonable suspicion to hold the suspect for a short time.
- d. If a suspect is stopped within a short time after the commission of the crime, he/she may be taken to a location where he/she can be viewed by a witness for possible identification; or, 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.
  - ii. For the same reason, clothing articles found at the crime scene should not be placed on or in contact with a suspect.
  - iii. If possible, a suspect should not be brought back to the home of a victim or witness unless that was the scene of the crime.
- e. Presentations should be one-on-one to avoid contamination or suggestiveness. Separate witnesses when there are two or more. Officer’s judgment must be used in determining whether or not to

separate the alleged suspects when there are two or more.  
[42.2.12(c)]

- f. After a witness makes an initial identification, consider using other less suggestive methods (i.e. photo array) for successive witnesses when appropriate.

### 3. Conducting a Show-Up

- a. Avoid saying or doing anything that may influence the witness. DO NOT tell the witness the police have stopped someone who fits the description.
- b. Transport the witness to the location of the suspect. Use of a cruiser is acceptable, however, the police radio should be turned off or down so the witness cannot hear related radio transmissions.  
[42.2.12(b)]
- c. Before presenting a suspect to a witness, read the following instructions from the Show-Up Advisement Card: [42.2.12(d)]
  - **You are going to be shown an individual.**
  - **This may or may not be the person who committed the crime, so you should not feel compelled to make an identification.**
  - **It is just as important to clear innocent people, as it is to identify possible perpetrators.**
  - **Whether or not you identify someone, the police will continue to investigate.**
  - **After you are done, I will not be able to provide you with any feedback or comments on the results of the process.**
  - **Please do not discuss this identification procedure or the results with other witnesses in this case or with the media.**
  - **Focus on the event: the place, view, lighting, your frame of mind, etc. Take as much time as you need.**
  - **People may not appear exactly as they did at the time of the event, because features such as clothing, head and facial hair are subject to change, even in a short period of time.**
  - **As you look at this person, tell me if you recognize him/her. If you do, please tell me how you know the person, and in your own words, how sure you are of the identification.**
  - **Do you have any questions before we begin?**
- d. Confirm that the witness understands the procedures.
- e. After the Show-Up, be prepared to record both the identification and non-identification results, including the witness's own words and any spontaneous comments.
- f. Do not provide the witness with any feedback, or comments on the results of the identification procedure in any way. If asked, explain that this is necessary to maintain the integrity of the investigation.  
[42.2.12(f)]

4. RECORDING THE RESULTS

- a. A report of every attempted show-up, whether an identification is made or not, shall be included with the original report. [42.2.12(g)]
  - i. Officers shall make written notes of any identification and any statements made by witnesses at the time of confrontation with the suspect. Officers should be particularly alert to note any spontaneous exclamations.
  - ii. Once a witness has indicated his/her opinion regarding the identity of the subject, the officer should ask the witness how certain he/she is of the identification. Officers should not ask the witness to use a numerical scale, but rather encourage him/her to indicate certainty in his/her own words. All statements by the witnesses should be incorporated into the officers' report. [42.2.12(e)]
  - iii. All significant circumstances should be reported, including the time, place, and all persons present at the scene of the confrontation.

5. Show-Up Identification Check List

- a. The “Show-Up Identification Check List” is located on the Police Departments computer G-Drive, under “Forms and Documents.”

6. Emergency Show-Up

- a. When a show-up identification 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 an appropriate manner consistent with the following:
  - i. Seek the permission of the hospital authorities or the patient's own physician to conduct the identification.
  - ii. Emergency identifications are subject to the fundamental requirements of fairness and must not be tainted by any suggestive remarks or gestures by the police.

7. Field Identification

- a. When a suspect is not being held by the police, officers may bring a witness to a public area where the suspects is likely to be found. Procedures similar to those above should be used, as follows:
  - i. Avoid doing or saying anything that may influence the witness.

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- ii. Record information regarding how you decide to conduct the field identification, such as the “good reasons” discussed in Section 2a above.
- iii. Transport the witness to a public area where the suspect is likely to be found. There must be some number of people in the area so that the suspect will not be isolated.
- iv. Provide the witness with advisements similar to section A3 above and read from the Show-Up Instruction Card.
- v. Record both identification and non-identification results, including the witness’s own words and any spontaneous comments.
- vi. Record the process used and the conditions present for the field identification, such as location, lighting, physical conditions, number of people, etc.
- vii. Do not provide the witness with any feedback, or comment on the results of the identification procedure in any way. If asked, explain that this is necessary to maintain the integrity of the investigation.

### B. Photographic Identification

#### 1. Composing Photo Arrays

- a. The use of photographs to establish or verify the identity of a criminal offender is a valuable investigative procedure. Although there is no right to an attorney during a photographic identification procedure, the same due process considerations requiring the procedure to be fair, objective, and non-suggestive apply.<sup>iii</sup>
- b. Photographs for identification purposes should be displayed to witnesses as soon as possible after the commission of a crime. This is when their memory is still fresh and the opportunity for a positive identification is at its greatest.
- c. In most instances, officers conducting photographic identification shall: [\[42.2.11\(a\)\]](#)
  - i. Place the suspect's photograph in a group of at least seven other similar type photographs of individuals (commonly referred to as “fillers”) who are reasonably similar in age, weight, and general appearance. The goal in building the array is not to select filler photographs that look like the suspect, but rather ones that fit the description given by witnesses. Avoid using fillers that so closely match the suspect that a person familiar with the suspect would have difficulty distinguishing the fillers. If the subject has an unusual feature such as a facial scar or disfiguration, attempt to select some fillers with the same type of feature, or artificially add or conceal the feature.

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- ii. Try to use photographs of the same size and basic composition. Do not include more than one photograph of the same person.
- iii. If the witness has previously viewed another array in connection with the same investigation, use different fillers.
- iv. Before showing an array to a witness, remove or completely cover any portions of mug shots or other photographs that provide identifying information or anything that could suggest to the witness that the subject has a criminal record.
- v. If the crime was committed by more than one subject, the officer should show a separate array for each subject.
- vi. Allow each witness to view the photographs independently, out of the presence and hearing of the other witnesses. [\[42.2.11\(c\)\]](#)
- vii. Never make suggestive statements that may influence the judgment or perception of the witness.

### 2. Photo Array Instructions

The officer should carefully instruct the witness prior to showing him/her the array. The instructions should be read from the departmental “Photo Array Information Sheet” listed on the G-drive, and the witness should be asked to sign the form indicating that he/she understands the instructions. The officer should also sign and date the form. The witness should be instructed as follows: [\[42.2.11\(d\)\]](#)

- **I am going to show you a group of photos, which are in random order. The person who committed the crime may or may not be included, so you should not feel compelled to make an identification. It is just as important to clear innocent people, as it is to identify possible perpetrators. Whether or not you identify someone, the police will continue to investigate.**
- **After you are done, I will not be able to provide you with any feedback or comment on the result of the selection. Please do not discuss the identification procedure or the results with other witnesses in this case or with the media.**
- **Think back to the time of the event, the place, view, lighting, your frame of mind, etc. Take as much time as you need. People may not appear exactly as they did at the time of the event, because features such as clothing and head/facial hair are subject to change.**
- **I will hand you photos one at a time, and cannot tell you how many photos there are in total. I will show you all the photos, even if you identify someone in an earlier one. As you finish with a photo, hand it back to me and I will give you another.**
- **If you identify someone, write down the photo you selected and state in your own words, how sure you are of the identification on this sheet.**

3. Conducting the Array (Blind Administration)

- a. Once the investigating officer has instructed the witness, a second officer should actually show the photographs. This second officer should, if possible, be unaware of which photograph depicts the suspect. This technique, called blind administration, has been recommended by the National Institute for Justice, and 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. The technique also allows the prosecution to demonstrate to the judge or jury at trial that it was impossible for the officer showing the photographs to indicate to the witness, intentionally or unintentionally, which photograph he/she should select. [42.2.11(a)]
- b. For the reason above, the officers should explain to the witness that the officer showing the array does not know the identity of the people in the photographs. [42.2.11(f)]
- c. The investigating officer should either leave the room while the array is being shown by the second officer, or should stand back and where the witness will not see him/her. [42.2.11(f)]
- d. If an investigating officer is present when a second officer is showing an array, he/she must remain completely silent. [42.2.11(f)]
- e. When showing photographs to a witness, the officer should show them one at a time by holding them up in front of the witness.
- f. The officer should ask the witness simply whether or not he/she recognizes the person.
- g. 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/she recognized the next photograph.
- h. The procedure should be repeated until the witness has viewed each photograph.
- i. If the witness identifies a subject before all the photographs have been viewed, the officer should ask the witness to view the rest of the photographs.
- j. If a witness asks to view the array a second time, the officer administering the identification should ask the witness if he/she was able to make identification from the original viewing. If the witness is unable to make identification, but feels that it would be helpful to repeat the procedure, then it is permissible to show the photographs a second time.

4. Recording the Results

- a. Once a witness has indicated his/her opinion regarding the identity of the subject, the officer should ask the witness how certain he/she is of the identification. Officers should not ask the witness to use a numerical scale, but rather encourage him/her to indicate certainty in his/her own words. All statements by the witnesses should be

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incorporated into the officers' report. The witness should be asked to initial and date the back of the photograph selected. [42.2.11(e)]

- b. In order to ensure the fairness of the procedure and to enhance the reliability of in-court identification, the photo array should be preserved in the same configuration as when the identification was made, together with full information about the identification process. [42.2.11(g)]
- c. A report of every photo array, 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 attaching to the report the "Photo Array Information Sheet"), any statement or reaction by the witness, and any comments made by the witness regarding the identification procedure. [42.2.11(g)]

### 5. Photographic Files (Mug Shots)

- a. When an investigation has failed to identify a suspect, it may be advisable to have those eyewitnesses who had a good opportunity to clearly observe the criminal offender come to the police station to look through photographic files. However, officers should not resort to this procedure until other investigative avenues have been exhausted.
  - i. Remove or hide any information on the photographs that might in any way influence the witness;
  - ii. Ensure that the files contain only one photograph of each individual and that the photographs are reasonably current;
  - iii. Do not refer to the photographs as "mug shots";
  - iv. If photographs of various formats are used, ensure that several of each format are used;
  - v. Permit the witness to look at a number of photographs before making his/her selection;
  - vi. Do not call to the attention of the witness any particular photograph;
  - vii. 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).
  - viii. Officers should be extremely cautious before charging a subject based on this type of identification alone.

#### 1. Photo Array Information Sheet

- a. The "Photo Array Information Sheet" is listed on the Police Department computer G-Drive, under "Forms and Documents."

C. Line-up Identification

1. Composing a Lineup

- a. All police lineups for possible eyewitness identification shall be conducted under the direction of the Detective Bureau Commander, or in his/her absence the Chief of Police or an officer designated by the Chief and, when feasible, after consultation with the District Attorney's Office.
- b. A suspect cannot be detained and compelled to participate in a lineup without probable cause to arrest.<sup>iv</sup>
- c. Before any suspect who has been arraigned or indicted is shown to eyewitnesses in a lineup, the suspect must be specifically informed of his/her right to have an attorney present at the lineup 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 if possible, no such identification may proceed without the presence of the suspect's attorney.<sup>v</sup>
  - i. A suspect has no right to have counsel present at a lineup if he/she has not been arraigned or indicted.
  - ii. If the suspect has a right to have an attorney present, permit him/her to call for his/her own attorney or take him/her to court so that an attorney may be appointed.
  - iii. If an attorney has been retained by the suspect or appointed by the court, such attorney shall be notified of the time and place of the identification procedure and the circumstances relating to the offense charged.
  - iv. If the suspect knowingly and voluntarily waives his/her right to have an attorney present (preferably in writing), the lineup may then be held with every effort to ensure that the suspect is protected from any prejudicial procedures.
- d. Select a group of at least five other persons who fit the description of the subject as provided by the witness (es). The goal in building the lineup is not to select fillers that look like the suspect, but rather ones that fit the description given by witnesses. Avoid using fillers that so closely match the suspect that a person familiar with the suspect would have difficulty distinguishing the fillers. If the subject has an unusual feature such as a facial scar or disfigurement, attempt to select some fillers with the same type of feature, or artificially add or conceal the feature. [\[42.2.11\(a\)\]](#)
  - i. Do not display a suspect in any lineup that is not suitable and properly composed.

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- ii. Advise the accused that he/she may take any position in the lineup that he/she prefers and may change positions prior to being viewed by each new witness.
- iii. All persons in the lineup must be numbered consecutively and be referred to only by number.
- iv. A complete written record of the lineup proceedings shall be made and retained, including the name of each lineup participant.
- v. The entire lineup procedure shall be recorded, photographed, or videotaped for possible future court presentation. [\[42.2.11\(b\)\]](#)
- vi. Witnesses shall be given instructions similar to those described in section V. B. of Photographic Identification, and shall be asked to sign a Lineup Instruction Form indicating that he/she understands the instructions. [\[42.2.11\(d\)\]](#)

### 2. Line-up Instructions:

- **You are being asked to view a group of people.**
  - **You will be viewing them one at a time.**
  - **Please look at all of them.**
  - **They are in random order.**
  - **Please make a decision about each person before moving on to the next one.**
  - **You should remember that it is just as important to clear innocent persons from suspicion as to identify guilty parties.**
  - **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**
  - **The person who committed the crime may or may not be one of the people you are about to view.**
  - **Regardless of whether or not you select a person, the police department will continue to investigate the incident.**
  - **The procedure requires the officer to ask you to state, in your own words, how certain you are of any identification.**
  - **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**
  - **Regardless of whether you select a person, please do not discuss the procedure with any other witnesses in the case.**
  - **Do you have any questions before we begin?**
- a. Ensure that witnesses are not permitted to see the accused or shown any photographs of the accused immediately prior to the lineup.
  - b. Ensure that only one witness views the lineup at a time and that witnesses are not permitted to speak with one another during the proceedings. [\[42.2.11\(c\)\]](#)

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- c. Scrupulously avoid using statements, clues, casual comments, or providing unnecessary or irrelevant information that in any manner may influence the witness' decision-making process or perception. [\[42.2.11\(f\)\]](#)
- d. Adhere to the principles of blind administration as described in B.3. above. As is the case with photo arrays, investigating officers may be present during the line-up, but must position themselves in such a way that they cannot be seen by the witness (es). If an investigating officer is present, he/she must remain completely silent while the witness is viewing the lineup. [\[42.2.11\(f\)\]](#)
- e. The witness shall view the suspect and fillers one at a time. The line-up shall be designed in such a way so that the participants who are not being viewed by the witness are out of sight.
- f. Make a written notation of any identification made (or any failure to make an identification), including any spontaneous exclamation or reaction by a witness, and any comments made by the witness regarding the identification procedure. Once a witness has indicated his/her opinion regarding the identity of the subject, the officer should ask the witness how certain he/she is of the identification. Officers should not ask the witness to use a numerical scale, but rather encourage him/her to indicate certainty in his/her own words. All statements by the witnesses should be incorporated into the Officers' report. [\[42.2.11\(e\)\]](#)
- g. If there are two or more suspects of a particular crime, present each suspect to witnesses in separate lineups. Different fillers should be used to compose each lineup.
- h. When an attorney for the suspect is present, the attorney should be permitted to make reasonable suggestions regarding the composition of the lineup and the manner in which it is to be conducted. Any suggestions made by the suspect's attorney should be included as part of the lineup report.
  - i. Allow counsel representing the accused sufficient time to confer with his/her client prior to the lineup.
  - ii. Once the lineup is commenced, the Suspect's attorney should function primarily as an observer and he/she should not be permitted to converse with the lineup participants, or with the witnesses, while the lineup is underway.
  - iii. The Suspect's attorney is not legally entitled to the names or addresses of the witnesses attending a lineup if the suspect has not yet been arraigned or indicted.<sup>vi</sup> If an attorney in such a situation insists on having information about lineup witnesses, advise him/her to direct his/her request to the District Attorney's office.
- i. During a lineup, 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>vii</sup> If officers are to ask

the participants to wear an article of clothing, they must guard against circumstances where the article only fits the suspect. All lineup participants shall be asked to perform the same actions. Each lineup participant may also be directed to speak for voice identification purposes. See Section D.

- j. After a person has been arrested, he/she may be required to participate in a lineup regarding the crime for which he/she was arrested.<sup>viii</sup> After arrest, a suspect may lawfully refuse to participate in a lineup 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.
  - i. If the suspect refuses to participate in the lineup, arrangements may be made for an alternative identification procedure.
  - ii. In serious criminal cases, the District Attorney's Office may be asked to apply for a court order to compel the suspect to participate in a lineup.
- k. A report of every lineup, 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 attaching to the report the Line-up Information Sheet), any statement or reaction by the witness, and any comments made by the witness regarding the identification procedure. [\[42.2.11\(g\)\]](#)

### 3. Line-Up Instruction Check List

- a. The "Line-Up Information Check List" is located on the Police Departments computer G-Drive, under "Forms and Documents."

## D. Voice Identification

### 1. Composing a 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, their eyes were covered by the perpetrator or they were never in the same room with the perpetrator but did hear his/her voice. If officers wish to conduct a voice identification procedure with a witness who also saw the subject, they must first consult with the District 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.

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- c. Where voice identification is attempted, the following procedures should be employed to the extent possible:<sup>ix</sup>
- i. As in a lineup, there should be at least six persons whose voices will be listened to by the witness; one-on-one confrontations should be avoided;
  - ii. The suspect and other participants shall not be visible to the witness; this can be done by using a partition, or similar means;
  - iii. All participants, including the suspect, shall be instructed to speak the same words in the same order;
  - iv. If the victim or witness recalls hearing the perpetrator use specific words, those words shall not be ones the suspect and other participants are instructed to speak; the lineup participants should speak neutral words in a normal tone of voice;<sup>x</sup>
  - v. When both a visual and voice lineup are done, the lineup participants shall be called in a different order and by different numbers;<sup>xi</sup>
  - vi. If there are two or more suspects of a particular crime, present each suspect to witnesses in separate lineups. Different fillers should be used to compose each lineup.
- d. 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.
- e. Witnesses shall be given instructions similar to those described in C.2. above, and shall be asked to sign a “Voice Identification Lineup Instruction Sheet” indicating that he/she understands the instructions.
- **You are being asked to listen to several people speak.**
  - **You will be hearing them one at a time.**
  - **Please listen to all of them.**
  - **They are in random order.**
  - **Please make a decision about each person before moving on to the next one.**
  - **You should remember that it is just as important to clear innocent persons from suspicion as to identify guilty parties.**
  - **The individuals you hear may not sound exactly as they did on the date of the incident.**
  - **The person who committed the crime may or may not be one of the people you are about to hear.**
  - **Please pay no attention to the content of the words spoken. The words they will speak have been chosen at random.**

- **Regardless of whether or not you select a person, the Police Department will continue to investigate the incident.**
  - **The procedure requires the officer to ask you to state, in your own words, how certain you are of any identification.**
  - **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.**
  - **Regardless of whether you select a person, please do not discuss the procedure with any other witnesses in the case.**
  - **Do you have any questions before we begin?**
- f. Adhere to the principles of blind administration as described in B3 above. As is the case with photo arrays and lineups, investigating officers may be present during the voice identification, but must position themselves in such a way that they cannot be seen by the witness (es). If an investigating officer is present, he/she must remain completely silent during the voice lineup.
- g. The result of any voice identification procedure shall be detailed in the officer's report. The report shall include a summary of the procedure, the persons who were present for it, instructions given to the witness by the officer, any statement or reaction by the witness, and any comments made by the witness regarding the identification procedure. The officer's report, or supplemental report made by the array presenter should record the order in which the voices were heard.

## 2. Voice Identification Check List

- a. The "Voice Identification Check List" is located on the Police Department's computer G-Drive, under "Forms and Documents."

**NOTE:** In-person line-ups and voice identifications are used less frequently and most often involve the suspect's right to counsel. Due to the infrequency and increased complexities, the Middlesex District Attorney's Officer should be consulted when these methods are being used.

## E. Drawings and Identi-Kit Composites

1. An artist's sketch, computerized drawing, composite, or other depiction should be considered in a major crime investigation when a witness displays a good recollection of the physical appearance and features of the criminal offender but has not been able to identify a suspect from available photographs.

2. Due process principles applicable to all identification procedures apply to artist's sketches, computerized drawings and composites.
3. Two or more witnesses may collaborate in preparing the drawing or sketch, provided that officers do not use procedures that are unnecessarily or unduly suggestive. Prior to doing so, officers should first separate the witnesses and take a detailed statement and description from each one.

#### F. Police Station and Courtroom Identification

1. Prior to conducting any courthouse identification procedure, police should consult the Middlesex District Attorney's Office.
2. The same right to an attorney and the same due process suggestiveness considerations that apply to all other identification procedures apply to station house 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 suspects by witnesses must be done in such a manner as to minimize any undue suggestiveness.
  - c. Officers shall not state or suggest 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 or 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.

#### G. Hypnotically Aided Identification

1. 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.<sup>xii</sup>
2. 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 Chief of Police or the Detective Commander, the District Attorney's Office, and appropriate hypnosis experts.

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

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

<sup>iii</sup> *U.S. v. Ash*, 413 U.S. 300 (1973)

- iv *Com. v. Bumpus*, 209 N.E.2d 167, 362 Mass. 672 (1972)
- v *Com. v. Torres*, 442 Mass. 554 (2004)
- vi *U.S. v. Wade*, 388 U.S. 218 (1967)
- vii *Id.*
- viii *Id.*
- ix *Com. v. Marini*, 378 N.E.2d 51, 375 Mass. 510 (1978)
- x *Id.*
- xi *Com v. Demaria*, 703 N.E.2d 1203, 46 Mass. App. Ct. 114 (1999)
- xii *Com. v. Kater*, 447 N.E.2d 1190, 388 Mass. 519 (1983)